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SMART RESILIENCE AND EU ENLARGEMENT POLICY[1]

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The European Union's enlargement policy is an ever-changing policy area. Today, its flexibility is illustrated by an ever more diverse set of entry rules. In the half-century since the first round of enlargement, the transposition of thousands of pages of legislation has been accompanied by the harmonisation of laws and the incorporation of other values, along with indicators of economic maturity. In the wake of the first two enlargements, the credibility of the European Union was under threat in the eyes of the political elite and society in the applicant countries, and reforms were introduced to avoid disillusionment. The sluggishness of enlargement in the Western Balkans and the aftermath of recent Russian aggression in Ukraine have redefined the course of enlargement policy with any significant acceleration yet to occur.

Keywords:
enlargement policy, smart resilience, Western Balkans, European Union

INTRODUCTION

The European Union's enlargement policy is an ever-growing and detailed policy area in which the will of the Member States prevails and which is characterised by a very slow process of compromise decision-making. In this paper, I will attempt to show the sensitivity of enlargement policy to external pressure, the extent to which the international environment (geopolitics) influences the bargaining system, and the extent to which it is in fact a policy that is constantly changing but responsive to environmental events.

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In the course of the study, I will define the following hypotheses, which I will attempt to prove or disprove by the end of my work:

H1. Enlargement policy is a soft policy instrument in the hands of the Member States.

H2. The ongoing development of the detailed rules of enlargement policy is itself a consequence of resilience.

This paper will primarily use a qualitative method, drawing on both primary and secondary sources. It will make use of primary sources published by the European Union, supplemented by published book chapters, studies, and journal articles, as well as occasional newspaper articles. The structure of the study follows the logic of the evolution of the EU's enlargement policy, with the first section covering the first enlargement, from the 1970s until the adoption of the Maastricht Treaty. The second section discusses the changing rules and the introduction of an ever-expanding set of criteria. The third section deals with the current enlargement process in the Western Balkans and the negotiating position of these countries, while the fourth section deals with the consequences of Russian aggression and the applications for the accession of Ukraine, Moldova, and Georgia. In the fifth section, I aim to describe the evolution of enlargement policy itself and the actors who play a major role in its development.

THE FIRST PHASE OF ENLARGEMENT POLICY (1970–1990)

European integration has been an attractive form of cooperation since its inception, and in the 1960s, the first countries intending to join had already expressed their wish to gain full membership. In the summer of 1961, the United Kingdom, Ireland, and Denmark applied for membership, followed by Norway in 1962, and the enlargement clause of the then EEC had to be activated. Although the internal tensions in the Member States meant that it was not until 1970 that practical steps towards achieving this were taken, the core elements of the policy was already in the making. With the enlargement of the bloc's membership, the aim was to establish cooperation on a solid basis of shared values, with political and economic identification at the heart of the process. The first phase of enlargement involved the accession of the countries that shared the common characteristics of having democratic systems, functioning market economies and benefiting from Marshall Aid.

As new members have joined the process of European integration, it can be referred to as a constantly changing scheme of cooperation, with frequently changing and tightening enlargement standards. However, the main strategy had already been put in place at the time of the first phase of accessions and had been continuously updated over the previous fifty years before a total of 22 countries joined.

It is important to draw attention to two factors that have influenced the constant evolution of enlargement policy, which can then be interpreted as a reflection of the way in which the responses to the challenges that have emerged have been reflected in enlargement policy and, ultimately, in the resilience of accession policy. The first stage of enlargement took

place during the Cold War period, where the sense of bloc integration and the constant threat from the Soviet Union took its toll on the Western states. This may also have been reflected in the fact that it was not considered necessary to work out an enlargement policy in this period in which the reinforcement of the bloc proved more important than the drafting of detailed rules. The emergence of this phenomenon can be seen as a response to the international situation. This misguided thinking may have ultimately proved to be detrimental to the Community during the UK's Thatcher period or after Greece's accession. On the other hand, the Cold War reflexes did not lead to the development of the detailed accession criteria mentioned previously, because the international environment did not provide grounds for it, i.e. enlargement policy was not adapted to the requirements of the times, and no detailed expectations were set for those intent on joining. The external and internal 'expectations' at this time ultimately resulted in the emergence of a very flexible system, an instrument of soft policy, with only the treaties defining the conditions, while the detailed rules were easily shaped by the Member States of the Community. An example of this can be seen in the speed with which the technical parts of the negotiations were completed during the first enlargement phase, with only a few detailed rules needing to be agreed on, while no specific strategies and documents were drawn up for accession on a country-by-country basis.

The legal framework for enlargement was laid down in the Treaties, which were implemented in three stages:

1. In accordance with Article 98 of the Treaty of Paris of the European Coal and Steel Community, any European state can join the organisation, and thereby entrusts its implementation entirely to the Council.[2]
2. This was later supplemented by Articles 237 of the Treaty of Rome of the European Economic Community and Article 205 of Euratom. All three regulatory articles were necessary at the time as a candidate country were required to join all three organisations simultaneously, yet separately. The relevant provision of the EEC Treaty states that:

   "Any European state may apply to join the Community. It must submit its application to the Council, which will decide unanimously after obtaining the opinion of the Commission. The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant state. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."[3]

   Since 1958, the basic framework for accession that has prevailed to this day has been clear: 1. the existence of European statehood, 2. the Member States having a decisive say on any proposed accession in the Council, 3. the Commission giving an opinion

[2] Treaty of Paris establishing the European Coal and Steel Community (ECSC), Article 98.
[3] Treaty of Rome establishing the European Economic Community (EEC), Article 237.

on a candidate's preparedness, 4. unanimity required for full membership, 5. the need for a single agreement to implement the accession, 6. the need for the agreement to be ratified by both the existing and the new Member States. The content of the treaties would be amended with practical elements during the first round of enlargement, thus adding elements of customary law to the enlargement policy.

3. With the adoption of the Single European Act, Article 237 of the EEC Treaty was amended to read: "Any European State may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament."[4] As is evident from this, the European Parliament's powers have been extended, as it now has a say in the composition of the membership in the field of enlargement policy, and it is now also engaged in the monitoring of the preparedness of the candidate countries.

The parts of the agreement pertaining to enlargement were rather brief and focused more on procedural issues than membership conditions. The real criteria and principles were contained in a combination of codified law and customary law: being European, statehood, and democratic rights, supplemented by the unwritten requirement of accession to the Council of Europe.

The following points were already formulated as basic principles of enlargement during the first round of accessions:

1. Accession negotiations with a candidate country may commence when it accepts the treaties and the political objectives set by the Community. This is the primary cornerstone, which has been increasingly insisted upon over time. The elementary requirement was formulated at the European Council meeting in The Hague on 1–2 December 1969. The requirements to this end were specified in the Treaties, thereby ensuring their imperative role.
2. Countries wishing to join must fully adopt the *acquis communautaire* (body of Community law). As the Community's areas of cooperation have expanded steadily, candidate countries have had to take on board more and more written law and even non-codified law, including non-binding recommendations and opinions. As a result of the continuing delegation of tasks to Community-level, by the 1990s, the volume of Community legislation had reached 80,000 pages.
3. The transitional period after accession (derogation) should be as short as possible, with no long derogations from Community rules and the commitments made in the Treaties being permitted.[5]

The codified background and principles for enlargement were developed in the first round of enlargement. The origins of the principles were set out in the Commission's country

[4] Single European Act, Article 8.

[5] Temporary exemptions usually cover a period of between 2 and 7 years, with exceptions of up to 10 years (for example, in the case of Hungary for agricultural subsidies or the right of foreigners to buy land).

opinions of 1 October 1969 on the preparedness of the British, Irish, Danish, and Norwegian States. It is clear to see the Commission playing a very important role in providing the substance of these, as they also provided a framework for national governments during the negotiations. The negotiations proceeded at a rapid pace, as the aforementioned principles had been agreed upon, even if the interests of the candidate countries did not always coincide with the expectations of the Community (see the British and Irish negotiations).[6] Eventually, as is well known, the European Communities by 1973 had grown to having nine members, with the accession of the United Kingdom, Ireland, and Denmark.

When discussing membership of the European Economic Community, it is important to mention the association agreements, which established close cooperation with third countries with the ultimate aim of membership. Such association agreements were concluded with the countries of the southern, Mediterranean or second phase of enlargement, because certain characteristics of these countries prevented them from becoming rapidly subject to cooperation. The 'Athens Agreement' was signed with Greece on 9 July 1961. Spain sent its letter of request for association in 1962, to which a reply was received only in 1967, and the preferential agreement was signed in 1970. Portugal also expressed its wish to participate in 1962, and once again, there was a long pause before the agreement was signed, until the free trade agreement came into force in 1972. All three countries had in common a non-democratic system which made them unstable in political values. It is interesting to examine how the European Communities applied the enlargement option to these three countries. In fact, during the undemocratic period of these countries, the EEC 'forgot' to respond to their membership applications. The enlargement policy was then used (or rather not used) as a way of making value judgments as well as a means of international politics. Greece applied for full membership in 1975, while the two countries on the Iberian Peninsula did the same in 1977. Unlike the first wave, these accessions involved protracted rounds of negotiations and divided national interests. The EEC finally decided to integrate on political grounds, because once these states had begun cooperation, they could not deviate from the democratic path, so Greece joined in 1981 and Spain and Portugal in 1986, thus expanding the trading bloc to twelve members.

Even during the first and second rounds of enlargement, differences between Member States over the admission of new members arose. In the first accession, of the prime examples of this were the two vetoes by President Charles de Gaulle against the British joining, which can be seen as representing the French national interest, or, in the case of the Mediterranean enlargement, the French and Italian fears about an influx of new agricultural products. However, it is also important to note that without the larger states, enlargement could not be given a boost, since France and Germany had a decisive say in both British entry and the southern enlargement.

Following the domino principle of regime change, the European Communities' immediate neighbourhood also saw the beginning of a series of changes and democratic

[6] Rapcsák 2005: 287; Gálik 2005: 352.

transformations. The fall of the Berlin Wall and the unification of the two German states was a unique area of enlargement policy, since the literature does not count the 'accession' of the GDR among the EU's enlargements, although it undeniably involved territorial expansion (geographical spillover). The reason behind this is that, because of the one nation two states concept, the Federal Republic of Germany from the very beginning of integration considered the East German territory of the DDR as one that would eventually unite with them, and as such, these territories would also be covered by the agreements.

THE SECOND PHASE OF ENLARGEMENT POLICY (1990–2020)

The end of the Cold War and the collapse of the Eastern bloc led to regime changes in Central and Eastern Europe and European integration subsequently became the most attractive forum for cooperation for those states. However, integration was preceded by the provision of political and economic stability in the candidate countries, therefore a major reform of enlargement policy was also underway.

The third enlargement, known as the EFTA round, followed the same logic as the previous ones, in that the candidate countries had the same characteristics as the previous ones, with the clear reasons for their desire to join being the changing global political context. These countries applied for membership in 1989, with negotiations starting in February 1993[7] and took 13 months to complete. The rapid negotiations with Austria, Sweden, Finland and Norway were made possible by all four candidate countries having levels of economic development well above the EU average and their democratic functioning having long established them among the Western European states. The Norwegian people voted against accession for the second time, but the other three countries became full members of the European Union from 1995 onwards, bringing membership of the Union to a total of 15 members.

The role of enlargement policy was also enhanced by the changing international environment, and it started to be used increasingly as an instrument to influence the leadership of an applicant country, be it in general political terms or even on the level of policies. The volatility of policy has created an ever-increasing and richer system of detailed rule-making concerning membership. In the run-up to the EU's enlargement to the East, the previous wave of clarification of the treaties was further intensified, complemented by a tightening of the principles of enlargement:

1. With Maastricht, a formal change took place, Article 237 of the EEC Treaty was abolished and the Treaty on European Union was adopted, with Article O of the Maastricht Treaty identical in content to the previous definition of enlargement.[8] A change from

[7] With the adoption of the EEA Agreement, the EFTA countries have also become bound by the rules of the internal market.

[8] Treaty on European Union, Article O.

1994 was that the European Parliament now voted on the accession treaties, in which it could even veto them by virtue of its power of assent.

2. The Amsterdam change assigned number 49 to Article O making it Article 49, and the elements of customary law were incorporated into the accession rules in written form: "Any European State which respects the principles set out in Article F(1) may apply to become a member of the Union. It must submit its application to the Council, after consulting the Commission and obtaining the absolute majority of the votes of the Members of the European Parliament and the assent of the European Parliament, acting unanimously by a majority of its component members." Article F(1) stated that: "The Union shall promote freedom, democracy, human rights and respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." According to Article F(1), "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."[9]
3. With the entry into force of the Lisbon Treaty, the strengthening of the role of national parliaments is also reflected in the enlargement policy, which states that

   "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant state shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.
   The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant state. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."[10]

The expansion in terms of principles is evident from the now more than 100,000 pages of Community legislation, which it is not enough for the candidate countries to transpose into national law, but the EU is also expected to monitor its application. Article 25 of the 1997 Luxembourg Decision of the European Council already requires the Candidate State to increase its capacity. Moreover, since the entry into force of the Amsterdam Treaty, the principle of limited flexibility has been introduced, i.e. candidate countries cannot opt out of policy cooperation in certain areas. The three existing principles have been amended with a fourth one, conditionality, which ensures that the EU Member States guarantee that

[9] Treaty of Amsterdam, Article 49.
[10] Lisbon Treaty, Article 49.

democratic transition and the consolidation of the market economy will be achieved in the candidate countries before accession and that their instability will not jeopardise the European project. The adoption of the Copenhagen criteria at the Copenhagen summit in 1993 provided the legal basis for all of these principles:

1. Political criterion: A stable, democratic institutional system guaranteeing the rule of law, human rights and the protection of minorities.
2. Economic criterion: A functioning market economy with the ability to compete in the EU.
3. Legal and institutional criterion: the candidate states must be able to assume the obligations of membership, adopting and applying the whole body of Community law.
4. Absorption capacity: the Union must be able to absorb the new members.[11]

It has become difficult to define the content of enlargement policy as the criteria have not been plainly defined, so it is still not clear what the EU means by one or other of these criteria, and hence what is the ideal state in which a candidate country is ready for accession. The EU's enlargement to the East and the negotiations in the Balkan region have shown that this conceptual framework is also constantly being developed. This in turn leads the parties to the mistake of not having crystallised the accession criteria. Strategies prepared by the European Commission and country opinions on preparedness may provide more precise definitions. The vagueness of the enlargement policy criteria is in fact used as a tool in the hands of the EU institutions and Member States, as they can be interpreted in different ways, making enlargement policy an area that is both strict and flexible.

The Central and Eastern European countries and the two Mediterranean island states expressed their desire to join European integration in the first half of the 1990s. The first step towards this was to build closer economic ties with the region, and the Europe Agreements were signed for this reason. This was the start of a process in a historical context in which the Member States themselves were divided and had different national interests at Community level. Some member states wanted to deepen cooperation in the newly created political areas, while others wanted to unify Europe as soon as possible, since they had a sense of responsibility towards the countries of the former Eastern bloc. The aforementioned Copenhagen criteria were also established on the basis of the same principle, in order to provide a more precise framework for the enlargement policy.

When it became clear at the Helsinki summit of 11 December 1999 that the principle of differentiation would be combined with the principle of equity, the Big Bang enlargement became a reality, i.e. it was established that the applicants would be admitted to the European Union together. The previously non-existent system of more detailed specifications was replaced by individual progress, with negotiating rounds of 31 chapters of Community legislation, which were composed of the technical agreements, along with country-specific preconditions and provisional closure. The Europe of the Fifteen sensed that there might be

[11] Braun 2017.

a number of concerns about the new entrants, and a protracted series of negotiations took place. It was also becoming clear that Romania and Bulgaria were lagging behind the other eastern countries, so their entry was delayed. Formal negotiations with the Luxembourg Six started on 31 March 1998 and with the Helsinki Six on 15 October 2000. The large number of applicants also required a single document to set out the stages of the process and clarify the expectations of enlargement. On 8 November 2000, the European Commission published an enlargement strategy paper, which proposed to the Council and the European Council that three categories should be distinguished when assessing applications from candidate countries: acceptable, negotiable and inadmissible. The areas of concern among the existing and acceding members included the free movement of labour, changes in the level of agricultural subsidies, the problem of foreigners buying farmland or derogations from the transposition of environmental rules. The Copenhagen summit on 12 and 13 December 2002 formally concluded the negotiations and opened the way to the ratification process, which culminated in the enlargement of the European Union to 25 members on 1 May 2004.[12]

Romania and Bulgaria had a considerable backlog when it came to meeting their commitments, so at the 2002 European Council it was decided that the two countries could only join integration at a later stage. It was further agreed that a new measure, the so-called co-operation and verification mechanism (CVM), would be introduced for them after accession to fill the obvious gaps in their preparations.[13] The mechanism covers the areas of judicial and administrative reform, and the fight against money laundering, corruption and organised crime. The initiative has by no means been an unqualified success, as the mechanism is still in place for both countries.

What the European Union has to learn from all this is that preparedness can be meaningfully influenced in the accession process, but its persuasiveness after accession is more dubious. In line with the renewed consensus on enlargement endorsed by the European Council of 14–15 December 2006 and the subsequent Council conclusions, the admission of new members has remained a key policy of the European Union, but the "3Cs" of *consolidation, conditionality, communication*[14] were defined as an innovation. Finally, Romania and Bulgaria became members of the European Union on 1 January 2007.

The 2004 and 2007 rounds of enlargement negotiations made it clear to the European Union that new key areas needed to be developed and kept on the agenda from the start of negotiations until their conclusion. The previous 31 negotiating chapters have thus been expanded to 35,[15] and two key areas have been created: 23: Judiciary and Fundamental Rights and 24: Area of Freedom, Security and Justice. These two chapters came into effect

[12] Ördögh 2022: 523.

[13] Várkonyi 2019: 63.

[14] Consolidation: deepening the impact of past accessions. Conditionality: strict, but fair conditionality, with specific targets and consistent monitoring. Communication: proper communication of the process to the public in the Member States and candidate countries.

[15] For the chapters in force since the eastern enlargement and the Croatian enlargement, see Annex 1.

with the accession of Croatia and are also a priority for the ongoing enlargement process in the Western Balkans. Another novelty of the negotiations was that chapter opening conditions[16] were now set, not only chapter closing conditions as before, while the possibility of suspending negotiations[17] was introduced at the same time. While the opening of these two chapters was delayed at the time of Croatia's accession, the Commission took this opportunity in 2011 to announce a "new approach", with a new set of procedures for its negotiations with Montenegro. The opening of chapters 23 and 24 is now subject to the adoption of action plans by the candidate country authorities. In the common position on the opening of chapters, the Member States stipulated intermediate (interim) conditions. Finally, it should be acknowledged that Croatia has come a long way from its application as a candidate country in 2003 to becoming the 28th member state of the European Union on 1 July 2013.[18]

ENLARGEMENT TO THE WESTERN BALKANS

With the accession of Romania and Bulgaria, and the lengthy but ultimately successful integration of Croatia, the EU seems to have stalled its enlargement plans for a while. The process of accession of the Western Balkan countries seems to be a rather bumpy detour. Neighbourhood relations are a major stumbling block to progress, exacerbated by political instability and unpredictability. Slow but incremental progress over the past decades has undermined the credibility of the European Union.

In connection with the states of the region, a series of Stabilisation and Association Agreements with a regional approach were first concluded as a result of the post-Yugoslav wars and the autocratic traditions of these countries, setting out country-specific recommendations for political and economic recovery. The first agreement of this kind was put in place with Northern Macedonia, followed by an agreement with Kosovo in 2016. Meanwhile, it can also be seen that over the last two decades, the best perspective for the states in the region has been perceived as entering the European Union, with all states having now submitted their applications for membership.

Northern Macedonia indicated its intention to join in 2004, followed by a positive response in 2005, while the Greeks consistently vetoed the opening of negotiations due to a name dispute between the two nations. The conflict was settled in 2018 with the Prespa Agreement.[19] However, not long afterwards the Bulgarians stepped in with their national identity dispute[20] and blocked the start of negotiations. Montenegro was the second country

16 Opening or closing conditions, benchmarks.

17 Negotiations may be suspended in the event of a persistent and serious breach of EU values, at the request of the Commission or of one third of the Member States, by a qualified majority in the Council.

18 See Annex 2 for the enlargement rounds of the European Union.

19 Prespa Agreement.

20 Egeresi 2022.

to apply for full membership in 2008, was granted candidate status in 2010 and has been negotiating since 2012. Progress has been mixed, with 33 chapters opened but only three provisionally closed. Montenegrin politics has become rather unstable in recent years with the end of Milo Đukanović's party in government after 30 years.[21] As a third regional state, Albania indicated its intention to join in 2009, although it was only granted candidate status in 2014. Internal, structural problems have meant that negotiations have not yet started with the Albanians either, and they have been waiting nearly ten years to sit down at the negotiating table. Serbia was the fourth country to apply to the rotating presidency for full membership in December 2009. It was granted candidate status three years later, in 2012, and has been negotiating harmonisation since 2014. Like Montenegro, Serbia is still not close to accession, with 22 chapters opened and two provisionally closed. The most major problem is its unsettled relationship with Kosovo.[22] Bosnia and Herzegovina became the fifth state to apply for membership in 2016 and received a positive response from the EU in December 2022, but still has a number of tasks to complete before negotiations can start. Finally, Kosovo, whose independence is not recognised by five EU Member States, has begun the accession process. In December 2022, the Kosovo Prime Minister formally handed over his country's application for membership.[23] The disputed statehood will certainly not receive a positive response from the EU for a few years.

Several factors have influenced the halt in EU enlargement. For one, the European Union was preoccupied with Brexit, focusing chiefly on the exit arrangements with the United Kingdom. Almost as soon as this crisis was over, it was the turn of the Covid–19 pandemic to paralyse any possibility of political progress for another two years, followed by a period in which the EU's leaders focused on recovery and economic growth. On enlargement policy, the countries that wanted to join the EU increasingly voiced their dissatisfaction, and the EU eventually reacted. In 2020, to restore credibility, Olivér Várhelyi, Commissioner for Neighbourhood and Enlargement, said:

> "First, today we are proposing concrete steps to improve the accession process. While strengthening and improving the process, the goal remains accession and full EU membership. Second, in parallel with the first point, the Commission stands firmly by its recommendations to open accession negotiations with Northern Macedonia and Albania and will provide an update on progress made by both countries shortly. Third, in preparation for the EU-Western Balkans Summit in Zagreb in May, the Commission will present an economic and investment development plan for the region."[24]

In reality, all three steps have been taken, but there has been no rapid change in the pace of accession negotiations. Negotiations on enlargement reform will start with the core issues,

[21] Hungarian Institute of International Affairs [s. a.].
[22] Kristóf 2022.
[23] Shenouda 2022.
[24] European Commission 2020a.

which will remain open until the end of the accession negotiations (e.g. the rule of law). The results of these negotiations will set the framework for the rest of the process, and the criteria will remain unchanged throughout the process in the interest of predictability. In the last two years, no significant progress has been made in either Montenegro or Serbia, so the reform has not lived up to expectations. Negotiations with Northern Macedonia and Albania could not start in 2022 either, following vetoes from Bulgaria and the Netherlands. The third element announced is the Economic and Investment Plan 2020. This was presented in October, and it provides €9 billion in support around five pillars: "(a) climate action, including de-carbonization, energy and transport; (b) circular economy, with a focus on waste management, recycling, sustainable production and efficient use of resources; (c) biodiversity, i.e. the protection and restoration of the region's natural assets; (d) combating air, water and soil pollution; and (e) sustainable food systems and rural areas."[25] These investments are currently being implemented. Moreover, for the Western Balkan countries, the rapid granting of Ukraine's candidacy may have sent the wrong message.

THE EASTERN PARTNERSHIP ENLARGEMENT

The Russian Federation committed aggression by attacking Ukraine on 24 February 2022, and this geopolitical event also triggered a series of actions in the European Union. In addition to the widening sanctions list, it also affected enlargement policy. The act of war in the EU's immediate neighbourhood also posed a security challenge. As fighting intensified, Ukraine was the first to apply for EU membership on 28 February 2022, followed by Moldova and Georgia on 3 March. Clearly, the aim was primarily to allay fears of war and strengthen ties with the West (for parallels, see Finland and Sweden's NATO accession process). On 17 June 2022, the European Commission published its opinion on the preparedness of the three countries[26] where it called for the granting of status to all three, praising their achievements. This 'country review', which lasted only a few months, makes it clear that the decision was less about technical and more about political issues. A similar explanation can be found in the positive endorsement of all three applications by the European Council on 23 June 2022, which granted them candidate status. Enlargement policy has thus become a tool for international relations and has sent the wrong message to the countries that have already joined. The basis of the wrong message is that they have not in fact achieved the expectations that were set for them or that the EC has differentiated between candidates and candidate states. This move also set a new record, as Moldova and Georgia were assessed at record speed, in just three months. It is important to emphasise these differences, as the treatment of the Eastern Partnership countries and the accession of the Western Balkan countries has been taking place in a different international context.

[25] European Commission 2020b.

[26] European Commission 2022a; European Commission 2022b; European Commission 2022c.

ACTORS AND PROCESS OF ENLARGEMENT

The treaties mention the candidate country, the EU Member States, the Council, the European Commission and the European Parliament as the actors of enlargement policy but make no mention of the European Council. It is clear from the Paris Treaty's reference to enlargement that the emphasis is on the Member States, but in practice it has been the Commission that has played a major role in progress. Today, this seems to be changing and the Council is becoming a more active player as the political involvement of Member States comes to the fore. It should be added, however, that the Commission continues to represent the EU in the negotiating rounds according to the predefined framework programme, although the Member States are also increasingly making their voice heard in this area. Within the European Commission, it is the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR) that plays the most important role in enlargement.

The classical enlargement methodology, as developed today, can be summarised in the next six points, following in the footsteps of Christopher Preston:[27]

1. The candidate country is required to transpose and implement the *acquis communautaire* into its national law; no permanent opt-out is allowed.
2. The accession negotiations are the practical implementation of the *acquis communautaire*.
3. New problems have arisen in the context of the enlargement process, and new accession instruments have been introduced to solve them.
4. The new members were only partially prepared and able to integrate into the Community institutions, but effective functioning took place in the post-accession period.
5. The Community negotiates and enlarges as a group with countries that are similar to each other.
6. Member States focus on their individual interests during negotiations, but the Union seeks solutions to internal problems by projecting them.

Márta Várkonyi[28] described the stages of the accession process as follows:

- The European Union is a European perspective, a promise of future accession for a given country or region – *a potential candidate for membership.*
- The potential candidate country submits an application for membership to the Council Presidency.
- The Council asks the Commission to examine the application. The Commission draws up an Opinion (Avis).
- On the basis of the Opinion, the Council decides unanimously to grant candidate status.
- Once the status of candidate member is granted, it can be called a candidate member.

[27] Preston 1997: 18–21.
[28] Várkonyi 2019: 68.

– The Council sets the conditions for the opening of accession negotiations. It decides whether or not these conditions have been met on the basis of the relevant Commission report.
– Accession negotiations take the form of an intergovernmental conference and start with *screening.*
– In the final stage of the negotiations, Member States draft the text of the Accession Treaty.
– The Council decides on the conclusion of the accession negotiations.
– The signature of the Accession Treaty is followed by a ratification procedure by the acceding country and the Member States.
– Once the ratification process is completed, accession takes place.

The current enlargement countries are mainly those of the Western Balkans.[29] As with previous accessions, the European Union has sought to forge closer relations with the countries of the region for the first time, and the *Stabilisation and Association Process (SAP)* has been developed for the region, with bilateral *Stabilisation and Association Agreements (SAAs)* concluded with each of the countries concerned.[30] In parallel, the Feira Summit of June 2000 envisaged 'the fullest possible European integration', i.e. potential membership candidacy for these states. The Thessaloniki meeting in June 2003 set out a triple objective for them, based on stabilisation, regional cooperation and integration. Five out of the six countries applied for membership, four of which were granted candidate status.

With regards to the enlargement policy, it is important to note its susceptibility to influence by national interests. As seen earlier, the use of soft instruments at EU level is reflected in each enlargement round, but also in the ability of individual Member States to pursue their interests in the case of an accession country. The larger member states certainly have an important role to play, as can be seen in the activities of France and Germany in the Western Balkans (e.g. the Berlin Process). However, it is not only the larger states that have the power to influence progress in this area, but any country can slow down progress if it does not find the harmonisation of an accession chapter satisfactory.

CONCLUSIONS

In my study, I have sought to illustrate the resilience of enlargement policy, namely how it has evolved over the last fifty years. The focus of my research has been on how enlargement policy can be understood as a response to international developments, and what aspects and value judgments can be identified in it.

[29] The following countries are included in the Western Balkans: Albania, Bosnia-Herzegovina, North-Macedonia, Kosovo, Montenegro, Serbia.

[30] For the key dates of European integration of the candidate countries, see Annex 3.

I formulated two hypotheses, the evidence for which was as follows:

H1: Enlargement policy is a soft instrument in the hands of member states. It can be seen that, from the 1960s onwards, existing member states shaped the expectations that a state wishing to join had to fulfil. Initially, the potential of this was not exploited, but with each enlargement round, the instrument has become more substantial, but at the same time less concrete. The content is still immature and there are no clear explanations of what is expected as the instrument continues to evolve. This implies flexibility, i.e. the policy is capable of formulating country-specific expectations, but it also implies unpredictability, which has jeopardised the credibility of the European Union.

H2: The continuous development of the detailed rules of enlargement policy is itself a consequence of the enlargement policy's resilience. The enlargement criteria defined by each enlargement round and then fleshed out after the Maastricht Treaty continue to leave room for interpretation. This broad, undefined set of requirements is the result of the stubborn insistence of the EU Member States on not wishing to define and quantify the criteria precisely, thus leaving room for arbitrary definition. This, however, generates controversy between the acceding countries and the EU Member States. To add to that, different explanations for this fluidity have been proposed within the Community as a whole, for example on the question of democracy and the rule of law. In each enlargement phase, the EU's increasing demand for democracy and the rule of law is reflected in the negotiating rounds and monitored in the European Commission's annual country reports.

In sum, enlargement policy is a soft tool in the EU's hands, but this weapon seems to be backfiring if politically motivated decisions and the current geopolitical environment are allowed to influence value judgments. It will soon be a question for the Community to decide whether to maintain a flexible approach to enlargement policy or to commit to a more precise definition, in which case it will lose one of its soft instruments to influence the functioning of the acceding country.

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ANNEXES

Annex 1: Eastern enlargement 31 and chapter 35 of the Croatian negotiations

Negotiating chapters in the Eastern enlargement negotiations	Chapters of the accession negotiations with Croatia
1. Free movement of goods	1. Free movement of goods
2. Free movement of persons	2. Free movement of workers
3. Freedom to provide services	3. Right of establishment and freedom to provide services
4. Free movement of capital	4. Free movement of capital
5. Company law	5. Public procurement
6. Competition policy	6. Company law
7. Agriculture	7. Intellectual property rights
8. Fishing	8. Competition policy
9. Transport policy	9. Financial services
10. Taxation	10. Information society and media
11. Economic and Monetary Union	11. Agriculture and rural development

Negotiating chapters in the Eastern enlargement negotiations	Chapters of the accession negotiations with Croatia
12. Statistics	12. Food safety, animal and plant health policy
13. Social policy, employment	13. Fishing
14. Energy	14. Transport policy
15. Industrial policy	15. Energy
16. Small and medium-sized enterprises	16. Taxation
17. Science and research	17. Economic and monetary policy
18. Education and training	18. Statistics
19. Telecommunications and information technologies	19. Social policy and employment
20. Culture and audiovisual policy	20. Enterprise and industrial policy
21. Regional policy (regional development and cohesion aid)	21. Trans-European networks
22. Environment	22. Regional policy and coordination of structural instruments
23. Consumer protection	23. Justice and fundamental rights
24. Justice and home affairs	24. Justice, freedom and security
25. Customs union	25. Science and research
26. External economic relations	26. Education and culture
27. Common Foreign and Security Policy	27. Environment
28. Financial control	28. Consumer and health protection
29. Financial and budgetary provisions	29. Customs union
30. Institutions	30. External relations
31. Other matters	31. Foreign, security and defence policy
	32. Financial control
	33. Financial and budgetary provisions
	34. Institutions
	35. Other matters

Source: Várkonyi 2019: 66.

Annex 2: Entry of new Member States into European integration

Enlargement phase		Country	Accession						
			Submission of application	Beginning of negotiations	Signing of agreement	Referendum			Membership start date
						Date	Yes (%)	No (%)	
I.		Denmark	10.08.1961	30.06.1970	22.01.1972	02.10.1972	63	37	01.01.1973
		The United Kingdom*	09.09.1961			–	–	–	
		Ireland	07.31.1961			10.05.1972	81	19	
II.	1.	Greece	12.06.1975	27.07.1976	28.05.1979	–	–	–	01.01.1981
	2.	Portugal	28.03.1977	17.10.1978	12.06.1985	–	–	–	01.01.1986
		Spain	28.07.1967	29.11.1978		–	–	–	
III.		Austria	17.07.1989	01.02.1993	12.04.1994	12.06.1994	67	33	01.01.1995
		Finland	18.03.1992			16.10.1994	57	43	
		Sweden	01.07.1991			13.11.1994	52	48	
IV.	1.	Cyprus	04.07.1990	31.03.1998	16.04.2003	–	–	–	01.05.2004
		Czechia	17.01.1996	31.03.1998		13–14.06.2003	77	23	
		Estonia	24.11.1995	31.03.1998		14.09.2003	67	33	
		Poland	05.04.1994	31.03.1998		07–08.06.2003	78	22	
		Latvia	13.10.1995	15.10.2000		20.09.2003	67	33	
		Lithuania	08.12.1995	15.10.2000		10–11.05.2003	91	9	
		Hungary	31.03.1994	31.03.1998		12.04.2003	84	16	
		Malta	16.07.1990	15.10.2000		08.03.2003	54	46	
		Slovakia	22.06.1995	15.10.2000		16–17.05.2003	94	6	
		Slovenia	10.06.1996	31.03.1998		23.03.2003	90	10	
	2.	Bulgaria	14.12.1995	15.10.2000	17.12.2004	–	–	–	01.01.2007
		Romania	22.06.1995	15.10.2000		–	–	–	
V.	1.	Croatia	21.02.2003	17.03.2005	09.12.2011	22.01.2012	67	33	01.07.2013

*Note: * The United Kingdom would leave the European Union on 31 January 2020.*
Source: Compiled by the author based on Preston *1997: 11.*

Annex 3: Enlargement countries

Country	Status	Stabilisation and Association Agreement		Accession				
		Signing	Effective from	Submitting application for membership	Enter candidate status	Start of negotiations	Number of chapters opened	Number of chapters provisionally closed
Iceland	withdrawn candidate membership*	–	–	17.07.2009	17.06.2010	27.06.2011	27	11
Ukraine	candidate member	–	–	28.12.2022	23.06.2022	–	–	–
Moldova	candidate member	–	–	03.03.2022	23.06.2022	–	–	–
Georgia	candidate member	–	–	03.03.2022	23.06.2022	–	–	–
Turkey	candidate member	–	–	01.12.1964	14.04.1987	12.12.1999	18	1
Montenegro	candidate member	10.10.2005	01.05.2010	15.12.2008	17.12.2010	29.06.2012.	33	3
Serbia	candidate member	10.10.2005	01.09.2013	22.12.2009	01.03.2012	21.01.2014	22	2
North-Macedonia	candidate member	15.04.2000	01.04.2004	22.03.2004	17.12.2005	–	–	–
Albania	candidate member	31.01.2003	01.05.2009	28.04. 2009	24.06.2014	–	–	–
Bosnia-Herzegovina	potential candidate member	25.11.2005	01.06.2015	15.02.2016	15.12.2022	–	–	–
Kosovo	potential candidate member	28.10.2013	04.01.2016	15.12.2022	-	–	–	–

*Note: * The government of Iceland withdrew its candidate membership application on 12 March 2015.*
Source: Compiled by the author based on Ördögh *2019: 52, 56.*

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FOCUS GROUP DISCUSSION AS A METHOD OF DATA COLLECTION IN HIGHER EDUCATION AND RELATED FIELDS[1]

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This article sets out to report our first-hand experience with using focus groups as a method of data collection in higher education research. We were interested in shedding light on how university lecturers coped with remote teaching during the Covid pandemic and how the unusual circumstances affected their teaching. The analysis of the resulting data is still ongoing. In this study, we summarise

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our experiences of using the focus group methodology in our research. By discussing and evaluating our research experiences, we aim to demonstrate the usability and the potential risks of the Focus Group Discussion (FGD) in a higher education context by identifying further areas of application, such as for supporting the development of the education system. We argue that the main characteristic of FGD is its interactive nature, and we back this claim by providing a detailed presentation of the focus group methodology, as well as by describing and analysing the experiences of group discussions conducted with the involvement of university lecturers. Due to their interactive nature, focus group discussions are particularly suitable for research on educational methodology, specifically within the training system for public officials operated by the Ludovika University of Public Service (LUPS) in Budapest, Hungary since 2013. The focus group research method can be used either as a tool for quality assurance or as a tool for assessing training needs. Our study is highly relevant for those who are planning to conduct focus group research in a higher education context or in related fields such as adult education programmes, by providing practical recommendations.

Keywords:
focus group, higher education research, adult education

INTRODUCTION

When conducting a research project, an obvious first step is to analyse and evaluate the chosen data collection method. In this way it is possible to confirm if the method chosen is appropriate for the research objectives, if it is suitable for the study of the groups concerned and if it can reveal new data. To explore the long-term impact of the pandemic on the work of lecturers, to understand how lecturers think about higher education pedagogy and about its methodology, we were confident that the focus group method is appropriate.

We chose the focus group method primarily because it is a qualitative research method that is relevant for exploring a specific focus of a broader topic. From a communication point of view this method can also be used successfully to explore and understand different perspectives on and attitudes towards a particular topic. The method is also suitable for group discussions, as it allows participants to get to know and shape each other's opinions and to articulate similar and different viewpoints.

We argue that the focus group, as a research method, is particularly suitable for conducting educational methodology research with the participants of the training system for public officials operated by the LUPS since 2013. This is primarily due to the method's interactive nature, which we present in detail, while describing and analysing our experiences of conducting FGDs with lecturers.

The first part of the paper will discuss the focus group method, drawing upon international and national literature. In the second part of the paper, we will summarise the experiences of our focus group research, and in the light of these experiences, we will argue for the potential of the focus group research method in a field bordering the higher education context: adult training.

LITERATURE REVIEW – FOCUS GROUP RESEARCH

As defined by Krueger and Casey, "A focus group study is a carefully planned series of discussions designed to obtain perceptions on a defined area of interest in a permissive, nonthreatening environment".[2]

The focus group is a method of data collection used in qualitative research settings[3] and has become widely used and accepted in social sciences. This is because FGD enables an in-depth understanding of a wide variety of social issues, from nature conservation and biodiversity[4] to the assessment of patient-based outcomes in medicine.[5] As a working method, it can be applied when working with young people and even to topics requiring a high degree of sensitivity, such as AIDS or other sexual risks. It can therefore be seen that it promises to be a suitable method for interviewing a university collective with a tight hierarchy that is receiving special government attention.[6] The participants talk in small groups in a more structured way than in everyday conversations, under specific conditions set by a moderator. The optimal number of participants in a focus group is 5 to 7 which is small enough for participants to feel safe when sharing their views, while being large enough to allow differences between participants' perspectives. Individual opinions that are extreme or are not communicated in the desired level of detail can be explored further by conducting subsequent in-depth interviews.

The group discussion is repeated several times with similar types of participants to identify trends and patterns of opinions.[7] The structure is provided by planned, guided interview questions through which the moderator encourages the participants to talk to each other and to share their attitudes on a particular topic.

Some Hungarian authors have argued that group interviews are more time-consuming to organise and require particularly careful preparation and special circumstances. The technical requirements of the process include a special venue, audio and video recording, a moderator actively engaging in the conversation and the presence of an observer.[8] However, other authors argue that FGD is simple, cost-effective, requires few participants and can be carried out in a short time.[9] Moreover, as a result of coordinated, well-prepared and well-organised research, small group discussions bring individual opinions and views to the surface more evidently, while participants can interact dynamically to reveal their attitudes and influence each other. The same cannot be said for individual interviews. Small group discussions also improve community spirit, as participants have the chance to hear how other participants deal with the same problem, and that is a real intangible incentive for participation.

2 Krueger–Casey 2014: 26.
3 Parker–Tritter 2006.
4 Nyumba et al. 2018.
5 Zacharia et al. 2021.
6 de Oliveira 2011.
7 Krueger–Casey 2014.
8 Síklaki 2006.
9 Zacharia et al. 2021.

BRIEF DESCRIPTION OF THE FGD METHOD

Krueger (2002) divides the conduct of focus group research into four basic steps, which are: decision and arguments in favour of using the focus group method, decision on the group of participants, listening to the target audience and communicating the results.[10] In the following, we break this down into detail and identify further steps (processes), similarly to Brown (2021), whose approach better reflects the practical aspects of the research.[11]

The first three steps are (1) defining the research objective and comparing the arguments for and against FGD, (2) formulating the most important research questions, and (3) developing various protocols (engagement of the participants, scheduling of meetings, selection and preparation of moderators and observers, FGD guidelines, additional data collection methods, data protection, technical trial). Then, in the following three steps (4) participants are recruited (sending out invitation letters, making appointments), (5) focus discussions are conducted (moderation, monitoring, recording and data storage), and (6) notes and transcripts are made (sharing the materials created and experiences gathered, as well as additional personal impressions). The last phase is (7) the analysis of data (manually or by using software, possibly automatic, now even supported by artificial intelligence), (8) communication and dissemination of the results (preparing and sharing research reports, holding presentations for different groups of stakeholders), and (9) matching the results of the analysis to the results of the broader research programme and to further research plans (aspects of institutional development), and archiving (including possibly deletion of content in compliance with data protection regulations).

Academic approaches to focus groups usually emphasise that the conversations are conducted in a community environment, such as in community rooms or meeting rooms, or alternatively in the natural environment of the interviewees, or in various outdoor spaces. In addition to the consciously structured set of questions, the basic fact-finding tools of the focus discussion include the various so-called data-generating activities during which the participants perform certain actions together. This can involve listing, ranking, organising, drawing answers, mapping, etc.[12] During the focus group discussion, various creativity-stimulating and projective techniques (e.g. metaphors, associations, role-playing or collage) can be used, depending on the research goal, and the participants' and the moderator's preparation.[13]

At the same time, mini focus groups can be organised, if it is not possible to reach enough participants or if there are other obstacles to the group discussion.[14] In this case, the mod-

10 Krueger 2002.
11 Brown 2021.
12 Hennink 2014.
13 Spry–Pich 2021.
14 Nyumba et al. 2018.

erator must consider that the group dynamics will change[15] and that there is a high risk that the opinion of one or two dominant participants will determine the discussion.[16]

THE FGD MODERATOR

In order for the focus discussions to achieve their goal, i.e. to reveal the desired information, the moderators must have the necessary skills and know suitable techniques with which they can keep the discussion on the right path.[17] Shaha and his co-authors (2011) mainly identify interpersonal and team leadership skills in this context.[18] The moderator's responsibility is to encourage full, active participation, to help participants overcome possible self-censorship, and to guide the conversation towards mutual understanding. Instead of win-lose games, they should steer the group in the direction of inclusive practices, while strengthening the awareness of shared responsibility in the participants, so that they leave power constraints (resulting from social and/or organisational hierarchy) behind.[19]

Good moderators are characterised by an interplay of particular individual characteristics and situational factors and can be excellent conversation leaders. Personal traits include age, gender, qualifications, sensitivity about the topic and the ability to change roles. Other factors that contribute to the suitability of a moderator are a well-chosen physical environment and the time factor, while many other things may affect their performance, relationship with the group, and finally the group results. Moderators have the unenviable task of balancing the requirements of sensitivity and empathy on the one hand, and objectivity and detachment on the other.[20]

From itemised lists of skills and qualities, we can also conclude the following:

An FGD moderator:

- has good communication skills (to build rapport), is able to create a supportive atmosphere and facilitate dialogue
- is attentive and has empathy towards listeners who reflect, summarise or paraphrase the statements of the participants in a meaningful way and stimulate the dialogue with their feedback
- is an accurate observer who follows the group dynamics, while reading the behavioural signs and gestures of the participants
- is an excellent communicator who, despite being prepared in the subject, is able to look "naively" at the content of the focus conversation

15 Smithson 2008.
16 Bloor et al. 2001.
17 Morgan et al. 1998.
18 Shaha et al. 2011.
19 Kaner et al. 2007.
20 Stewart–Shamdasani 2014.

– is a flexible manager who adapts the course of the conversation to the needs and characteristics of the group, and who can make quick interventions to modify the conditions in order to achieve the research goal
– is able to remain impartial and express this both verbally and non-verbally during conversation
– has a sense of humour with which they overcome tensions and help the group through difficult situations.[21] In addition, it does not hurt if they are assertive, credible, have adequate self-esteem, are enthusiastic and optimistic, extroverted, humble and reliable.[22]

The technical and organisational conditions of our research will be explained after discussing the particularities of higher education.

UTILISING FOCUS GROUP RESEARCH IN A HIGHER EDUCATION CONTEXT

Similar to other qualitative tools, focus group research is popularly used in higher education,[23] but it is only occasionally used to find out the views of lecturers. We found that an overwhelming number of research papers apply it as a means to amplify students' voices and to increase student engagement, rather than in connection with faculty members. In contrast to student questionnaires, focus groups do not homogenise their findings, but instead help to express the viewpoints of the interviewees in a dialogic way and preserve their diversity, and this is the key to the true authenticity.[24]

The focus group method is widely used in competence development to improve the negotiation skills, reasoning ability and oral performance of students, especially in teaching English as a foreign language or when teaching multicultural groups of students. Qualitative researchers using the focus group method emphasise that this structured and facilitated form of group discussion helps to make participants aware of the importance of listening to each other.

The study by Hiltz and his co-authors (2007), that originally used the focus group method to explore motivations related to active learning networks, can be considered the direct methodological antecedent of the present research. One of their main conclusions was that "the method is recommended to other institutions that wish to obtain a better understanding of their online faculty and of steps that can be taken to improve their motivation for teaching online".[25]

21 Nyumba et al. 2018.
22 Stewart–Shamdasani 2014.
23 E.g. Lea et al. 2010; Moule et al. 2010; Smith 2017; Trahar–Hyland 2011.
24 Bourne–Winstone 2020.
25 Hiltz et al. 2007.

Participants have the feeling that they are experts on the current topic and therefore they are more likely to share their thoughts and opinions, especially if the topic is directly related to their everyday lives[26] (compared to a face-to-face interview). By no means is the goal for the interviewees to come to an agreement, or achieve a consensus, but rather to reveal the widest possible horizon of viewpoints and experiences.[27]

The FGD method can be best used when for some reason the usual, transaction-based forms of communication[28] do not yield results, when the research objective cannot be obtained or when unambiguous answers are not given to the questions asked. The reasons for this vary, but it is especially worth emphasising a couple of them: the topic or phenomenon researched seems too complex and has a structure that the research subjects do not fully grasp and which they therefore only have vague feelings about and attitudes towards, or they do not care to articulate an opinion, and at the same time they do not have the sufficient vocabulary to name the elements of the researched phenomenon. For these reasons, research on teaching methodology cannot be effectively conducted by using transaction-based communication. This is especially true if the research subjects – not only those participating in training, but also the lecturers – do not have (sufficient) experience in pedagogy, andragogy and teaching methodology.

Focus group discussions may, however, be perceived as an act of interactive communication[29] where – together with the exchange of information – the research subjects, with the assistance of the moderator create and articulate their own or even a common point of view by building on each other's comments. Data derived from a focus group discussion is interactively constructed, which sharply distinguishes this method from other qualitative data collection methods.[30] In addition to this, it also serves to expose and register latent opinions, attitudes, feelings, individual or group experiences, and to create a 'common tongue' describing the research topic based on the vocabulary used by the research subjects. This also eliminates problems related to different interpretations of terminology.

Because of the reasons given above, the FGD method is especially compatible with the research projects in the field of education methodology conducted at the Ludovika University of Public Service which investigate the participants in its public officials training system.

PARTICULARITIES OF THE PUBLIC OFFICIALS TRAINING SYSTEM

Government regulation 273/2012 (IX. 28.) on public officials' training (hereinafter: Regulation) entrusts the Ludovika University of Public Service with the operation of this training system. The system aims to deepen participants' general knowledge of

[26] Hadi–Junaidi 2020.
[27] Hennink 2014.
[28] Shannon–Weaver 1949; Barnlund 1970.
[29] Newcomb 1953.
[30] Barbour–Kitzinger 1999.

public administration and their specialised knowledge of institutions and competences while developing their personal and leadership skills. The Regulation states that it is the responsibility of the LUPS to provide training on public administration and on leadership skills, while other types of training can be organised by any unit of public administration, conducted inhouse. Every public official – in different proportions – has to undergo 2-6 training sessions based on their individual qualifications and the particularities of the given training course. The Regulation also states that these training sessions can only be conducted by personnel who are included in the registry of university lecturers through tenders launched by the university. The university has to provide these lecturers with planned and regular professional training on teaching methodology and andragogy, participation in which is also a condition for lecturers to be allowed to teach general public administration courses and to hold leadership seminars or workshops. There is, however, no such requirement stated in the Regulation for those teaching internal courses.

Lecturers participating in public officials training constitute 3 categories:

- university lecturers who are included in the university's registry in any role (lecturer, trainer, facilitator, tutor, training official, language teacher etc.) who have taken part in a teaching methodology training course – whether they are lecturers at the Ludovika University of Public Service or at other universities
- individuals who are not university lecturers but who are included in the registry and have taken part in the teaching methodology training course
- experts in certain fields of public administration who hold internal training courses/sessions and for whom the university does not provide teaching methodology training and who probably have never received such training

It could be an interesting and useful avenue of research for assessing the efficiency of the public officials' training system to examine what kind of teaching methodology supports these lecturers' needs best and how can they best be provided. For the reasons mentioned above, focus group discussion is the most suitable research method for such analysis. When organising this type of research, it is important for researchers to pay attention to the differences in the level of teaching methodology knowledge and the teaching skills of lecturers from all three categories as they all require different focal points.

To comply with the Regulation, the university is not only obliged to organise general public administration and leadership training programmes for public officials, but it also has to develop them. As a result, in addition to teaching methodology, training programme development methodology also received special attention in our study. These two terms are obviously not independent from one another, but the legislative requirements of the system for quality assurance make it necessary to deal with training programme development methodology in its own right. The experts developing a curriculum also follow some kind of methodology (for example, a language learning textbook may be communication based, grammar based or even culture based). Often the curriculum and the related tools facilitating learning and teaching inherently define the teaching methods (and of course the opposite can be true: some teaching methods require certain types of teaching tools).

In other cases, in contrast, alternative teaching methods may be employed, depending on the lecturer's personality and the target group (public officials are a heterogenic target group not only due to their different fields of expertise and positions, but also because of their professional qualifications). From a quality assurance point of view[31] it is important that the developed curriculum and the related teaching/learning tools serve as a 'recipe book' with the help of which even lecturers who have less experience, less knowledge of teaching methods and less teaching skills can deliver training sessions that achieve the course goals and develop the required levels of competences and skills. This is important because, given the volume and the structure of the training system for public officials, the people responsible for the development of a training programme or session cannot all cooperate in its realisation. Besides, treating training development methodology as a different subject matter is plausible given the many e-learning based courses that require special methods, yet which do not require the cooperation of lecturers at the stage of their realisation.

The university involves experts who have experience in planned training in the process of training development. Nevertheless, only some of these experts have training experience and sufficient knowledge of teaching methodology and skills, as their task is to provide appropriate professional content. However, the people responsible for developing training programmes do not have to possess the same methodological skills as lecturers (for example different skills are needed for an expert tasked with writing appropriate exam questions and a competent examiner). The FGD method hence is not only a good choice for research involving lecturers but also for studies involving curriculum developers as it helps to understand what kind of methodological support this target group needs and how it can be best provided.

The results of the research projects described above can, on the one hand, be incorporated into the professional materials on the methodology of obligatory training provided by the university that are related to certain lecturer roles; and on the other hand, they allow the trainers for who are not obligated by legislation to receive training in methodology to be provided with the most suitable methodological support. The training system that is operated by the university and is embedded into its educational activity can thus be integrated into the paradigm shift that is part of the Institutional Development Plan.

In the foregoing discussion, the FGD method has been presented as a kind of a quality assurance tool. However, when the method focuses on the participants of the public officials training system it also has the potential to be used for the assessment of training needs.

Training programmes for public officials are organised in both online and offline formats in addition to a hybrid blended format.

The teaching tools and methods associated with e-learning can be sorted into the following main categories:

- video presentation
- complex e-curriculum – the core of the curriculum is storytelling, which presents the values and patterns of thought related to the subject, facilitating the later recall

[31] EMISZ 2017.

of the knowledge thus acquired. Stories can take the form of comics, live action films or animations that are complemented by e-learning texts, narrated videos and video presentations
- educational movie – a media presentation that consists of scenes that have an appropriate didactic structure and that is consistent in terms of its content and its imagery. This is a visual tool of teaching which is primarily based on images but which also applies manipulative mechanisms that have an effect on both the mind and the emotions
- simulation – short scenes in the online space recorded on video that aim at developing skills and that have the same actors and are embedded into a wider story. It models real decision-making situations in the online space, and it allows students to deepen the knowledge that they have acquired in theory and turn it into practical skills

Written background materials and glossaries are often developed for e-learning courses to complement the learning materials and to facilitate learning.[32]

Offline training can vary from frontal lectures to courses applying training methodology to workshops and seminars (see: case studies). Consequently, teaching tools developed for these also vary, and they may thus exhibit methodological heterogeneity. The lecturers involved are chosen from the above-mentioned pool based on the competences required for each academic role.

While a research methodology based on transactive communication can work well in the examination of the training subjects required by public officials (see: survey); when it comes to the different methodological approaches taken by participants and their expectations such research is less suitable.

The most important questions both from the standpoints of the efficiency of the training system and of the methodological requirements of lecturers are as follows:
- How can participants be motivated and activated; how can they be involved in the learning process?
- What methods are available to make learning more experience- and practice-based?
- How can interactive techniques be incorporated into traditional, frontal instruction?
- Which elements of the training methodology can be incorporated into the more traditional practice of education?
- What methods can be effectively used in remote teaching through online platforms (MST, Zoom, etc.)?
- How can testing knowledge become part of the learning process instead of being a separate exam?

[32] See: https://probono.uni-nke.hu/onfejlesztes/

Even though answers to these questions can be found in the teaching methodology literature, these approaches are not always suitable for every target group.

Public officials function within a severely regulated institutional system based on a tight hierarchy (in this it is similar to the university collective that also operates with a high level of hierarchy and that receives a great deal of government attention) and, as we have already mentioned, it is in several aspects a very heterogeneous target group and therefore not every method can be effectively used with public officials. They could, however, indicate those methods that motivate them and those that they reject through focus group discussions. The focus group format allows them to articulate their views, opinions, needs and expectations for further research.

RESEARCH CONTEXT

The primary aim of the research in which the focus group method was used was to explore the long-term impact of the Covid–19 pandemic on lecturers' work. The research was motivated by our experience of the pandemic situation, as well as by the institutional drive to reform the teaching methodology, which had already started at the university shortly before the pandemic broke out. There is an increasing ambition internationally to improve the quality of education[33] in various ways. The changes forced by the need for emergency remote teaching during the Covid–19 lockdowns have raised awareness of digital education even more. These circumstances have required flexible institutional and faculty responses, and they have led to the appearance and the widespread use of new teaching methodologies.[34]

The educational reform process began at the LUPS in 2019. Following the preparatory work, the university's Institutional Development Plan (2020 to 2025) aimed to deliver a paradigm shift in pedagogy entitled the Creative Learning Programme (CLP). CLP is a process that has the objective of bringing teaching methods up to date and building lecturers' teaching skills to better support the effective development of students' abilities. As it transpired, the implementation of the CLP started under the difficult circumstances of Covid.

Qualitative research therefore did not begin without any precedent or introduction. Online workshops were organised to collect best practices from lecturers. In January 2021 a total of 80 teachers in 10 groups participated in online discussions on good practices. The discussions were led by moderators using the same questions and scenario. The moderators produced a summary of the discussions, and the summaries were used to produce a 39-page report for the CLP. Then training materials were developed and delivered to share and to improve innovative and creative teaching methods. From March 2022 to June 2022, a pedagogical revision of 10 mandatory courses were carried out on the BA in International Administration, after which all the elective courses of the faculty were

[33] Kálmán 2019.

[34] Sutton – Bitencourt Jorge 2020.

updated. Since September 2022, a series of discussions on methodological issues connected to teaching at the university have been held under the title Methodological Tea Party, led by a moderator. With this background in mind, we started our focus group research in the autumn of 2022.

OUR EXPERIENCES WITH FOCUS GROUP DISCUSSIONS

Similarly to Brown (2021), we can describe the main steps of the research by starting with the definition of the research objective and comparing the arguments for and against FGD, formulating the most important research questions and developing various protocols (selection and preparation of moderators and observers, FGD guideline, additional data collection methods, data protection and technical trial).[35] The focus of our research is on lecturers' perceptions of the digital switchover. However, we were also interested in shedding light on how they experienced and coped with emergency remote teaching, how special circumstances affected their teaching and what long-term effects they recognise in their work afterwards.

The criteria for conducting focus group research include choosing a suitable location, a convenient time slot and an appropriate moderator. We planned the possible dates of the focus groups, taking into account the working schedule of lecturers. We tried to provide an atmosphere that was relatively informal but professional where participants would feel comfortable and feel safe talking. The university has its own one-way mirror room, but this had not been previously known either to us or to the participants. The one-way mirror room is located in one of the buildings of the Faculty of Law Enforcement, along with several other practical classrooms. After visiting and assessing the room, we were convinced that it was suitable for FGD, so we requested permission to use it. The technician of the Forensic Department of the Faculty of Law Enforcement helped us adapt the room to our purposes and to take full advantage of its technical facilities. A moderator and an observer were assigned to each time slot.

Once the venue, possible dates and moderators had been identified, we started to formulate the questions. The research team brainstormed and developed the questions in a logical sequence that it felt would support the purpose of our research. We used different types of open-ended questions: opening, introductory, transition, key, and ending questions, with 10-12 questions being asked in 90 minutes of discussion. We decided to start the FGD with broader questions, then continue with more specific, more focused questions on the topic. We paid particular attention to documenting participants' consent, ensuring that various documents on data protection and additional data collection were signed.

[35] Brown [s. a].

In the following phase, the participants of the focus groups were recruited. During the recruitment process the heads of 16 faculty departments were asked by email to propose participants from among their colleagues for focus group discussions with varying qualifications, different professional profiles and/or different perspectives. We also requested a range of participants differing in terms of how much time they had spent at the university or how much experience they had as lecturers. Proposals were received from eight departments. For the remaining eight departments, potential participants were selected by reviewing their CVs on the university's website. For several reasons, it was important to include participants from different departments in the focus groups. We hoped that the mixing of departments would provide as much information as possible, and that this diversity would also be attractive for participants to allow them to meet people from other departments.

After a successful recruitment process, five FGDs were conducted in November 2022. The participants were informed in the invitation letters about the venue of choice, where video and audio recordings would also be made. The researchers playing the role of the moderator were those who had experience as trainers. Moderators were responsible for keeping the discussions on track and for stimulating discussion if necessary. At the same time, Moderators tried to stay on the periphery of the discussion as much as possible. Moderators worked in pairs with an observer from the research group.

Participants were met on arrival outside the building where the focus groups were held. Some snacks and water were prepared in the room. At the beginning of the talks, we introduced ourselves briefly, explaining the purpose and benefits of the focus group. The observer sat behind the one-way mirror so she could take notes without disturbing the discussion. The moderator kept track of time and guided the discussions along the lines of predetermined questions, while observes took notes from the other side of the one-way mirror. The discussions lasted 60-90 minutes. The technician shared the video materials with us that we transcribed word for word. Observers added their own personal impressions and observations to the transcripts. Using the verbatim transcription of the FGD, we obtained a corpus of text available in Word format, running to more than 100 pages.

The last phase of the research involved the analysis of data, the communication and dissemination of the results, preparing and sharing the research reports, holding presentations with different groups of stakeholders and matching the results to the results of the broader research programme and to our further research plans (institutional development aspects), as well as archiving the results (including the deletion of sensitive content to comply with data protection regulations). The qualitative data corpus was analysed with the help of a computer assisted qualitative data analysis software, specifically MAXQDA.

POSSIBLE PROBLEMS AND THEIR ELIMINATION DURING THE APPLICATION OF FGD

Zacharia and his co-authors (2021) identified differences inherent in the regional, economic, cultural, educational, linguistic and social situation and roots as risk factors.[36] In our case, participants from the same cultural milieu and the same university (organisational) culture had a discussion based on similar values, which were, however, enriched by the participants' experience in other educational institutions and educational levels and forms. At the same time, a kind of fault line could be observed between those colleagues who mainly or regularly work with international (multicultural) student groups and the lecturers who mainly teach Hungarian (homogenous) groups. By definition, there was no language barrier. We faced a dilemma when deciding what data to gather about the participants and where to obtain it, and the level of detail of the data sheet that participants would complete before the group discussion. We decided to process the public data published on the organisation's website as a primary source, i.e. the biographies of the lecturers, which have to be uploaded for the sake of organisational transparency. However, since we encountered a great deal of variety regarding the level of detail of such documents, it was necessary to have the participants fill out a short form on paper before the discussion. This mainly included columns relevant to their professional socialisation as lecturers: a) teaching experience expressed in years, b) educational levels taught,[37] c) teaching in a foreign language, d) other relevant professional experience[38] (self-declaration), e) other.

Maintaining quality and consistency during successive focus group discussions can be a challenge,[39] especially if, as in our case, there are several different moderators and observers. The research group of the Creative Learning Programme is a group of researchers who have been working together for several months, which jointly planned and commented on the guidelines of the interview with its members in several rounds, so that a unified framework of thought was arrived at.[40] Adhering to the fixed thematic units and a specific order made it possible for the focus groups to share their thoughts via the same questions and, as far as possible, under the same conditions (space, time and number of employees).

Before each focus group, the moderator and observer had the opportunity to view the recordings of the previously completed sessions. At the same time, since each conversation

[36] Zacharia et al. 2021.

[37] In Hungary, these levels are: primary or secondary school education, vocational school or high school, higher education vocational education, higher education bachelor's and master's education, doctoral education, postgraduate education (specialised further education), and possibly courses or other forms of education outside the school system.

[38] Here, we primarily took into consideration participants' professional experience as lawyers, judges, in diplomatic and business roles, their training or coaching activities, training or mediation experience, and artistic or creative activities.

[39] Muijeen et al. 2019.

[40] Four of the members of the research group were participants in the same doctoral programme on communication, so their common professional history went back much further.

was not conducted by the same moderator, it was not a concern that over time, due to the feeling of familiarity, moderators and observers would become almost saturated with the information that had been shared and already mentioned by previous groups – fresh eyes and ears were ensured for active, understanding and facilitative listening.[41]

Recruiting presented a whole set of challenges. We started recruiting two weeks before the first group session was planned to be held. We sent out invitation emails to 51 members of staff, more than 100 exchanges of correspondence took place, and finally, as a result of a repetitive process (contact, confirm, remind) 23 lecturers were recruited to participate in the discussions in 5 focus groups.

Trust was a key issue in the recruitment process. Closer colleagues of the recruiters were easier to engage. Some individuals were hesitant and said no because of the one-way mirror room and the recording process.

Fern (1982) determined that the members in a focus group produce fewer ideas (contributions) on a topic than they would in an individual interview.[42] This makes it questionable whether we can obtain better quality or deeper answers from the participants than with other methods. However, in our case, the focus groups are a complementary method in the broader context of the research in which personal in-depth interview were also conducted. This helped to eliminate the potential shortcomings of the methodology regarding the quality of the data.

CONCLUSIONS

Is it possible to conclusively name any pros and cons of using the focus group method? One possible drawback was that the monitoring/observation and recording of the discussions discouraged some people from participating, even those for whom a C-type national security check/screening is an entry requirement for their jobs, and this is well known and communicated. When organising an FGD, it is important to take into account the power structure of the organisation, the competing interests of the departments and the level of resistance to and scepticism about changes. It is necessary to assume the role of a neutral facilitator regardless of whether the moderator is working with participants she has known for a long time or with colleagues she has never met before to ensure that they share their experiences. Researchers need to make cold calls like salespeople do in the marketplace. The moderator needs to be able to ask questions as openly and impartially as if she did not know the pedagogical practices of her colleagues by hearsay, and must create an atmosphere in which they honestly discuss what they do well or poorly, leaving behind institutional expectations, admitting what they fail to do, what they do not believe in and why they do or do not make an effort.

41 Kaner et al. 2007.
42 Fern 1982.

The method proved to be suitable for channelling knowledge and initiatives from below into the development process to help to deliver an absolutely top-down and centralised institutional-level methodological paradigm shift. Precise preparation, strict adherence to scientific and ethical principles and data protection rules and successful facilitation all contributed to the success of this research methodology.

FGD can be effectively used both as a quality assurance and a needs assessment tool in the context of adult training, which differs in many aspects from regular higher education, and the results of needs assessment can be incorporated into quality assurance processes.

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THE ROLE OF ICT IN REFUGEE GOVERNANCE IN BANGLADESH[1]

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The study discusses the evolving role of information and communication technology (ICT) in refugee crisis management, transitioning from a humanitarian to an enabling model. The focus is on how ICT contributes to education, self-reliance, skill development and entrepreneurship among refugees, marking a shift in the paradigm of how refugee crises are addressed. The study, centred in Bangladesh, explores the intricate connection between ICT and the governance of refugee landscapes. It delves into questions about how ICT ensures safety and dignity for refugees in camps during transitory settlement, as well as considering its impact on future refugee management and resettlement. The research, conducted through content analysis and based on secondary data, reveals that ICT interventions offer comprehensive benefits. They create a platform involving various stakeholders, emphasising a trade-off in Rohingya refugee governance, providing geo-localised support, aiding in adverse situations, and identifying harmonised ideas for coordinated actions. The article aims to present a concise snapshot of ICT's current role, its potential, ongoing strategies, and possibilities for achieving easier, cheaper and better outcomes for refugees.

Keywords:
ICT, Rohingya, refugee, governance, Bangladesh

[1] This paper is a revised and updated version of a conference paper published in the conference proceedings of Central and Eastern European eDem and eGov Days, 2020 titled 'How is ICT Shaping the Refugee Governance Landscape in Transitional Bangladesh'.

INTRODUCTION

"In the world we live in today, internet connectivity and smartphones can become a lifeline for refugees."
Filippo Grandi

The number of refugees has increased significantly because of violence and armed conflicts in several parts of the world. The refugee explosion all over the world has become increasingly challenging for several reasons. The resulting refugee crisis has become a global problem, and the resettlement of these refugees has become a central topic among academics, leaders and politicians.[2]

The world is witnessing the highest number of refugees and displaced people in global history. According to a recent report of the United Nations High Commissioner for Refugees (UNHCR), there are 79.5 million forcibly displaced people worldwide. 26 million of them are refugees, 45.7 million are internally displaced people, and 4.2 million are asylum seekers, as a result of persecution, conflict, violence, or human rights violations as of the end of 2019. Only 25.9 million of these refugees are under the UNHCR's mandate, whereas 80% of the refugees are hosted by their neighbouring country of origin, and over half of them are under the age of 18.[3] As of 2018, more than two-thirds of the world's refugees come from just five countries: Syria, Afghanistan, South Sudan, Myanmar, and Somalia. According to the UNHCR (2018), Turkey hosts the largest number of refugees, with 3.7 million, Pakistan has 1.4 million, Uganda 1.2 million, and Germany 1.06 million while the fourth largest number of refugees by country of origin persisted steadily at 1.1 million coming from Myanmar, with Bangladesh continuing to host a large population of 906,600 refugees at the end of 2018 almost entirely from Myanmar. It is pertinent that they are protected and treated humanely where they take refuge.

Rohingya refugees faced an uncertain future as a result of a multitude of human rights violations in the past and continuing vulnerabilities that ultimately made them stateless and plunged them into an identity crisis. Refugees who are in camps are not allowed "legal protections enshrined in international, regional, and domestic laws"[4] as they are waiting to relocate. At the same time, international and regional humanitarian organisations and NGOs are intervening in ICT-based services in refugee camps all over the world.[5] The present study focuses on the nexus between ICT and refugee management which has shaped the refugee settlement landscape in Bangladesh. The study will attempt to demonstrate how ICT is embedded in the governance nexus and connected with the refugee tragedy. There is a widespread consensus that there is a lack of policy in the countries that make up

[2] Hossain 2020b.
[3] See: www.unhcr.org/figures-at-a-glance.html
[4] Holzer 2013.
[5] Mason–Buchmann 2016.

the resettlement of Rohingya refugees. The study will investigate how ICT enables refugees to live safely in camps during their transitory settlement and what this indicates about the future of refugee resettlement. This study attempts to describe how information and communication technology (ICT) is assisting the refugees in their distressing trip to safety from their homeland to the host country, their transitory settlement at the camps, and post-inclusion in the host country.

RESEARCH METHOD

To investigate the role of ICT in addressing the present crisis of Rohingya refugees in Bangladesh, the study followed a content analysis method to extract the intuitions of the study and attain the research objectives. The term "content analysis" denotes a 'technique for making inferences by objectively and systematically identifying specified characteristics of messages'.[6] In doing so, this method tries to organise, classify and compare relevant documents to draw a theoretically based and valid inference from them,[7] and attempt to reduce the qualitative data and interpretation to define the fundamental uniformity and significance through qualitative research of a substantial number of studies.[8] This qualitative method also involves combining rational inquiries, approaches, emphases, and limitations that may affect the refugee people in the qualitative research on the refugee crisis.[9] Due to the extreme vulnerability of this group, critical issues pose hazards to them living a healthy life. Many services are required for refugees to enjoy basic livelihoods and the initial provision of these was not adequate. As a result, researchers and practitioners have done plentiful studies on these problems to provide an overview of the crisis to depict a more authentic picture of it not only from global perspectives but also in the local and regional context.[10] The present study tries to incorporate all the available data that studies have collected related to these issues in connection with ICT intervention in crisis management concerning the Rohingya refugee crisis, primarily as a humanitarian emergency. Finally, the study offers an insight into Rohingya refugee crisis management through ICT interventions during the critical period of their refugeehood in Bangladesh and attempts to set future agendas for refugee crisis management. It concludes that for successful ICT intervention in refugee crises, one approach can ensure smoother management of refugees, organising the provision of services for refugees in their camps and helping the management of food and cash transfers while managing health facilities and education provision. This will in turn build up a useful store of information

6 Holsti 1969.
7 Cohen et al. 2002; Weber 1990; Stone et al. 1966.
8 Patton 2014.
9 Williamson et al. 2013.
10 Gianfreda 2018; Berry et al. 2016.

on the lives of the refugees themselves to bring about more accountable and transparent refugee services and better crisis management in refugee camps.

HOW THE MYANMAR GOVERNMENT EXCLUDED THE ROHINGYA

The Rohingya community was denied various rights and opportunities by the government of Myanmar in Rakhine State. These people were subject to forced labour and faced eviction while being denied citizenship and losing their freedom of movement amid confiscations of their land. It was a complete desecration of their human rights. In Myanmar, ethnic diversity is common, and about 140 ethnic groups resided in the regions where the Rohingya were not acknowledged by the government as an ethnic group. Before 1962, however, they were recognised as a minority group and had the right to vote.[11] Before they fled to Bangladesh, the official estimate of the number of Rohingya in Rakhine State was 2.6 million. It is widely believed, however, that more than one million additional Rohingya resided there.[12] Measures taken against the Rohingya people by the government of Myanmar included:

- continuous harassment of Rohingya people in Rakhine by military, separatist groups and Buddhist extremists[13]
- denial of citizenship and voting rights after the 1962 military coup
- in December 1977, "Operation Nagamin" officially excluded Rohingya from Myanmar[14]
- all ethnic groups except the Rohingya were included in the national census that resulted in the *"first major wave"* of Rohingya fleeing into Bangladesh in 1978[15]
- the Citizenship Act of 1982 was an unfair law which effectively made the Rohingya stateless[16]
- during the issuance of Citizen Scrutiny Cards (CSC) by the central government of Myanmar in 1989,[17] where three (pink, blue, and green) types of cards were issued, the Rohingya were not given any cards[18]
- a state-backed chain of attacks and wave of racial conflict in 1991 drove two hundred fifty-thousand Rohingya to flee to Bangladesh with limited availability of education and health facilities[19]

11 Islam 2006; Prodip 2017.
12 Ullah 2011.
13 Ganguly–Miliate 2020.
14 Human Rights Watch 2000; Smith 1996: 10.
15 Coutts 2005.
16 South 2003.
17 Lewa 2009: 11.
18 Uddin 2012.
19 Al-Mahmood 2019.

ICT, REFUGEE STATUS, AND LIVELIHOODS

Information and communication technology (ICT) is one of the major driving forces of the current world economy, society, and governance. This is equally true for human mobility; services, identification, and status depend on ICT to provide citizens with rights and opportunities all over the world. The present world has witnessed an ocean of displaced people since World War II. Refugees are more and more connected and accessible to people from the outside, and are receiving more and more IT services from the refugee agencies. ICT is helping in several ways in refugee management all over the world. Formal human mobility depends on individuals' nationality and status, which determines their economic viability and the choices and the acceptability of the host country. However, this does not work for the people who are forced to flee from their place of origin where they were born, grew up, and lived. These people frequently lose their formal identity that helped them prove their national identity in order to move formally and legally.

Refugee status is not a simple matter and is not given to a person without any formal procedures. When a person wishes to obtain the status, it requires a formal appeal or application, and then the host authority investigates the issue and the contemporary situation to determine whether to provide him or her with refugee status. During this process, the host country or authorised body can use ICT from the initial investigation to the stage of making a formal decision about the subject's refugee status.

ICT-enabled biometrics help in the procedure for defining the status of a person as he or she requires and demands. When any person has been given refugee status or not before/after the process, a simple biometric registration helps the hosting authority to securely and smoothly carry out the procedures. This biometric registration makes it easy to use and manage the data of a respective person for further utilisation. The process of biometric registration is a simple way to collect the necessary information about a person through a computer and biometric data collection device, making it easy to provide him with a service-based registration number based on these data which will allow him to be granted the required benefits. In most cases, the service is food, basic medical care, and some household products that are needed daily for the refugee's livelihoods in the camps. The refugee data are fragmented, and there are two different ways that information flows and is captured: a) refugees themselves create data sets, and b) sack the data. Refugees themselves create a database by using different social media, i.e. Facebook, Whatsapp, Twitter, phone calls, Instagram, Snapchat, etc. They thus create their own media data. The reason we need to do all this lies in the beautiful marriage between control and IT.

Displaced persons are often given a mobile phone and a SIM (subscriber identification module) card that grants them access to the internet to access the information that is required for their livelihoods in the camp and also for health services through SMS or phone calls. Also, the receiving state potentially has some control over connectivity, which people are connected, funding cards, etc. In Jordan the authorities dealing with refugees initiated eye scanning instead of issuing cards, which facilitated managing every sphere of the refugees' movements, including service provision. The World Food Program (WFP)

and Jordan shared this biometric data with the World Health Organization (WHO). These data also help to improve the accountability of the organisations that are deployed in refugee camps for programmes. The digital refugee is a jointly constructed persona; each refugee has their own story that they are putting into cyberspace. Not all, but many such individuals control the narratives of this part of the story, which is not always and not greatly under their control. However, the implications and threats to the security of the data and refugees include: how will the data be managed, where does the data "go", what are the rights on the cloud, and who takes ownership of that data? At the same time, it is worth noting that refugee policies vary significantly from country to country.

ROHINGYA: WHEN AND HOW DO THEY COME TO BANGLADESH AS REFUGEES?

The refugees have become helpless victims in a situation which is not of their own making. It is important that they are protected and treated humanely in the countries where they take refuge. As armed conflict has caused a massive flow of refugees, the issue of refugees, in turn, may lead to tensions and conflicts between states. The issue of refugees has become a sensitive subject for states because states that cause refugee problems are perceived as those that are intolerant of racial, religious, or linguistic minorities. For instance, Bangladesh received a large number of Rohingya Muslim refugees during crisis periods, and when the ethnic cleansing started in Rakhine last year, the figure amounted to a total of 918,936. In recent times, one can hardly find a government that has been so dreadful, so brutal, and so barbarous in its refutation of fundamental human rights as that of Myanmar, to a people that trace their origin to the land for nearly a millennium.

The Rohingya Muslims are the victims of this campaign, living in Arakan state, and have become the forgotten people of our time.[20] About 40% of the Rakhine population is made up of Muslims who fled to Bangladesh from Myanmar when the ethnic cleansing started decades ago.[21] This is considered "a semi-organized social movement with clear political goals".[22] However, the Rohingya people have been in the realm of statelessness for over six generations.[23]

The political landscape in Myanmar was established during the British colonial period. It is necessary to know why the alienation of the Rohingya started.[24] The trust of the authorities towards a rebellious minority was low and vice versa, due to the role of the British in the colonial period, as they used different minority groups against the ethnic Burmans. Every state has a historical background of its own and this has had an influence

20 Siddiqui 2005; Leider 2018.
21 Hossain 2020a.
22 Van Klinken – Aung 2017.
23 Milton et. al. 2017.
24 Knuters 2018.

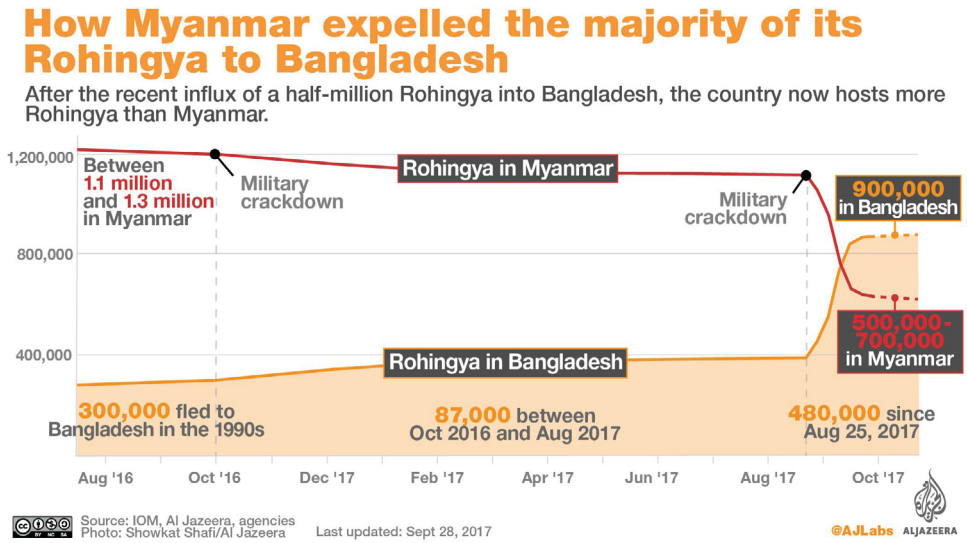

Figure 1: Rohingya refugees from Myanmar to Bangladesh
Source: Armstrong 2018

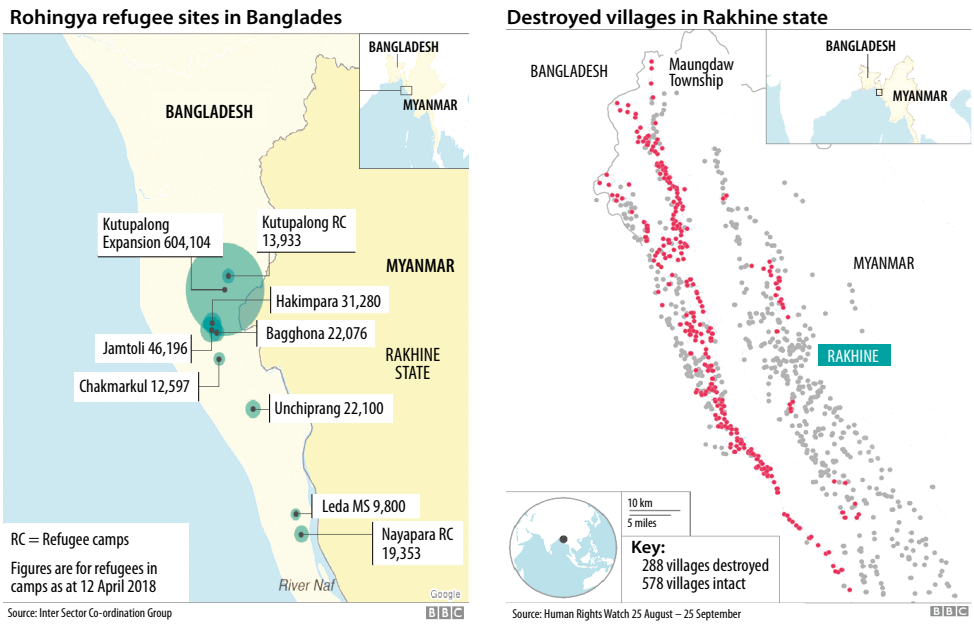

Figure 2: Destroyed villages in Rakhine and refugee sites in Bangladesh
Source: BBC 2020

on colonising nations, which combines both a general ideology and particular policies to form general and economic ideology.[25] The counter-modernisation movement resulted in religious and linguistic groups rebelling and demanding a return to fundamentalism.[26] In contrast, secularisation is a process, a transition from a prescriptive to a principled society, but it does not mean that religion disappears.

The oppression of the Rohingya people was brutal and turned into genocide, and this brutality amounts to a vulgar violation of their human rights[27] in Myanmar. The way in which Myanmar governments have estranged Rohingya through nationalistic and religious policies forms the essential background to this study, which aims to uncover the role of ICT in the governance of refugees.

REFUGEE AND ICT – GLOBAL DEPICTION

The world has witnessed the displacement of an enormous number of people since World War II, in excess of any earlier period in history. There are approximately 250 million migrants all over the world of whom 60 million are refugees. Several reports that have been published by the various global research and human rights organisations have emphasised the way that the "refugee crisis" is perceived only as the problem of Middle Eastern and European countries, which are facing enormous challenges due to the refugee influx. However, a large number of refugees are hosted by many developing countries around the world. The refugee crisis is well known due to the scale of the human tragedy, and there is a high level of public awareness of it with massive media coverage. Overall, more than 168 million people across the world need humanitarian assistance and protection – and more funding than ever before.[28] According to a report published by the Financial Tracking System, about 135.3 million people needed humanitarian support in 2009, while the fund required USD 9 billion for assistance but received only USD 7 billion. In the year 2018, the fund required USD 25.2 billion and received only USD 14.6 billion,[29] and this gap is continuously widening and creating risk and anxiety for the leaders of the world in the coming years.

Global and local actors, including GOs, NGOs, and other humanitarian organisations, are working together as a team to respond to the issue of refugees and support them in various ways. Information and communication technology is playing a significant role in this digital era of technology during the journey of these people from citizens to refugees. A smart mobile phone is an integral piece of kit for millions of refugees as they move from

[25] Johnson 1967.
[26] Holzer 2013.
[27] Knuters 2018.
[28] United Nations 2019.
[29] See: https://reliefweb.int/report/world/global-humanitarian-overview-2018-enaresfrzh

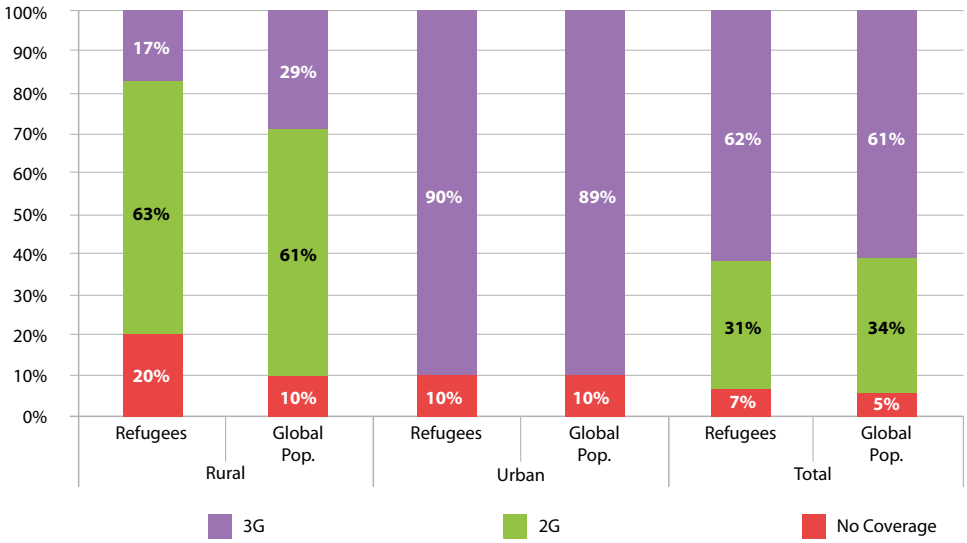

Figure 3: Refugees vs. global population: mobile network coverage
Source: UNHCR 2016

one place to another. ICT can assist refugees attain social inclusion and help empower them "to fully participate in society and control their own destinies".[30]

The global spread of mobile telephone ownership has changed the landscape of technology and development in many ways. It is widely observed that the mobile telephone is an indispensable technology in the 21st century, and this is equally the case in refugee camps where people have to settle down and where communities have developed the infrastructure needed for things like LAN lines, computer laboratory, mobile phones, etc. In 2016, the United Nations High Commissioner for Refugees (UNHCR) highlighted how internet and mobile telephone connectivity can improve refugee well-being and transform humanitarian action. They reported that 93% of refugees have access to some level of digital and mobile devices.

In this regard, Filippo Grandi, the United Nations High Commissioner for Refugees, stated that

> "Most importantly, connectivity can help broaden the opportunities for refugees to improve their own lives and pursue a vision of a future that would otherwise be denied to them […] Refugees deem connectivity to be a critical survival tool in their daily lives and are willing to make large sacrifices to get and stay connected."[31]

[30] Warschauer 2003.
[31] UNHCR 2016.

The report published by UNHCR in 2016 revealed that mobile phone and internet access are vital for displaced persons, not only for connecting them with loved ones, but also for ensuring their safety and security, and essentials such as food, shelter, and water. The study also found that access to mobile phones depends on affordability, with refugees in urban areas tending to have parallel access to mobile devices like other urban people. However, for those who are in rural regions, the scenario is very different. In these contexts, only one person in five has a mobile and one in six has 3G access, which is a considerably lower proportion than for the population at large. These findings originated at a moment when the world was witnessing an enormous number of people being driven from their homes by war and persecution, more than at any time in world history. At the end of 2018, 70.8 million people were globally displaced, of whom 2-9 million were refugees. Confronted by this persistent need, the results of the study suggested further investments in three key areas, which composed the basis of a new UNHCR Global Strategy for Connectivity for Refugees. These comprise: a) increasing the accessibility of mobile networks; b) improving affordability; and c) providing access to training, digital content, and services.[32]

People in rural settings also have access to internet connectivity to some degree, although the costs and barriers are surprisingly high. UNHCR found that a significant portion (two-thirds) of the financial resources available to many refugees are being spent on calls and other means of staying connected. Recognising this fact helps in determining the situation and needs of many of these communities. This is also relevant to education and security and may initiate a conversation about the changing fabric of these communities in society that persists throughout the migratory journeys and involves cultural norms and practices that are emerging within the new technological landscape. However, refugees still face several challenges, such as technological skills, access and use.[33]

REFUGEE AND ICT – BANGLADESH DEPICTION

Refugee and food security: the role of ICT

The refugee influx in 2017 generated a perilous situation for both the refugees and the government of Bangladesh. Bangladesh is facing several challenges to its efforts to uplift the economy from a developing to a middle-income level with steady economic growth. With the development of a multi-dimensional aspect, it is necessary to make progress in many areas to ensure the well-being of the citizens of Bangladesh. Although Bangladesh is now self-sufficient in food production, problems with the equal distribution of income and food persist. The refugees who fled from Myanmar also faced hazardous and unsafe conditions even in Bangladesh at that time due to shortages of food, shelter, and security. Refugees are

[32] UNHCR 2016.
[33] Mason–Buchmann 2016.

Table 1: Different family sizes and received items

Family size and persons	Number of baskets* Receive
Small size (1–3) persons	One basket
Medium size (4–7) persons	Two baskets
Large size (8–11) persons	Three baskets
Very large size (11+ persons)	Four baskets

* *One basket = rice 30 kg, pluses 9 kg, fortified vegetable oil 3 l*

known to be vulnerable and exclusively dependent on humanitarian assistance.[34] The influx of refugees reduced the scope of income generation for unskilled labourers in a highly competitive labour market, leading them to seek external aid for their main income.

The World Food Program (WFP) and the Food and Agriculture Organization (FAO) are leading the efforts, along with about 30 other national and international organisations, to ensure food security for the refugees. More than 880,000 people are directly connected to the general food service that is provided in 34 refugee camps. However, the unregistered refugees are among the most vulnerable, who typically came before the influx.[35] The food service is provided by in-kind or e-vouchers and complimentary food items. At the end of March 2019, about 65% of refugees use the e-voucher service. In-kind foods are life-saving, although to ensure more diversified diets, an e-voucher was programmed to be implemented by December 2019, while the refugees also need fuel, health care, light and electricity and access to safe drinking water, which are also crucial.[36] The following baskets of in-kind food items are distributed twice per month from 19 scattered points of distribution through 32 camps (Table 1).

The WFP is, with the cooperation of a range of food security partners, trying to enhance the dietary diversity for the most vulnerable people, such as children up to 5, the elderly, disabled people, pregnant women, people with chronic illnesses, and lactating mothers, who are receiving in-kind blanket food assistance complemented by vouchers for fresh food items, e.g. fish, eggs, vegetables, and spices. The WFP has planned, through a biometric debit card, to transition all the refugees from in-kind food assistance to e-vouchers. A refugee can use the debit card (SCOPE) to purchase a range of food items from private shops contracted by WFP, while the debit cards are credited monthly.

There were initially 10 e-voucher outlets, which was increased to 21 at the end of 2019, and 24 shops with one shop serving 5,000 to 20,000 households in seven camps. To ensure the diversity of food and nutritional security, the refugees have been offered twenty food items, among which twelve compulsory items are sold at a fixed price, set before negotiation, along with eight flexible items which traders choose to sell.

[34] WFP 2018.
[35] WFP 2018.
[36] Needs and Population Monitoring (NPM) 2018.

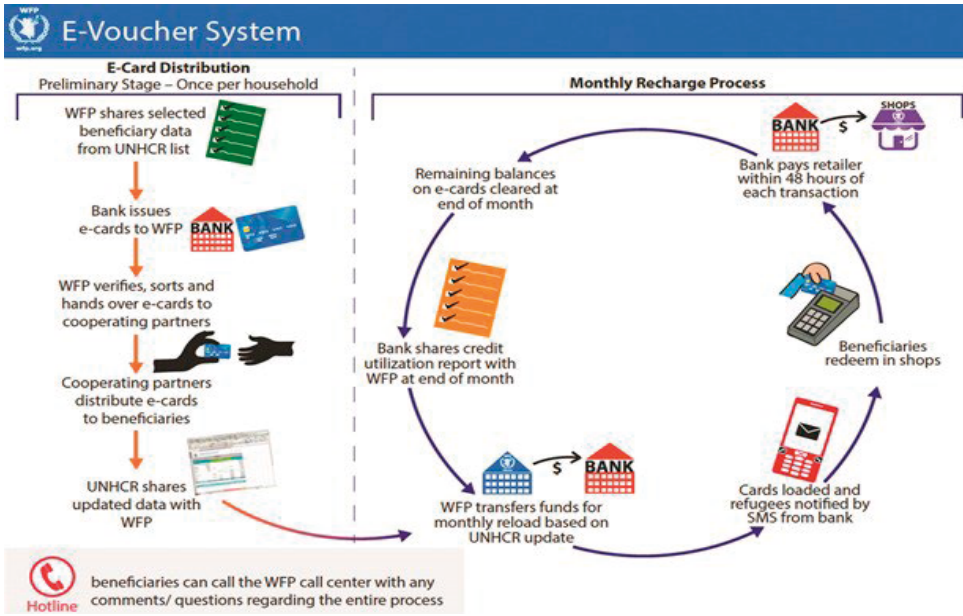

Figure 4: E-voucher system
Source: Luce 2015

Technology in gender and development

Considerations of gender have been fairly prominent in the discourse around the development of ICTs in refugee camps. the crucial role of mobile phones and how they are changing the landscape of technology and development has long been recognised, and the notion of mobile phones as "technological leapfrogging" in the 21st century is quite a popular and commonly voiced opinion. ICT also contributes to greater refugee empowerment through mobile-based technology, especially social media,[37] among other purposes to help the governing process in the refugee camps. In a typical example, a senior woman of a family was given the SCOPE card issued by the WFP, but the control and use of the card were implemented by the male person, and the entire decision was made by the male. This illustrates how women are still struggling to be empowered within the household decision-making process.[38]

The Rohingya Emergency Vulnerability Assessment-2 (REVA-2) reveals the precarious circumstances currently surrounding these refugees: the absence of resources and

[37] Andrade–Doolin 2016.
[38] UNHCR 2019.

inadequate income-generating opportunities only degrade their situation further. Overall, food-related coping has improved during 2018 and is found to be more predominant among newly arrived refugees as compared to registered refugees.[39] "Offline constraints and incentives still appear to frame the nature of online interaction much more than generally acknowledged, and it is, therefore, important to see and understand the realities of marginalization in which internet use is embedded and the complex tapestry of a socio-economic crisis that frames it."[40]

Migration integration governance and justice in refugee camps

The Government of Bangladesh (GoB) is always respectful of international human rights laws and treaties. It has also showed its generosity in every aspect of national and international human rights issues. Bangladesh historically was not familiar with the refugee issue. Although it had started to receive Rohingya after its independence, this migration pattern assumed dramatic proportions only in 2017 when the persecution and ethnic cleansing of Rohingya people by the Myanmar government started in Rakhine state. The latest instance of aggression was termed "ethnic cleansing",[41] and this triggered the massive Rohingya refugee influx into Bangladesh. Many of them were biometrically registered and given identity cards by the Immigration and Passport Department of Bangladesh,[42] which also provided shelter, relief, and medical services.[43] Although, with the cooperation of local and global agencies, the government was able to respond to the crisis, it is evident that contemporary life-saving funding is not sustainable and sufficient for programming and humanitarian actions. It is crucial to initiate a more development-oriented approach in order to build national resilience and sustain the degree and value of service delivered.[44]

The influx of Rohingya refugees into Bangladesh was the largest human displacement of the 21st century in the region. Bangladesh has had tremendous success in its immediate scale-up and partnership with other humanitarian organisations and communities to deliver support and a shield for saving the lives of the refugees.[45] Refugees are governed, including their habitation and movement, by the Foreigners Act of 1946 (Article 3) because Bangladesh is neither a signatory of the 1951 Refugee Convention nor the 1967 Protocol concerning the Status of Refugees and does not have a refugee law. The Foreigners Act empowered the government to retain the migrants in a prescribed place and put movement restrictions on them until they obtain permission to travel, with a valid reason. Refugees

39 WFP 2018.
40 Iwilade 2015.
41 OHCHR 2017.
42 Oh 2017.
43 Khatun–Kamruzzaman 2018.
44 Mason–Buchmann 2016.
45 UNHCR 2019.

are allowed to go outside of the camp to doctors and courts with prior approval by camp administrators (CICs). Bangladesh has signed various global human rights treaties that indirectly support the Rohingya refugees in humanitarian aspects. However, these are limited in that they are not enforceable in a local court by domestic law for their misconduct, which raises questions about the issue of local security.[46]

ICT and refugee family unification: protection and assistance

The Ministry of Home Affairs of the Government of Bangladesh (GoB) conducted a biometric registration of the refugees who had been in the country and were undocumented before the incursion as well as the new arrivals who came in 2017. The process ended in June 2018, and 1.2 million registered refugees have been given individual MOHA cards. The primary challenge was to find the missing link between the individual and his or her family members which was crucial for assistance at the household level.

UNHCR has started to complement MOHA's registration, in association with the Refugee, Relief, & Repatriation Commissioner (RRRC), for support and shielding purposes and to tie every individual to a family. In March 2018, 876,000 persons and/or 203,407 households had been assessed and connected to a family and were given a Family Card with a Family Counting Number (FCN) when their housings were geotagged.[47]

However, these cards (MOHA and FCN) were later replaced by a Smart Card with a household ID number when MoHA and UNHCR began a combined registration process in June 2018 at five registration sites, where the previous registration had taken place, for updating biodata and biometrics for the next three years, including an iris scan, to amalgamate and modify some of the adequacies of the earlier registration. Already, 43% of the refugees had been registered under this scheme by the end of June 2019, which amounts to

Figure 5: The EU and UNHCR support refugee registration in Bangladesh
Source: Reardon 2019; St-Denis 2019

[46] Khatun–Kamruzzaman 2018.
[47] UNHCR 2019.

374,000 persons and 82,000 refugee households. Once officially registered, refugees receive a smart card with a household identification to replace both the MOHA and FCN cards. As of 30 June 2019, about 43% of the refugee population had been officially registered, the equivalent of about 374,000 individual refugees and 82,000 refugee households.[48] It is also evident that the use of social media like WhatsApp and/or Facebook Messenger, in a new society mostly used by refugees, is efficient, cost-effective, and a favourite means of communication due to easy access to communicate with their family members and relatives including those back home.[49]

Refugee, terrorism and homeland security governance of Bangladesh

The concept of terrorism indicates that the terrorist has a clear goal for every attack that they carry out. It is also widely agreed that terrorists believe in the need for violence to coerce the society to make changes because they are not satisfied with the current institutional structure of the existing one. At the same time, they typically claim that they do not have many choices. Techfugees is an umbrella organisation that works on refugee-related issues, founded by Mike Butcher in September 2015. It has created a novel media landscape and become a central site for those working in networking and information exchange on the site. The organisation focuses on ICT that is conducive to receiving and supporting refugees who have fled their homeland and who are living in a camp in the host country. ICT refers to digital devices and systems that are accessible to everyone. The main technology used by refugees for information and communication technology is the internet because it is cheap and easy to access. ICT is crucial for externally displaced persons during their distressing journey from their home to the host country. It also enables them to maintain contact with their relatives and stabilise their insecure and uncertain situation to a degree.[50]

The most serious issue is that the refugees are not permitted to have any job according to the law of the land of the host country while at the same time they have been given free food and many basic items that may not even be available to many members of the host community. In this process, their consumption habits were changed without any income-generating behaviours, although it is a humanitarian issue, after all. In this way, the lifestyle that refugees are enjoying will be strengthened because they do not want to lose it and they will try to maintain it by any means possible. The threat to the host country posed by a funding crisis can create an unstable situation where several measures need to be taken for integration, resettlement, and repatriation. However, ICT-based identification is a strong mechanism to trace and track any individual who represents a threat to the host community and country, as well as to refugees.

[48] UNHCR 2019.
[49] Abujarour–Krasnova 2017; Vernon et al. 2016.
[50] Mason–Buchmann 2016.

ICT for sensitisation or understanding education and languages

Information and communication technology (ICT) for development is a new avenue and creates a new eco-system that combines ICT and development theory to expedite the speed, intensity, and diversity of this arena that is unprecedented. ICT plays a decisive role in educating refugees and providing access to various resources for learning languages. Education in (local) languages is a key to communicating with local groups, officials, and other people during the journey of a refugee. It also helps them to lead their daily lives in a host country. Education through ICT can also facilitate their participation in further educational programs that help them in their daily lives as asylum seekers or to resettle elsewhere. Addressing the challenges of accessibility to education and other basic services, the intervention of ICT has benefitted refugees in various parts of the world.[51] However, while it is valuable to provide electronic educational materials, it is inadequate without inclusive teaching support to achieve the ultimate goals of the refuge.[52]

ICT in education for Rohingya refugee

The number of refugee children has increased as conflicts interrupt societies on a global scale. Providing education for refugees and displaced people is becoming more challenging over time as the numbers of affected people are increasing. As such, host countries need to arrange adequate facilities to provide appropriate education to refugee children when they receive them.[53] The joint efforts of the government of Bangladesh and UN agencies and NGOs have saved many lives in refugee camps. However, this is not sufficient to ensure that refugees live with dignity and are self-reliant. Education has been identified as a key lever to involve children and young people in social and political life, while social equity and cohesion are political priorities at the local and global levels. ICT holds 'great promise' to respond to unmet education needs within refugee settings.[54] However, ICT implementation in education also requires skilled and trained teaching staff, while the absence of both can create barriers to effective education for the refugee community. ICT can support the learning process, but it is not a comprehensive solution to refugee children's educational needs, and none of the technological interventions are likely to be effective in obtaining the full benefit of ICT utilisation for education in refugee camps that are solely dependent on trained and dedicated teachers. The teacher is pivotal for learning, particularly in refugee education.

Two aspects of ICT intervention for refugee education were focused on globally by the recent review, which recommended: a) strengthening teacher training through cooperation

51 Abujarour–Krasnova 2017.
52 Dahya 2016.
53 Hamilton–Moore 2003.
54 World Bank 2016.

Figure 6: Rohingya refugee children study at an informal education centre at Kutupalong refugee camp run by Caritas Bangladesh (Photo: Stephan Uttom/UCA News/2017)
Source: Rozario 2020

with ICT programmers and local authorities; and b) enabling teachers to track students in various ways to manage and monitor their learning, while allowing them to get in touch with their peers and colleagues via SMS or social networks to support shared knowledge and to provide psychological support during trauma and post-traumatic stress.[55]

Education, skill-building, and livelihoods are inseparable for effective and durable resolutions and reintegration of refugees. The governments of the host countries and the international aid agencies are struggling to ensure a safe environment for learning and quality education for refugees. While many may be overly depending on ICT to offer at least part of the solution, ICT can indeed offer, even among impoverished refugees, a platform that educators can leverage to reach marginalised children and youth through the use of smartphones and other mobile devices.

UNICEF, along with other humanitarian organisations, was providing informal education in 2019 to Rohingya refugee children from 4 to 14 years old. More than 300,000 refugee children and adolescents were studying in 3,200 learning centres of which over 70% were

[55] Lewis–Thacker 2016.

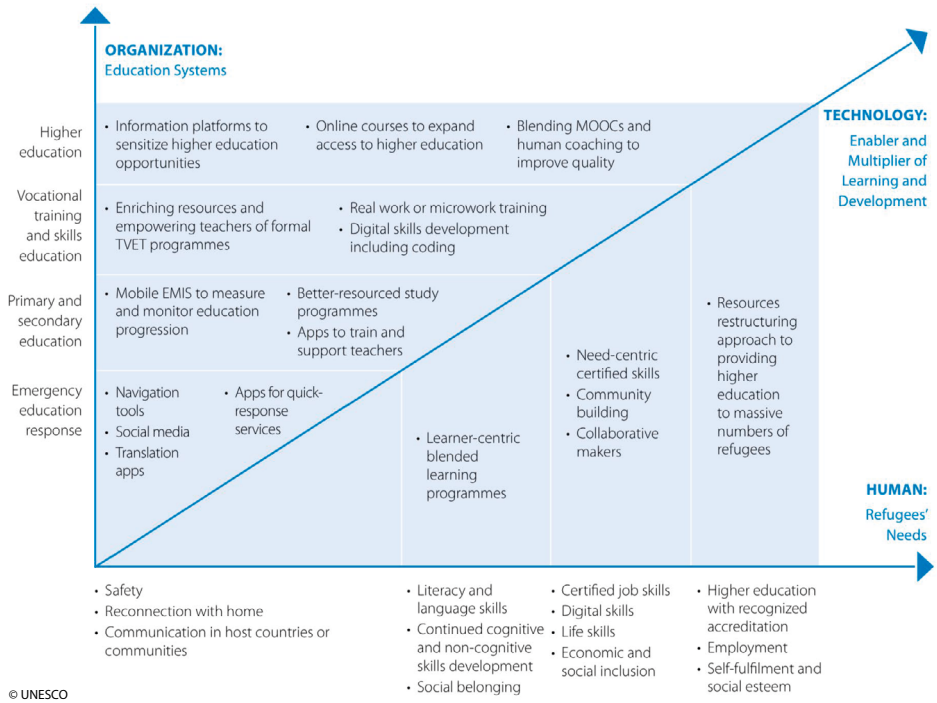

Figure 7: A human–organisation–technology model to map the values of mobile learning for refugees
Source: UNESCO 2018

supported by UNICEF. Although it was considered a development 'over the status quo ante', the education quality was very poor due to a lack of lesson plans, textbooks, and adequate training for the teachers. ICT plays a crucial role in managing these educational centres and continuing to provide education services in the world's largest refugee camp.[56]

Educating Rohingya refugee children with a structured curriculum, effective teaching, and consistent evaluation in the Rohingya refugee camps is hindered due to the lack of qualified and trained teachers. While the use of ICT can help overcome these difficulties, several challenges remain before it can help those in vulnerable and disadvantaged situations. There is a growing need for technological intervention in refugee education that countries around the world are trying to address. The outbreak of the Covid–19 pandemic prompted the governments of host countries to use technology for refugee education, and Bangladesh is also making efforts in this area.

[56] Human Rights Watch 2019.

ICT and public health of Rohingya refugee

Refugees are vulnerable to public health crises. They are experiencing stressful situations nowadays due to the double burden placed on the health sector after the outbreak of Covid–19. There is no doubt that increasing life expectancy, coupled with "the economic and societal costs of managing chronic diseases", has put healthcare systems in many countries under stress.[57] Public health concerns for refugees are becoming more challenging and result in more vulnerabilities. However, this is addressed several times for equity in public health, especially during conflict and pandemics.[58] Although public health facilities are provided in refugee camps, many camps can only offer limited support for refugees' health-related issues, which are inadequate in quality, numbers, and expertise. Moreover, some of them are not well equipped logistically for emergency support.[59]

Homeless refugees are at "heightened risk of disease exposure and transmission due to their reliance on precarious water, sanitation, and hygiene facilities" and refugee children[60] are the most vulnerable[61] and susceptible to different infectious diseases today, as almost 50% of those affected are children. Serious health issues are common in refugee children, along with mental trauma. Cardiac and respiratory diseases and acute asthma along with other serious health complications are also common. Malnutrition is a frequent problem due to food insecurity and the lack of a proper diet for both children and adults.[62] Moreover, refugees have an extensive knowledge gap in maternal and reproductive health due to poor infant feeding care practices and low diet diversity. There is a meagre "water supply, poor hygiene and sanitation facilities, and low vaccination rates that pose a greater risk for disease outbreaks and malnutrition in refugee camps than in mass populations" which is a great concern for public health.[63]

Employment and skill development

The Rohingya refugees are restricted in their camps and not allowed to be integrated into the host community workforce. That is why it is a great problem for them to grasp the opportunities to find work due to legal constraints along with cultural and language barriers. However, the youth are allowed to join skill development programs to work inside the camps and to utilise their skills after repatriation, integration, or migration to a third country. The use of ICT has intensified and its value in economic and public services is

57 World Economic Forum 2020.
58 Hossain 2021a.
59 Hossain 2021b.
60 Panhuis 2018.
61 Oberg 2019.
62 Toole–Waldman 1997; Goma Epidemiology Group 1995.
63 UNHCR 2019; Truelove et al. 2020.

Figure 8: Skills training to Rohingya adolescents (Photo: Shabir Hussain & Karen Homer, World Vision International)
Source: Homer 2019

recognised with unprecedented magnitude, while it has a profound impact on job-seeking, self-reliance, and social inclusion for refugees. It is evident that refugees are using mobile phones to access digital services and opportunities for employment and entrepreneurship. A digitalised economy requires digital skills and other cognitive and non-cognitive skills along with innovativeness, problem-solving, and collaboration skills, which demands a well-structured education system that is absent for Rohingya refugees. Hundreds of thousands of adolescents living in the world's largest refugee camp urgently need learning opportunities.

However, only four percent of the children in these camps have access to some form of education, life skills, or vocational training.[64] Although children and their parents have top priority for education and skill development training, there is a massive gap in access for children and adolescents. To bridge this vast gap and provide skill development training, World Vision initiated life-skill and pre-vocational training for adolescents.

ICT for consolidation system and the work of NGOs

Refugee camps are places where situations can change at any moment for several reasons. ICT can be helpful in a place where situations are changing rapidly and can meet the needs of the targeted people and effectively shape the governance landscape. NGOs are using different types of softwares that help them organise their work more effectively and promote accountability in service delivery. They use many devices, e.g. mobile and tablets, to conduct their assessment surveys, evaluate and process the responses and share them with other humanitarian local and international organisations that can be helpful for

[64] Homer 2019.

refugees and which allows them to arrange and deliver the services. It is also helpful for the bodies that are working in that area to respond to the needs and demands of the refugees. WhatsApp, IMO, Viber, and/or Facebook Messenger are also useful tools for the volunteers and workers to track each other during the process of introducing any new service or product delivery in the refugee camps.

Refugee crisis and security tension across the region

The refugee crisis has become a security concern both for the refugees and for Bangladesh as a whole. The 21st century has witnessed several global crises, including refugee crises and the Covid–19 pandemic, that have led to stricter migration policies and restricted human movement all over the world. As a result, refugee migration for long-term settlement has become a lengthy and restrictive process, causing numerous crises for both the refugees and the host countries. In addition, this irregular type of migration intensifies the risks of human trafficking and poses a threat to the security of the host country, which critical security theory defines as a danger to society and replicates in the government policies of the country.[65] The security of the state has always received the highest priority in any case, especially considering the social factors that need to be analysed when terrorism and other security crises are perceived as threats. The Rohingya crisis in Myanmar has a long history that has been maintained by a separatist militant group called the Arakan Rohingya Salvation Army (ARSA) in Rakhine who fled as refugees in Bangladesh during military action and promoted terrorism while enflaming tension inside Bangladesh.[66] The recent influx of Rohingya was the highest ever in Bangladesh compared to other neighbouring countries, which raised more security concerns. Hefazat-e-Islam (a radical Islamist group) of Bangladesh declared Jihad against the Myanmar government with the aim of an independent Rakhine and indirectly forced the government of Bangladesh to welcome Rohingya when the state undermined its security,[67] which may cause security tensions in the near future as a vast group of Rohingya have been confined in camps for years with minimal facilities. The extremist group in Myanmar is regarded as "threatening to deepen sectarian tensions across the region […] as Muslim communities grow increasingly angry over the treatment of Muslim Rohingya by Buddhist Rakhine".[68] In addition, it is alleged that ARSA has good connections with and receives funds from different militant organisations and Jihadist groups in this region. However, the government of India has already been informed about the threat to security in this region due to the Rohingya refugees.[69] The Taliban has given moral support to the ARSA since the beginning, and

[65] Nadig 2002.
[66] Rahman 2010.
[67] Joehnk 2017.
[68] Japan Times 2017.
[69] Mitra 2017.

India has faced several other cases of Islamic radicalism, so it could be an emerging security threat to this region if it is not addressed and managed properly to reach a permanent and peaceful settlement in the coming days.

CONCLUSION

The governments of developing countries continue to face several social, economic, and political challenges during their transition. The economy and society of Bangladesh has been running smoothly for the last decade, with steady economic growth putting it on the way to becoming a middle-income country, although it continues to face several crises. Rohingya refugees have appeared as perhaps its most serious crisis, while Bangladesh itself is one of the most densely populated countries in the world. In light of the worldwide and local refugee crises, we examined the significance of information and communication technology (ICT) in managing and overseeing refugees, given that the majority of refugees are being accommodated by developing nations. Research on the governance of refugees can help to develop effective ways to manage and resolve the crisis that the refugees and host countries are facing. The efforts to enhance the governance of refugees can also be complemented by researchers investigating the different contexts and perspectives of the crisis to identify the factors affecting the interplay between technology and refugees and to suggest a solution to the existing social problems. ICT-based service management has equipped regional and global humanitarian organisations to become effective and efficient in their service delivery with enhanced transparency and accountability. At the same time, there are many types of challenges when implementing ICT in this field, in areas including education, training, outreach, trust, and data protection. However, working with an existing structure, increasing access to technology, following the principles of responsible data practice, and fostering collaboration between the different stakeholders and groups can overcome the crisis and help complement the effective governance of refugees in a country that has no such previous experience.

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RETHINKING MAX WEBER. PREMODERN INTERPRETATIONS OF WEBER IN CRITICAL FOCUS

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This study examines criticisms of Max Weber by Leo Strauss and Mihály Polányi. When we claim that we act on the basis of moral considerations, the same is true for the case when we judge others on a moral basis, and in these cases, we also refer to generally recognised moral standards that we consider to be valid. Are these premodern interpretations of Weber critiques or indictments? Namely: the criticism of objectivity, criticism of historicism and criticism of positivism. Analysing Max Weber, we cannot go beyond Rudolph Sohm's concept of charisma and Weber's charisma. Weber was greatly influenced by Sohm, from whom the concept of charisma comes. Indeed, Weber perfected Sohm's concept of charisma, but also adapted it to his own. Neither Polányi nor Strauss find the theory developed by Weber to be completely consistent. The Weberian system of ideas requires renewal, the steps of which are embodied in the criticism of the two authors Mihály Polányi and Leo Strauss. In this study, I undertake to give the body an understanding soul in which both criticism and the Weberian system of ideas meet.

Keywords:
Mihály Polányi, political and state theory, political philosophy, political science, Leo Strauss, the criticisms of the Weberian theory, Max Weber

CRITICISM OF WEBER BY LEO STRAUSS

> "…what is called the whole is actually never complete, therefore it is not really the whole, the whole essentially changes in such a way that its future is unpredictable, the whole can never be grasped as a thing in itself or understood, human thinking is essentially something depends on something that cannot be foreseen, or that can never become its object, or that the subject cannot control, 'to be' in the highest sense never, or at least not necessarily, to 'always be'"[1]
>
> Leo Strauss

Strauss elaborates on Weber's criticism in his book, *Natural Law and History*[2] written in 1953. In this work, Strauss devoted an independent chapter to criticising Weber's doctrines in chapter 2 entitled *Natural law and the distinction between facts and values.* At the beginning of his critical analysis of Weber, Strauss writes about the German social scientist: "Since Weber, no one has devoted as much attention, work and almost fanatical devotion to the basic questions of the social sciences as he has. Whatever mistakes he made, he is the greatest social scientist of our century."[3]

Weber's assumption that the unique can arise from the general itself or from the whole and which is seen through the lens of Strauss "exclusively as the effects of other unique or partial phenomena"[4] is certainly applicable, but Weber's idea will never be valid for our knowledge of the whole. Weber considers himself a student of the historical school, but Strauss believes that Weber did not fully accept the doctrines of historicism, as he absolutely believes in the progressiveness of the idea of science, and the influence of this idealism can also be seen in Weber's work. Strauss did not have a problem with German thought although, to put it in simple terms, he objected to its distorted, almost dogmatic form which he called historicism.

In Weber's sense, the social sciences are only objective and universally acceptable (both for Western and Eastern people) if they are – in Strauss's formulation – "consisting of true propositions". However, Strauss goes beyond this and emphasises the determining nature of questioning and of the direction of interest, which arise from our individual viewpoints – which are unique to us – and these individually constructed systems of views are also related to our individual (separate content) value concepts. Strauss refers to the fact that the work of social science practitioners is both determined and guided by their value concepts and their field of interest (forming a kind of framework for keeping "research" in

1 Strauss 1999: 29.
2 Based on Joseph Cropsey's typology, Strauss's book can be placed at the end of the first phase of Strauss's oeuvre. The second phase lasted from 1958 until Strauss's death in 1973.
3 Strauss 1999: 34.
4 Strauss 1999: 34.

the desired direction). At this point, Strauss claims, in contrast to Weber's thesis, that the value-neutral social science criterion is only a utopian illusion, since the main questions of a given field of research and the selection of the methods themselves have a "value-saturated character", and these value concepts are "historically relative" in Strauss's theory.[5]

In Weber's thesis, according to which the complete heterogeneity of facts and values necessitates the standard of ethical neutrality that provides a basis for the social sciences, social science can only reflect on the facts and the reasons that can be discovered in them and attempt to provide answers. Weber believed that the correctness of the criterion of value neutrality was fully justified by the pair of opposites "Is" and "Be". The correctness of this was criticised by Strauss when he argued – unlike in Weber's approach – that neutral social science (in contrast to Weber's irresolvable conflict between Being and Consciousness) is rooted in the fact that it is impossible to gain true knowledge of Being. Weber's thesis that "every value choice, no matter how evil, vile or insane, must be brought before the judgment seat of reason, which is just as legitimate as any other value choice"[6] can result in nihilism in the Straussian sense (including noble nihilism). According to Strauss, in order for someone to call Weber's view noble nihilism, one must move away from Weber's position. At this point, Strauss recalls Weber's classic quote: "Be what you are!" – from which Strauss concludes that Weber himself rejected objective norms because these norms would have been incompatible with human freedom and action. Strauss believes that many social scientists today perceive nihilism only as a minor inconvenience, and they are also satisfied with all kinds of scientific results, which cannot be more than barren truths, the revelations of which truths "arise as a result of subjective value judgments and arbitrary value choices".[7]

Strauss also criticises Weber's "legitimate types of domination"[8] because Strauss believes that Weber identified (these types) only with what he claimed to be legitimate types of authority. This restriction in the Straussian sense carries with it the danger that Strauss himself describes as follows: "the person falls victim to all mirages and all the self-deception of the studied people." Strauss emphasises the ability to understand (social conditions) as the main characteristic of the social scientist, where the basis of understanding is a kind of (necessary) conceptual or reference framework which facilitates the understanding process. Strauss came to the conclusion that Weber's principles had a harmful effect on his work, because the rejection of value judgments is a threat to historical objectivity. What does this dangerous situation mean? On the one hand, by accepting Weber's basic idea of value neutrality, we cannot – in Straussian terms – "call things by their names".[9] On the other hand, the rejection of value judgments (standing on the basis of Weberian value

5 Strauss 1999: 35.

6 Strauss 1999: 37.

7 Strauss 1999: 41.

8 For Strauss, the Weberian system of criteria, which contains the requirements for selecting a charismatic leader, in which the important thing is how the person of the "charismatic leader" is judged by those who live under his power and charisma (i.e. the leader's followers or disciples) is based on "convenient" criteria theory.

9 Strauss 1999: 46.

neutrality) also threatens the objectivity of the interpretation. The following quotation from Strauss also testifies to his critical approach to Weber's perception:

> "So it appears that what Weber really meant when rejecting value judgments should have been formulated as follows: The objects of the social sciences include value references. The reference to values presupposes respect for values. This appreciation enables and compels the social scientist to evaluate social phenomena, i.e. to distinguish between true and false, high and low: true and false religion, true leaders and charlatans, true knowledge and mere knowledge or sophistry, virtue and sin, moral sensibility and moral obtuseness, art and senseless nonsense, vitality and degeneracy, etc. between."[10]

I consider it important to emphasise here that the "lack of neutrality" did not mean either approval or rejection. Strauss notes (in connection with the criticism of Weber's value neutrality) that since values that are separate from each other are incompatible, the acceptance of any value implies the immediate rejection of the opposite values. Strauss's argument further criticises the basic concept of Weber's value neutrality, including its thesis, which Weber himself accepted as self-evident, according to which all values are of the same rank as the others, so in this sense there is no such thing as a hierarchy of values. However, the essence of Strauss's argument (his critique of Weber) is revealed to us precisely in the fact that the main error of Weber's basic concept stems from the unconditional acceptance of Weber's basic concept itself – the thesis of the identity of values. Strauss's criticism of Weber is summarised in the following lines: "However reasonable Weber was as a practicing politician, however horrified by the spirit of narrow-minded party fanaticism, Weber as a social scientist approached social problems in a spirit that had nothing to do with the art of state management and no it served no other practical purpose than to encourage narrow-minded obstinacy." [11]

Although Weber pointed out that social science aims to understand social processes based on worldly aspects, the light of this is natural light, which offers rational answers (solutions) to society's many problems. Weber was able to reach a point in his theory whereby the goal of science is clarity, that is, the ability to see clearly when addressing big questions, with the ultimate goal being clarity regarding man. Science and philosophy are a way to dispel delusions and eradicate narrow-minded stubbornness. They are a way to live a life that dares to face reality, even if that is grim and only interested in the letter of the truth, regardless of whether we like it or not – nevertheless it is valid. Strauss argued in relation to the Weberian methodology that it is based on a very specific view of reality. In the Straussian critique, Weber is depicted as a social scientist who is less concerned with the characteristics of reality but is influenced and analysed more by countless abstract elements (e.g. types

[10] Strauss 1999: 50.
[11] Strauss 1999: 52.

of science, methodology, typology of rule) that reshape and shape reality. However, Weber's methodological theses – as Strauss puts it: "remain meaningless, or at least irrelevant, until someone translates these theses into theses expressing the nature of reality."[12]

Strauss never accepted Weber's concept of value neutrality, and criticised both Weber's typology of dominance (especially with regard to the selection of a charismatic leader) and the idea of modern science which Strauss regarded Weber to be a pioneer of. From this critical opposition comes Strauss's opposition to modern political science (which means scientific opposition): political scientists deal with useless things while Rome (that is, the support of liberal democracy) burns – this is how Strauss formulates his unique system of views. This conception of the task of political science built on Straussian foundations can also be seen as the Straussian argumentation of the conception of the task of political philosophy. As Strauss saw it, political philosophy must be freed from the crisis mechanisms of modernity (its unshakable belief in positivism and historicism), which pervades the conception of science that has developed since the 17th century and has conquered space for itself in the field of sciences. As a result of this conquest, philosophy (including political philosophy) has become value-laden, and thus cannot be regarded as a science in the modern sense of the word. The essence of Strauss's conception of tasks therefore constitutes an attempt to rehabilitate political philosophy – which would involve a return to the basic questions, approach and methodology of classical political philosophy in Strauss's conception of tasks. Strauss stands for the validity of classical political philosophy – this is how Weber's criticism becomes interpretable which comes to the defence of classical political philosophy, as if questioning the doctrines brought to life by modern positivist science or the truths of the doctrines which emerge during the Straussian interpretation of Weber's theses (they collapse and blend into each other like a house of cards).

In *What is Political Philosophy?* which Strauss published in 1959, he identifies "the topics of political philosophy"[13] as "the great goals of humanity: freedom and government, and power are goals that are suitable for raising all people above their poor self".[14] This framing of the tasks of the discipline continues three paragraphs below: "Political philosophy is the attempt to replace belief in the nature of political things by knowledge of the nature of political things."[15]

Political philosophy is a continuous attempt to understand political phenomena. Strauss's understanding of the task of political science (political philosophy) is based on the following assumptions: a) the examination of social phenomena and their study is impossible without dealing with value judgments; b) the assumption behind the rejection of value judgments, according to which the conflict between different values or value systems cannot be resolved for human reasons (which Weber himself accepted) according to

12 Strauss 1999: 58.

13 Strauss' political philosophy is also related to the relationship between man and country, which he emphasises in the introduction to *The City and Man*.

14 Strauss 1994: 21.

15 Strauss 1994.

Strauss, this is just a proposition that has never been proven; c) scientific knowledge, which is applied and accepted by modern science as a standard, in Strauss's thinking only seeks to neglect, discredit and devalue pre-scientific knowledge – in Strauss's critique of positivism – and historicism reappears at this point. Furthermore d) positivism transforms into historicism, which runs the risk that historical works will become unrepeatable, against which Strauss brings up the concept of historical understanding, the principle of close reading and the necessity of repeatability. Finally, e) the answers considered objective and thought out are articulated from subjective questions. By making these five propositions, Strauss shook the pulpit of modernity to its foundations and showed that what modern science believed to be a clean, value-judgment-free understanding of science in the narrow sense was nothing more than a fiction based on subjective facts, which did nothing other than encourage narrow-minded stubbornness. Going beyond Spengler, Strauss not only regarded it as justified that the decline or twilight of modernity would one day occur, but he also took it as read that modernity is currently in a crisis, and that the only way to alleviate the symptoms of this crisis is to revive the much-maligned classical political philosophy and elevate it back to its rightful place. "Strauss's political program set out to preserve philosophy in the 'strict' or 'classical' sense" – Rosen argues.

Strauss believed that the accurate interpretation of modern political phenomena is impossible without traditional political thinking. It is important to note at this point, however, that in Strauss's interpretation: "all political philosophy is also political thought, but not all political thought is political philosophy."[16] In Strauss's criticism, what is required is to guide the world of philosophy, which in the modern age has merged with the idealism of history, into a separate channel again, freeing philosophy from the distortions and beliefs imposed on it. Strauss's originality does not lie in the fact that he recognised the symptoms of the crisis of modernity or the escalation of this crisis, as this had already been illustrated by Spengler's guiding work. Instead, the novelty is that the results of Strauss's thoughts became relevant in political thought, hence Strauss's unique conclusion is as follows: in our time, classical political thought (classical political philosophy) can gain a current and decisive effect. Since neither historicism nor the interpretation of positivism could solve what Strauss termed "the eternal conflict between society and philosophy" – see the Socratic turn in Strauss's theory – the classical argument itself remained valid. The crisis of modern political philosophy (which is also the crisis of modern natural law) could only become a philosophical crisis because philosophy was completely permeated by politics, notes Strauss, and this politicisation created an atmosphere in the 17th century in which philosophy became a weapon. Strauss stands on the foundations of classical natural law and classical political thought – in the words of András Lánczi: "the rationalism of classical thought made him a 'progressive conservative'" –, this is how Strauss's criticism of Weber can be described.

[16] Strauss 1994: 22.

At the beginning of our cruise, we were introduced to the Straussian critique of Weber's thoughts. If we continue on our boat trip, we can come across another criticism of Weber at the next coral reef, and it is none other than Mihály Polányi's system of ideas and his criticism of Weber.

MIHÁLY POLÁNYI'S CRITIQUE OF WEBER

1. "He finds himself asserting the truth of his knowledge, and this assertion and this belief is an action that adds something to the world to which his knowledge applies."[17] Polányi's approach to objectivism has been raised. But what is the point of this? What solution does Polányi offer to objectivity as a distorting problem? The crux of the solution is in Polányi's identification of two types of knowledge. One half of our knowledge is explicit knowledge which in Polányi's definition includes that which is usually called knowledge, which can appear in countless ways (in maps, mathematical formulas, and written words). On the other hand, another component of our knowledge is tacit knowledge, which has not taken on a specific form but which is the knowledge used during action. For Polányi, tacit knowledge is the main element of all knowledge. The difference between these two typologies of knowledge outlined by Polányi is striking, because while an expression or thought thread obtained through explicit knowledge can be reflected upon (see Strauss and Polányi's critique of Weber), we cannot do the same in the case of tacit knowledge based on experience. In our case, therefore, explicit knowledge provides a specific space for critical statements.

2. "The emergence of the historical method known as historicism transformed our concepts of history, as the norms of the examined age began to be applied to past actions. This method, in an extreme case, would represent a perfect adaptation, and would make any overriding of the norms of an age pointless. The consequence of this is an extreme, completely mistaken relativism."[18] Polányi criticises historicism to point out that if the norms of the examined era were to be the guiding principle for a past era or action in all eventualities, then the studied era would cease to be the subject of critical reflections. In the critique of historicism, I would like to briefly mention Polányi's modern nihilism which in his theory "can be understood as one of the components of an unprecedentedly extensive moral protest in history".[19] (Opposed to it is the noble nihilism inherent in Straussian idealism.)

The next port of call for Polányi is the critical attitude inherent in positivism. 3. "Some philosophers of the last century were so influenced by this kind of tangible achievement that they wanted to abolish philosophy completely, dividing its subject among different disciplines."[20] It is worth recalling that Strauss wanted to save political philosophy in the classical sense from this liquidation.

[17] Polányi 1997: 106.
[18] Polányi 1997: 153.
[19] Polányi 1997: 70.
[20] Polányi 1992: 139.

Polányi calls this philosophical trend that ends philosophy positivism. The main direction of positivism created in modernity is that in its interpretative framework, truth can only be identified with scientific truth. Polányi's critique of positivism confronts positivism with the fact that since science itself is "positive", it cannot include the preservation of personal beliefs (personal knowledge). Through the lens of Polányi, this criticism could be formulated as follows: "My own main thesis, which I developed in Personal Knowledge – and the essence of which lies in the doubled meaning of knowledge, is, as it were, outside the borderline of positivism, and thus it is not science in the modern sense of the word." Elsewhere, Polányi states that: "The ultimate goal of modern science is the establishment of strictly impartial objective knowledge."[21]

Polányi's argument pulls the rug out from under the modern positivist understanding of science. Polányi considers his argument about positivism to be a closed issue since a positivist and unbiased science is not possible. After all, in every single human act lies the mode of action unique to that particular person, the individual's own line of questioning. The systems of views formed in this way become defined by scientific freedom, which is realised through the articulation of subjective facts.

"With the publication of the announcement, it will be possible for all those scientists who will form an opinion on its value to become familiar with it, and possibly even express their opinion. They can doubt or reject the claims of a statement, and their author can come to their defense."[22] This summarises Polányi's opinion on the question. At this point it is worth asking: In which aspects does Polányi question Weber's ideas?

Polányi was critical of positivism on the one hand and historicism on the other hand, as well as scientific objectivity, which supposedly banished value judgments from the process of scientific knowledge. Polanyi does not find the theory set up by Weber to be completely consistent. He describes Weber's thesis as inconsistent, arguing that "the science that claims to be able to explain all human actions without value judgments, yet admits that the scientist, as a private person, is often motivated by motives".

Science, which seeks to provide a value-free explanation for every single human action, and strives to do so, calls into question both the moral motives and goals of the people fighting for their freedom. Modern political science supports the theory that human ideas are not independent influencing factors of public life. Polányi's interpretation of this modern political science comes into direct conflict (not only at an abstract level) with the objectives of the Hungarian revolution ("the aspects of truth and justice should be re-established in the field of public affairs"),[23] which he himself considers to be similar to Polányi's idealism of 1848. Polányi does not consider scientific Max Weber's methodological position regarding the binding of knowledge to assumptions and value judgments and the separation of value judgments and factual judgments.

[21] Polányi 1997: 182–183.
[22] Polányi 1997: 50.
[23] Polányi 1992: 131.

Polányi formulates seven critical counter-arguments against Weber's position: a) Every person makes a moral judgment, regardless of their profession (referring to Weber's description of politics as a profession). b) When we claim that we act from our moral considerations, the same is true in the case when we judge others on a moral basis, and in these cases we also make reference to generally recognised moral standards that we consider to be valid. c) We must necessarily make a conceptual separation between moral illusion and moral truth. While the "awareness" of d) moral truth is based on the recognition of the validity of a requirement, the moral illusion e) is compulsive, like the illusion of the senses. f) In other words, if we accept the fact that there are valid moral judgments, as a result we must admit that there are moral human values, and if people are motivated by the knowledge of these values – and this is where Polányi's argument reaches its peak – due to the existence of this motivation, all claims that human actions can be explained based on moral judgments can thus be dismissed. g) Finally, Polányi states that political science, as a behavioural science, cannot be free from value judgments if it studies the behaviour of rebels (revolutionaries). A science that seeks to provide a value-free explanation of every single human action, calls into question from the outset the moral motives and goals of people fighting for their freedom. On the basis of his critique of Weber, Polányi concludes that political science must be re-established on new foundations, starting from the irrevocable moral value of human actions and drawing upon the political experiences of modernity in the 19th and 20th centuries.

MAX WEBER AND RUDOLF SOHM: TWO CONCEPTUAL SEPARATIONS OF DIFFERENT TYPES OF CHARISMA

Max Weber is often considered to be one of the founding fathers of sociology (and is especially regarded as the father of bureaucratic organisation theory) alongside Marx and Durkheim, despite the fact that Weber himself resisted this title.

There is no doubt that Rudolph Sohm[24] was the source of Weber's concept of charisma. Sohm had a great influence on Weber's thinking in general. Weber borrowed the concept of charisma from Sohm. For Sohm, charisma was an important but relatively minor weapon in his theological battle over the origins and doctrine of Roman Catholicism. Sohm focuses primarily on anonymous early Christian leaders. In contrast, Weber focuses primarily on political and ethical leaders.[25]

In the chapter on "Religiöse Gemeinschaften" [Religious Communities], in Weber's major work *Wirtschaft und Gesellschaft* [Economy and Society] Weber contends that "Under 'prophet' we will here understand a pure(ly) personal bearer of charisma" ["Wir wollen hier unter einem 'Propheten' verstehen einen rein persönlichen Charismaträger..."].[26] Weber drew on many of Sohm's legal writings, beginning with Sohm's 1880 essay "Fränkisches

[24] Sohm 1892; Sohm 1912.
[25] Adair-Toteff 2014.
[26] Weber 2001: 177.

Recht und Römisches Recht" and his 1888 article in "Die Deutsche Genossenschaft" [The German Confederation]. Weber quotes Sohm, who was the source of the concept of charisma, at least seven times in four different works: twice in *Wirtschaft und Gesellschaft,* once in *Probleme der Staatssoziologie* [The Sociological Problem of the State], twice in *Die Drei reinen Typen der Herrschaften* [The Three Pure Types of Authority], and twice in *Allgemeine Staatssoziologie* [General State Sociology].[27] He praises Sohm for being the first scholar to consider charisma from a purely historical perspective, and calls Sohm's a "brilliantly developed" concept of charisma.[28]

For Sohm, charisma is important, but for him it was primarily in support of his claim that ecclesiastical authority based on canon law cannot be theologically justified. The only true Christian "authority" is God-given charisma, and this has nothing to do with political, legal or religious orders. In contrast, Weber's conception of charisma is essentially political, and this is manifested in his use of prophets as examples of "charismatic carriers".[29]

However, it should be recalled that extraordinary times call for extraordinary people. People who appear to be charismatic authorities appear primarily in times of great unrest and upheaval. In times of crisis, special leaders are needed – charismatic leaders. In Weber's view, charisma is a radical and even a revolutionary power. In *Drei reinen Typen der legitimen Herrschaft* Weber calls charisma "one of the greatest revolutionary powers in history", and in his last work entitled *Staatssoziologie* (Sociology of the State), he claims that charisma is a "revolutionary power from above". In that work he identifies charisma along with rationality as the "two great revolutionary powers".[30] Charisma is revolutionary in part because it is the opposite of legal authority. In contrast to "rational" legal authority, charisma is "irrational". Legal authority is impersonal and regular, while charismatic authority is personal and exceptional. Charismatic authority is also anti-traditional because it breaks with what has always been. Not only does it defy any traditional or rational norm, it actually reverses all values. Weber cites Jesus' insistence that: "It is written, but I say unto you."[31] Weber insists that "the old law is broken by the new revelation" and hence the charismatic leader "gives new orders".[32] Charisma is also revolutionary because it is "eternally new" [*Das ewig Neue*].[33] It is radical because of its extraordinariness. Weber constantly emphasises the "extraordinary quality" (*außertägliche Qualität*) and "extraordinary character" (*außeralltägliche Charakter*) of charisma.[34] It is also referred to as "*außeralltägliche Kraft*"[35] [extraordinary power].

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27 Weber 1922: 124; 2005: 735, 755; 2009: 78–79.
28 Weber 2005: 462.
29 Adair-Toteff 2014.
30 Weber 2009; see further Weber 1976: 142.
31 Weber 1976: 141; Weber 2005: 468.
32 Weber 2009: 141.
33 Weber 2005: 735.
34 Weber 2001: 740; Weber1922: 122.
35 Weber 2009.

The extraordinary nature of charisma is also based on its almost exclusively personal nature. Weber constantly calls it personal: it is "personal authority" and "personally effective".[36]

Weber's contribution to the discipline of sociology is not in doubt, as he dealt with the big questions of his own and our time: the emergence and challenges of modern capitalist societies from a comparative and historical perspective. He not only established sociology as a new field, but also broke new ground in the fields of anthropology, economics, history, political science, religious science, law, media and culture.[37]

Some scholars argue that his work covers four main areas of social reality: 1. the ideal–typical regularities of action and the meaning actors assign to their actions; 2. the vehicles and contexts of social action – that is, the role of strata, classes, organisations, and social domains such as economics, religion, and politics; 3. the role of ideas, interests, values, norms and cultural practices that explain the grouping (*Vergesellschaftung*) and community building (*Vergemeinschaftung*) of people; and 4. actors' lifestyles (*Lebensstil*) and life conduct (*Lebensführung*), which help us understand how individuals are shaped by different types of rationalities and express their habitual, mental, and ethical dispositions. Weber's influence is evident in the enduring concepts and terms he coined or defined for the mainstream social sciences: charisma, bureaucracy, dominance, status, prestige, power, objectivity, ideal types, rationalisation and alienation, the Protestant ethic, the purpose of the social sciences. A critique of scientific life and the so-called iron cage that confines individuals to arrangements based solely on teleological efficiency, rational calculation and control.[38]

Weber's ideas have been used for many, sometimes contradictory, purposes, such as the theory of social action – as a model of rational action and as a guideline for structural functionalist analysis – and as a basis for modernisation and systems theories. As a result, the meaning of Weber's perceived contribution has changed over time, indicating that his work is not a closed system but an open book from which different perspectives and interpretations can and can be creatively derived and deduced.[39]

Two schools of thought representing Weber's legacy emerged: Weberology[40] and Weberism.[41] Weberology mainly examines Weber's historical, intellectual and political history, as well as his scientific development (*Werkgeschichte*). Weberology is not a form of advocacy for Weber, but interprets his concepts and methodology in relation to Weber's position as a "classical" sociologist, his biographical and editorial

[36] Weber 2005: 469, 467.

[37] Kurthen 2021.

[38] Scaff 2015.

[39] Kurthen 2021.

[40] Some representatives of weberology: Eliaeson, Chalcraft, Collins, Gerhardt, Hanke, Hennis, Kaelber, Kalberg, Lash, Lehmann, Löwith, Merton, Mommsen, Morcillo Laiz, Parsons, Poggi, Radkau, Riesebrodt, Rossi, Roth, Scaff, Schluchter, Tilly, Sica, Swedberg, Tenbruck, Tribe, Turner, von Schelting, Weisz, Whimster and Winckelmann. Kurthen 2021.

[41] Some representatives of Weberism: Albert, Albrow, Bendix, Bruun, Chalcraft, Gerth, Giddens, Gunderson, Habermas, Hennis, Joas, Joosse, Kaelber, Kalberg, Lepsius, Mills, Müller, Parsons, Prisching, Roth, Scaff, Schluchter, Schneider, Schwinn, Swedberg, Tenbruck, Turner and Whimster. Kurthen 2021.

reinterpretations and revisions. It is about "what Weber said, when, what, under what conditions and for what purpose".[42]

Weberology confirms that there is a lack of consistent and unified consensus on the meaning and content of Weberian theory. Instead, the contingent and contextual nature of his work becomes visible, emphasising the unique rather than the universal.[43] There is an eclectic abundance of interpretations, commentaries, and applications for a wide variety of subjects and research topics, or as Caldwell wrote, "there are as many Webers as there are interpreters of his work".[44]

SUMMARY

Weber's interpretation depends on time, place and question. So far, there has not been a comprehensive consensus on where, when and how to use the Weberian toolbox. Depending on the way Weber is atomised and contextualised, as well as the availability of translations, we can distinguish between Weberian, neo-Weberian and post-Weberian, "old" and "new" Weberian approaches. For example, Weberian studies have applied Weberian thought to such far-reaching topics as the trajectory of global capitalism, Eastern European and Middle Eastern transformations, rising inequality, religious conflicts, great power competition and foreign policy, new pandemic conflicts, ethics of the world, life, religion and science, nuclear weapons, and culture and consumerism in modern capitalism. Some argue that the application of Weberian concepts and expressions to contemporary issues may lead to new insights into current autocratic or direct referendum trends; charismatic strong leaders and the resurgence of nationalism,[45] sovereignty and legitimacy issues of supranational entities and institutions; failed states and increased migration; sectarian religious movements in the Middle East in connection with the dispersion of power and state authority; and the fragmentation of beliefs, lifestyles and behaviour in a world increasingly influenced by social media, fake facts and artificial intelligence.[46]

Like Weberology, Weberian scholarship proves the continuous applicability of Weber's thought across time and space.[47]

The constant acceptance of Weber's ideas and their popularisation in scientific education and scholarship also started trivialisation trends, which can be considered the inevitable consequence of all long-term, widely applied conceptual and methodological innovations. Weber shares this fate with other "classicists" such as Marx. Weber has often been borrowed

42 Bruun 2011: 145.
43 Gordon 2020.
44 Caldwell 2016. 215.
45 Joosse 2018.
46 Strazzeri 2016.
47 I would like to write more about some of the results of the recent international and domestic interpretation of Weber in another study.

as an honorific reference on the opening pages of journals and books on charisma, bureaucracy, status groups, and the Protestant ethic, sometimes in a clichéd and ritualised way as a quasi-cult object without serious application. At other times, with a conformist nod to sociological convention, Weber is referred to superficially to provide quasi-professional prestige and legitimacy, or to embellish current concepts without innovative content. The selective use of theories, concepts, expressions and quotations out of their original context often leads to over-interpretation or trivialisation, if not falsification.[48]

This is facilitated, as mentioned earlier, by Weber's rejection of the existence of a systematic theory. Moreover, his sometimes scattered or ambivalent expressions and conceptual frameworks open to multiple interpretations make his work an easily exploited "quarry".[49]

Max Weber stands out for his continued relevance in the social sciences. Weber's appeal for social science and political decision-makers is due to the broad comparative, multidimensional, multicausal, and transdisciplinary nature of many of his theoretical and methodological concepts. It provided critical insight into the rise of supposedly "modern" Western capitalism vis-à-vis non-Western civilizations and pointed to the importance that human agents attach to their social actions. Even as Weber's ideas have been rechristened, redefined, and rejected, they have created ripple effects in areas beyond mere sociological inquiry and beyond their original intent, leaving footprints that many do not recognise as Weberian. His work inspired a new understanding (*Verstehen*) of past and present societies because he was not a utopian realist who did not conceive of history as linear, teleological or accumulative progress, but understood its non-linear, unpredictable, contingent and unintended qualities.[50]

Empirically analysing societies and civilisations on their own terms, Weber pointed to the anti-utopian nature and weaknesses of modern capitalist societies, such as moral relativism, confused reason, and the ever-present spectre of authoritarianism. In this sense, Weber can be seen as the heroic liberal conscience of reason and individual freedom in the enchanted world of Western modernity.[51]

Since social science itself (as well as the societies it analysed) is determined by the limits of the socio-historical and biological development of the human species, and by the forces of change, continuity and selection, there is no guarantee that social theory and the 'reception' of the 'classical' authors continue as before. As societies and people change over time and space, it is inevitable that social science contributions and insights will lose their limited relevance, fade and become obsolete. While Weber's relevance remains that of most of his predecessors and many of his contemporaries and successors, his work can fade over time, as he himself wisely acknowledged. Yet, although it is eventually lost to the past, like other human creations, it remains in the history of human thought.

48 Eliaeson 2002: 128.
49 Käsler 1979: 228.
50 Kalberg 2008: 284.
51 Caldwell 2016: 214.

"The choice between positions based on different kinds of presuppositions is thus more of an intuitive and ultimately a matter of conscience, rather than a choice between interpretations based on the same or similar presuppositions."[52]

In connection with their clashes (conflicts and critical elements used), we can talk about the mutual influence of these two presented Weber critiques and their differences in viewpoints. The most observable features of mutual influence arise in connection with the discussion of Weber's critical reflections in which both of our Weber critics: Strauss and Polányi attacked and crushed the same cornerstones of Weber's theory with the help of their thought rhythms: these are none other than historicism, positivism, and the prominent role of value judgments in refuting scientific objectivity.

Further mutual influence can be observed in Strauss's and Polányi's understanding of science. According to Strauss: "We know more and more about less and less",[53] while Polányi's thesis reads as follows: "When rethinking human knowledge, I start from the fact that we know more than what we can say."[54]

In my analysis in which I made a theoretical attempt to present the complexity of the connections inherent in the thought systems of Leo Strauss and Mihály Polányi, focusing in particular on the critical reflections of Weber's ideas.

In the course of the research, it was revealed that 1. these critical reflections exert influence, counter-effect mechanisms on each other, according to which their critical viewpoints (in terms of positivism, historicism and progressivism) show agreement, while their unique systems of views point to marked differences.

Nevertheless, 2. despite the critical remarks made by Strauss and Polányi 3. the Weberian theory did not cease to exist and did not quietly disappear from the map of social science – it does not have to do so. Strauss and Polányi, through their criticism of Weber, instead of ignoring it, by fitting it into a deeper interpretive framework, they fully contributed to an understanding reading of Weber's thoughts and theses as well as their uniqueness for social science.

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[52] Polányi 1997: 70.
[53] Lánczi 1999: 21.
[54] Polányi 1997: 170.

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Tibor Pintér

THE LEGAL AND STATE THEORY PROBLEM OF FEDERAL SOMALIA IN THE 21ST CENTURY[1]

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Somalia is one of the most unstable states in Africa, and this instability is the result of power-political rivalries, due to the historical influences of different eras. Three separate entities with the capacity to influence the state can be distinguished: the oldest is the Somali clan system and hence the clans, followed by the current end product of the significant Islamic expansion in the region, the jihadist organisation al-Shabaab, and finally the Somali government, which is the main enforcer of the federal state apparatus. My aim is to examine the triad's relationship and the extent of their power from a legal and state-theoretical perspective, which requires a descriptive analysis of the actors in order to reveal their legal and state-theoretical implications. The study concludes that all three actors are in varying relationships with each other, which may be a hostile relationship or a state of dependency, and this is at the root of Somalia's instability, the resolution of which will be a long-term process.

Keywords:
4.5 formula, al-Shabaab, clan system, FGS, heer, legal pluralism, Shari'ah, Somalia

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INTRODUCTION

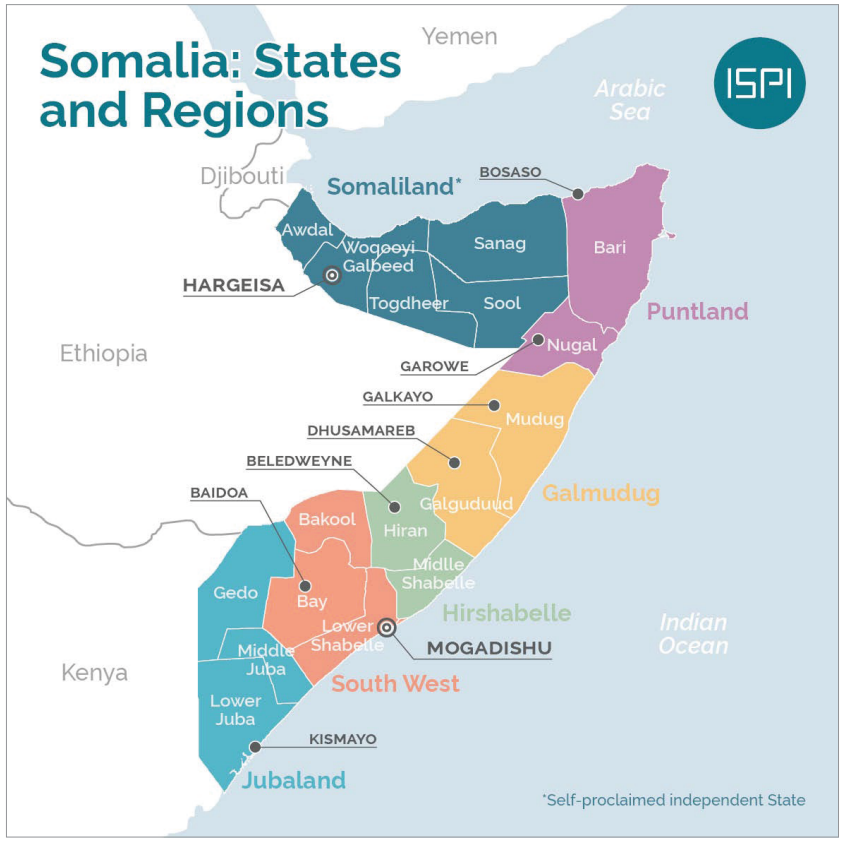

Figure 1: Map of Somalia and its seven Federal Member States (FMS)
Source: ISPI 2021

As the map in Figure 1 shows, Somalia lies in the Horn of Africa, bordering Kenya, Ethiopia and Djibouti. The country is poor in mineral resources and is not strategically important in terms of natural resources. However, its geographic and geopolitical location makes it an essential player, as it lies on the African coast of the Gulf of Aden, an important stage on one of the world's busiest shipping routes. However, in recent decades, the coastal country has become synonymous with chaos. Somalia has met the criteria for a fragile state, as shown by the fact that it ranks second worst in the 2022 Fragile State Index, ahead of only one country, civil war-ravaged Yemen.[2] Since 2004, Somalia has been governed under a federal structure, which has not been able to fully alleviate inter-clan tensions and

[2] Fund For Peace 2022: 7.

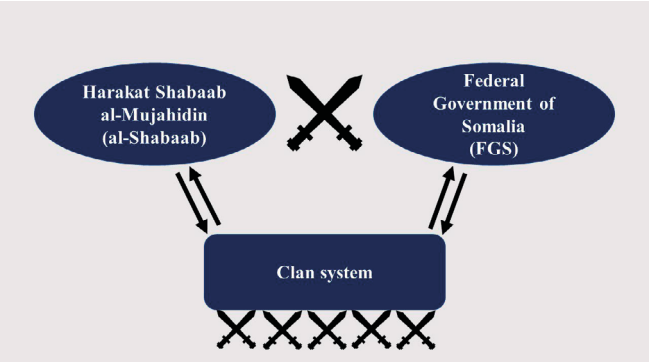

Figure 2: The three main actors in Somalia and their relationship to each other
Source: compiled by the author

a generalised distrust in the state. This is compounded by two other factors. One is the presence of al-Shabaab, which is still able to maintain a presence in rural areas. The other is perhaps partly a consequence of the former, in that the state has only a limited ability to exercise its authority beyond the capital, Mogadishu.[3] Both of these factors are further affected by a particularity of Somali society: clanism.

This paper examines the roots of the instability in Somalia from a legal and state theory perspective, highlighting and explaining the problem illustrated in Figure 2 below, namely the presence of multiple actors in the Somali administration. The figure illustrates that this is a multidimensional problem, and the analysis is further complicated by the fact that all three actors are in a mutual relationship with each other, which can be both hostile and interdependent.

The paper concludes by suggesting an answer to the question of why Somalia cannot escape the chains of instability and why the international community cannot afford to leave Somalia in this condition. In order to answer this question, it is first necessary to examine the three actors, to demonstrate how all three actors have a significant capacity to influence the life of the Somali state. The scope of the study only allows us to approach this kind of influence from a legal and state-theoretical perspective, which requires an outline of the judicial systems of the three actors, the identification of their legal frameworks and the dissemination of these remedies.

From a state-theoretical point of view, it is interesting to note that there are three actors in the region with the capacity to influence states. It is also worth considering the physical and population size of these actors, which of them dominate urban and which rural areas, and exploring the possible reasons for this. I would like to stress that this study focuses on

[3] Nogueira Pinto 2022.

the southern part of Somalia, which is the cradle of decades of instability and the site of the main power struggles between actors.

THE MAIN ACTORS IN SOMALIA

Figure 2 shows in simplified form the three actors and their relationship and interdependence. The emergence of such a situation is quite unique and is due not only to the civil war that broke out in 1991, but also to the preceding Siad Barre dictatorship (1969–1991), as well as the processes of decolonisation and colonialism.

The clan system

The Somalis are spread across an area that stretches from the Indian Ocean to the eastern highlands of Ethiopia and from the Gulf of Aden to the northern part of Kenya, beyond the borders of Somalia. They are the most extensive population in the Horn of Africa. Ethnologically, the Somalis are a segmented society.[4] This means that they are divided into a number of segments or lineages based on their genealogical distance from a common ancestor, which is the basis of a particular social structure, the clan system.[5]

The role of clans and the system that unites them is so fundamental to society that they are an inescapable feature of Somalia. For a Somali, clan affiliation is the most important link to other Somalis, as this bond goes back hundreds of years.[6] The clan system itself is based on kinship and a specific social contract that defines the conditions of collective unity within and between patrilineal clans. At the basis of all this is a common ancestor, which determines the affiliation of relatives to particular clans. Each Somali belongs to a genealogical lineage that also functions as a basic political unit. At the top of the system are four major clan families:[7] the Dir, the Darood, the Hawiye and the Rahanweyn.[8]

Each of these four groupings is divided into ten to twenty clans, which are further divided into dozens of sub-clans. In a country where virtually everyone shares the same religion, language and ethnic origin, clan membership is the main characteristic that distinguishes one person from another. This is the main factor that Somalis struggle over when it comes to the distribution of power.[9]

4 EASO 2021: 46.
5 Lewis 2002: 6–7.
6 Maruf–Joseph 2018: 17.
7 Several sources consider the Isaaq to be a separate clan family, but as the 4.5 formula, which will be described later, also distinguishes between four major clan families, I will follow the same scheme.
8 EASO 2021: 46.
9 Maruf–Joseph 2018: 17–18.

In pastoral societies, such as Somalia, elders are still highly respected in clans. They control resources and networks that transcend clan boundaries, ethnic identity and generations.[10] They play the most important role in pressuring the parties to a conflict to accept a ceasefire and in initiating negotiations between the parties.[11] However, the civil war, the inter-clan fragmentation caused by the civil war[12] and al-Shabaab's clan politics[13] have begun to erode the role of the clan in society.

Al-Shabaab

Al-Shabaab grew out of a community-based, bottom-up Islamic jihadist movement inspired by Somali Islamic scholars trained as followers of the Wahhabi movement in Saudi Arabia.[14] It rejects the central government of Somalia and its founding principles, aims to oust foreign peacekeepers and other external armed actors and seeks to establish a completely new political order, an Islamic state in Somalia.[15]

The amount of territory controlled by the group started to expand rapidly from 2009 onwards. By 2010, al-Shabaab was free to operate in much of southern Somalia, an area the size of Denmark with a population of about 5 million, about 50% of Somalia's total population at the time.[16] Despite al-Shabaab's control over a large territory, the number of its fighters was only around 5,000. As a result, it could not properly govern the areas under its nominal control.[17] In August 2010, during the Ramadan offensive in Mogadishu, al-Shabaab launched large-scale frontal attacks against the TFG (Transitional Federal Government) and its ally AMISOM (the African Union Mission in Somalia). The failure of this offensive was a turning point and the jihadists began to withdraw. Overall, al-Shabaab forces were reduced by about 25% at this time.[18]

As the battlefield defeats increased, so did the internal tension and frustration in the movement. The organisation's then emir Ahmed Abdi Godane came in for heavy criticism. The organisation began to disintegrate and to become highly decentralised. Godane's radical measures saved al-Shabaab from falling apart, with the leader's response being quick and brutal. Several senior figures were killed or forced to desert.[19] As the internal cleansing took place and a strong structure emerged within the organisation, the US eliminated several senior leaders of al-Shabaab between 2014 and 2015, including the emir

10 Kulow 2018: 115.
11 UNHCR – NRC – UN-HABITAT 2008: 160.
12 Abbink 2009: 4–5.
13 Hiraal Institute 2018: 3–5.
14 Ali 2008: 1.
15 Menkhaus 2018: 4.
16 Jones et al. 2016: 18.
17 Hansen 2013: 83.
18 Jones et al. 2016: 20.
19 Hansen 2014: 11–12.

Godane in September 2014.[20] The new emir is Ahmad Umar Dirija Ubajda, who at the time of writing as the incumbent leader is capable of holding the organisation together.[21]

Al-Shabaab controls some rural areas in South-Central Somalia, mainly in Galmudug, Middle and Lower Shabelle, Gedo, and Lower Juba. In South-Central Somalia, their military presence often extends from rural areas to the main supply routes serving the main urban centres and their surroundings. However, the group's military presence and territorial control does not accurately reflect al-Shabaab's real area of influence, since it has control over the population extending beyond the areas where it has a direct geographical presence.[22]

The Federal Government

The first decade after independence in Somalia was a decade of democracy, until General Mohamed Siad Barre took power in 1969, building a regime which combined elements of both nationalism and communism, with strong Soviet support. He reached the apex of his popularity in 1977, when he attempted to fulfil the Greater Somalia ideal by invading and occupying the Ethiopian Ogaden region, a territory largely populated by Somalis. Barre suffered a major defeat, however that set him on the road to his eventual failure. The 1980s saw the internal collapse of the regime, with the result that Barre fled in early 1991, leaving the country in chaos.[23]

The most devastating period of the civil war was in the early 1990s, when the central government collapsed, followed by a wave of ethnic cleansing and a subsequent famine. This was the decade of warlords and militia leaders, whose power was based on looting, warfare and the acquisition of humanitarian aid. After years of devastation in the early years and the failure of several foreign operations, Somalia eventually entered a quieter period, with sporadic clashes and low-intensity warfare. Political reconciliation between the factions peaked in 2002–2004, when negotiations took place in the neighbouring Kenyan town of Mbagathi. An agreement was finally reached, which forms the basis of the political system. This led to the formation of the TFG in 2004, which was replaced by the FGS (Federal Government of Somalia) in 2012.[24]

The branches of power under the Provisional Constitution of the Federal Republic of Somalia comprise:

– Legislative power: In Somalia, this is the Federal Parliament, whose main task is to pass, amend or reject legislation put before it. The Parliament is a bicameral legislative branch consisting of the House of the People and the Upper House. The Provisional

[20] Jones et al. 2016: 49–50.
[21] Marsai 2020: 8.
[22] EASO 2021: 58–59.
[23] Maruf–Joseph 2018: 9–11.
[24] Menkhaus 2018: 6.

Constitution stipulates that the House of the People is composed of 275 ordinary members. De jure, they are directly elected by Somali citizens, but de facto they are (still) indirectly elected, through a clan-based power-sharing formula (the 4.5 formula, to be discussed later). The Upper House is elected by direct, secret and free ballot by the people of the federal member states.[25] In practice, the members of the upper house are elected by the assemblies of the Federal Member States, with a total of 67 senators.[26]

- The President and the executive power: the president is the Head of State, symbol of national unity and guardian of the Constitution. He is elected by the houses of the Federal Parliament by a 2/3 majority for a 4-year term. The President has a number of powers, including being Commander-in-Chief of the Armed Forces and appointing the Prime Minister. He signs bills passed by the federal parliament into law.[27] The Council of Ministers is the supreme executive body of the Federal Government and consists of the Prime Minister, the deputy prime minister(s), ministers, ministers of state and deputy ministers. The Prime Minister appoints the deputy prime ministers, ministers, state ministers and deputy ministers.[28]
- The justice system. In accordance with the Provisional Constitution, the judiciary, which is independent of the legislative and executive branches, is organised into three levels: the Constitutional Court; the Federal Government level courts, of which the Federal Supreme Court is the highest court, and the Federal Member State level courts of which the Federal State Supreme Sourt is the highest court.[29]

It is worth briefly outlining the relationship between the FGS and Mogadishu, as the situation is not straightforward. Historically, whoever has previously owned the capital has occupied a dominant position in the political and economic life of the country. Currently, however, a power-sharing arrangement operates in the governance of Mogadishu. The Provisional Constitution states that Mogadishu is the capital, but this is not its final status, but requires further clarification, which has not yet taken place. It follows that the FGS has de facto control of the capital, but the Governor of the Banadir region, where the capital is located, is also the Mayor of Mogadishu. However, the authorities of the region do not have any local electoral or accountability arrangements, they do not represent the population of the capital, and instead the revenues from the capital are used for the operation of the FGS, not to improve the living standards of the population. This situation continues to blight the perception of the FGS in the capital to this day, which, for example, is an obstacle to a broader political settlement and to development throughout Somalia.[30]

25 The Federal Republic of Somalia 2012: 16–21.
26 EASO 2021: 23–24.
27 The Federal Republic of Somalia 2012: 27–29.
28 The Federal Republic of Somalia 2012: 31–32.
29 The Federal Republic of Somalia 2012: 33–34.
30 Somali Public Agenda 2022: 2.

LEGAL PLURALISM

As Griffith defines it, legal pluralism refers to a situation in which not all law is state law and a territory is not governed by a single set of state legal institutions, and thus the application of the law is not systematic and uniform. Although such pluralism is not limited to the colonial and postcolonial context, it is most typically encountered in this field.[31] Somalia fits this pattern, with a complex, fragmented, plural legal system rooted in long years of colonialism, wars, power vacuums, culture, customs and religion. The majority of Somalia's population is made up of traditional nomadic, pastoral and agro-pastoral people. The formal legal system is weak outside and even within the major cities. Social interactions are based on clan dynamics, deeply embedded traditional structures and customs, and Shari'ah law. The different regions of present-day Somalia maintain a complex plural legal system consisting of *heer* (xeer) the traditional law of the Somalis, an emerging formal legal system, and Shari'ah law, with significant jurisdictional overlap and contradictions between them.[32]

Heer

In order to get a clearer picture of the legal divide, it is necessary to consider the coexisting legal systems separately. It is logical to begin this with a description of the oldest body of law, Somali customary law, *heer,* which is, in La Sage's terminology, the set of rules and obligations developed between traditional elders to mediate peaceful relations between Somalia's competitive clans and sub-clans.[33] As the heer was never fully codified, it remains a set of customary law that has been passed down through generations. Although there have been attempts to codify it, both in the late 1960s[34] and in the last 20 years by the Danish Refugee Council,[35] little progress was made. In pastoral societies and clans, elders are still highly respected to this day.[36]

Shari'ah

Islamic law, or shari'ah, basically covers marriage, inheritance, property law, punishments and tribal institutions in the political field. In contrast to heer, Islamic law established

31 Griffiths 1986: 5.
32 Burke 2020: 193.
33 Le Sage 2005: 32.
34 La Sage 2005: 34.
35 Simojoki 2011: 39.
36 Kulow 2018: 115.

group solidarity and overcame the hereditary blood structure.[37] Shari'ah as a legal system has four main sources:

- The most important source of law is the Qur'an, which concerns, among other things, the foundations of faith, morality, wisdom and various forms of human relations.[38]
- The Sunnah, which is the words and deeds of the Prophet Muhammad, recorded in the Hadith in well-attested stories.[39]
- Indeed, one of the accepted sources of Islamic law is the consensus of Muslim jurists, the Ijma.
- Finally, there is the analogical interpretation, the Qias, which provides a means of deciding an unprecedented case where the solution cannot be found in the Qur'an, the Sunnah or the Ijma.[40]

The system is not without problems. Most Shari'ah judges were educated in Somalia solely through informal religious studies. However, some from Sudan, Egypt and Saudi Arabia also have formal training. None of the Shari'ah courts in Somalia follow the school of Islamic jurisprudence, but simply apply their personal reading according to their knowledge of the Qur'an and Islam.[41]

Finally, it is important to recognise the significance of al-Shabab's courts, where justice is one of the most prominent means of recruitment. Many Somalis first turn to these courts for a number of reasons, including community pressure, lack of trust in other jurisdictions and easy physical access. They choose these courts despite the Somali government's punishment of people who turn to them. Even so, they undertake to do so because of the rapidity with which decisions are made and the legal enforcement power provided by al-Shabaab fighters. The punishments are simple and drastic, including stoning for adultery, amputation of hands for theft and detention and flogging for other offences.[42]

Formal legal system

In terms of legal sources, the following three can be highlighted:

- The Provisional Constitution of the Federal Republic of Somalia in force since 1 August 2012.[43]
- The Penal Code, which was adopted in December 1962 but has only been in force since 3 April 1964.[44] The Code has not been renewed since then, but the Constitution

37 Jany 2018: 2–3.
38 Prieger–Mátyás 2014: 106–107.
39 UNHCR – NRC – UN-HABITAT 2008: 155.
40 Ahmed et al. 2020: 6–7.
41 UNHCR – NRC – UN-HABITAT 2008: 156.
42 Ahmed et al. 2020: 25–27.
43 The Federal Republic of Somalia 2012.
44 Somalia: Penal Code 3 April 1964.

states that provisions contrary to Shari'ah law must be repealed and that all provisions repealed by the Constitution are nullified.[45]

– The Civil Code of Somalia entered into force on 1 June 1973. The Code does not regulate matters of personal law, but covers the full range of civil law, including obligations, contract law, tort and property law.[46]

The formal justice system faces a number of problems, with recent reports suggesting that the Somali justice system is fractured, understaffed and rife with corruption. Its powers are not respected, state officials ignore court decisions and citizens often turn to Islamic or customary law as an alternative. Furthermore, the judicial system is overburdened and long delays can occur before cases are heard due to the large number of prisoners and the limited number of prosecutors and judges.[47]

The Somali basis for legal pluralism

The question arises: how can three different legal systems operate simultaneously? The answer in the case of the formal legal system is simple, as the sources of law are codified and it is the formal legal system which governs the Somali state. It works in places where the government can fully extend its influence, especially in cities. This problem can also be traced back to the colonial period. A common feature of the regional capitals of the southern half of Somalia (Kismayo, Baidoa, Beledweyne, the capital Mogadishu and Dhusamareb) is that they are all adjacent to water, with only the centre of central Somalia not being located either on the ocean or on a river bank. The colonialists paid little attention to the governance of rural areas, leaving it largely to local leaders. The Europeans concentrated on cities of strategic importance for trade, which laid the foundation for the pattern of state development that Somalia is struggling with today, namely that the government, like the colonialists, has exclusive power only over the centres, and access to rural areas remains a major challenge.[48]

Shari'ah owes its support to several factors including practical reasons connected with the above-mentioned al-Shabaab. Furthermore, 99% of the population is Sunni Muslim,[49] which means that the constitution enshrines Islam as the state religion. In legal terms, however, the most important element is the Constitution within the meaning of Article 2, third paragraph: "No law can be enacted that is not compliant with the general principles and objectives of Shari'ah."[50] In other words, the Constitution and Islamic law have

45 The Federal Republic of Somalia 2012: 1.
46 Xeerka Madaniga – Civil Code 2 June 1973.
47 Home Office 2020: 44.
48 Herbst 2000: 65–67.
49 Office of International Religious Freedom 2021.
50 The Federal Republic of Somalia 2012: 1.

been elevated to the same level as other law. The reason for this can be traced back to historical roots, as on the one hand the recognition of the Shari'ah at all times increased the legitimacy of the current incumbent power, while on the other hand, Islamic courts as institutions became increasingly embedded in the Horn of Africa during colonialism. This continued during the period of decolonisation and the dictatorship of Siad Barre, but the outbreak of civil war brought about a restructuring of the Islamic courts as they were brought into close contact with religious leaders of clans and sub-clans rather than the non-existent government in order to improve local security conditions.[51] Although the main representative of radical Islam in Somalia is al-Shabaab and its courts, the popularity of the Islamic courts, especially among the rural and urban population, is not due to the jihadists, but to the Islamic courts that have gradually become embedded in society over the past centuries.

Since the social structure is based on the clan system, the associated customary law, the heer, is the most prevalent law, especially in the more rural areas, and it is the oldest of the three legal systems in Somalia. It is estimated that heer is used in 80–90% of criminal cases.[52] For this reason, it is an inescapable element of Somali society, which makes it difficult to create a more attractive alternative on the state side, as the rural scope of government power does not allow it, and the federal executive is a distinctly new institutional form compared to the clans and the heer, with only a weak tradition among the Somali population.

STATE THEORY ISSUES AND PROBLEMS

Somalia is a federal state under the Constitution with the following member states: Somaliland, Puntland, Galmudug, Hirshabelle, SouthWest, Jubaland and Banadir Regional Administration with the capital city.[53] The federal structure of the state has never been in question, yet its effectiveness is questionable because it risks, as Menkhaus writes, turning the country into a 'weak collection of clanustans'.[54] Two reasons for the weakness of the central government include the presence of al-Shabaab in the countryside and the still remaining 4.5 formula, which limits but does not mitigate the power struggles of the clans.

Starting from the classical concept of the state as formulated in Georg Jellinek's General Theory of State,[55] according to which the state is a triangle of sovereign power over the people living in a given territory, in classical terms Somalia would be a smaller territory than it is today. This is because al-Shabaab's rural presence limits the extent of the government's power in rural areas. Added to this is the issue of the monopoly of violence, which the state, including the main power, cannot fully claim as it still needs foreign backers. The two

[51] La Sage 2005: 14.
[52] Simojoki 2011: 36.
[53] Ministry of Planning, Investment and Economic Development 2022.
[54] Menkhaus 2018: 19.
[55] Jellinek 1900; 1905; 1914.

regions most distant from the capital, Somaliland and Puntland, are the most self-sufficient, the former having been an autonomous state since 1991, although it is not recognised as an independent state, and the latter having been an autonomous region since 1998.[56] Thus, it can be stated that the full extent of the government's authority actually extends to the capital and its surrounding region, as well as to the larger towns and their surroundings in southern Somalia.

The other problem is the bid for power between clans at the level of the main power. To remedy this, the so-called 4.5 formula was created in 2004, a Somali version of the Lebanese consensual democratic model, in which each of the four main clan groups[57] is equally represented in the 275-seat parliament, so that representation is negotiated more between clan families, each of which elects 61 representatives from its own family. The remaining half are minorities who do not belong to the main clan groups.[58] The 4.5 formula, which was supposedly created to provide Somalia with much-needed stability, has in practice been counterproductive and harmful to the country's development. As political power in the country is divided according to clan affiliation, clan loyalty has become more important than loyalty to the state.[59]

CONCLUSION

Somalia in sub-Saharan Africa presents a particular paradox in that the Somalis are a homogenous society, with many things in common, including religion, language, culture and customs, yet they favour clans rather than cohesion, and it is this kind of tribalism that has set Somalia on the path to becoming one of the most unstable states in the world today.[60] The lack of unity is well illustrated by legal pluralism, which results in three legal systems functioning and coexisting side by side, backed by the three main actors, which are able to make their own jurisprudence exclusive in the areas under their influence. The state apparatus represents and upholds formal law, al-Shabaab operates Shari'ah courts in its territory of influence, while the clans, including the elders, govern their society according to customary law. This is compounded by the federal system of the state, which to function effectively would require a strong government at the federal level, which is not the case in Somalia. Thus, the areas further away from the capital are in fact partly or entirely autonomous. Furthermore, al-Shabaab prevents the FGS from extending its influence to rural areas.

Thus, although federalism is on paper the best solution, the interaction between the three actors in Somalia poses a formidable obstacle to its functioning. The clan system

[56] Weller–Nobbs 2010: 278.

[57] The 4 main clan groups are the Darood, the Dir, the Hawiye and the Rahanweyn. The Dir group includes the Isaaq clan, which is the dominant force in the north of Somaliland.

[58] Menkhaus 2007: 360; Brosius 2021.

[59] Brosius 2021.

[60] Bakayr 2008.

is an unavoidable element in the country, both under the centralised supreme power, Siad Barre, and al-Shabaab, both of which tried to dominate the clans and the system itself. However, neither of the actors succeeded, and as the introductory diagram shows, they instead developed a kind of symbiosis with the clan system, engaging in clan dynamics. Siad Barre sought to marginalise the clan system under scientific socialism, as well as religion, but this was reversed with the defeat of the Ogadeni in the war, and fragmentation along clan lines eventually broke his system. During the sudden rise of al-Shabaab, a state within a state built a system which prioritised the idea of jihadism over clan affiliation, but as the organisation weakened, clan politics dragged it down and today al-Shabaab is able to operate in rural areas only by using effective clan politics. Finally, the donor states of the international community, especially AMISOM or now the ATMIS (African Transition Mission in Somalia), fear the spill-over effects mentioned by Peter Marton,[61] namely that either destabilisation itself or the rise of al-Shabaab could trigger a security crisis that would also drag the other East African countries down with it. It is important to remember that the government is able to maintain its position due to foreign forces, most notably ATMIS. Also, neighbouring states fear the spill-over effect the most, which is why both Kenya and Ethiopia support any measure that does not endanger their security.

The final conclusion is that of the three actors, al-Shabaab can only conceive of a Somali state without the Somali government, and vice versa, i.e. by weakening the rival party to the point where it is unable to be a state-building factor. Since the third actor, the clan system, is indispensable for achieving these goals, the clans can be both strategic assets and deterrents, as the 4.5 formula and the clan infighting in al-Shabaab's top leadership show the clan system's continued domination from behind the scenes.

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[61] Marton 2006: 30.

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URBAN LAND MANAGEMENT SYSTEM IN ETHIOPIA: AN EMPIRICAL STUDY OF POLICY IMPLEMENTATION

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This study aims to assess urban land management in Ethiopia from a policy perspective. A mixed approach with a concurrent nested strategy was employed. A total of 353 questionnaires were collected from civil servants and clients of urban land management systems, 8 focus group discussions (FGDs) with civil servants, and 24 interviews with experts, middle and top managers were conducted. The data were analysed and presented using logistic and multiple regressions. The results indicated that urban land management in Ethiopia continues to employ outdated and traditional systems. The main reasons for the unsatisfactory state of urban land management in the country are lack of commitment, lack of human resources, political influence, maladministration, instability of rules, etc. These factors are hampering the effective management of urban land in Ethiopia. Hence, people are not satisfied with the service of urban land management. Thus, the regional governments must reconsider the policy, employ an automated system, and work to address the identified problems.

Keywords:
urban land management, policy, policy implementation, Ethiopia, land

INTRODUCTION

The land is critical to urban development but its supply is limited in cities.[1] As nations grew in size and rural areas became urban centres, these centres became giant metropolitan areas – thus, there is always increased competition and demand for land for different purposes.[2] The huge demand for urban land because of ongoing urbanisation becomes more problematic if there are problems connected with identifying who holds what land, which land is private and which is government-owned, and problems identifying the various land-use types.[3] Many urban problems are linked in one way or another with the operation of the mechanism for managing land.[4] Therefore, land management can play an important role in providing suitable conditions for maximising the potential for a beneficial urbanisation process and minimising the negative impacts on the poor and vulnerable.[5]

Land management encompasses all activities related to managing land and the natural resources needed for viable development.[6] Urban land management is a system of interrelated actors and activities, resulting in the most efficient allocation and utilisation of urban space, particularly of land.[7] Urban land management in Africa is complicated since it employs traditional administration systems. Moreover, the urban administration system is not indigenous and thus not based on the culture of Africans. Current urban land management models and practices applied in Sub-Saharan Africa have been borrowed mainly from Europe and are often the legacy of colonialism, except for a few like Ethiopia.[8] Hence, they are not compatible with African urban standards and the characteristics of the local people. The notable deficiencies of urban land management systems in Sub-Saharan Africa have led to the emergence and proliferation of informal elements like land acquisition, land delivery process, and land titling among others.[9]

Like other African countries, Ethiopia's urban land management system is a challenge and the object of much wrangling. Land, for most Ethiopians, is central to their livelihood. Land constitutes one of the factors of production, and access to land facilitates access to a key resource in value-adding economic activities.[10] The land management system in Ethiopia is generally weak and surrounded by a growing number of weaknesses and threats.[11] Furthermore, the Ethiopian urban land management system suffers from a high degree of informality.[12] Land management systems are institutional frameworks that

1 Garba – Al-Mubaiyedh 1999; Madan 2015.
2 Aribigbola 2008.
3 Alemie et al. 2015.
4 Garba – Al-Mubaiyedh 1999.
5 Locke–Henley 2016.
6 Enemark 2005.
7 Fekade 2000.
8 Fekade 2000.
9 Gondo 2012a.
10 Stebek 2015.
11 Alemie et al. 2015.
12 Lindner 2014.

operate in various national, cultural, political, and judicial settings and via technology, which involves a high degree of complexity.[13] However, urban land management in Ethiopia is accompanied by the absence of independent institutions at the federal and regional levels, a lack of coordination of the existing institutions, a lack of societal participation and transparency, and a weak capacity for implementation and monitoring of laws and spatial plans.[14] Despite these discouraging findings, this study focuses on how the indicators included in the policy for modernising the urban land management system are being implemented and what specific factors are hindering it.

PROBLEM STATEMENT

The management of urban land is a complex task in Ethiopia because it is a major socio-economic asset and the struggle over who controls the land, which is equivalent to who controls power, has played a significant role in the history of Ethiopia and is likely to continue to do so.[15] Therefore, managing urban land has become a serious challenge since that is also the space in which urban activities are carried out in general.[16] Ethiopia has a complex institutional environment with regard to land administration.[17] Moreover, Lindner (2014) argued that the Ethiopian urban land administration system is troubled by a high degree of informality. She added that there is a lack of clear policies in Ethiopia in this respect. However, the ruling party argues that public policies are fully and effectively formulated but ineffectively implemented. Therefore, assessing the determinant factors of a sustainable urban land management system would help expose the real situation in the country.

Many empirical studies on urban land management have been conducted in Ethiopia.[18] However, none of these studies has focused on the implementation and urban land management systems and the factors affecting them. While a handful of studies by Lindner and Fairlie et al. have identified the determinant factors of urban land management systems, their focus was chiefly on institutional factors. Moreover, some of these studies are very narrow in their scope, being conducted in a single town/city.[19] In addition to the high level of dissatisfaction of beneficiaries with urban land management, this study aims to address the geographical and content-related shortcomings of previous studies.

13 Enemark 2005.

14 Alemie et al. 2015.

15 Belachew–Aytenfisu 2010.

16 Dube 2013.

17 Fairlie et al. 2017.

18 Gondo–Zibabgwe 2010; Gondo 2011, 2012a, 2012b; Achamyeleh 2014; Dube 2013; Belachew–Aytenfisu 2010; Lindner 2014; Bennett–Alemie 2016; Tessema et al. 2016; Alemie et al. 2015; Kebede 2017; Sungena et al. 2014; Weldesilassie–Gebrehiwot 2017; Belay 2018; Mengie 2017.

19 For example Belay 2018; Dube 2013; Sungena et al. 2014; Tessema et al. 2016; while others are extremely broad in focus, and were conducted at a national level but not at a policy level, for example Mengie 2017; Lindner 2014; Weldesilassie–Gebrehiwot 2017; Bennett–Alemie 2016.

Furthermore, the Amhara and Tigray regions were selected because of the similarities of their experience of urban land management systems. According to a report by the Ministry of Urban Development, Housing & Construction (2014) the City Proclamations of 2000–2003 were developed first in Amhara, then followed by Tigray. In the end, all regions reached, more or less, the results arrived at in Amhara and Tigray. These regions were the centre for an experimental test of the city proclamations, including the urban land management systems. Thus, it is wise to conduct a study in these regions to represent the country as a whole. Hence, the study addressed the following research questions:

1. What does the implementation process of urban land management policy look like in Ethiopia?
2. What are the determinant factors influencing urban land management in Ethiopia?

LITERATURE REVIEW

Urban land management

Virtually all human activities require land, but there is often intense competition for land because of the diverse needs of different human activities.[20] Land as an economic resource has always been the subject of debate in the research literature between scholars who favour a neo-classical economic approach to its management and those who favour a political economy approach.[21] As rapid urbanisation led to increased competition over land ownership and higher land prices in urban and suburban settings, it became necessary to design appropriate Land Use Planning to balance conflicting interests.[22] Land management is the process of putting land resources to good use, and all the activities associated with managing land and natural resources are required to achieve sustainable development.[23] A central issue in land disputes and conflicts is the security of tenure, which demands an enabling land administration.[24] Therefore, the vital role of land in development makes it imperative to ensure it is appropriately managed.[25]

Land administration is concerned with managing the land tenure system, including arrangements for monitoring and enforcing many of the laws and regulations affecting tenure. In any country, land administration is a product of the political and social development of the nation.[26] Urban land administration is a complex issue and one, which is more difficult in developing countries. Therefore, to address the contemporary

[20] Nuhu 2007.
[21] Garba – Al-Mubaiyedh 1999.
[22] Dadi et al. 2016.
[23] Enemark 2005.
[24] Nuhu 2007.
[25] Garba – Al-Mubaiyedh 1999.
[26] Nichols 1993.

urban land management-related challenges, formulating and implementing policies and laws while taking into consideration the principles of governance is important to create harmony between urban people and urban land.[27] Effective urban land management should not only be the task of the government or another authority. Successful sustainable land management efforts rely on stakeholder support and the integration of stakeholder knowledge.[28] Considering the complexity of sustainable development, sustainable land management – which is supposed to support sustainable (land) development – must be defined as both process-oriented and action-oriented, according to Lange, Siebert, and Barkmann (2015). They argued that urban land management is a matter of what kind of development can be achieved and how this is done (e.g. participatory, transparent).[29] Hence, urban land management requires different stakeholders' involvement with genuine participation, transparency, equity, etc.

Urban land management in Ethiopia

Urban land governance in Ethiopia is neither new nor was it adopted from other Western countries, unlike in other African states. The urban land management system can be traced back to the imperial regimes. It has been practiced for a very long time and is based on indigenous systems. Ethiopia's urban land management system has reached its present state through many ups and downs. Therefore, it has been accompanied by different informalities, challenges, and good practices in its path. Historically, the land issue in Ethiopia has been a vital and sensitive topic throughout different times.[30] Even though city administrations bear responsibility for urban land management in Ethiopia, the system differs from one city to another. Gondo (2012) argued that urban informality in the land management process is plural and characterised by multiple linkages in Ethiopia. According to him, just like in many other developing countries, the land management process in Ethiopia has not been immune to the growing phenomenon of urban informality. Besides, one of the main problems in urban land administration is the absence of clear legislation as well as confusion about the applicability of legislation.[31] Of course, the legislation in itself is not the problem, but its implementers do not obey the rules and regulations but instead provide circular letters during its implementation.

Effective land administration requires clarity on land issues and the decisions of the body responsible for administrating land at any level.[32] The Ethiopian government has tried to address rural and urban land administrations by strengthening land administration

27 Alemie et al. 2015.
28 Klaus 2005.
29 Lange et al. 2015.
30 Achamyeleh 2014.
31 Lindner 2014.
32 Belay 2018.

systems and developing Land Use Planning at the national and regional levels.[33] Even though efforts have been carried out to develop the policy and legislative framework for urban land administration, these initiatives need to be scaled up.[34] The current Ethiopian land administration programs are not harmoniously coordinated between national and regional levels.[35] Detailed guidelines and working procedures do not provide the necessary support for urban land management policies in Ethiopia, while coordination problems impinge upon the efficiency of infrastructure provision. There is also a lack of a systematic land management information system that would serve as a basis for decision making and a lack of capacity to effectively implement, monitor, and update urban land management related policies.[36] Nevertheless, the Ethiopian government is quite confident about the quality and content of its policies and consistently claims through the media that the policies are well formulated.

MATERIALS AND METHODS

Study design and sampling techniques

This study employed a mixed approach method. Therefore, a concurrent nested design was applied. In this study, both primary and secondary data sources were employed. The primary data were collected through key informant interviews, focus group discussions and questionnaires. Secondary data sources were collected from the reports and plans of urban land management offices. The urban land management policy of Ethiopia was also reviewed.

This study was conducted in the Tigray and Amhara regional states in northern Ethiopia where the urban land policy was initially implemented. The major focus of the study was the regional and zonal capital cities, due to their central position in business and investment. The regional capital cities, i.e., Mekelle and Bahir-Dar, were deliberately selected because the demand for urban land in these cities is very high. Besides, they have large populations and are experiencing a significant influx of people. Along with the regional capital cities, the Zonal capital cities have a high demand for land and investment. Amhara and Tigray have ten and six Zonal capital cities, respectively. Among these, three cities were randomly selected from each. Thus, Adi-Grat, Axum, and the Shire from Tigray and Debre-Berhan, Dessie, and Gondar from Amhara were studied. Next, the urban land management office of each selected city was investigated because the mandate for urban land administration was given to them.

[33] Dadi et al. 2016.
[34] Fairlie et al. 2017.
[35] Belachew 2010.
[36] Yusuf et al. 2009.

Individual respondents were recruited using two different approaches. On the one hand, beneficiaries were recruited using a convenient sampling method. Volunteer beneficiaries who visited the urban land management offices during the data collection process were investigated in this study. On the other hand, employees of the urban land management administration were recruited using a systematic random sampling method. A list of all the employees in each selected urban land management office was collected from its human resources department. Finally, employees were chosen based on a certain number of intervals. Forty-eight were surveyed from each selected city and a total of 384 participants were recruited in this study. Finally, 353 completed surveys were returned, representing a response rate of 91.9%.

In the interview stage, the managers of the urban land management offices and regional directors were recruited using the purposive sampling method because they have a thorough knowledge of urban land management systems. Thus, one interviewee from each city urban land administration office and the regional urban land directors, a total of ten key informants, were recruited. Moreover, case team coordinators were recruited purposefully to participate in the focus group discussion due to their responsibility and detailed knowledge of the issue. One focus group discussion was conducted in each regional capital city with a total of two focus group discussions being conducted in this study.

Data analysis

Multiple and logistic regression models were employed in this study. Multiple regression analysis was employed to distinguish existing relationships between effective urban land management systems and their determinant factors, specifically governance, motivation, skill, teamwork, leadership, politics, commitment, and human resources. Therefore, these eight explanatory variables were used to predict the dependent variable (effective urban land management system). The choice of explanatory variables was obtained from existing literature on the area. The logistic regression model was applied to determine the influence of technology-related determinant factors on the urban land management system. The qualitative data were first transcribed and summarised in accordance with the objectives of the study. Therefore, the qualitative data obtained through the interview, FGD, and document review were described qualitatively.

RESULTS AND DISCUSSIONS

This section presents the result of the study. The urban land management systems were evaluated based on the performance indicators included in the urban land management and development policy of Ethiopia formulated in 2011. The results indicated that the urban land management systems in both regions are not effective.

Table 1: Binary logistic regression predicting likelihood of reporting effectiveness in urban land management

		B	S.E.	Wald	df	p	Odds Ratio	95% C.I. for Odds Ratio	
								Lower	Upper
Step 1[a]	Region (1)	1.052	.404	6.776	1	.009	2.86	1.297	6.325
	Standardised cadastre	.130	.218	.359	1	.549	1.14	.744	1.745
	Digital service delivery	.115	.325	.126	1	.722	1.12	.594	2.120
	Automation system	–.800	.387	4.267	1	.039	.45	.210	.960
	Digital identity number	.363	.332	1.192	1	.275	1.44	.749	2.758
	Land grabbing	.262	.264	.991	1	.320	1.30	.776	2.179
	Green area development	.589	.288	4.196	1	.041	1.80	1.026	3.167
	Constant	–3.822	.854	20.039	1	.000	.02		

a) variable(s) entered on step 1: region, standardised cadastre, digital service, automation system, digital identity number, land grabbing, and green area development

Source: compiled by the author

As indicated in Table 1, binary logistic regression was performed to assess the urban land management systems in terms of the likelihood of its effectiveness. The model contained seven independent variables (region, standardised cadastre, digital service, automation system, digital identity number, land grabbing, and green area development). The full model containing all predictors was statistically significant, $\chi 2$ (7, N = 186) = 20.23, p < .005, indicating that the model was able to distinguish between the effectiveness and ineffectiveness of urban land administration in the regions investigated. The model as a whole explained between 10.3% (Cox and Snell R square) and 15.9% (Nagelkerke R squared) of the variance in urban land management effectiveness. The Amhara region is 2.86 times more likely to exhibit effective urban land management than the Tigray region. It can be seen in Table 1 that only three independent variables contributed statistically significantly to the model. The strongest predictor of effectiveness was green area development, recording an odds ratio of 1.80. This indicated that Amhara is over two times more likely to be effective in green area development than Tigray, controlling for all other factors in the model. The odds ratio of. 45 for the automation system was less than 1, indicating that Amhara is. 45 times less likely to report having an automation system, controlling for other factors in the model.

The qualitative results indicated that the land banking system was introduced in both regions in the recent past, but it is not auditable and has no effective implementation system. Moreover, land banking has not yet been implemented appropriately, especially in small towns. Thus, there is no modern handling and management mechanism for land banking. There is a land inventory, but the land information system is ineffective because of material shortages, lack of human resources, and lack of educated employees. Although the counting of small free plots, assigning identity numbers to plots and registration have been started, the ownership right for small free plots and other lands whose ownership is controversial is still

Table 2: Multiple linear regressions on the factors of urban land management

Model		Unstandardised Coefficients		Standardised Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	.396	.186		2.132	.034
	Governance	.175	.078	.167	2.258	.025
	Motivation	–.072	.046	–.106	–1.563	.120
	Skill and ability	–.156	.089	–.156	–1.757	.081
	Teamwork	.177	.077	.195	2.302	.022
	Leadership	.367	.084	.365	4.353	.000
	Politics	.311	.068	.338	4.554	.000
	Commitment	.121	.048	.160	2.537	.012
	Human resources	–.123	.055	–.151	–2.235	.027
Dependent Variable: Effective urban land management						

Source: compiled by the author

not finished. Hence, without properly addressing these issues, it is difficult to incorporate them into the land banking system.

Despite starting to implement the cadastre system, recruiting trained professionals and establishing an office, the system is not decentralised in all the Woreda towns. On the one hand, the cadastre system is only found at the regional level; on the other hand, it is not being implemented effectively even at that level. Hence, it is not yet functional because of material shortages.

Although automation and digital services are mentioned in the policy documents, they are not yet functional in practice. In the Tigray region, the plot numbers are entered in soft copies, but problems remain regarding possessing the appropriate software. Except for AutoCAD, no modern system is utilised in urban land management. For example, in the Tigray region, land parcel identification numbering was initiated, but it was suspended because of an unclear standard. Of course, the files and the land are now harmonised, but the modern systems are not fully functional. Even though there is an interruption in the implementation process, the urban land information management situation is relatively good. However, there is still a poor utilisation of technology in the urban land management system with the available resources. Furthermore, illegal urban land grabbing, illegal constructions and illegal practices on the land are common. There has been a small decrease in the amount of urban land grabbing but it has not stopped.

As indicated in Table 2, a multiple regression was run to predict the effectiveness of urban land management based on the determinant factors (governance, motivation, skill, teamwork, leadership, politics, commitment, and human resources). These variables statistically significantly predicted the effectiveness of urban land management, F (9, 175) = 25.637, $p < .0005$, $R^2 = .569$. Among the eight, six variables added

statistically significantly to the prediction, $p < .05$. Therefore, the major factors for effective urban land management are governance, teamwork, leadership, politics, commitment, and human resources.

The qualitative result indicated that implementers are not sufficiently familiar with the content of the urban land policy. As a result, they are implementing the policy without understanding its objectives and intended outcomes. Furthermore, commitment is a major problem in the implementation process. Urban land administration is the riskiest and most sensitive area of land management. There is no excuse for the slightest risk in this area. A minor error is not considered a mistake; instead, it is regarded as a misuse of power or corruption. Therefore, implementers are hesitant to implement urban land management appropriately; instead, they evade responsibility for deciding because a minor error in land issues can be extremely costly.

The focus groups discussed the proclamations on urban land, such as proclamation no. 818 Urban Landholding Registration, Urban Lands Lease Holding Proclamation no. 721/2011, Urban Planning Proclamation no. 574/2008, Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation no. 455/2005, and Re-Enactment of Urban Lands Lease Holding Proclamation 272/2002, and found that these proclamations have gaps. For instance, Urban Lands Lease Holding Proclamation 721/2011 states that: "If a lessee, with the exception of inheritance, wishes to transfer his leasehold right prior to commencement or half-completion of construction, he shall be required to follow transparent procedures of sale to be supervised by the appropriate body." However, the meaning of half-completion of construction has not been standardised. What does half-completion mean? It is not clearly stated in the proclamation. Such ambiguities in the proclamations are hindering the urban land management systems. Furthermore, the annual report of the urban land management offices in both regions indicated that the available human resources are not carrying out the office's workload sufficiently because the number of employees and customers is not matching. The urban land management offices did not fulfil the required demand for human resources.

The annual plan of Mekelle and Bahir Dar cities' urban land management offices indicated that they would be able to provide all the necessary materials for the budget year. However, the annual report for both cities subsequently indicated that they had material shortages of items such as laptops, computers, stationery materials, tables and other office equipment, and logistics supplies (vehicles for fieldwork). Moreover, access to the internet was not available to check Google Earth. In addition, various factors in urban land management, including the complexity of illegal work on urban land, problems with integrity, delays in service delivery, lack of responsibility, frequent change of regulations, shortage of budget, lack of controlling illegal construction, inappropriate compensation, contradiction of proclamations and addressing these through circular letters are highlighted in the annual reports. The cabinet of the town issues decisions which do not comply with the regulations, and the implementation is carried out accordingly. Thus, the professionals and political appointees do not agree on the urban land issue. As a result, the ineffective communication between these two bodies affects urban land management.

There is a difference between the two regions in the structure and implementation process of urban land management. For example, the Tigray region gave 70 square meters of residence land to unions, while this program is not applicable in the Amhara region. There are also valuation differences in urban land.

Another major problem is that the structural plan of cities and the actual situation on the ground is different. The residential, business, investment, and green areas provided in the structural plan are not accurately reflected on the ground. For instance, the satellite image of Mekele City is not designed based on the facts on the ground. In this city, the residential area in the structural plan was found to be a forest; the business area became the residence and contrariwise on the ground. This hinders the effective implementation of urban land management.

CONCLUSION AND RECOMMENDATIONS

Ethiopia's urban land management and development policy clearly states that a standardised cadastre, digital service, automation system, digital identity numbers for plots, etc., are performance indicators of urban land administration. However, these performance indicators are not effectively implemented in the country. While the introduction of cadastre and digital identity numbers for plots has commenced, it is not yet efficiently implemented. This implies that a well-designed policy is a good but insufficient condition for sustainable urban land management. Comparatively, Amhara has exhibited more effective urban land management in green area development than Tigray, while it was less likely to report the presence of an automation system. To address these problems, on the one hand, all the regions of Ethiopia should share their experiences of land management practices based on their effectiveness. For example, Tigray should take into consideration the experience of green area development of Amhara, while Amhara can learn from Tigray's success in implementing the automation system. On the other hand, the regional governments need to engage with all the stakeholders that render effective service delivery to bring the urban land service online. Finally, a strong land information administration and management system is required because having all these in place helps to achieve efficient and transparent land management in the regions.

Sustainable urban land management has not yet been achieved despite the endeavours of the two regional governments to address the problem. The major causes of the failures in urban land management systems in the country are the absence of good governance, ineffective teamwork, leadership failure, political interventions in the decision process and the appointment of leaders, lack of commitment, and shortage of human resources. Moreover, shortage of budget, shortage of material, illegal land invasions, unfair compensation for farmers, contradictory laws, circular letters, and inappropriate structural plans are further reasons for the unsatisfactory state of urban land management systems. Therefore, an appropriate intervention would be to provide effective training for the implementers and better education in land affairs for the general public. Moreover, proper

monitoring and evaluation strategies are required to manage the emerging and evolving factors of urban land management systems. Strengthening the institutional capacity of land administration is also required to address the problems of urban land management while staying independent. It should also be stressed that urban good governance, which is explained by elements including equity, efficiency, transparency, responsiveness, accountability, sustainability, subsidiary, participation, and security, must be ensured in the country. Finally, the importance of advanced planning and reconsidering urban land policy ought to be emphasised.

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ALTERNATIVE DISPUTE RESOLUTION IN PUBLIC PROCUREMENT FOCUSING ON HUNGARY

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In public procurement frameworks, bidding, contracting and performing contracts is notoriously more challenging than the bidding, contracting and performance of private contracts. The strict procedures of public procurement do not tolerate mistakes and reduce the possibility of compromise if conflicts arise.

This study examines whether the resolution of disputes arising in public procurement procedures with the use of alternative dispute resolution (ADR) methods can be integrated into the strict system of public procurement regulation. It also investigates whether the use of ADR can be justified in public procurement disputes at all, and whether it can handle them effectively. During our investigation, we reviewed the so-called preliminary dispute settlement (PDS) scheme, a special institution of Hungarian public procurement law. Although this mechanism is not a form of dispute resolution in the classical sense, since it does not involve consultation and does not result in compromise at all, the PDS process, as a widely used, quick and simple electronic procedure is an accepted formula in Hungary for settling public procurement procedure conflicts.

Keywords:
public procurement, public contract, alternative dispute resolution, ADR, preliminary dispute settlement, arbitration, conciliation

INTRODUCTION

Conflict is a natural part of everyday life and human relationships. Various academic disciplines have formulated many definitions of conflict and assessed conflict in various ways.[1] The sociology of law[2] deals with those conflicts where legal means are employed and when violations of rights and interests turn into legal disputes.[3]

The area of public procurement involves many types of conflicts that arise at different levels. The transposition of EU directive legislation and the exercise of law in the constantly changing and evolving interpretation of the law can make resolving these conflicts particularly challenging. The correct interpretation of legislation and the implementation of jurisprudence in accordance with the basic principles are fraught with many difficulties. Contracting authorities may conflict with bodies carrying out various aspects of public procurement, while economic actors may not agree with the procedural and substantive (contractual, professional) conditions imposed by contracting authorities. All of this generates numerous public procurement conflicts.

Public contracts are in fact private acts of public administration, whereby the state or public purchaser does not act in a position of power, but as a private legal entity, on an equal footing with the other contracting party. Moreover, they apply their acts in combination (specialised activity, unilateral act as award, followed by private law contracting).[4] This creates an interesting dichotomy while reinforcing the mixed regulatory nature of public procurement. The conflicts which may arise during the contract performance phase and their handling are determined by the regulation underlying all public procurement legislation: the Hungarian Civil Code (hereinafter: Civil Code) and a number of substantive rules related to the subject matter of the public procurement. For example, in the case of a construction contract, the provisions of the Civil Code relating to the contract to produce works and the rules of construction law apply. Against this background, different forms of ADR could be considered at this stage, either in the form of formalised and legally settled ADR arrangements or arbitration as determined by the contracting parties. At this point, therefore, the conflict resolution goes beyond the framework for public procurement procedures.[5]

The rules governing the settlement of disputes relating to this stage of the public procurement procedure can be found in public procurement law, but the review of these decisions is subject to the rules of civil procedure and administrative procedure.

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1 Glavanits–Wellmann 2020.

2 "Sociology of law – a science dealing with the functioning of law (e.g. conflict management), the actual effects of law on individual behaviour and social processes, and the determinants of law as a social phenomenon. Some of the research is based on jurisprudence, while others seek answers to the questions of sociology (using empirical methods)." See: www.hunfi.hu/nyiri/enc/1enciklopedia/fogalmi/jog/jogszociologia.htm

3 Pokol 2002.

4 Magyary 1942: 588.

5 Boros 2021b: 8.

In terms of the outcome of public procurement, the aim is to fulfil the procurement needs of a contracting authority (state, municipal or other organisation operating from public funds qualifying as a contracting authority) in order to perform public tasks. It is a process concerned with efficiently spending public money within a controlled framework.[6] In the field of public procurement, conflict situations arising from differences of interests can occur at three points. First of all, conflicts may arise when determining the public procurement need, and in the process of concretising the related source and content, i.e. during the planning and preparation phase of public procurements. In organisations engaged in budget management, this is a system of processes that overlaps greatly with budget planning, which is not covered by this study.[7] On the other hand, conflicts may also arise at any other point in the procedure, between the contracting authority and any economic or other actor with an interest in the procedure, i.e. from the launch of the procedure until its conclusion by the announcement of results and, optimally, by the conclusion of a contract. The third type of conflict situation may arise after the completion of the procedure, during the performance process of the contract concluded as a result of the public procurement procedure. Our investigation focuses on conflicts between contracting authorities and bidders, but also discusses alternative dispute resolution options related to public procurement audits.

Forms of alternative dispute resolution

At the heart of alternative dispute resolution (ADR) is third-party neutrality, which helps disputants select, design and conduct processes designed to help the parties find a mutually acceptable solution to disputes between them. ADR procedures range from simple proposals for solutions to direct solutions and are much more flexible than traditional, formalised court and authority procedures.[8]

Various forms of ADR have emerged from the resolution of consumer disputes related to different sectors. The importance of this issue is demonstrated by the fact that in financial markets, for example, reports by the World Bank (2012) and the European Parliament (2014) have suggested that limited consumer protection in parts of the financial sector exacerbated the global financial crisis.[9]

Alternative approaches to dispute resolution can be found in many areas of international literature. Lee et al.[10] describe alternative solutions for settling disputes in the

6 Pfeffer 2018.

7 The examination of dispute resolution at the planning stage goes beyond the scope of this article, but its importance must be emphasised, see, for example, Magyary 1942: 460–480.

8 Lock 2007.

9 Gaganis et al. 2020.

10 Lee et al. 2016.

construction industry, highlighting arbitration,[11] business dispute resolution between parties,[12] mediation,[13] the ADR advisory system,[14] the use of a Dispute Review Board,[15] and the Mini Trial.[16] Some authors have also pointed out that ADR procedures, especially arbitration, despite its many advantages[17] are still marginalised in contrast to formalised lawsuits.[18] Contrasting trends are reported in literature on public procurement with Radinova, for example, providing evidence suggesting that the majority of suppliers prefer to resolve procurement conflicts with purchasers through out-of-court negotiations, and only 31% of respondents resort to legal proceedings.[19]

The latest literature also addresses the issue of Electronic[20] and Online Dispute Resolution (ODR), which is based on the "information technology and telecommunications via the Internet (collectively referred to as 'online technology'), which are used for alternative dispute resolution".[21] According to Lavi (2016), "the full spectrum of alternatives to out-of-court resolution of disputes, implemented while using communication and other technological means, especially the Internet".[22]

Since the 1980s, the EU has encouraged Member States to introduce mediation procedures as widely as possible at the judicial stage of disputes or as an alternative way of settling disputes.[23]

However, this is a less explored issue in the field of public procurement: based on an analysis of the Web of Science database, we found a total of 1,423 studies on the search term alternative dispute resolution. These can be classified by discipline as follows, based on the first ten records (Table 1).

Based on our analysis of the Web of Science database, only two studies have been conducted so far that contain both the keywords "alternative dispute resolution" and "public procurement".[24]

In Hungary, the framework for mediation is Act LV of 2002 on Mediation Activities (Kvtv.), which was created with the aim of facilitating the out-of-court settlement of civil law and administrative law disputes.[25]

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11 El-Adaway et al. 2009.
12 Lu–Liu 2014; Yiu–Lee 2011; Murtoaro–Kujala 2007.
13 Qu–Cheung 2013.
14 Cheung–Yeung 1998.
15 Ndekugri et al. 2014.
16 Stipanowich–Henderson 1993.
17 Drahozal 2004; Eisenberg et al. 2008; Hagedoorn–Hesen 2009.
18 Hylton 2005; Stipanowich 2015.
19 Rodionova 2021.
20 Beebeejaun–Face 2022.
21 Hörnle 2003: 27.
22 Ojiako et al. 2018.
23 See the European Commission's Green Paper of 2002 and Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.
24 Dragoş, 2011; Rodionova 2021.
25 Act LV of 2002, Art. 1 (1).

Table 1: Web of Science records in different research areas on the search term alternative dispute resolution

Research Areas	Record Count	% of 1,423
Government Law	748	52.57
Business Economics	241	16.94
Social Sciences Other Topics	95	6.68
Engineering	66	4.64
Environmental Sciences Ecology	63	4.43
International Relations	62	4.36
Psychology	55	3.87
Public Administration	55	3.87
Education, Educational Research	43	3.02
Family Studies	40	2.81

Source: Web of Science

It is widely recognised that mediation is most used in family and labour law cases. For reasons of economy of procedure and time, the literature supports the wider dissemination of mediation into other fields and emphasises its advantages.[26] Some studies call for judges themselves to refer cases before them to mediation, either at their discretion or on a mandatory basis in certain types of cases. Mediation contributes to the success of the procedure and compliance with the law by involving the stakeholders. In addition to high-level, advanced public administration systems, the socialisation, acceptance, and transparency of public administration decisions can be increased by mediation, and this type of ADR can thus also become a mean of increasing efficiency and publicity.[27] In view of these positives, its dissemination in as many areas as possible should be supported. The question arises as to whether mediation is justified in public procurement disputes or whether another ADR approach is more appropriate.

Settlement of public procurement disputes

During the performance phase of public contracts, various ADR methods may be used from country to country, usually in order to avoid lengthier and more costly legal proceedings. These are typically optional (e.g. United Kingdom).[28] Sometimes court litigation has to be preceded by mandatory conciliation (e.g. in Romania), which also applies to public contracts. While Dragoș noted in 2011 the reluctance of contracting authorities to use conciliation for

[26] Blohorn-Brenneur – Nagy 2021: 132.
[27] Hohmann 2019: 6.
[28] Trybus 2011.

fear of an audit by the Court of Auditors, which itself does not support the use of similar alternative means in public administration,[29] Mihaela V. Cărăuşan's 2018 study suggests that the time has come in Romania when alternative dispute resolution will no longer be the exception but the rule, as it has become mandatory for works contracts to recourse to arbitration.[30] In the early 2010s, Lithuania also experienced uncertainty in this area: a decision by the Supreme Court led to a setback to the acceptance of public contract arbitration when it ruled that public contracts cannot be awarded through arbitration.[31] Portugal has a long tradition of arbitration, and the challenge for them is to ensure compliance with EU directives, transparency and publicity.[32] The international FIDIC contractual system, widely used in the construction sector, with its dispute prevention and settlement mechanism, through the so-called Dispute Avoidance/Adjudication Board (DAB), aims to prevent parties from reaching the level of dispute.[33]

The lack of research and studies is mentioned in the literature as an obstacle to the development of ADR. This is due to the confidentiality of the settlements reached in the course of ADR and the need to fulfil confidentiality requirements. Miller argues that while various forms of ADR are widespread internationally and are preferred for resolving contractual disputes between businesses and central governments in Canada, the United States and the United Kingdom, the applicability of the ADR to public procurement litigation is questionable. Miller also notes that when a case involving a public procurement procedure goes to court, months of litigation can cost a great deal of public money. In his opinion, this could become a thing of the past if forward-looking public procurement professionals embrace and institutionalise the use of ADR.[34]

Member States of the European Union are responsible for resolving disputes arising in public procurement procedures under the Government Procurement Agreement (GPA), UNCITRAL and EU public procurement directives. These documents contain the right to legal remedy and the mandatory possibility of judicial review, but they do not oblige or expressly refer to arbitration. In addition to these rules of international and EU law, the public law rules of the Member States are free to determine their own systems of bodies for public procurement review and the criteria that would give rise to judicial review.

In international cases, in the case of large-scale cross-border contracts and concessions, foreign bidders face greater difficulties than domestic firms, while at the same time they may distrust national regulations and institutions, as well as public procurement review bodies. This may necessitate greater use of international arbitration. Some authors, such as Miller, argue that arbitration may already have a place in the contract award process, and

[29] Dragoş 2011.
[30] Cărăuşan 2018.
[31] Audzevičius–Daujot 2012.
[32] Mimoso–Anjos 2019.
[33] Ledger 2017.
[34] Miller 2006.

would be an innovative way of resolving this trust problem. The question is how this can be integrated into the structure of the EU and the Member States.

In January 2021, the International Chamber of Commerce (ICC) Arbitration Rules for International Affairs entered into force, seeking to provide a neutral framework for resolving cross-border disputes. The organisation, which represents 45 million companies worldwide, continued to conduct arbitration in a port concession case involving public procurement prior to the entry into force of this Policy.[35]

The biggest challenge to incorporating arbitration into the procurement process is the challenge of speed. In the case of an unlawfully awarded contract, in the tenderer's view, it is in the tenderer's primary interest to stop the contracting process in order to buy time to prove itself right, and, where appropriate, to bring about a situation where the procurement procedure can be declared successful or repeated. This is because it is not possible to restore the original conditions with regard to the already fulfilled contractual elements, so the business opportunity is lost. If the search for arbitration starts only when an infringement is detected, the form and conditions of the applicable procedure are established, and the temporal implications of this make it impossible to remedy the law effectively from a business point of view in public procurement contexts.

It can be seen from the above that arbitration as a form of ADR enjoys support from academics internationally and primarily in "Anglo-Saxon" legal systems: it has a role to play in resolving public procurement and tender disputes, and this role may increase. However, in order for the potential of arbitration to develop further, public law should take this into account and arbitration tribunals should develop their own set of rules for the specific structure of public procurement.

AIM AND METHODOLOGY OF THE RESEARCH

This study aims to provide an overview of potential applications of ADR in public procurement, focusing on domestic applications. Among other things, Miller's earlier article argued for the use of mediation and the introduction of new forms of alternative dispute resolution in public procurement, primarily for the benefit of foreign bidders of internationally available tenders.[36] We were interested in determining whether a particular Hungarian method of ADR in public procurement, the preliminary dispute settlement (PDS) procedure, fulfils its purpose or whether it is necessary to introduce additional measures to ensure effective legal protection.

First, we examined whether the legal institution of PDS could be regarded as an alternative dispute resolution tool for public administration. Our hypothesis (Hypothesis 1) is that

[35] Jenkins–Forster 2021.
[36] Miller 2006.

PDS in public procurement can be regarded as an alternative means of administrative legal protection.

Our second hypothesis (Hypothesis 2) is that the legal institution of PDS is suitable for remedying most of the infringements occurring during public procurement procedures.

Our third hypothesis (Hypothesis 3) is that the current Hungarian public procurement legislation does not require the inclusion of an additional alternative dispute resolution solution.

A range of different research methods were used to investigate each hypothesis. In the first half of our study, descriptive and historical methods were applied. In the framework of a literature review, we examined and analysed the results of current research into alternative dispute resolution. We examined the system of administrative dispute resolution mechanisms using a descriptive methodology, and then reviewed the alternative dispute resolution mechanisms used in public procurement historically. Our first hypothesis was confirmed by the literature research results.

In support of our second and third hypotheses, as a primary research method, we conducted an in-depth interview and focus group-based research with highly experienced public procurement experts. In the focus group, we involved nine experts who are familiar with and represent the policy, authority, contracting and bidding aspects in order to become familiar with their views and acquire a more nuanced picture of the topic. It was not possible to organise a moderated discussion at the same time in the focus group, instead we received answers to our questions during an in-depth, iterative professional discussion, and beyond that, the respondents also provided valuable comments and discussion points.[37] To test the second hypothesis, i.e. whether PDS is suitable for remedying most of the infringements occurring during public procurement procedures, we asked the interviewees the following two questions, the second of which clearly goes into greater detail than the first question. (Question 1: Do you consider that PDS is an effective and good solution for preventing public procurement disputes from the point of view of contracting authorities and/or tenderers? Question 2: At what stage of PP is PDS the most useful and effective solution? At the application/bidding stage or against the summary announcing the results of the procedure?) The aggregate answers and the comments raised during the discussion are described in the fourth chapter of this study dealing with the second hypothesis. To examine the third hypothesis, i.e. whether the current Hungarian public procurement legislation requires the inclusion of an additional ADR solution from among the public procurement remedies, we formulated questions that deal with specific important stages or legal institutions of the public procurement procedure. (Question 3: Due to the crisis phenomena of previous years, the modification of public contracts became a priority issue and a great challenge for operators. In this context, would you suggest the use of an alternative dispute resolution solution that would be able to bring the parties' positions into convergence with the involvement of an independent actor in order to prepare an

[37] Boncz 2015: 43; Babbie 2001: 315–348.

agreement between the parties (in compliance with public procurement rules)? Question 4: Do you envisage including an alternative dispute resolution mechanism in the area of public procurement control? Question 5: Would you propose introducing other means of dispute resolution in the area of public procurement or changing the current prior dispute resolution mechanism? If so, how? Question 6: Do you have knowledge of practices from other areas of law, or perhaps foreign experience in alternative dispute resolution solutions that could be considered in the field of public procurement?) The responses received are summarised in the fifth chapter.

In addition, during the analysis of our second hypothesis, statistical data collection was performed as an additional primary method. There is no readymade statistical analysis available that can be used directly for this research, so we examined the procurement remedies of the last three years (2020–2022) in detail, using the publicly available database of decisions of the Public Procurement Arbitration Board.[38] Since the search functions do not contain a direct indication of whether the PDS process took place prior to arbitration, we narrowed down our results by means of a search word test. Direct research cannot be carried out on the total number and occurrence of PDS processes, as a search function is not available in the Electronic Public Procurement System where the uploading of documents relating to PDS is mandatory and public. Unfortunately, no data is available either that would indicate the number of cases in which PDS resolved the alleged or actual impairment in such a way as to avoid arbitration redress. Therefore, we individually formed a set of investigations on the procedures that fell within our scope and filtered out the procedures involved in PDS individually. We tried to cross check the rates derived from the occurrence data with in-depth interview responses. To verify our third hypothesis, we also used in-depth interview answers.

In connection with our second and third hypotheses, we conducted national and international literature research as a secondary research method.

REGULATED CORRESPONDENCE OR REAL DISPUTE RESOLUTION?

To describe the special legal institution of Hungarian public procurement law, PDS, it is first necessary to place it in the context of the wider legal system.

In Hungary, the resolution of disputes related to public contracts is a matter of administrative appeal or is settled in court, depending on the subject matter of the dispute and the claim to be asserted. The administrative route falls within the competence of the Public Procurement Arbitration Board, whose rules of procedure are contained in the Hungarian Public Procurement Act (Kbt.). Civil law claims related to violations of public procurement legislation and public contracts fall within the jurisdiction of the court, except for the declaration of nullity based on infringement pursuant to Section 137 of

[38] See: https://dontobizottsag.kozbeszerzes.hu/dontobizottsagi-hatarozatok/

the Kbt. In many cases, disputes related to public procurement contracts are completely independent of public procurement rules since these are civil law contracts, where the rules of the Civil Code apply. Occasionally, the provisions of the Kbt. deviate from the rules of the Civil Code and are considered special cases. Both public procurement and civil law disputes may arise in respect of these.[39]

Hungarian public procurement law has experience with two legal institutions involving alternative dispute resolution. One is conciliation, the legal basis for which has been repealed, and the other is the PDS that is currently in place.

The 2003 Public Procurement Act in force in Hungary introduced conciliation and special conciliation procedures[40] during the transposition of Directive 92/13/EEC to prevent disputes and relieve the burden on the Arbitration Board. The purpose of the conciliation procedure was to attempt to settle disputes between the contracting authority and the tenderer or other interested party by agreement.[41] The explanatory memorandum of the former public procurement act introducing that legal institution rightly pointed out that conciliation does not mean conciliation in the classical sense of the word, since public procurement disputes and public procurement violations cannot be remedied by parties by trying to reach some kind of *agreement*. A public procurement dispute is a multi-party dispute: it also affects other economic operators, candidates and tenderers interested in the procedure. Therefore, if a compromise can be reached during conciliation, this may directly entail a conflict with another actor outside the conciliation procedure and result in a new legal dispute.

The main difference between the former conciliation procedure and the current PDS was that it involved external, independent and neutral persons, i.e. a conciliator appointed jointly by the parties or, in the absence of agreement on this, a three-member conciliation chamber. It was hoped that its operation would be able to convince the parties whether or not the disputed situation was indeed unlawful and, by means of legal and professional arguments, this could cause the tenderer to withdraw its request to initiate a review or for the contracting authority to recognise and remedy the infringing measure or decision itself. However, the institution of conciliation did not live up to expectations, so it was repealed in 2009.[42]

The PDS process stipulated in Section 80 of the current Act on Public Procurement is now a commonly used alternative dispute resolution tool for public procurements in Hungary.[43] The purpose of PDS is to provide the contracting authority with a quick and

[39] Várhomoki-Molnár – Kéri 2021: 6–7.

[40] Former Kbt., Sections 352–368 and 369–371.

[41] Former Kbt., Section 352 (2).

[42] In current Hungarian law, conciliation board proceedings appear in a completely different area, namely the out-of-court settlement of consumer disputes between consumers and businesses. See Antal 2022: 54–55.

[43] Boros 2020: 28; Hubai 2021.

effective opportunity to remedy the infringement caused by it on its own initiative, thereby relieving the burden on public procurement review bodies.[44]

At the time of its introduction in Hungary, PDS was mandatory: the tenderer could only submit an appeal against the decision of the contracting authority to the Public Procurement Arbitration Board after attempting to reach a resolution through PDS.[45] Later, PDS became optional, but at the same time its legal basis was extended.[46] It was possible not only against the outcome of the procedure, but also against any other procedural act of the contracting authority considered to be unlawful and against any document of the procedure considered to be infringing.[47]

According to the interpretation of the Curia of Hungary, the legal institution of PDS is not a mean of legal remedy. (Accordingly, it is not included in the Kbt.'s chapter on appeals.)[48] In PDS, there is no real and simultaneous exchange of arguments. "Its aim cannot be summed up indisputably in the provision of an opportunity for agreement before referral to the Arbitration Board and, on the other hand, in preparing the appeal procedure before the Arbitration Board by recording the positions of the parties."[49] This is still conducted in written form. In fact, there is a one-off, written back-and-forth communication in a PDS procedure in which the initiator argues his case, and the contracting authority responds and/or takes action. The initiating party shall indicate the element of the document or procedural act created during the public procurement that is considered unlawful and its proposal for avoiding or correcting the infringement. If the contracting authority detects the unlawful nature of its act on this basis, it is entitled to remedy it within a limited time limit and by the procedural acts of Kbt. There is no possibility to present pros and cons, nor to *reach consensus:* the former is excluded due to the rapid conclusion of dispute resolution, and the latter cannot be interpreted within the rules of the Kbt. The infringement alleged in the request for PDS cannot be remedied by compromise or agreement between the parties. This is excluded by mandatory public procurement regulations and public procurement principles. The arguments of the applicant shall either be accepted by the contracting authority and the requisite action thus taken, or it shall not be accepted, leaving its previous acts unchanged. There is no intermediate solution. If the applicant considers that the infringement persists, he or she may seek redress.[50]

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44 The technique of preliminary dispute settlement was introduced by Act CVIII of 2008 amending Act CXXIX of 2003 on Public Procurement and has been in force since 1 January 2010. The precedent and reason for its transposition into Hungarian law is that Directive 2007/66/EC of the European Parliament and of the Council inserted in the two review directives (89/665/EEC and 92/13/EEC) a provision according to which Member States may require the person affected by an infringement to seek review first before the contracting authority.

45 Act CVIII of 2008, Sections 96/A and 96/B.

46 Act CVIII of 2008, Section 96/A.

47 Act LXXXVIII of 2010.

48 BH2016. 50. [25], Kfv. IV. 37.642/2013.

49 BH2016. 50. [25] This follows also from Section 324 (2) of the Kbt., which was in force then.

50 Boros 2021a.

Instead of involving an independent, external party in the conciliation process, PDS entrusts the settlement to the contracting authority and the initiator: it leaves the presentation of an argument exclusively to the latter and the decision to the contracting authority alone. Therefore, the dispute is not *resolved* but merely *settled* by the current form of alternative dispute resolution prior to resorting to the appeal procedure of the Kbt. in force. Any remaining prejudice may be remedied by appeal before the Public Procurement Arbitration Board, depending on the decision of the party that alleges injury to its rights and legitimate interests.

The question arises whether, on the basis of the above, the PDS procedure can be regarded as an ADR measure at all. To answer this question, we reviewed the system of administrative control mechanisms.

Public administration influences the behaviour of legal entities in the exercise of public authority and intervenes in the specific life and legal relations of legal entities outside the organisation of public administration. This position of power requires the presence of control under the rule of law,[51] which primarily means the legal remedy laid down in the Rome Convention and provided for in the Hungarian Fundamental Law (the country's constitution),[52] but on the other hand it has a much broader scope. "Public administration control refers to all procedures during which the activities of a public administration body are examined, evaluated and, in some cases, influenced by an administrative or other body."[53] From this broader perspective, the control of public administration can be viewed in terms of institutional forums, or outside institutions, or otherwise internal (within the system of public administrations) or external control (outside the organisational system). Institutional control can be politically oriented or law-enforced. Judicial control may take the form either of legal remedies or alternative forms, which means all control mechanisms which do not involve legal redress against an administrative decision. An alternative form of control mechanisms against public administration in Hungary is the ombudsman procedure, prosecutorial control of the legality of public administration, and additional private judicial legal protection in addition to administrative judicial protection. This also includes any settlement reached outside administrative proceedings and approved by the court, as well as mediation proceedings under the Hungarian Code of Administrative Court Procedure.[54] Another important range of *alternative control* tools are ADR tools, an umbrella term which includes the out-of-court resolution of conflicts between two or more parties, in particular arbitration, mediation, and conciliation.[55]

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51 Magyary 1941: 624.

52 The Rome Convention on the Protection of Human Rights and Fundamental Freedoms Convention of 4 November 1950 Article 13e. The Convention was promulgated by Act XXXI of 1993. Fundamental Law of Hungary, Article XXVIII (7): "Everyone shall have the right to appeal against judicial, administrative or other administrative decisions which prejudice his or her right or legitimate interest."

53 Boros 2019: 7.

54 Act I of 2017 on the Code of Administrative Court Procedure.

55 Glavanits–Wellmann 2020.

Specialists in various areas of law (e.g. labour law, criminal law, civil law) and other social sciences – as described elsewhere in the "Forms of alternative dispute resolution" chapter – consider mutual *agreement* reached through *joint negotiations* to be a distinguishing feature of ADR forms. ADR thus differs sharply from the redress resulting from a decision made by an external authority, which necessarily leads to a negative or losing outcome for one party.[56] This interpretation of ADR does not think in terms of a *win-lose* pair but aims to create a *win-win* situation.[57]

Based on our literature review – regarding our first hypothesis – we came to the following conclusion: Public procurement is one of the manifestations of public administration operation and implementation, thus its placement in administrative law is not disputed. Even if a private law contract is concluded as a result of procedural rules, it is done so in a way that is strongly influenced by administrative aspects. It is indisputable that the PDS procedure aiming to avoid the need for administrative acts can be regarded as an alternative form of administrative legal protection, even if it does not fully possess the main characteristics usually associated with ADR (involvement of an independent third party, negotiation, consensus) in the literature outside administrative law. Knowledge of both public administration literature and studies of other sciences provides numerous clues and broadens one's horizons when thinking about the resolution of public procurement disputes.

A SUCCESSFUL ALTERNATIVE INSTRUMENT: PRELIMINARY DISPUTE SETTLEMENT

In Hungarian public procurement practice, statistical data are not available on the number, proportion and success of PDS procedures.[58] Moreover, it is difficult to state what can be considered success in a conflict situation. Avoiding review proceedings before the Public Procurement Arbitration Board? To accept the applicant's position and remedy it at the discretion of the contracting authority? Is the PDS even capable of remedying infringements of public procurement rights and preventing redress disputes? This is what we are trying to answer in verifying our second hypothesis.

To answer this question, we conducted a statistical analysis based on data available from the Electronic Public Procurement System (EKR) and the website of the Public Procurement Arbitration Board, as well as other relevant information available to us. In connection with the foregoing, it was necessary to take it on trust that contracting authorities publish information on PDS on the PDS interface in accordance with the rules applicable to them, and we assumed that the search functions would work properly on the interfaces.

[56] Kovács 2008: 18.
[57] Kovács 2008: 21.
[58] Hubai 2021.

Table 2: The average share of review procedures for successful public procurement procedures, 2020–2022

	2022	2021	2020	Average over the previous three years
Number of successful procurement procedures (pcs)*	7,894	7,676	7,431	
Number of appeals before the Public Procurement Arbitration Board (pcs) **	529	533	545	
Share of procedures subject to redress in terms of number of successful procedures (%)	6.70	6.94	7.33	6.99
Number of PDS previous appeal cases (pcs) **	146	183	187	
Share of PDS antecedent redress cases per case of appeal (%)	27.60	34.33	34.31	32.08
Share of redress cases with PDS history in terms of number of successful procedures (%)	1.85	2.38	2.52	2.25

Source: Közbeszerzési Hatóság 2021

Based on the data from the previous three years, the average share of review procedures for successful public procurement procedures is 7% (Table 2).[59]

About one third of the procurements subject to review procedures before the Public Procurement Arbitration Board in the previous three calendar years involved PDS procedures. It is not certain that the legal basis of the PDS is the same as the legal basis for the remedy, nor should it be concluded that these cases are initiated after and because of the failure of the party who has infringed his right. It should also be added that the PDS is of real relevance only in arbitration proceedings initiated on application, since those entitled to bring an ex officio appeal cannot initiate PDS, and vice versa.[60] In this sense, the above picture is further complicated by the division of appeals on application and ex officio. The relevant data for 2022 cannot be extracted from the website of the Public Procurement Authority, but information from the previous year is available from the Authority's annual accounts.[61] Based on the 2019–2021 data, the proportion of appeal procedures initiated on application is on average 43%.

It was not possible to collate data on the total number of PDS processes, as the search functions of currently available databases are not suitable for this. Nevertheless, we wanted to gain an overview of the prevalence of PDS, therefore, in line with our research areas focusing on construction economics, we formed a non-representative set of public procurement procedures related to construction works and engineering services that fell

[59] It should be noted that an appeal procedure may also relate to an unsuccessful procurement procedure, but no aggregated public data is available for the latter.

[60] Kbt. Section 80 (1) and 152 (1).

[61] Közbeszerzési Hatóság 2021.

within our scope of the previous three calendar years. In the set of 180, we found that PDSs were involved in 22% of the proceedings. 7% of dispute settlements were directed against summaries establishing the outcome of the procedure, while the remainder were against the alleged infringing content of the invitation or documentation, or concerned a procedural act of the contracting authority that was deemed to be infringing.

While Public Procurement Arbitration Board decisions are challenged and taken to administrative litigation at a rate of 11–14%, in proceedings previously subject to PDS, this proportion is only between 6% and 8% in the previous three calendar years. Here, too, we did not carry out a detailed examination of the legal bases, i.e. it cannot be said whether PDS, then appeal, and finally litigation have the same legal bases, but these ratios are telling.

The results of this primary research can by no means be considered representative, but the above sample suggests that the majority of applicants are satisfied with or accept the outcome of the PDS and do not feel it necessary to resort to further legal remedies. The uncertainty resulting from the lack of representativeness of the empirical research is reduced by the answers received during the in-depth interview research. The experts interviewed generally consider the legal institution of PDS to be adequate and effective. They cite its low cost and speed as advantages. From the point of view of contracting authorities, it was considered an advantage that minor errors and irregularities can be quickly remedied without major delays and negative consequences resulting from redress sanctions.

From both the point of view of the contracting authority and the tenderer, it is also an important aspect that contracting authorities that do not necessarily have direct and up-to-date market knowledge can be provided with information at this point through the arguments and suggestions of economic operators that they may not have possessed even with careful preparation (e.g. partial information provided in the scope of the fulfilment of the conditions indicated in the reference requirement or the justification of an abnormally low price). However, they still have the opportunity to apply the provisions of the Kbt. to correct the requirements or decisions concerned by appropriate means. However, this intervention is limited. The other side of the coin is when economic operators appear in their PDS requests with the need for procurement or their own tailoring of the suitability and contractual conditions, controversially citing equal opportunities. In order to ensure competition, these requests should be treated with caution and consideration. According to the now established interpretation, although still controversial in professional circles, such modification during the procedure may also be anti-competitive, and only a new public procurement procedure can provide a legitimate solution.[62] In summary, the basic requirement of all this is proper preparation and the existence of professional and market knowledge, which is expected on the side of the contracting authority. Tenderers are equally strongly expected to use PDS at the appropriate time and for the right purpose. Different legal institutions are used for different purposes in public procurement procedures, so

[62] Kbt. Section 55 (6).

requests for supplementary information, access to the file or, in some cases, redress may be the only way forward.

Another criticism of the system is that, in the experience of some of the respondents, contracting authorities may give a mechanical response without a proper examination of the merits or arguments, or they may, despite agreeing with the tenderers' suggestions, not choose to amend the contract notice or to launch a new procedure due to lack of time.

In the cluster we examined, PDS requests were rejected in the majority of cases, with only 13% of requests for PDS being upheld by contracting authorities. In the opinion of the experts consulted, who were economic operators in many cases, even if they do not agree with the reply received, do not seek redress. This is due to resource-saving considerations (so as not to incur procedural costs or the costs of legal representation, as well as the time required for the preparation of legal remedies) and concerns about the loss of confidence of contracting authorities. In particular, economic operators that already have (or intend to have) contractual relations with the contracting authorities concerned fear that applying PDS as a remedy may exclude potential business opportunities in the future. In our opinion, this concern cannot be justified in the regulated and objective world of public procurement, but it does arise.

We also found that although chambers and professional representative organisations were also granted the right to request PDS,[63] they typically do not make use of this opportunity, even though they have a wide range of market knowledge, so their insight and advocacy could achieve improved results in broadening competition.

In summary, the research supported our second hypothesis from every point of view, confirming that the legal institution of PDS fulfils the expectations placed on it as an alternative dispute resolution tool. Case law makes extensive use of this specific form of ADR, which is unique and specific even at EU level, and which has already proven its worth. Apart from proposing improvements to certain small technical details, respondents agreed that its current regulation does not require significant legislative intervention or amendment.

EXAMINING THE RAISON D'ÊTRE OF ADDITIONAL ADR MEASURES

After examining the effectiveness of PDS, which is the only ADR tool currently available, the question arises as to whether other ADR techniques could be justified at other stages of public procurement on other legal bases. We selected the most problematic stages of public procurement, i.e. those which are most challenging for professionals for various reasons: disputes built into the process or arising from ex-post procurement audits; the problem of amending public contracts; and monitoring the performance of public contracts. During our in-depth interviews, we sought to answer whether the introduction of various alternative dispute resolution techniques is justified at these points.

[63] Kbt. Section 80 (1) b).

In Hungary, the domestic control system for public procurement is very complex. Without describing the entire control system in detail, the Directorate-General for European Aid Audit (EUTAF) and the system of audits carried out within the organisational system of the Prime Minister's Office should be highlighted.[64] If EUTAF detects an infringement of public procurement law in the course of its tasks, it is entitled to initiate an *ex officio* review procedure in accordance with the rules of Section 152 of the Kbt. The subjects of the in-depth interviews agreed that the most serious problem arise both in public procurement procedures and in the control of contract amendments if the legal remedy is not initiated for any reason, typically due to the limitation period under the Kbt. In that case, EUTAF's finding of infringement is left without a public procurement remedy, which is ultimately contrary to the principle of the rule of law. Other serious problems identified included the time required for the checks built into the process and the unpredictability of findings. The control mechanisms of these two audit bodies are different, but essentially, they are document-based. In the case of EUTAF, additional means of proof appear, but oral communication of this is not typical in practice. As irregularity procedures, which can have serious financial consequences, focus on procedural steps that have already taken place, the related alternative dispute resolution mechanism cannot be understood. At the same time, the respondents would consider it important to clarify the concerns raised by the auditors through more effective communication between the parties, and it is also essential to have uniform and clear jurisprudence and for there to be familiarity with the issues.

Due to the crises of previous years, the modification of public procurement contracts became a priority issue, and this posed a great challenge to public procurement operators. It is known that the modification of public procurement is only possible under very strict conditions, and if the conditions set out in Section 141 of the Kbt. are not met, contracts can only be concluded with the modified conditions through a new public procurement procedure. The contract amendment process may require assistance in two stages: the establishment of a consensus and its justification and support for public procurement. Typically, the difficulty is not connected to reaching consensus between the contracting parties, although assessing the extent of price increases and inflationary effects due to crisis phenomena and the impact of the obstacles thus arising on meeting the deadline is by no means a simple process, but requires continuous learning and adaptation.[65] To the question of whether the legal basis and scope of the contract amendment could be assisted by preparation by an independent mediator or otherwise, the experts' response was not entirely uniform. The problem may also depend on the preparedness of the public

[64] EUTAF is the central office responsible for carrying out audit authority functions pursuant to Regulation (EU) No. 1303/2013. Its audit authority covers audits related to budgetary support provided by the European Union and other international sources, as well as procurements implemented in connection with these.

[65] The Prime Minister's Office shows the preparation process for the application and interpretation of law announcement on the application of legal provisions on the amendment of public contracts in the context of the coronavirus emergency (Prime Minister's Office, 29 April 2020), and then amending works contracts No. 13/2023 (I. 24.) Government Decree and, on the basis of its authorisation, Decree 4/2023 (II. 23.) CCM Regulation.

procurement professional, the contracting authority and the winning economic operator. It is a problem if a public procurement professional only defines the circumstances giving rise to the modification of the contract under public procurement law, but does not judge it professionally, which be subject to further legal control in a quality assurance process, and thus the contract amendment process may be blocked or protracted. This is made more difficult by caution related to the quality assurance of EU-funded public procurement, as irregular contract changes result in financial corrections. On the contracting authority's side, these contract amendment processes may be blocked either out of caution or due to lack of sufficient funds.

On the winner's side, the drafting of contract amendments is greatly hampered by the lack of documentation of work processes and supplier/subcontractor offers, which also calls into question the public procurement preparedness of economic operators. Proof of change of circumstances, unforeseeability and causality can only be provided by written documents. A well-prepared and diligent contractor with public procurement skills should be prepared for similar situations and should not expect the other party to enter a contract amendment process at its own risk without them.

While public procurement consultants (3 interviewees out of 9) saw the need to accelerate the quality assurance process and also make it predictable by a clear legal interpretation, and one of them also suggested a kind of mediation, the actors of the public procurement authority and the market (5 interviewees out of 9) preferred to improve the public procurement preparedness and prudence of economic operators. These answers suggest that it would be helpful to develop a kind of exemplar for the application of the law, which, in addition to the general regulation, would present concrete practical examples for the fulfilment, justification and assessment of the conditions related to contract amendment. From the perspective of the contracting authority, it is important that the public procurement consultant is also involved in the performance phase of public procurements, if required, while he must also be competent against professional arguments.

In our conversations, we also touched upon the possibility of mediation-based approaches. The articles in the academic literature emphasising the importance of mediation assume that conflicts are also caused by differences of opinion, different value systems, misunderstandings, or emotional charges, which means that the visible conflict that grows into a legal dispute is "only the tip of the iceberg".[66]

Different interests and different economic needs – i.e. market acquisition or business acquisition purposes – obviously arise during a public procurement procedure, which can then lead to a PDS procedure. This may be the case if, in the opinion of the economic operator, the contracting authority imposes unduly stringent qualification requirements which restrict competition, or if it imposes evaluation criteria which cannot be objectively assessed or are not relevant to the subject-matter of the contract. This may also be the case if it announces a tenderer as the winner whose ability to perform is doubted by the other,

[66] Blohorn-Brenneur – Nagy 2021: 20.

underperforming tenderer. However, these cannot be regarded as primarily emotionally-charged reasons, even if the requesting party may be emotionally charged.

When it comes to conflicts arising from misunderstandings in public procurement, mediation can be equated with neither a means of mediation nor a role for the PDS. The public procurement procedure does not specify a cooperation obligation similar to the contracting and performance process of the Civil Code.[67] Independent public procurement legal institutions were established to deal with problems of interpretation of the contents of public procurement notices and documentation, namely supplementary information and requests for information.[68] In the interests of ensuring real competition, transparency and controllability, these are carried out simultaneously towards all economic operators, in a documented, regulated procedure, contrary to the general cooperation rule of the Civil Code.

Mediation, as an alternative dispute resolution format, requires the involvement of a third, independent party in the dispute. Its task is to identify the individual interests of the parties in as much detail as possible and to suggest the most suitable compromise for satisfying both parties. It is obvious that this personal, trust-based procedure cannot be used in the necessarily restrictive public procurement procedure. Although the previous conciliation procedure involved a third party in the dispute, the task of the conciliator was not primarily to identify the interests of the parties and reach the best possible agreement, but to provide information within the legal framework provided by public procurement and to guide the contracting authority to the lawful procedure, as well as to persuade the tenderer to accept the legal decision, in order to avoid burdening the Public Procurement Arbitration Board with unnecessary work. While private legal relations can offer a much wider scope for settling conflicting interests, since financial, behavioural and even personality issues can be included in the scope of the agreement, such flexibility is incompatible with the public procurement procedure. Indeed, "[a] dispute which concerns only the interpretation of the law cannot be resolved by mediation, but only (by) the judge".[69]

The raison d'être of mediation being built into the quality control process is also questioned by its time requirements. Difficulties arise when selecting a suitably prepared third party to be involved. According to some proposals, professional organisations covered by the procurement would be able to provide this type of mediation.

It is clear that, according to Hungarian legislation, none of the conflict resolution methods (negotiation between the parties, mediation and arbitration)[70] known to sociology of law and intended to replace formal judicial procedures can be used in conflicts arising during public procurement procedures. Overall, the consensual procedure is not a logical option in disputes arising during the procurement procedure. Neither the PDS, nor the former legal

[67] Civil Code, Section 6:62.
[68] Kbt. Sections 56 and 71.
[69] Blohorn-Brenneur – Nagy 2021: 35.
[70] Pokol 2002; Antal 2022: 51.

institution called conciliation, nor the review procedure before the Public Procurement Arbitration Board can be regarded as such a procedure, and in our opinion, it could not be successfully established with any other legal institution in the public procurement regulatory system currently known and applied in Hungary.

Regarding the contract performance phase after the public procurement procedure, the official "control" (i.e. monitoring of compliance) of public procurements is also worth mentioning. Hungarian legislation uniquely regulates the monitoring of the performance of public procurements, integrating this "control" into an administrative procedure, which also applies to the subsequent control of amendments to public procurement contracts. [71] The Hungarian Act on General Public Administration Procedures (Ákr.)[72] allows the use of means of proof, but the tools of alternative dispute resolution do not fit into its rules of procedure – experts interviewed from the authority side clearly agreed on this during the in-depth interviews. At the same time, other experts interviewed argued that it is necessary to incorporate some form of negotiation into the audit procedure in order for the parties to exchange pros and cons in more detail, even with the aim of reaching a kind of settlement. Furthermore, two objections may be put forward: on the one hand, the alleged infringement in the context of the contract audit of the Public Procurement Authority is necessarily followed by a review procedure conducted by the Public Procurement Arbitration Board in a regulated manner. On the other hand, the supervision of public procurement is not intended to remedy or resolve the dispute between the parties – as there is typically no such dispute between the contracting authority and the tenderer side – but in fact protects outsiders from the point of view of the orderly spending of public funds, and does justice to everyone other than the public procurement contract with its findings.

During our conversations, we also examined the period of performance of public procurement contracts and the possibility of handling disputes between the parties. Such disputes do not constitute a public procurement dispute, but a civil law dispute, but one which proceeds in a peculiar way, due to the difficult circumstances arising from the use of public funds. In contrast to the slower and more costly judicial path, respondents voted in favour of arbitration, which would entail the very rarely used arbitration procedure of the FIDIC system. It was also proposed to develop the Certification of Performance Expert Body (TSZSZ) as an existing institution for this task, in relation to public procurement contracts in the construction economy. This requires strengthening the professional weight of the TSZSZ, expanding its current list of experts in an appropriate direction, raising awareness among experts, and developing an appropriate procedural system. (In the case of other public procurement objects, a similar expert body could perform this conciliatory task.)

[71] Government Decree 308/2015 (X. 27.).

[72] Act CL of 2016 on General Public Administration Procedures.

SUMMARY AND RECOMMENDATIONS

The Hungarian domestic public procurement review system fully complies with the EU directive regulation,[73] which was confirmed by the 2017 REFIT report of the European Commission of the European Union.[74] The effectiveness of the public procurement review system is also confirmed by statistical data.

Public procurement experts generally have a positive opinion about the PDS procedure specifically designed in Hungarian public procurement law, as well as about the arbitration appeal mechanism. The PDS is widely used, although this mechanism is not a dispute settlement mechanism in the classical sense, since it does not involve consultation and does not result in a compromise. However, the quick written exchange of positions typically produces an acceptable result for those concerned.

Public procurement experts have unanimous confidence in the operation of the Public Procurement Arbitration Board. This trust of economic operators is greatly contributed to by the fact that, in addition to the public procurement and law arbitrators, experts in the field of public procurement, which is the essence of public procurement processes, are also present among the expert commissioners acting in the three-member committee, and they represent the aspects and characteristics of the profession. [75]

The aim of this study was to examine the suitability of ADR approaches in the field of public procurement. The starting point was the definition in legal terms of the special legal institution of Hungarian public procurement law, PDS. Based on our literature research, we concluded that PDS can be classed as an alternative administrative control tool, and although it does not possess all the typical features of an ADR procedure (negotiation between parties involving an independent party, leading to a mutually acceptable compromise), it may be regarded as such on the basis of our statistical data collection and the results of interviews conducted in the research. Our hypothesis, that PDS is generally capable of preventing public procurement remedies and resolving emerging legal conflicts, appears to have been validated. Furthermore, our empirical and in-depth interview-based research indicate that public procurement regulations in Hungary leave very limited scope for various ADR techniques. The final conclusion of our study is that the transformation and modification of this well-functioning system is not justified in Hungary at present.

At the same time, improvement, development and continuous renewal are always desirable and necessary.

[73] Boros–Kovács 2017.

[74] European Commission 2017.

[75] The effectiveness of the arbitration procedure is demonstrated by the proper conduct of proceedings within statutory time limits and by the very low number of challenge figures. In litigation against arbitration decisions, judgments of an altering nature are not typical at all, but instead very few refer to new proceedings, exceeding 90% proportional upholding judgments, which also confirm the raison d'être and mature professionalism of this particular administrative procedure.

The need for forms of alternative dispute resolution arises in the preparatory phase of EU-funded public procurement procedures and in connection with the preparatory and quality assurance phases of contract amendments. This may not necessarily take the form of a method involving an independent organisational formation but instead may involve a mechanism built into the procedural order – professional dialogue, confrontation of positions and prevention of debate – which would thus increase the predictability and efficiency of quality control processes.

When dealing with contract amendment requests, a mediation approach that takes into account the criteria of the contracting authority and the successful tenderer while at the same time being adaptable to market conditions can be considered. Such a form of mediation which could work effectively if its position is also accepted by quality control bodies.

In all cases, professionalism and the existence of technical-professional and market knowledge on the subject of public procurement are the key requirements, the strengthening of which is expected. The process of public procurement requires qualified specialists and purchasers. The requirement of this professionalism was emphasised by Magyary in connection with the rational and economical operation of public administration, even at the stage of determining needs.[76] Whatever stage of public procurement, a dispute can only be resolved successfully and effectively if the parties are able to clearly state their pros and cons and use the appropriate means with precise knowledge of the legal environment. By developing the competences of public procurement experts, it is possible to ensure that they have the knowledge and communication skills necessary for avoiding and managing disputes. A similar set of competences is required for persons acting in ADR procedures. A well-prepared professional who is sensitive to the arguments of both parties, understands them and is aware of professional regulations and market conditions in addition to the system of public procurement rules may be able to handle conflicts related to public procurement in a manner which can lead to acceptable compromises even at the points where the need for this has been highlighted above. Competence in conflict resolution and mediation is already expected of public procurement professionals, and it is also important to emphasise this in their training, further training and generally as an expectation of public procurement professionals.[77] Diaz draws attention to the requirement of independence, while the importance of professionalism was emphasised by all our in-depth interviewees.[78]

The creation of new ADR entities seems unnecessary in Hungary, since merely increasing the number of organisations is not a guarantee of professionalism or efficiency.

Public procurement professionals advocate a uniform and knowable interpretation of the law, which itself contrasts with the actual public procurement legal environment, which despite its ostensibly stable and permanent framework based on the background of the directive is nevertheless constantly evolving and changing in detail.

[76] Magyary 1942: 504–506.
[77] European Commission 2020. ProcurComp EU.
[78] Diaz 2022.

In line with international trends, the use of arbitration or other forms of alternative dispute resolution during the performance phase of contracts in civil claims is, in our view, also valid for public contracts. The traditions of this are narrower in Hungary, but globalisation will certainly bring about progress in this field as well to which digitalisation tools can also contribute.

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MEASURING THE IMPLEMENTATION OF DELIBERATIVE PRACTICES IN DECISION-MAKING

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According to deliberative democracy theories, decisions taken by citizens through deliberation have greater legitimacy for those concerned. It may therefore be worth examining to what extent and at what level the decisions and recommendations of deliberative bodies are taken into account in the decision-making process of a given country. The paper presents a metric which, based on the analysis of specific aspects – the embeddedness of already implemented practices in decision-making, their deliberative level and the scope of the practices – indicates the extent to which a given country applies the results of deliberative bodies' deliberations to the decision-making process. The metric was tested on a sample of 27 EU Member States and four groups were identified in terms of the embeddedness of deliberative practices in decision-making: Laggards, Emergers, Aspirers and Exemplaries.

Keywords:
decision-making, deliberative democracy, deliberative practices, international comparison, metrics

INTRODUCTION

The main purpose of involving citizens in decision-making in representative systems is to cure the ills of democracy, real or perceived, through more democracy. Recent decades have seen the emergence of a number of democratic innovations, i.e. practices or methods aimed at deepening citizens' involvement in political decision-making, most of which emphasise the role of deliberation as a central element of deliberative democracy. This is no coincidence, since deliberative democratic theory is based on the idea that a collective decision taken by citizens on the basis of rational argumentation has greater legitimacy; it is therefore not surprising that more and more countries are channelling the results of

deliberation into the decision-making process, or are using deliberation directly at multiple levels of decision-making. Not only has the European Union articulated the importance of deliberative practices in a Recommendation,[1] but the OECD has also published a report[2] on how deliberative practices can be implemented into existing decision-making structures.

The central question of this paper, therefore, is whether it is possible to create a metric that can measure the extent to which the results of deliberative bodies are incorporated into decision-making, since the methodological measurement of democracy or of certain aspects of it can be very difficult to carry out. The purpose of this paper is to present a metric that measures the level of employment of deliberative democratic practices in decision-making in a particular country, based on the extent to which the deliberative practices already used by the given country are embedded in decision-making, the deliberative level of these practices, and their scope of practice. The main purpose of the metric is to make it possible to compare the degree to which different countries have incorporated deliberative practices into their decision-making processes.

The paper first introduces the theoretical and interpretative framework of the topic: the reasons for and objectives of citizens' involvement in decision-making in representative democracies, democratic innovations and the paradigm of deliberative democracy, followed by a discussion of deliberative practices in decision-making and the methodological difficulties of measuring democratic processes. This is followed by a detailed description of the methodology associated with the metric and the process of applying the metric in practice. In relation to this, the paper presents the results of an analysis of a sample of the 27 EU Member States to illustrate the practical application of the metric in the field of deliberative democratic practices in decision-making, allowing conclusions to be drawn on the applicability and validity of the metric in practice. The paper also discusses and attempts to answer the main methodological questions that arose during the testing of the metric. Finally, the paper summarises the results of the testing of the metric and the most important insights gained from its use in practice, and briefly discusses the potential for further development of the metric.

THEORETICAL FRAMEWORK

Deliberative democracy theory emerged from the tradition of two main theories, Rawlsian liberal theory and Habermasian critical theory, and the debate between these two schools can be traced in the *Journal of Philosophy*.[3] However, several generations of deliberative democracy writers have now developed the theory further within the framework of both John Rawls and Jürgen Habermas. It is not the purpose of this paper to present in detail the theoretical starting points and different approaches of deliberative democracy,

[1] See Kotanidis – del Monte 2022 and Alemanno 2022.
[2] OECD 2020.
[3] See Habermas 1995 and Rawls 1995.

except insofar as they need to be explained in relation to the adoption and adaptation of deliberative practices.

Citizen participation in decision-making in the representative system

In complex mass societies, direct decision-making by citizens is unfeasible in practice, so modern democracies operate on a representative basis, with representatives elected by citizens making decisions about public affairs. In recent decades, however, increasing attention has been paid to the crisis of representative democracies: the fact that this form does not necessarily ensure that citizens' voices are sufficiently reflected in decision-making processes and outcomes.

Thinking about the crisis of the representative system is closely linked to thinking about the crisis of democracy itself. In the 1930s and 1940s, the threats to democracies were embodied in totalitarian ideologies. However, since the 1970s, the crisis of Western democracies has been more of an existential and systemic crisis. This was described in more detail, for example, in the 1975 report of the Trilateral Commission,[4] which identified the main signs of the crisis of democracy as the increasing delegitimisation of power and the loss of confidence in governments and leaders. During this period, some authors began to reflect on the content of democracy: for example, whether too much democracy can be a problem for the functioning of a state, whether a state can be democratic if a large part of society cannot participate effectively in the functioning of democracy, or whether representative democracy is the only viable way to institutionalise democracy at the level of the nation state.[5] Subsequently, in the early 2000s, thinking about the crisis of democracy resurfaced in academic discourse and since then attention has turned to the crisis of representative democracies.

Almond and Verba pointed out in their work on "The Civic Culture"[6] that citizens' trust in democratic governance and the institutions of governance plays a major role in the practical functioning of democracy. However, processes of depoliticisation can be observed in representative democracies in recent decades, such as the general dissatisfaction with the political system and the lack of trust of citizens in politics or in political actors, representatives and governments. These are accompanied by an increasing lack of political literacy[7] and a decline in political party membership.[8] At the same time the power of unelected actors, such as transnational institutions, banks or other bodies, such

4 Crozier et al. 1975.
5 Ercan–Gagnon 2014: 4.
6 Almond–Verba 1963.
7 Rapeli 2013.
8 Whiteley 2009.

as regulatory bodies which lack political accountability is growing.[9] All these trends that have led to an overall erosion of the robustness of democracy in many countries.[10]

The importance of citizen participation has been emphasised in several contemporary democratic theories, such as participatory democracy,[11] deliberative democracy,[12] direct democracy,[13] or difference democracy.[14] These approaches all focus on how to increase or deepen citizens' participation in decision-making.

- Modern theorists of *participatory democracy* argue that by involving citizens in decisions that affect them, they will feel more responsibility for the decisions they make, and thus view them as more legitimate. Public participation plays a major role in creating rules that are acceptable to all.[15] Furthermore, participatory democrats see the importance of increased citizen participation not only in political decision-making, but also at the level of smaller communities or workplaces.[16]
- The starting point of *deliberative democracy,* which will be discussed in more detail below, is that citizens' deliberation should be decisive when decisions are being taken that affect everyone. This allows rational decisions to be taken, based on public reasoning and with greater legitimacy, as the views of individual citizens can be heard and taken into account in the deliberation.
- Like participatory democracy, *direct democracy* focuses on the involvement of citizens in decision-making about public affairs, but differs from it in that it places more emphasis on institutional aspects such as referendums or popular initiatives.[17]
- According to *difference democrats,* it is also important that the views of oppressed groups in society are taken into account when decisions are made, thus legitimising those decisions.[18]

These approaches, which bring citizens' views to the forefront of decision-making, are clearly important because they reflect the very nature of democracy itself by bringing together a range of perspectives and interpreting positions from different angles.[19] There is a growing belief that "the cure for the ills of democracies is democracy",[20] i.e. the adoption of practices that propagate more democracy and more effective forms of citizen participation in decision-making, such as democratic innovations.

9 Vibert 2007.
10 Mair 2013.
11 Pateman 1970.
12 Bohman 1998.
13 Saward 1998.
14 Young 1990.
15 Michels 2011: 278.
16 Barber 1984.
17 Antal 2009: 84.
18 Dryzek 2000: 57.
19 Dean et al. 2019.
20 Dalton et al. 2003: 251.

Democratic innovations

Recent decades have therefore seen a growing number of democratic innovations that call for democratic practices that broaden and deepen citizens' participation in political decision-making. All of this is designed both to increase the legitimacy of decision-making and to 'lure' disenchanted citizens back into politics.

Democratic innovations are "institutions that have been specifically designed to increase and deepen citizen participation in the political decision-making process".[21] Another approach defines democratic innovations as "processes or institutions that are new to a policy issue, policy role or level of governance and are designed to rethink and deepen the role of citizens in governance processes by increasing opportunities for participation, deliberation and influence".[22] The concept of democratic innovation can also be defined as "the successful implementation of a new idea that is intended to change the structures or processes of democratic government and politics in order to improve them".[23]

Innovations aimed at involving citizens in decision-making and changing political institutions to make them more participatory were grouped by Smith into the following categories:[24] electoral innovations, consultation innovations, deliberative innovations, co-governance innovations, direct democracy innovations and e-democracy innovations. Based on this categorisation, Newton distinguishes between so-called top-down and bottom-up democratic innovations:

- In the *top-down* approach, innovation should focus on political structures and processes to make the instruments of representative governance work even better and to improve their performance either horizontally, in terms of regulation and oversight of government and public institutions, i.e. improving checks and balances, or vertically, in terms of their accountability to citizens and responsiveness to public opinion.[25]
- Meanwhile, *bottom-up* innovations are primarily aimed at enabling citizens interested in political participation to become more proactive in public affairs on the one hand, and at improving the political knowledge and skills of less active citizens on the other, thereby encouraging their participation. These forms of innovation therefore seek to improve the quality and quantity of participation and to emphasise the direct nature of participation.[26]

[21] Smith 2009: 1.
[22] Elstub–Escobar 2019: 14.
[23] Newton 2012: 4.
[24] Smith 2005.
[25] Newton 2012: 6–7.
[26] Newton 2012: 8–9.

Five main types of practices can be identified among these democratic innovations:[27]

- *Mini-publics:* These are forums where citizens, selected to participate, decide on issues in various different policy areas (e.g. health, environment, social policy, constitutional reform) and at different stages of the policy process (from policy formulation to monitoring), as well as at local, regional, national and transnational levels of governance, based on deliberation and possibly complemented by decision-making through aggregation of preferences.
- *Participatory budgeting:* Typically operating at a local level and usually open to all citizens in the community concerned, in this approach it is up to the people to decide how public spending is allocated. While there may be a role for deliberation, decisions are usually made by aggregating opinions.
- *Referenda and citizen initiatives:* These are perhaps the most widely known forms of public participation, where decisions – which may be either advisory or binding – are made by aggregating votes.
- *Collaborative governance:* This category includes a number of practices that are varied in terms of the interaction between citizens and government, but which all include as an important element a participatory mode based on discussion and decision-making which aims at consensus building, which can be based either on negotiation or deliberation. Examples of these practices can be found in a wide range of policy areas and at various stages of policy-making, and at local, regional, national and transnational levels.
- *Digital participation:* In the digital space, it is possible for forms of democratic innovation to emerge with characteristics of any or all of these categories. However, it is still worth considering digital participation as a separate category of democratic innovation, as online platforms allow participants to observe, listen, deliberate and vote, even simultaneously during the same process and much more easily than is possible in "offline" spaces.

As can be seen, deliberation is a dominant element in most democratic innovations,[28] and the term 'democratic innovation' itself was closely associated with deliberative democracy when it first appeared in the literature.[29] It is therefore worth briefly reviewing the main theorems of deliberative democracy.

The deliberative paradigm

The deliberative democracy paradigm proposes several different approaches to increasing the level of deliberation in democracies, and various ways in which deliberative practices

[27] Elstub–Escobar 2019: 24–27.
[28] Asenbaum 2022: 682.
[29] Saward 2000.

can be implemented. However, all these different approaches share a number of elements that make the deliberative paradigm not only a theory of democracy in its own right, but also distinguish it from other theories that promote citizen participation in various forms.

The starting point of deliberative democracy is that decision-making should be based on a decision taken by citizens in a process of deliberation, not by voting,[30] and that the legitimacy of the decision derives from the fact that it is taken collectively by citizens – the people affected by the decision – in collective deliberation.[31]

In this context, deliberation involves a debate or exchange of arguments between citizens in which the participants discuss the problem at the heart of the deliberation and their proposed solutions. An ideal deliberation must fulfil a number of conditions: equality is a basic requirement, i.e. the opinions of all participants have the same 'value'; there must be open and free expression of opinion; each position must be supported by arguments; the common good must be taken into account; the interests of all participants must be considered and mutual respect must be shown.[32] Other important elements of deliberation are reflection and seeking mutual understanding, so that participants are willing to change their preferences during the process.[33] For all these reasons, and because the deliberative process allows both minority and individual voices to be heard, and because everyone has the opportunity to persuade others of the validity of their views, deliberative democrats believe that the outcome of deliberation should be a rational decision.[34] In fact, deliberative democracy puts communication at the heart of decisions that affect everyone.

Deliberative forums for deliberation can also be examined on the basis of micro and macro divisions:[35] approaches that examine the level of already institutionalised practices interpret the location and institutionalisation of deliberative forums, ranging from local citizens' bodies and expert forums to parliament.[36] What these different approaches have in common, however, is deliberation: in all of them, the confrontation of arguments and interests, their consideration and reflection, in short, communication, play important roles.

Several criticisms of the practical application of deliberative democracy have been made, which are also worth mentioning briefly. Critics of the immanent features of deliberative democracy argue, for example, that deliberation does not work optimally in all cultural contexts, and therefore the deliberative process cannot be sufficiently inclusive even if all the ideal conditions for deliberation are met.[37] This is because, despite its best efforts, deliberative democracy "systematically excludes a variety of voices from effective participation in democratic politics".[38] Moreover, critics argue that citizens, the building blocks

30 See Elster 1998; Gutmann–Thompson 2004.
31 See Gutmann–Thompson 1996: 41–42; Dryzek–List 2003; Levine et al. 2005.
32 See Steiner 2012; Bächtiger et al. 2018.
33 Dryzek 2001.
34 Benhabib 1996.
35 See Hendriks 2006; Chappell 2010.
36 See Rose–Sæbø 2010; Parkinson–Mansbridge 2012; Dryzek 2012; Chwalisz 2019.
37 Sanders 1997.
38 Dryzek 2000: 58.

of the deliberative approach, do not have the skills to make deliberative democracy work anyway.[39] Parkinson points out shortcomings in the concept of legitimacy in deliberative theory.[40] Another criticism is that deliberative forums can delegitimise traditional democratic processes, such as elections,[41] because deliberative approaches are often presented as more 'democratic' than traditional institutions of democratic decision-making. Some critics, however, have also questioned the point of institutionalising deliberative democracy or the possibility of adapting these practices more widely, because support for deliberative democracy is not universal.[42] However, despite these criticisms, in practice more and more countries are implementing deliberative democratic practices in their decision-making.

Deliberative practices in decision-making

The reason for the increasing adoption of deliberative practices around the world is that public participation is perceived as having a positive impact on the quality of democracy: it involves citizens in decision-making who can influence it, it encourages the exercise of civic skills, such as communication skills, knowledge of the political system and the ability to think critically about political life, and, thanks to deliberation, it leads to rational decisions based on public reasoning, thus increasing the legitimacy of decisions.[43] The direct involvement of citizens in complex decision-making processes is one of the most important innovations of the "third wave" of democratisation.[44]

Furthermore, the changes listed above have measurable benefits in practical terms: not only can deliberation legitimise government decisions, but also the exchange of information between citizens and decision-makers prior to the implementation process of government policies can have an impact on the effectiveness of policy implementation, because listening to citizens' views and experiences can lead to optimal outcomes when deciding between conflicting alternatives.[45]

Not surprisingly, not only local, regional or national decision-making, but also supranational decision-making is increasingly open to deliberative solutions. A European Union recommendation in 2022[46] stresses the need for citizens to participate in the EU's deliberative process through consultations, citizens' assemblies and online platforms. Another recommendation made in the same year[47] also emphasises the need to make the EU more democratic, proposing the creation of a consultative mechanism of randomly

39 Somin 2010.
40 Parkinson 2003.
41 Lafont 2017.
42 Pilet et al. 2022.
43 Michels 2011.
44 Wampler 2012: 667.
45 Abdullah–Rahman 2015.
46 Kotanidis – del Monte 2022.
47 Alemanno 2022.

selected citizens to scrutinise proposals from other channels of participation or from the EU institutions themselves. Years before these recommendations, another study[48] examined whether, for example, the European Commission's consultation system could be effectively replaced by a citizens' jury of randomly selected citizens from different Member States. Another OECD report considered how deliberative practices could be incorporated into existing decision-making institutions to give citizens a direct and sustained role in the decisions that affect their lives.[49]

Measuring democratic processes and the relationship between concepts of democracy

Based on the above, it is not unreasonable to conclude that the participation of citizens in decision-making, and in particular the implementation of this participation through deliberative practices, has a positive impact on democratic processes. It may therefore be worth measuring the extent to which a country has incorporated deliberative democratic practices into its decision-making structure.

A number of indices or other metrics attempt to measure the quality of democracies or of different democratic practices:

- The Economist's Democracy Index measures the electoral process and the degree of pluralism, the functioning of government, political participation, democratic political culture and civil liberties.[50]
- V-Dem uses indices of electoral democracy, liberal democracy, participatory democracy, deliberative democracy and egalitarian democracy to measure the state of democracies.[51]
- Freedom House's 'Freedom in the World' report investigates political rights in each country – specifically the electoral process, political pluralism and participation, and the functioning of government. It also examines civil liberties: freedom of expression, freedom of association, the rule of law, and individual liberty in each country.[52]
- Another initiative worth mentioning is the Hungarian Good State and Governance Report (Jó Állam Jelentés), which examined changes and developments in government effectiveness in terms of security and trust in government, community well-being, financial stability and economic competitiveness, sustainability, democracy and effective public administration.[53]

48 Cengiz 2018.
49 OECD 2020.
50 *Economist Intelligence Unit* 2022.
51 *V-Dem* [s. a.].
52 *Freedom House* [s. a.].
53 *Jó Állam Jelentés* [s. a.].

A number of other indices or indicators have been devised that seek to measure democracy in various ways.[54] It is important to note that these indicators tend to focus on specific aspects of democracy – such as the enjoyment of freedoms, the rule of law or political pluralism, or on the democratic institutional structure, which may clearly determine the quality or level of democracy – but do not take into account all of them. In order to really measure the quality of a democracy or democratic processes, it may be more useful to consider some broader concepts of democracy.

The Schumpeterian minimalist approach to democracy essentially only requires democracy to account for the procedural dimension of democratic competition, such as the existence of open, free and unrestricted competition in elections and the selection of leaders in this way.[55] The "average" concept of democracy expects more than this, however: it considers a democratic institutional structure and a democratic procedural framework for gaining and retaining power to be necessary but not sufficient in themselves. In contrast, the broad or maximalist notion of democracy emphasises the horizontal and vertical accountability of power, and also interprets the role and nature of participation much more broadly and accords greater importance to citizen participation and deliberation in decision-making.[56]

In another interpretative framework, Coppedge introduces "thick" and "thin" approaches to democracy,[57] while Bühlmann et al. present a threefold typology based on the multi-level concept of democracy outlined by Lincoln in his Gettysburg Address: the minimalist or "elitist" concept means effective governance ("Government of the people"), the medium or participatory dimension means intensive and qualitative participation and representation ("Government of and by the people"), while the maximalist or social concept emphasises social justice and a high level of citizen participation and the most complete form of representation ("Government of, by, and for the people").[58] In Campbell's understanding, the minimalist approach to democracy is a more narrowly focused theory of democracy that defines democracy as a characteristic (property) of the political system, while the maximalist concept is a comprehensive understanding of democracy that refers to society, the economy and the environment and seeks to contextualise the political system within society.[59]

Broader conceptions of democracy, therefore, also take into account factors such as deliberative processes, which, as we have seen above, are particularly relevant to the quality of democracy. In the age of complex modern democracies, it may be essential to consider such factors as the extent to which citizens' views are sought and taken into account in decision-making when defining and measuring the quality or performance of democracies.

54 See Krieger 2022: 5.
55 Schumpeter 1942.
56 Fejes et al. 2014: 176–177.
57 Coppedge 2012.
58 Bühlman et al. 2008: 3–6.
59 Campbell 2008: 20-21.

Of the metrics presented earlier in this sub-section, only the V-Dem indices examine the existence of deliberative processes: the extent to which decisions are made with people's interests in mind, focusing on the quality of discourse on the one hand, and public policies on the other. This involves, for example, the extent to which the political elite publicly and reasonably justifies its position in general and in terms of the common good before making important policy changes, whether there is any level of consultation on this and, if so, the extent to which the political elite acknowledges and respects the arguments against its position, and the extent to which welfare programmes are broadly based.[60]

While the approach taken by the V-Dem to measure deliberative processes is very important, measuring democratic quality should also include an assessment of the deliberative capacity of nation states[61] and the extent to which democratic innovation practices based fundamentally on deliberation are emerging in a given country. The following sections will attempt to determine how the incorporation of deliberative practices in decision-making can be measured in a country, and which variables need to be taken into account.

METHODOLOGY

Theoretical background and detailed presentation of the metric

A precise method for measuring the deliberative dimension of democratic systems has not yet been developed, which would provide a valid basis for scaling up existing measures and integrating them into existing indices of democracy.[62] The aim of this paper, therefore, was to create a metric that could approximate the extent to which deliberative practices have been incorporated into the decision-making processes in a given country.

The paper does not claim that the metric it proposes addresses all questions related to measuring the level of deliberation in democracies. It may, however allow the adoption of deliberative practices in decision-making to be measured in terms of some of the most relevant factors involved. It may also allow the creation of a measurement method that can be used for making international comparisons and serve as a starting point for other, more complex measurement tools.

In order to measure the level of deliberative practices in decision-making in a country, the following factors may be useful to consider.

– *The level of embeddedness in decision-making*, i.e. the extent to which the decision or opinion of a deliberative body is binding on the democratic institution deciding on a given issue or topic: the deliberative forum can make a proposal or a recommendation, or the decision it takes may be binding on the decision-maker or not. The higher the level, the more embedded the practice is in the decision-making process.

60 Coppedge et al. 2021: 159–162.
61 Fleuss–Helbig 2021: 321.
62 Fleuss–Helbig 2021: 321.

The metric distinguishes between low, medium and high levels of embeddedness in decision-making:

- *Low-level* practices are those that do not lead to a concrete outcome at the end of the deliberative process, i.e. they do not formulate a concrete recommendation or proposal that the decision-maker can take into account.
- *Intermediate level* practices are those that formulate recommendations or suggestions but these do not need to be taken into account by the relevant decision-making body, and/or where the deliberative forum conducts its activities independently of the decision-making body and/or where the recommendation or suggestion emerging at the end of the deliberative process is not transmitted to the relevant decision-makers.
- *High-level* practices are those that formulate proposals or recommendations on a particular issue that are specifically communicated to the decision-making body, and/or where the deliberative process is initiated by the decision-making body, and/or the decision of the deliberative forum is binding on the decision-making body.

– *The deliberative level of the method*, i.e. whether the deliberative exercise is more "problem-focused" or "deliberation-focused". This categorisation is based on the distinction between the "external-collective" and "internal-reflexive" aspects of deliberation.[63] The former reflects the fact that democracy is essentially a form of collective decision-making, i.e. a shared decision by equal citizens (participants) (this is the basis of the "problem-focused" approach), while the latter focuses on the nature of deliberation, which emphasises its discursive character (this is the basis of the group of "deliberation-focused" methods). As will be shown below, this aspect of the metric "rewards" deliberation-focused exercises more than problem-focused exercises.

- In *problem-focused practices,* deliberation is present, but the emphasis is on the need to produce an outcome of the deliberative process, i.e. a report or a recommendation.
- In *deliberation-focused practices,* the focus is on deliberation, debate, and the clash of arguments, and there is not necessarily a product of the deliberative process, or no decision at all.

– *The scope of the method*, i.e. the level at which the deliberative process takes place and/or the level to which the decision or proposal (if any) it makes applies.

- *Local level practices* are deliberative methods at the level of a town or small local community, for example.
- *Regional level practices* include deliberative processes at the level of a county, a region, a province or even a federal state.

[63] Goodin 2000: 81.

- *National level* practices are those conducted by deliberative bodies on issues that affect the whole country, all citizens.

– *Population:* the population of the country (in millions of people). The purpose of this element of the metric is to make comparisons between countries more rational and proportionate, as it is assumed that countries with larger populations may in practice have more deliberative practices, although using population as a proportionality factor avoids giving disproportionately high scores by the metric to countries with large populations and many (or presumably more) deliberative practices.

The metric can determine the value of adapting and applying deliberative democratic practices to decision-making in a given country.

Using the metric in practice

The first step in applying this method of measurement is the collection of data, i.e. the collection of deliberative practices from the countries to be studied and compared, the listing of all deliberative practices and their venues (bodies, forums, meetings, methods, institutions, etc.) where deliberation is at the heart of the method. The metric measures each aspect separately and assigns a score to each (Table 1).

Table 1: Breakdown of the metric measuring the adaptation of deliberative practices in decision-making

Name of the component	Name of the aspects of the component	Description	
(A) The level of embeddedness in decision-making	a) Low-level	At the end of the deliberative process, the deliberative body does not make any specific recommendations or proposals.	1
	b) Intermediate level	The deliberative process makes a recommendation or suggestion, but it does not need to be taken into account by the decision-making body responsible for the case and/or the deliberation was carried out independently of the decision-making body.	2
	c) High-level	The deliberative process formulates a proposal or recommendation that is specifically addressed to the decision-making body, and/or the deliberative process is initiated by the decision-making body, and/or the decision of the deliberative process is binding on the decision-making body.	3
(B) The deliberative level of the method	a) Problem-focused	Deliberation is present, but the emphasis is on the end product of the deliberative process (a recommendation, proposal, etc.).	1
	b) Deliberation-focused	The focus is on the deliberation of the participants, not necessarily on the results from the deliberative process (a decision, recommendation, proposal, etc.).	2
(C) The scope of the method	a) Local level	A deliberative process at the level of a city or small local community.	1
	b) Regional level	A deliberative process at the level of a county, region, province or even a federal state.	2
	c) National level	A deliberative process on issues that affect the whole country, and/or all its citizens.	3
(D) Population	-	The population of the country (in millions).	x

Source: compiled by the author

The value of a country in terms of the application of deliberative practices in decision-making can be determined by assessing components A, B and C of each practice implemented by that country separately – i.e. for each practice, the level of embeddedness in decision-making, the deliberative level of the method and the scope of the method – and determining the values associated with these components.

EXAMPLE: A deliberative process with a high level of embeddedness in decision-making, which is problem-focused and is implemented at national level will score (3 + 1 + 3) = 7 for components A, B and C.

The D value for the country is then determined, which is the country's population in millions.

EXAMPLE: For a country with a population of 9 million 600 thousand, the D value will be 9.6.

The metric is derived from the components described above as follows:

$$X_{\text{(country) value of deliberative practices adapted in decision-making}} = \frac{[n_1(A + B + C) + n_2(A + B + C) + n_3(A + B + C) + n_x(\ldots)]}{D}$$

In other words, the value (A + B + C) is determined for each deliberative process, and then the values determined for each process for that country are added together. The final value of the metric for each country is obtained by dividing this aggregate value by the country's population in millions.

The metric is therefore an aggregate indicator that can determine the value of a country's employment of deliberative democratic practices in decision-making in terms of three main components: the degree of embeddedness of the deliberative practice(s) in decision-making in that country, the level of deliberation of the practice(s), and the scope of the method(s); the final value is given by a proportionality divisor based on the country's population in millions.

RESULTS OF TESTING THE METRIC

Testing of the metric, and thus the first study using the metric, was carried out on a sample of the 27 EU Member States. The study corpus included practices with a focus on deliberation that were listed on the Participedia platform and/or in the POLITICIZE

database up to the time of the study, i.e. June 2023. Participedia[64] is a platform listing democratic innovations and different practices of public participation, while POLITICIZE is the most systematic and comprehensive database of its kind, collecting the mini-deliberative public opinion exercises carried out in Europe since 2000.[65] Only those practices where deliberation is present and where this method is at the heart of the practice were included in the corpus of the study.

Unfortunately, a degree of subjectivity was inevitably present in deciding which practices to include in the study corpus. As there is no comprehensive database of deliberative processes of all forms and levels in all countries, compiled on the basis of objective criteria, which would fully include all the practices, there may have been cases that were not included in the study because neither Participedia nor POLITICIZE included them.

Raw data

The study found a total of 342 deliberative democratic processes in the 27 EU Member States that met the study criteria (Table 2).

Table 2: Components of the metric measuring the level of adaptation of deliberative processes in decision-making, and the associated item numbers and values for each country

Country	Total number of deliberative practices	Component A			Component B		Component C			Component D
		a	b	c	a	b	a	b	c	
Austria	28	-	26	2	28	-	12	13	3	9.10
Belgium	25	24	1	-	24	1	6	11	8	11.75
Bulgaria	2	2	-	-	-	2	-	-	2	6.45
Croatia	1	-	1	-	1	-	-	-	1	3.85
Cyprus	0	-	-	-	-	-	-	-	-	0.92
Czech Republic	0	-	-	-	-	-	-	-	-	10.83
Denmark	32	5	12	15	27	5	4	3	25	5.93
Estonia	2	-	-	2	2	-	-	-	2	1.37
Finland	7	-	7	-	7	-	2	1	4	5.56
France	37	-	34	3	37	-	9	15	13	68.07
Germany	76	-	75	1	76	-	47	17	12	84.36
Greece	1	1	-	-	-	1	-	-	1	10.39
Hungary	2	1	1	-	1	1	2	-	-	9.60
Ireland	6	1	1	4	5	1	2	3	1	5.19

[64] *Participedia* [s. a.].
[65] Paulis et al. 2021.

Country	Total number of deliberative practices	Component A			Component B		Component C			Component D
		a	b	c	a	b	a	b	c	
Italy	59	2	57	–	57	2	42	16	1	58.85
Latvia	1	–	1	–	1	–	–	–	1	1.88
Lithuania	0	–	–	–	–	–	–	–	–	2.86
Luxemburg	4	–	4	–	4	–	–	–	4	0.66
Malta	0	–	–	–	–	–	–	–	–	0.54
The Netherlands	18	–	18	–	18	–	16	1	1	17.81
Poland	9	1	8	–	8	1	9	–	–	36.75
Portugal	7	–	6	1	7	–	7	–	–	10.47
Romania	2	–	1	1	2	–	–	–	3	19.05
Slovakia	1	–	1	–	1	–	–	–	1	5.43
Slovenia	1	–	1	–	1	–	1	–	–	2.12
Spain	18	–	18	–	18	–	14	3	1	48.06
Sweden	3	–	3	–	3	–	3	–	–	10.52

Note: data of component D is based on Eurostat 2023. The results are derived from the practical application of the metric using the data of Participedia and POLITICIZE databases.
Source: compiled by the author

It can be seen that large differences exist between the countries studied. I believe that one explanation for this could be the size of the population: in countries with a larger population, the promotion of deliberation can take place not only at the regional and/or national level, but also at the local level, simply because more citizens feel the need to have a direct say in decisions through democratic innovations; on the other hand, it can also be explained by the development of a democratic culture in the sense that some countries, regardless of their population size, wish to focus more on the practical application of deliberative methods and thus on the direct involvement of citizens in decision-making, while others do not. In any case, simply comparing absolute levels of deliberative practices in decision-making does not give a complete and undistorted picture of the ranking of EU Member States in this respect.

It is therefore necessary to examine the practices listed in Table 2 using the methodology described in Section 3 of this paper. For each deliberative democratic practice used, the level of deliberation, the degree to which it is embedded in decision-making, and the scope of the method were determined on the basis of the information available on the practice. By aggregating them for each country and then dividing this value by the population in millions, it is possible to determine the values given by the metric for each country and to establish a ranking of the application of deliberative practices in decision-making in the sample under investigation, in this case the EU Member States (Figure 1).

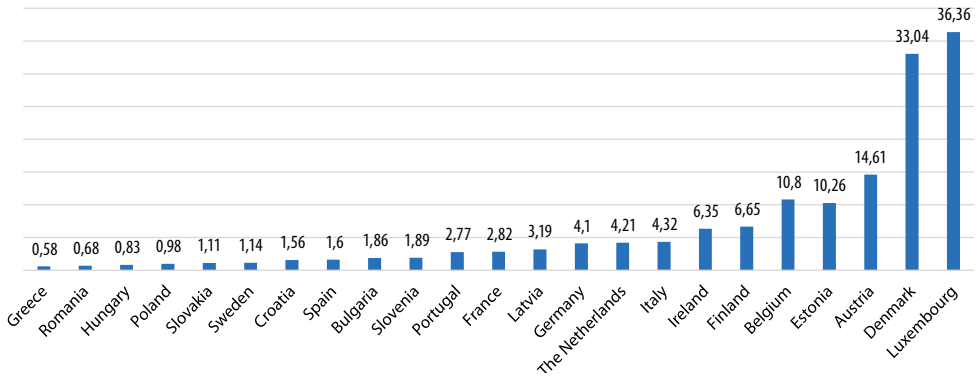

Figure 1: Ranking of the 27 EU Member States according to a metric of their use of deliberative practices in decision-making (countries for which no deliberative democratic practices were found to meet the criteria are not shown)
Note: The values of indicators A, B and C presented above were aggregated and then these aggregated values were divided by the country's population of one million (D). This gave the score for each country, which was then ranked.
Source: compiled by the author

The above dataset was compiled using the methodology detailed above: for each practice, the degree of embeddedness in decision-making, the level of deliberation and the scope of the practice were determined, then the A, B, C values for each practice were aggregated, and then these aggregated values were divided by the population of the country in millions. This gave the scores for each country, which were then sorted.

Examining the data, a clear divide can be seen between the lower and higher scoring countries, as well as a clear "lagging behind" of some countries compared to others. The resulting order is worth interpreting in the light of some important observations.

- A higher number of cases, i.e. a higher number of deliberative democratic practices used, does not necessarily imply a higher value, as the measure relates the practices under scrutiny to the population. For example, although Germany has by far the largest number of deliberative practices (76) and is the EU country with the largest population (over 84 million), because of its scores across the metric, it is in the middle of the range.
- However, the number of cases can also increase the value produced by the metric, but this is closely related to the size of the population: in the case of Luxembourg, only 4 deliberative practices in decision-making were identified, but given the population of the country (around 660,000), these 4 practices, which obtained essentially high scores for the inner aspects of the measure, also gave the country a high value.
- The component of the metric marked A, i.e. the level of embeddedness in the decision-making process, can "highlight" the value of a country if there are many practices where legally binding decisions are taken, in other words, if the decision-making

body or even the executive in a given case is obliged to take the decision of the deliberative body into account in practice, or if the decision-making body itself initiated the deliberative process in order to obtain the views of citizens. This is precisely what explains the high score given by the metric in Denmark for the so-called consensus conferences, which are deliberative forums of citizens that also formulate concrete recommendations for political decision-making or legislation. However, if the purpose of the deliberative forum is only deliberation and no proposal or recommendation results at the end of the cooperation, it carries less weight.

– Component B of the metric, i.e. the deliberative level of the given process, is intended to compensate for this aforementioned lower weighting and to "reward" exercises that emphasise deliberation. As can be seen in the case of Bulgaria, with only two practices at the national level, which do not have a great direct influence on decision-making but which focus on deliberation, and with a relatively small population (although it is not a mini-state), it scored higher than some countries where more deliberative processes were identified.
– The value of component C, i.e. the scope of the practice(s), also influences the score a country receives. As this analysis now examines the extent to which citizens are consulted and the extent to which their decisions are incorporated into decision-making at the end of a deliberative process based chiefly on representative systems, it is perhaps simplistic, but in the case of the metric it 'rewards' deliberative practices at the national level, i.e. the higher the level at which the method is implemented, the higher the metric. Therefore fewer, but national level practices may score higher than a greater number of practices that are largely at the level of local deliberative bodies. The latter can be seen, for example, in the case of Italy: three quarters of the 59 practices in the corpus were local, which had a strong impact on the value given by the metric.

The following section will examine the systematisation of the data from a different perspective, in order to enable a more structured interpretation of the data.

Systemised data

Looking at deliberative democratic practices in decision-making in the Member States of the European Union and assessing them with the help of the metric, the following categories can be distinguished:

1. *Laggards.* This group includes countries that have not yet been affected by the trend of more deliberative practices,[66] i.e. the increased use of deliberative practices and their implementation in decision-making at various levels since the 1990s, and are thus falling further and further behind countries that are already at the forefront. The

[66] Dryzek 2000: 1.

countries included in this group are those that either did not use deliberative practices at all in their decision-making processes, or which used them very rarely (in relation to their population) and at a low level, or those which used them several times at a high (national) level, but the decision taken by the deliberative body was not legally binding. The countries included in this group in the current study are those at the bottom of the list based on the scores assigned to each country by the metric: Malta, Cyprus, the Czech Republic, Lithuania, Greece, Romania, Hungary, Poland and Slovakia.

2. *Emergers*. In the present study, this group includes countries where there is either a visible will to incorporate deliberative practices into decision-making at a high level, or where there is a small but high level of deliberation on important issues, even those affecting society as a whole, or where the number of deliberative practices implemented is in proportion to the country's population. The countries in this group performed better than those in the first group in terms of the metric's measures of adoption of deliberative practices and comprise Sweden, Croatia, Spain, Bulgaria and Slovenia.
3. *Aspirers*. This group includes countries where citizens' deliberation is already an active part of the decision-making process, i.e. decisions taken by deliberative bodies often have a real impact and are taken into account by the legislator. However, it is possible that some countries have used even fewer deliberative practices in decision-making relative to their population size, and are therefore 'penalised' by the proportional nature of the metric. The countries in this group are Portugal, France, Latvia, Germany, Italy, Ireland, the Netherlands, Ireland and Finland.
4. *Exemplars*. These "elite" countries are pioneers and role models in incorporating deliberative practices into decision-making: Belgium with its large number of deliberative practices at all levels of decision-making; Estonia with its first digital People's Assembly enabling online deliberation; Austria with its many deliberative bodies at local level; Denmark with its consensus conferences going back decades; and the mini-state of Luxembourg with its deliberative practices on a small number of high-profile issues compared to the others.

DOUBTS ABOUT THE METRIC AND ANSWERS

A metric such as the one presented above raises a number of questions. The most important questions are, of course, those of validity and reliability, the two basic requirements of scientific research: that is, whether the method really measures what it is intended to measure, and whether the measurement will produce similar results if repeated several times. Just as no social science model that attempts to explain reality using different methods can be perfect – since it can only ever approximate the object of its study – so no measure of the application of deliberative practices to decision-making can be perfect. Nevertheless, I would argue that the metric presented above provides a good approximation of a valid value for a given country in terms of the employment of deliberative practices in decision-making, which becomes meaningful when compared with other countries. The following

section of the paper attempts to respond to the most controversial points and arguments concerning the metric, its aspects, purpose or methodology.

As mentioned above, the main difficulty was that there is no comprehensive database listing and detailing deliberative practices in all (European) countries, so it is possible that not all cases were included in the study corpus – it is assumed that the latency is particularly high for deliberative initiatives at the local level. Related to this was the problem of incomplete data: i.e. even if an exercise was listed either on the Participedia platform or in the POLITICIZE database, it was not always possible to determine with sufficient certainty how it was embedded in decision-making, its scope or its level of deliberation. Moreover, in several cases there were duplicates or even merged cases – for example, if a deliberative exercise was repeated or regular. In all cases, an 'expert estimate' was made to determine these practices for the components of the metric. Problems also arose in relation to incomplete data, where precise details of a practice going back several decades could not be found in the databases used to build the corpus, neither in the literature nor on the internet. These practices, found by mention or only by name, were ultimately not included in the corpus as there were essentially a small number of such cases, which presumably did not significantly bias the analysis.

In addition to the more general difficulties, the practical testing of the measure also revealed potential problems with its content. Since these external difficulties outlined above may also represent fundamental internal validity and reliability problems for the metric, the following part of this section will attempt to refute and answer the most important doubts and questions, thus demonstrating the integrity of the metric.

1. *The metric does not distinguish between offline and online practices.* Indeed, no distinction is made between the offline and online deliberative methods found in the study corpus. The reason for this is that this metric does not examine the (qualitative) differences between online and offline deliberation, but rather the existence of deliberation and its impact on decision-making. In this respect, there is no meaningful difference between online and offline practices.
2. *The metric does not take into account either interregional/international cooperation nor supranational (EU) deliberative initiatives.* The main purpose of this metric is to measure and compare the extent to which different countries apply the results of deliberative democratic practices in decision-making. That is why the units of analysis in this respect are countries, whereas including deliberative multi-country cooperation in the metric would require the introduction of additional dimensions that would not provide added value.
3. *The metric could also take into account other aspects, such as the acceptance of deliberative practices in a given country, the diversity of deliberative practices, etc.* While the metric could be extended to include many other important aspects, the aim was to provide a basis for measuring with a high degree of certainty the level of deliberative processes adopted by each country in decision-making, and thus to allow for comparison. An extended metric can of course include other relevant aspects.

4. *The metric is too simplistic in measuring deliberative practices (scores 1, 2, 3).* Again, the aim was simplicity and clarity to create a metric that works well. In the future, it may be worth considering using a scale rather than a dedicated score to measure the aspects under consideration, but for the time being this simplified approach was intended to show that the metric is usable and works.
5. *The metric overestimates practices at national level.* Starting from the premise of practical ways to make representative systems more 'democratic', the present study aimed to examine and measure the embeddedness of the results of deliberative processes in decision-making as a kind of remedy for the failures of the representative system. In this sense, since the representative system is the focus and level of analysis of the metric presented here, the metric in this instance "rewards" practices at the national level more. However, the metric also has the advantage that the values 1, 2, 3 associated with each component can be reversed or swapped if, for example, the aim is to 'reward' practices at local level – and the same is true for the other components.

CONCLUSION

At this point it may be possible to answer the central question of the paper formulated in the introduction: is it possible to construct a metric that can measure the level of embeddedness of the results of deliberative practices in decision-making in a given country? When the metric was tested on a sample of EU Member States, the results showed that it is.

The measure was tested on a sample of 27 EU Member States. The corpus of the study consisted of deliberative practices already implemented by the EU27, collected from the Participedia and POLITICIZE databases. For each country studied, the value given by the metric was determined and then, using these values, a ranking was established and four groups were identified in terms of the embeddedness of deliberative practices in decision-making: Laggards, Emergers, Aspirers and Exemplars.

However, the metric presented in this paper is only a starting point: in order to measure with even greater validity the embeddedness of the deliberative practices, whether in decision-making or in other policy areas, it may be necessary to include other factors in the measurement. For example:

- the variety of deliberative practices implemented, i.e. how many different deliberative practices are used in a particular country, as different practices can be used for different purposes and have different outcomes, and therefore the use of a variety of deliberative practices can also show a high level of adoption of deliberative democracy
- opinions about deliberation or the acceptance of deliberation in a given country may be considered because if, for example, there is a strong resistance in a society to implementing deliberative decisions in legislation or policy-making, there are likely to be fewer practices, and this will obviously influence the level of deliberative practices adopted

– it may also be worthwhile to include the number of different forms of direct democracy, such as referendums, which also seek in different ways to channel citizens' opinions into decision-making, and to look at how deliberative or direct democratic practices are manifested in a given country – for example, whether all are present, none are present, or one or the other is predominant – and to assess deliberative democratic trends in this light.

One might also ask why it is necessary to quantify a process such as the embedding of the results of deliberative practices in decision-making, and why it is necessary to measure these trends in this way. The related literature and research show that decisions made through deliberation have greater legitimacy, allow individual interests and opinions to be heard and reflected, and are perceived as more "owned" by citizens. In short, they make democracy more democratic. Therefore, it may be necessary to measure the extent to which a particular country has incorporated deliberative practices to "complement" the representative system in order to channel citizens' opinions into decision-making. The metric presented in this paper will not only allow this, but also the impact of the results of deliberative practices on decision-making to be tracked, measured and monitored for change from time to time, and the democratic impact and consequences of this to be examined.

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PERSPECTIVES ON SUSTAINABLE PROJECTS ALIGNED WITH UN DEVELOPMENT GOALS

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Sustainability has emerged as a paramount global concern in the 21st century, and the United Nations Sustainable Development Goals (SDGs) stand at the forefront of the efforts to address it. This study delves into the profound implications of these SDGs for sustainable projects carried out by organisations. Sustainable projects are those that align with the principles and objectives outlined in the SDGs, thereby contributing to a more inclusive and environmentally responsible future. By attempting to achieve these goals, sustainable projects not only mitigate environmental degradation but also foster economic development and social progress. This study explores the critical link between sustainable projects of organisations and the SDGs, whether the projects have contradictory impacts or just the opposite, they can also strengthen each other. The hypothetical assumption is that there is tension between the goals and actions of contradictory and synergistic movements. The transformative power of sustainable projects is underscored through real-world examples and case studies, showcasing how they can address complex, interconnected challenges. The literature review lends support to the hypothesis that in some cases certain sustainable goals might confront each other. A pilot study methodology employing impact measurement is used to prove the hypotheses about how the goals support and contribute to or affect each other's results. The results underscore the essential role of sustainable projects. The conclusion also highlights the critical need for research and project development that can effectively navigate the tension between contradictory and synergistic goals within the SDG.

Keywords:
ESG, SDG, strategy, sustainable projects, synergistic goals

INTRODUCTION

The Sustainable Development Goals outlined by the United Nations serve as guidelines for attaining global peace and prosperity. They present a collection of approaches to enable both developed and developing nations to eradicate poverty, enhance health and education, and address climate change. However, these 17 goals are closely interconnected, potentially leading to conflicting dynamics and varied outcomes.

The SDGs consist of 17 goals and 169 targets to ensure human well-being, economic prosperity, and environmental protection simultaneously. The goals thus established are interdependent and provide a blueprint for a global partnership between the developed and developing countries to achieve economic prosperity, ensure environmental protection and safeguard the well-being of people around the world.[1]

The SDGs assume that efficiency improvements will suffice to reconcile the tension between growth and ecological sustainability.[2] This paper draws on empirical data to test whether this assumption is valid, paying particular attention to projects by companies that concentrate on supporting targets or goals that are associated with a multiple impact on achieving the overall objectives of SDGs.

LITERATURE REVIEW

Sustainability, particularly through the lens of the UN Sustainable Development Goals (SDGs), has gained immense prominence in global discourse in the 21st century. The interaction between the realisation of these SDGs and the types of sustainable projects undertaken by organisations and commercial enterprises forms a critical nexus influencing economic, environmental, and social progress.

In terms of the conceptual framework of sustainable projects and sustainable development goals, Dyllick and Muff (2016) present a typology ranging from business-as-usual to true business sustainability, delineating the various stages organisations undergo in adopting sustainable practices.[3] They stress the need for a comprehensive transformation of business models and practices to achieve genuine sustainability aligned with the SDGs. Elkington (1997) introduces the concept of the "triple bottom line" as a framework for businesses to assess their environmental and social impact in addition to financial performance.[4] This concept resonates strongly with the multifaceted approach of the SDGs, emphasising the need for organisations to address the ecological, social, and economic dimensions of their activities simultaneously.

1 Igini 2024.
2 Hickel 2019.
3 Dyllick-Muff 2016.
4 Elkington 1997.

In an analysis of the contradictions and tensions within and between the SDGs Hickel (2019) and Hickel (2015) highlights the inherent contradictions between economic growth and ecological preservation within the SDGs.[5] He argues that pursuing unlimited growth on a finite planet, as advocated in some SDGs, contradicts the goal of ecological sustainability.[6] Frame, McDowell, and Fitzpatrick (2022) provide empirical evidence on the ecological contradictions of the SDGs in the context of Malaysia, emphasising the complexities and challenges facing the country in their implementation.[7] Menton et al. (2020) echo similar sentiments, pointing out the gaps and contradictions within the SDGs, especially concerning environmental justice.[8] Their work emphasises the need to address discrepancies in the SDGs and gaps in their scope to achieve a more holistic sustainability agenda. Pradhan et al. (2017) examined SDGs to find the positive and negative correlations between indicator pairs to allow the identification of particular global patterns.[9] They established that the attainment of the SDG agenda will greatly depend on whether the identified synergies among the goals can be leveraged. In addition, the highlighted trade-offs, which constitute obstacles in achieving the SDGs, need to be negotiated and made structurally nonobstructive by implementing deeper changes in the current strategies.

In connection with corporate strategy and sustainable development Eccles and Serafeim (2013) discuss the performance frontier and the importance of innovation for sustainable strategy.[10] They emphasise the role of innovation in navigating potential conflicts between various SDGs, by aligning them more synergistically with organisational goals. Whiteman, Walker, and Perego (2013) discuss planetary boundaries and their significance in defining the ecological limits for corporate sustainability efforts.[11] They argue that businesses must operate within planetary limits, aligning with several SDGs related to environmental conservation. Sharma and Vredenburg (1998) emphasise the development of organisational capabilities through proactive corporate environmental strategies.[12] Their work sheds light on the integration of environmental concerns within an organisation's strategic capabilities, possibly aligning with certain SDGs.

Kolk and Lenfant (2010) investigated multinational corporations' reporting on CSR and conflict in Central Africa, underscoring the complex relationship between CSR initiatives and regional conflicts.[13] Their study highlights the ethical and practical challenges of aligning SDGs with business activities in regions marred by conflict. Hopkins (2012) highlights the significance of corporate social responsibility (CSR) and its impact on

5 Hickel 2019.
6 Hickel 2015.
7 Frame et al. 2022.
8 Menton et al. 2020.
9 Pradhan et al. 2017.
10 Eccles-Serafeim 2013.
11 Whiteman et al. 2013.
12 Sharma–Vredenburg 1998.
13 Kolk–Lenfant 2010.

business strategies, emphasising the relevance of CSR in advancing the SDGs.[14] Waddock (2017) differentiates between Environmental, Social, and Governance (ESG) initiatives and CSR activities, providing insights into the evolving landscape of sustainability in business and its connection to the SDGs.[15] His work contributes to understanding how organisations navigate the complex terrain of sustainability and societal responsibilities. In contrast, Lozano and Huisingh (2011) explore the interrelationships between corporate social responsibility, sustainability, and governance, emphasising the importance of governance structures in driving sustainable practices.[16] Their study sheds light on how CSR initiatives within organisations can align with the SDGs.

In their examination of the role of corporate commitment and political activity, Russo and Harrison (2005) explore the relationship between organisational design and environmental performance focusing on the electronics industry.[17] This work underlines the significance of organisational structures in influencing environmental outcomes, potentially intersecting with SDG objectives. Möllering, Rasche, and Henry (2022) investigate cross-sector social partnerships as a form of corporate political activity.[18] They provide insights into how businesses engage with external stakeholders to promote sustainability and SDG-related goals. Schuler Rehbein, and Cramer (2002) studied the pursuit of strategic advantage through political means drawing attention to how corporate political activity may influence and align with certain SDGs, especially in fostering supportive policy environments.[19] Schaltegger and Wagner (2011) explore sustainable entrepreneurship and innovation, identifying the categories and interactions that drive sustainable practices in businesses.[20]

Schaltegger and Burritt (2017) went on to explore the measurement and management of sustainability performance in supply chains.[21] Their work demonstrates the importance of quantifying and managing the environmental and social impacts of business operations, thus aligning with SDG goals. In a slightly different vein, Hamilton (2013) examines the link between corporate responsibility and economic development, emphasising the performance requirements for sustainable economic growth, an issue relevant to various SDGs.[22] This study explores how organisations can contribute to economic growth while maintaining responsible and sustainable practices.

In conclusion, this literature review has demonstrated the multifaceted nature of the relationship between sustainable projects and the SDGs. It highlights the tensions, contradictions, and potential synergies between them, demonstrating that a more comprehensive approach is required to align organisational practices with the diverse and

14 Hopkins 2012.
15 Waddock 2017.
16 Lozano–Huisingh 2011.
17 Russo–Harrison 2005.
18 Möllering et al. 2022.
19 Schuler et al. 2002.
20 Schaltegger–Wagner 2011.
21 Schaltegger–Burritt 2014.
22 Hamilton 2013.

interconnected objectives of the SDGs. Taken together, these scholarly works emphasise the need for further research and the development of strategic approaches to navigate the complex landscape of sustainable development and sustainable development goals.

RESEARCH QUESTIONS AND HYPOTHESES

In the dynamic landscape of sustainable development, the pursuit of United Nations' Sustainable Development Goals (SDGs) has become a central focus for various entities, including corporations. This research aims to address two critical questions shaping the discourse on SDGs and corporate engagement.

The research explores the critical link between sustainable projects conducted by organisations and the SDGs, as projects can strengthen each other or, on the contrary, have contradictory effects. By this means, the study will attempt to answer the first research questions (Q1) of *How can tension be identified between the goals and actions of contradictory and synergistic movements of SDGs that can be eased by dedicated SDG projects of companies?* Another research question (Q2) explores the link between targeting strategy and measurement: *How can new metrics of SDG projects identify the gap between the goals and create a link with the targets?*

The assumption of our first hypothesis is that there is a significant tension between the goals and actions of contradictory and synergistic movements. As the first hypothesis (H1) states: *There is a significant tension between the goals and actions of contradictory and synergistic movements of SDGs in the dedicated SDG projects of companies, impacting their alignment with SDG objectives.* The second hypothesis (H2) assumes the need for a specialised measurement approach*: New metrics developed for SDG projects will identify a gap between the stated goals and their actual achievement, highlighting discrepancies or missed links among specific SDG targets.* The first research question seeks to unravel the intricate relationship between contradictory and synergistic movements across the spectrum of SDGs. As companies align their actions with specific goals, a complex interplay of tensions may emerge. Some goals might inherently come into conflict with each other, while others synergistically complement each other. This study intends to identify instances during the pursuit of project goals where tensions arise between SDGs that are contradictory and synergistic and, crucially, whether projects initiated by companies that are dedicated to meeting one or more SDGs can serve as mechanisms to ease these tensions. Exploring this aspect is of fundamental importance not only for corporate strategists but also for policymakers and stakeholders aiming to take a harmonised approach to sustainable development.

The second area of investigation concerns how new metrics for measuring the achievement of SDG projects can identify the gaps between goals and create a link between targets.

The second research question addresses the critical need for further developing metrics in the evaluation of SDG projects. Traditional metrics often fall short in capturing the multidimensional nature of the SDGs and fail to provide a nuanced understanding of the gaps between goals. This study will investigate how new, innovative metrics can be

developed to bridge this gap and establish a clear link between targets. By doing so, the research aims to contribute to the refinement of measurement tools, providing a more comprehensive and accurate assessment of the impact and effectiveness of SDG projects. This is particularly relevant for companies seeking to align their operations with the SDGs and for policymakers endeavouring to gauge the progress that has been made in achieving global sustainable development targets.

Through a rigorous examination of these two interconnected research questions, this study aspires to shed light on the complexities, challenges, and opportunities at the intersection of corporate initiatives and the SDGs. The findings have the potential to inform strategic decision-making for both businesses and policymakers, fostering a more cohesive and effective approach to sustainable development.

DATA AND METHODOLOGY

The literature review underlines the hypothesis that in some cases the sustainability goals might contradict or conflict with each other. A pilot study methodology with impact measurement is used to prove the hypotheses of how the goals support and contribute to each other's results. Given the complex nature of the topic, a mixed-method research approach is used. *Interview* – conducting interviews with key stakeholders involved in sustainable projects and the implementation of SDGs within organisations – and *case study* – analysing specific sustainable projects in a sample organisation, examining their alignment with particular SDGs and how conflicts or synergies emerge – methods were used in the *qualitative research,* whereas the *data analysis* of project performance metrics method was used in the *quantitative research*. The *method of triangulation* was used: the approach combined the qualitative insights gathered from interviews and the case study with quantitative data from performance metrics to gain a more comprehensive understanding of how sustainable projects relate to the SDGs.

A significant positive correlation between a pair of SDG indicators is classified as a synergy while a significant negative correlation is classified as a trade-off. As in previous research, this study set out to rank synergies and trade-offs between SDG pairs on global and country scales in order to identify the most frequent SDG interactions. For a given SDG, positive correlations between indicator pairs were found to outweigh the negative correlations in most countries. Among the SDGs, the positive and negative correlations between indicator pairs allowed for the identification of specific global patterns.[23]

An Expert Group on SDG Indicators endorsed a set of 230 individual indicators for monitoring progress in achieving the SDGs (Figure 1). This analysis made use of both country and country-disaggregated data. Hence, multiple time-series are available for the same indicator depending on the level of disaggregation. This study captures synergies and trade-offs

[23] Pradhan et al. 2017.

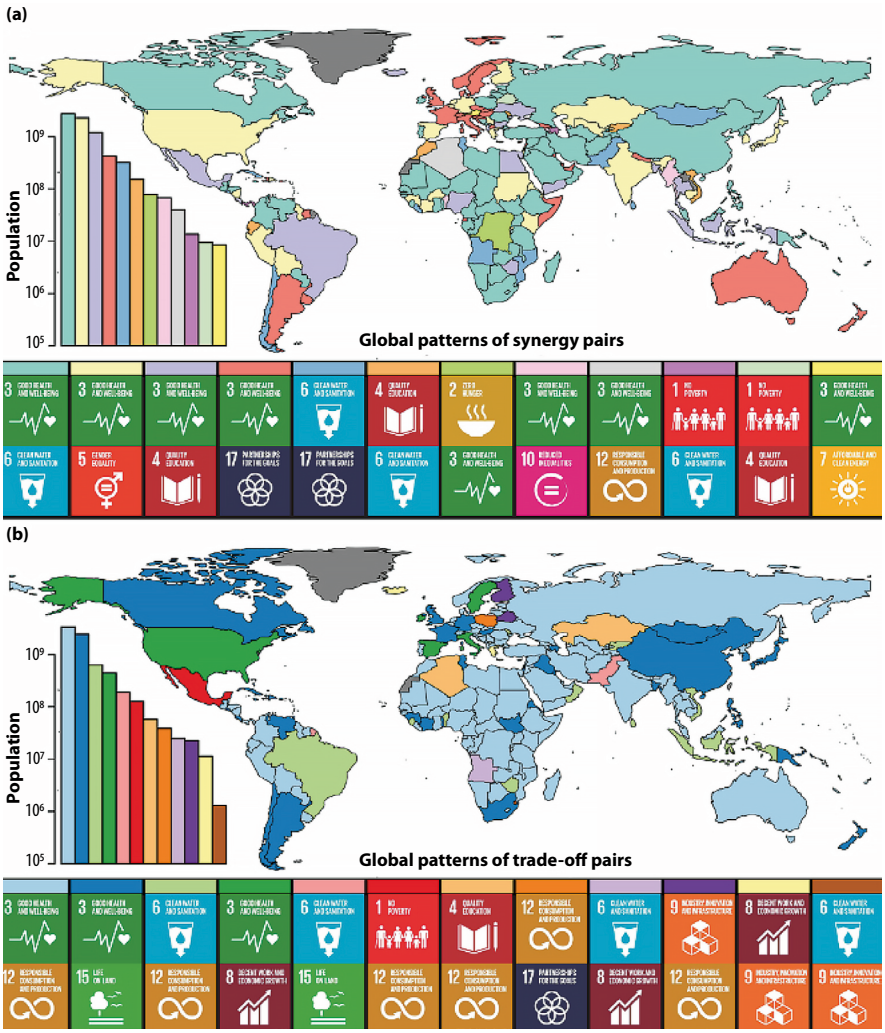

Figure 1: Global patterns of (A) synergy and (B) trade-off pairs with corresponding population for the year 2015 (bar chart)
The synergy between SDGs 3 (Good health and well-being) and 6 (Clean water and sanitation) is widely observed among countries with a total population of 2.7 billion. The trade-off between SDGs 3 (Good health and well-being) and 12 (Responsible consumption and production) is largely encountered among countries with a total population of 3.4 billion. The grey colour depicts regions with no data or with less than 10 data pairs.
Source: Pradhan et al. 2017

in a statistical sense, that is, as the existence of a significant positive and negative correlation, respectively. The correlation analysis is carried out between unique pairs of indicator time-series, taking into consideration both country-level and country-disaggregated data.[24]

DISCUSSION

To find an answer to our research questions of whether tension between goals can be eased by dedicated SDG projects being run by companies and, if so, whether new metrics for SDG projects would identify the gap between goals and create a link between targets, we conducted a pilot case study of a multinational company.

A global beverage company, Diageo,[25] implemented sustainable projects which are closely aligned with the principles and objectives of the United Nations Sustainable Development Goals (SDGs). In line with this article's title "Sustainable Projects from the Perspective of the UN Sustainable Development Goals" it is possible to explore how Diageo's initiatives contribute to and balance the often-conflicting demands of the SDGs.

The company has taken significant steps towards achieving several SDGs. These include SDG 6 (Clean Water and Sanitation) through their commitment to responsible water usage, SDG 12 (Responsible Consumption and Production) by promoting responsible drinking of alcohol and the sustainable sourcing of raw materials, and SDG 13 (Climate Action) through their efforts to reduce carbon emissions and mitigate climate change impact.

Moreover, the focus on community development and empowerment through initiatives related to SDG 1 (No Poverty), SDG 2 (Zero Hunger), and SDG 8 (Decent Work and Economic Growth) can be explored in the context of balancing contradictory elements within sustainable projects. Dedicated projects often address complex issues, such as balancing economic growth with environmental conservation and social responsibility.

The research investigated specific case studies or examples of how sustainable projects navigate and harmonise the potentially conflicting aspects of the UN SDGs, shedding light on the company's approach to creating a more sustainable and equitable world while contributing to the overall global goals.

A detailed analysis of the synergistic projects aimed to determine whether new metrics constitute a more sophisticated measurement that could capture the complex interactions and trade-offs between goals.

Our research explored the intricate relationships between Sustainable Development Goals (SDGs) and corporate initiatives, focusing on specific projects and their alignment with key goal areas. The table below outlines noteworthy projects, their associated SDGs, and the performance metrics employed by a global company, Diageo, to assess their impact (Table 1).

[24] Pradhan et al. 2017.

[25] Certain parts of this chapter are based on the website of the company and the below-mentioned site: www.sec.gov/Archives/edgar/data/835403/000083540323000016/deo-20230630.htm

Table 1: Consolidated project and metric summary on SDG synergistic projects of Diageo in 2023

SDGs in synergy	Goal areas in synergy	Project name	Tool	Company Aim with Project	Company Target description	2030 Target	Performance F23	Performance F22	Baseline year	Background information
SDG 3 – Good health and well being SDG 8 – Decent Work and Economy Growth SDG 12 – Responsible consumption and production	Social – Governance	Promote Positive Drinking	DrinkIQ	The aim is to invite consumers to change their attitudes to alcohol and empower them to achieve a balanced lifestyle	Number of markets that have launched DRINKiQ – Champion health literacy and tackle harm through DRINKiQ in every market where we live, work, source and sell	21	21	21	F20	Launched DRINKiQ in all the markets where it's legally permissible
SDG 4 – Quality education SDG 10 – Reduced in equalities	Social – Governance	Champion in inclusion and diversity	Learning for Life and other skills programme	The aim is to promote sustainable growth and a resilient supply chain through inclusive programmes giving equal access to resources, skills and employment opportunities. Other aim is to tackle barriers faced by other under-represented groups including the ethnically diverse community and people with disabilities	Number of people reached through Learning for Life and other skills programmes in fiscal 23 – Provide business and hospitality skills to 200,000 people, increasing employability and improving livelihoods through Learning for Life and our other skills programmes	200 000	31 600	22 230	F20	Markets with no such programmes are Australia, South Korea, Turkey and Eastern Europe
SDG 4 – Quality education SDG 8 – Decent Work and Economy Growth SDG 12 – Responsible consumption and production	Social – Governance	Champion in inclusion and diversity	DBA-Diageo Bar Academy	The aim is to drive sustainable growth in the hospitality sector and make it more diverse	Number of participations in training sessions delivered through Diageo Bar Academy in fiscal 23 – Through the Diageo Bar Academy (DBA) we will deliver 1.5 million training sessions, providing skills and resources to help build a thriving hospitality sector that works for all	1 500 000	236 000	190 383	F20	88% of survey respondents agreed or strongly agreed that DBA presents a modern and progressive view of the bar community
SDG 4 – Quality education SDG 8 – Decent Work and Economy Growth SDG 10 – Reduced in equalities	Social – Governance	Champion in inclusion and diversity	Creating inclusive communities	We're committed to addressing barriers women face in accessing the skills, resources and opportunities we provide	Percentage of beneficiaries of our community programmes who are women – Ensure 50% of beneficiaries of our community programmes are women and that our community programmes are designed to enhance diversity and inclusion of under-represented groups	50%	59%	64%	F20	The scope currently includes female beneficiaries of registered business and hospitality skills programmes. In future, the scope of this target will also include female representation on our water sanitation and hygiene (WASH) committees and women who benefit from initiatives such as our smallholder farmer programmes
SDG 4 – Quality education SDG 13 – Climate action SDG 17 – Partnerships for the Goals	Environmental – Social	Pioneeer Grain-to-glass susutaina-bility	Regenerative agriculture adaptives	The aim is to help farmers implement projects to test new regenerative farming approaches and practices, measure the results and share what we learn	Number of regenerative agriculture pilot programmes initiated – Develop regenerative agriculture pilot programmes in five key sourcing landscapes	5	1	1	F23	The programmes include: • On-the-ground programmes with farmers to test and integrate regenerative and low-carbon practices in crop production systems • On-farm measurements and data collection protocols to track improvements in soil health, soil carbon, biodiversity, water stewardship and farm profitability • Collaborative programmes with our suppliers, other commodity off-takers, expert agronomists, technology providers, NGOs or specialist organisations
SDG 4 – Quality education SDG 6 – Clean water and sanitation SDG 13 – Climate action SDG 17 – Partnerships for the Goals	Environmental – Governance	Pioneeer Grain-to-glass susutaina-bility	Water colletive actions	The aim is to collaborate with multiple stakeholders to create solutions and interventions that improve the water security across entire water-stressed catchments	Percentage of priority water basins with collective action participation – Engage in collective action in all priority water basins to improve water accessibility, availability and quality and contribute to net positive water impact	100%	50%	33%	F20	Priority water basins identified using a Diageo criticality assessment (based on expert judgement and consumption volumes) and those facing high water risk, according to the WRI Aqueduct tool
SDG 4 – Quality education SDG 6 – Clean water and sanitation SDG 13 – Climate action SDG 17 – Partnerships for the Goals	Environmental – Social	Pioneeer Grain-to-glass susutaina-bility	Water replenishment	The water replenishment programme, an important contribution to supporting the climate resilience of company's communities and supply chains.	Replenish more water than we use for operations in water-stressed areas (Percentage of water replenished in waters tressed areas)	100%	71,5%	43,2%	F20	
SDG1 – No poverty SDG 3 – Good health and well being SDG 4 – Quality education SDG 5 – Gender Equality SDG 6 – Clean water and sanitation SDG 8 – Decent Work and Economic Growth SDG 9 – Industry, innovation, and infrastructure SDG 13 – Climate action SDG 14 – Life below Water SDG 15 – Life on Land SDG 17 – Partnerships for the Goals	Environmental – Governance	Pioneeer Grain-to-glass susutaina-bility	Preserve water for life	We work with suppliers, research organisations and other partners to build more resilient local supply chains	Number of smallholder farmers in our supply chain supported by our smallholder farmer programme in fiscal 23 – Provide all local sourcing communities with agricultural skills and resources, building economic and environmental resilience (supporting 150,000 smallholders)	150 000	12 900	4 660	F22	The work with smallholder farmers is currently focussed around sorghum value chains in five countries in Africa
SDG 3 – Good health and well being SDG 6 – Clean water and sanitation SDG 13 – Climate action SDG 17 – Partnerships for the Goals	Environmental – Social	Pioneeer Grain-to-glass susutaina-bility	WASH	The aim is to provide access to clean water, sanitation and hygiene (WASH) in water-stressed communities near our sites and in water-stressed areas that supply our raw materials	Percentage of water-stressed markets with investment in WASH – Invest in improving access to clean water, sanitation and hygiene (WASH) in communities near our sites and local sourcing areas in all our water-stressed markets	100%	100%	88,9%	F20	The scope excludes water-stressed markets in which Diageo operates where there is no demand or requirement for new community WASH projects (Turkey, Indonesia, Seychelles).

Source: Diageo 2023

A specific case study that illustrates how Diageo's sustainable projects align with the United Nations Sustainable Development Goals (SDGs) and balance potentially conflicting elements is the company's 'Preserve Water for Life' programme. This initiative is a good example of how Diageo's efforts contribute to SDG 6 (Clean Water and Sanitation) while addressing various other goals.

The 'Preserve Water for Life' programme focuses on improving access to clean water and sanitation in water-stressed regions where the company operates, particularly in Africa. The programme aims to provide 20 million people with access to clean drinking water by 2030. In general, this directly contributes to SDG 6's target of ensuring the availability and sustainable management of water and sanitation for all. Specifically, the relevant goals include:

- SDG 6 (Clean Water and Sanitation): This goal is at the core of the 'Preserve Water for Life' programme. Diageo's efforts to provide clean drinking water not only directly address this goal but also serve as a foundation for achieving several other SDGs.
- SDG 1 (No poverty): Access to clean water reduces the financial burden on communities who may have previously spent a significant portion of their income on buying or treating water. This economic relief contributes to reducing poverty and aligns with the aim of SDG 1.
- SDG 5 (Gender Equality): Many of Diageo's community-focused initiatives within the 'Preserve Water for Life' programme also include a strong focus on women's empowerment. Access to clean water can reduce the time women spend fetching water, enabling them to pursue other opportunities, thus contributing to gender equality as per SDG 5.
- SDG 8 (Decent Work and Economic Growth): The 'Preserve Water for Life' programme often involves local job creation and skills development, providing opportunities for community members. This contributes to decent work and economic growth, aligning with SDG 8.
- SDG 13 (Climate Action): While not directly related to the 'Preserve Water for Life' programme, Diageo's efforts to reduce water wastage and operate efficiently in water-stressed areas can indirectly contribute to mitigating climate change, supporting the objectives of SDG 13.
- SDG 14 (Life below Water) and SDG 15 (Life on Land): By responsibly managing water resources and protecting ecosystems, Diageo's programme supports the broader goals of conserving life on land and below water, as clean water is essential for all forms of life.
- SDG 17 (Partnerships for the Goals): Diageo's collaborative approach to implementing the 'Preserve Water for Life' programme involves working with governments, NGOs, and local communities. This multi-stakeholder engagement aligns with SDG 17, emphasising the importance of partnerships in achieving the SDGs.

These interconnections illustrate how the 'Preserve Water for Life' programme acts as a catalyst for positive change across a range of SDGs. By providing clean water, it addresses

an immediate and critical need, while also creating a ripple effect, fostering economic development, poverty reduction, gender equality, and environmental conservation. This holistic approach demonstrates how focusing on one SDG can have far-reaching and complementary benefits for achieving other goals, highlighting the synergies between the different dimensions of sustainability within Diageo's project.

In addition to the case study, we also used the interview method to test our hypothesis, as it is a versatile tool in academic research and can be tailored to suit various research needs and objectives. The key to effective qualitative research lies in careful planning, clear formulation of objectives, and meticulous methodology, both in terms of interview design and data analysis.

Qualitative research always aims to gather information to describe a current phenomenon or situation. In our case it is aimed at understanding the current ESG practices in terms of various needs of the company, meaning we interviewed leaders in the ESG area with governance, reporting and compliance points of view. The research also had an analytical element: it focused both on understanding relationships and testing our hypotheses, analysing the correlation between ESG established SDG projects and measurement methods.

The interviews were self-administrated: they were distributed to respondents to complete on their own, via email. The documents thus distributed included open-ended questions allowing more in-depth qualitative responses, although they concentrated particularly on the areas of measurement, compliance, and reporting, so they were semi-structured. Taking a topical approach, the following components were explored within the interview:

- *General project understanding.* Concerning the organisation's target setting and understanding the deliverables of the projects to present the desired results, all the answers referred to a specific target setting method, whereby the company has set 25 targets across a range of ESG issues that matter to the business, to the communities they work with, to society as a whole and to the planet. They clearly stated that targets were set in line with the objectives and timeline of the UN's 2030 Sustainable Development Goals.
- *Alignment with the SDGs.* Every participant in the research understood that the specific alignment with SDGs would depend on the nature and focus of the organisation's sustainable projects. Moreover, it is possible for the projects to align with more than one UN SDG.
- *Synergies and contradictions.* According to the answers, leaders explore cases of synergies between sustainable projects and recognise that SDGs could involve initiatives that simultaneously address environmental, social, and economic aspects. However, they also emphasised that conflicts might arise if a project, while pursuing sustainability, inadvertently impacts another SDG negatively.
- *Decision-making and priority setting.* Since it is conducted by business leaders, the decision-making process might involve careful consideration of performance and strategy, along with stakeholder engagement. Engaging with relevant stakeholders involves local communities, environmental experts, and representatives from affected groups. This allows diverse perspectives to be considered to ensure

a comprehensive understanding of the potential impacts of a proposed scheme. Impact assessment means evaluating the positive and negative consequences of the project on various SDGs. Developing a prioritisation framework that considers the relative importance of each SDG and the severity of potential impacts is essential to the organisation. It should prioritise goals based on factors such as urgency, irreversibility of impact, and overall societal benefit.

– *Mitigation strategies.* According to our research, the company explores ways to adapt a project or to implement mitigation strategies that minimise the negative impacts on conflicting SDGs. This could involve technology upgrades, community engagement programmes or alternative approaches. On the other hand, the company does not put special emphasis on mitigating tensions if any are clearly identified as not being sources of concern. Specific strategies for mitigating tensions between sustainable projects and SDGs depend on the context, but some general approaches may include integrated planning, capacity building actions, stakeholder collaboration and transparent reporting, which is of crucial importance.
– *Impact measurement.* Concerning the measurement aspects, participants understood that the company needs to implement a monitoring system to track the project's ongoing impact on SDGs. This allows for adjustments in strategies if unforeseen conflicts arise during the project lifecycle. The performance of non-financial KPIs is integrated into the relevant focus area sections. The organisation concentrates on 25 ESG targets backed by several key performance indicators. The document also includes detailed non-financial reporting boundaries and methodologies. Beside each single area, we highlight the relevant impacted SDG.
– *Stakeholder involvement.* The company realises that there might be some gaps in the current measurement methods which may not take into consideration time lags in reporting, baseline data changes or the subjectivity of metrics. Measuring the impact of a project on a specific goal may not capture the full extent of its influence on other related goals. External factors, such as economic conditions or regulatory changes, can influence the impact of a sustainable project on SDGs. Isolating the project's contribution amidst these external influences can be challenging. Companies typically highlight case studies or examples that showcase how stakeholder input has shaped their approach to sustainability. In general, stakeholder engagement can occur through various channels, such as consultative workshops, surveys and feedback, partnerships, and regular reporting.
– *Learning from controversial nature.* Major challenges identified by respondents included changes in environmental regulations or policies, which can affect the success of sustainable projects. It is important to ensure proactive engagement with regulatory bodies such as the FRC, CDP and ISSB, etc. Concerns over "greenwashing" underline the importance of transparent communication, measurable targets, and third-party verification to build trust. The ability to adapt projects based on feedback and changing circumstances was found to be crucial, demonstrating the importance of flexibility in achieving long-term sustainability goals.

– *Future development.* In summary, addressing tensions between SDGs and sustainable projects requires a combination of rigorous research, adaptive strategies, and a commitment to collaboration and transparency. Organisations that embrace these principles are better positioned to contribute meaningfully to sustainable development. To make this improvement, the organisation carries out interdisciplinary research, long-term impact studies, metrics standardisation and local context mapping, while using innovative technologies.

Based on the answers, all the respondents discussed Diageo's "Society 2030: Spirit of Progress", a comprehensive ESG action plan addressing critical issues across the company, people, brands, suppliers, and communities. The initiative is characterised by three priority programmes:

– P1: Promote Positive Drinking – Encouraging responsible alcohol consumption
– P2: Champion Inclusion and Diversity – Fostering an inclusive corporate culture
– P3: Pioneer Grain-to-Glass Sustainability – Ensuring sustainability in production processes

Our interviews focused on exploring how the project's goals aligned with UN SDGs, in particular the synergies and conflict with the SDGs which have an impact on decision making and priority setting.

The initiative aligns with several SDGs, including: SDG3 Good Health and Well-being) through promoting responsible drinking; SDG 6 (Clean Water and Sanitation) via water conservation efforts; SDG 7 (Affordable and Clean Energy); SDG 8 (Decent Work and Economic Growth); and SDG 13 (Climate Action) through sustainable production practices and community engagement. Besides these, the 25 ESG targets set by the initiative are directly mapped to the objectives and timeline of the UN's 2030 SDGs.

In terms of identifying the synergies between goals, the initiative often aligns with multiple SDGs such as renewable energy projects supporting SDG 7, 8, and 11. However, potential conflicts were also noted such as the potential conflict of water usage reduction with local water stress (SDG 6). This highlights the need for careful planning and a solid understanding of trade-offs.

The responses indicate that integrated planning, stakeholder collaboration, and transparent reporting are key strategies. There is also a recognition of the need for adaptive management, although it is not a current focus.

The initiative uses non-financial KPIs to measure the impact of the project, while acknowledging some challenges, such as the subjectivity of the metrics and short-term measurement limitations.

Stakeholder engagement was highlighted as vital to the project's success, with Diageo engaging various stakeholders, including business partners, employees, governments, and communities, to ensure the initiative aligns with broader societal goals.

The main challenges of the projects and the accurate measurement of their success were robust and rapid regulatory changes, greenwashing concerns, and balancing conflicting

SDGs. Areas for future development could include long-term impact studies, innovative technologies, metric standardisation, and harmonising contradictory and synergistic goals within the SDGs.

The "Society 2030: Spirit of Progress" initiative – a dedicated programme involving various subprogrammes and several projects with their specified measurement objectives – demonstrates the company's commitment to integrating ESG principles deeply into its business strategy, aligning closely with various UN SDGs. The company employs a range of strategies to mitigate conflicts, measure impact, and involve stakeholders. While facing challenges related to its measurement methods and having to balance conflicting goals, the company's approach reflects a dedication to sustainable development, emphasising the need for continuous improvement, adaptability, and holistic planning. The established projects of the company address these challenges, enhancing the means of measurement and putting the theoretical goals into practice.

By means of a literature review and empirical data analysis, our study provided insights into the interconnectedness of SDGs and the potential for companies to play a significant role in addressing conflicting dynamics. The analysis of a multinational company, Diageo, illustrated how its sustainable projects align with various SDGs and contribute to a balanced approach.

The examination of global patterns of synergy and trade-off pairs, as illustrated by Pradhan et al.'s study, offered a broader context for understanding the intricate relationships between different goals on a global scale. By utilising both country data and country-disaggregated data, our study statistically analysed correlations between project goals and outcomes and SNGs, shedding light on the most frequent interactions and identifying meaningful patterns.

The case study on Diageo's 'Preserve Water for Life' programme further exemplified the practical implications of corporate initiatives that are aligned with the SDGs. This programme not only directly addressed SDG 6 but also demonstrated how a focused project could have ripple effects, positively impacting several other goals such as poverty reduction, gender equality, economic growth, and environmental conservation.

In addressing the first research question, our findings support the hypothesis that dedicated SDG projects can play a crucial role in easing tensions between contradictory and synergistic movements, offering a pathway to harmonised corporate contributions to sustainable development.

Furthermore, a possible indicator was identified for measuring the tension between the contradictory goals. A proposed SDG Tension Index (SDGTI) aims to quantify the level of tension or synergy between SDGs in specific corporate sustainability projects, providing a measure that can guide strategic decision-making and project adjustments to enhance the alignment of such projects with global sustainability objectives. Components of this index would include an IS (interaction score) which quantifies the nature and degree of interaction between pairs of SDGs involved in a project. Each pair of SDGs would be evaluated based on their potential for conflict (negative score) or synergy (positive score). The score would be determined through empirical data and expert assessments related to

the specific project context. The Impact Weight (IW) means that each SDG will be assigned a weight based on its importance or priority within the specific context of the project or region. This weighting helps to prioritise actions where the tension or synergy has the most significant impact on overall sustainability outcomes. The adjustment factor (AF) accounts for external influences such as regulatory changes, market dynamics, and socio-economic conditions that could alter the interaction dynamics between SDGs.

$$SDGTI = \sum I = 1n\sum j = I + 1n(ISij \times IWi \times IWj \times AF)$$

where

ISij is the Interaction Score between SDG *i*i and SDG *j*
IWi and *IWi*IWj are the Impact Weights for SDGs *i*i and *j*
AF is the Adjustment Factor for external influences.

Consequently, a positive SDGTI suggests that the project is generally creating synergies between SDGs, enhancing their collective achievement. A negative index indicates significant tensions between SDGs, suggesting that there are areas where strategic adjustments might be necessary to minimise conflicts and enhance the overall sustainability performance of the project.

Regarding the second research question, our exploration of new metrics for SDG projects highlighted the importance of further developing the measurement tools. The case study showcased how specific projects could be analysed across multiple SDGs, providing a nuanced understanding of their impacts and contributions.

In essence, our research contributes to the ongoing discourse on sustainable development by emphasising the potential of corporate initiatives to navigate complex SDG interactions. The findings underscore the importance of holistic approaches, collaborative partnerships and innovative metrics in ensuring effective progress toward global sustainable development goals. As we move forward, this study encourages continued exploration and refinement of strategies that align corporate actions with the principles of the SDGs, fostering a more cohesive and impactful approach to global sustainability.

Our study has also illuminated crucial knowledge gaps, underscoring the intricate interconnectedness of Sustainable Development Goals (SDGs), the imperative for collaboration across diverse sectors, and the necessity of bridging the gap between global targets and local implementation. As we navigate the complex landscape of sustainable development, the gaps thus identified pose both challenges and opportunities for future research and practical application in the area of projects addressing SDGs.

In conclusion, the results underscore the essential role of sustainable projects within the frame of an organisation-measurement approach as well as their occasionally controversial nature. It is also worth emphasising the critical need for research and project development that can effectively navigate the tension between contradictory and synergistic goals among the SDGs with the aim of resolving or at least mitigating such tension so that *SDG projects of companies can identify and ease the tension between the goals and actions*

of contradictory and synergistic movements (R1). Moreover, it can be concluded that *an impact measurement model development including new metrics of identified by SDG projects is a suitable way for companies to determine the gap between goals and create a link between targets (R2).*

As the SDGs aim to address a wide range of global challenges, this research has recognised a need for more comprehensive and integrated approaches to sustainable development. Knowledge gaps have been identified in the following areas: the interconnectedness of goals, the lack of collaboration across different sectors and the need to bridge the gap between global targets and local implementation.

An intriguing avenue for exploration lies in the potential adaptation of our model within the public sphere, particularly within the realm of universities. The question of whether such a model can be effectively employed by universities to establish meaningful links between global sustainability targets and local implementation efforts remains an open inquiry. As knowledge hubs and catalysts for change, universities have a unique opportunity to contribute to the global pursuit of SDGs. By addressing the knowledge gaps identified in this research, universities can play a pivotal role in fostering collaboration, influencing policy, and taking or supporting tangible actions that resonate at both global and local scales.

CONCLUSIONS AND IMPLICATIONS

In conclusion, our research aimed to explore the complexities and synergies involved in the pursuit of Sustainable Development Goals (SDGs) and corporate engagement, focusing on two pivotal questions. The first question investigated the tension between contradictory and synergistic movements among SDGs, with a particular emphasis on whether dedicated SDG projects initiated by companies could mitigate such tensions. The second question examined the development of new metrics for SDG projects, aiming to identify gaps between goals and to establish links between targets.

As we move forward, it is our hope that this study not only highlights existing gaps but also serves as a catalyst for further research, innovation, and practical initiatives. Bridging these knowledge gaps is not only essential for achieving the ambitious targets set by the SDGs but also for cultivating a collective understanding and commitment to sustainable development that spans the academic, public, and private spheres.

This study also highlights the need for policymakers to facilitate and encourage corporate alignment with the United Nations Sustainable Development Goals (SDGs). To optimise the positive impacts of sustainable projects, policies should foster an environment that supports holistic and integrated approaches to sustainability. Governmental bodies and international organisations could consider the implementation of frameworks that encourage companies to identify and manage the tensions between contradictory SDG targets. These frameworks should promote transparency in reporting and encourage the use of innovative metrics that can clearly demonstrate the synergies and trade-offs

involved in corporate sustainability projects. Moreover, policies should support research and development in sustainability practices that prioritise the most impactful SDGs for regional contexts, fostering a deeper collaboration between the public and private sectors. This would involve providing incentives for companies that align their operations with SDG targets, including tax benefits, grants, or public recognition. By doing so, governments can play a crucial role in advancing global sustainability efforts, making it not only a corporate responsibility exercise but a collaborative endeavour that involves all sectors of society.

By adopting the SDG Tension Index, organisations can systematically assess and manage the complex interactions between sustainability goals, allowing them to develop more informed and effective sustainability strategies.

Incorporating ESG strategies on curriculum integration, research, policy advocacy or partnerships into the operational and educational frameworks of universities can significantly amplify their impact on sustainable development. By embracing these roles, universities can not only contribute to achieving the SDGs but also equip a new generation of leaders to tackle the world's most pressing challenges.

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ANNEX 1

Interview questions

1. Can you describe a sustainable project that your organisation has undertaken or is currently involved in? How would you define the principles and objectives that guide sustainable projects within your organisation? (General Project Understanding)
2. In your perspective, how does the sustainable project align with the principles and objectives outlined in the UN Sustainable Development Goals (SDGs)? Are there specific SDGs that the project explicitly addresses, and if so, how? (Alignment with SDGs)
3. Can you share instances where you observed synergies between the goals of the sustainable project and the SDGs? On the contrary, have you encountered situations where the goals of the sustainable project conflicted with the objectives of certain SDGs? (Synergies and Contradictions)
4. How are decisions made when there are conflicting goals between the sustainable project and SDGs? Can you describe the process of prioritising certain goals over others when conflicts arise? (Decision-Making and Priority Setting)
5. In your experience, what strategies or approaches have been effective in mitigating tensions or conflicts between the goals of sustainable projects and SDGs? How does your organisation navigate the complexities of balancing contradictory and synergistic movements within the SDGs? (Mitigation Strategies)
6. How is the impact of the sustainable project on SDGs currently measured within your organisation? In your opinion, are there gaps in the current measurement methods that may affect the accurate representation of the project's impact on specific SDGs? (Impact Measurement)
7. How are stakeholders, both internal and external, involved in decision-making processes related to the alignment of sustainable projects with SDGs? Have you observed any instances where stakeholder perspectives influenced the project's alignment with certain SDGs? (Stakeholder Involvement)
8. Can you provide examples of controversies or challenges faced by sustainable projects in relation to SDGs, and what lessons were learned from these experiences? How have controversies or challenges influenced decision-making for future projects? (Learning from Controversial Nature)
9. What do you think are the critical needs for research and project development to effectively navigate the tension between contradictory and synergistic goals within the SDGs? In your opinion, how can organisations better resolve or mitigate tensions between SDGs and sustainable projects in the future? (Future Development)

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SAFEGUARDS OF FAIR TRIAL IN CONSTITUTIONAL COURT PROCEEDINGS: EFFICIENT ACCESS TO JUSTICE AS A KEY FACTOR[1]

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The right to fair trial, which is usually described as an essential starting point of the protection of human rights, as a basic safeguard of the rule of law, as a general principle of EU law and as a certain quality of procedure, plays a crucial role in defining the framework of judicial proceedings in the European states both in criminal and civil matters. The current paper examines how the concept of fair trial applies to constitutional court proceedings, with special regard to the safeguards of an efficient access to such procedures. The study raises questions like: What cornerstones for an efficient access can be identified in the case-law? What are the most typical obstacles of obtaining a decision by a constitutional court? How can a more efficient access to these procedures be promoted? The analysis offers a synthesis of the theoretical background and the general requirements identified by the relevant international and European fora (complemented by references to the related jurisprudence of the constitutional courts of certain EU Member States). This way the study can give useful insights not only into the understanding of the concept of fair trial but also into the possibilities of enhancing the efficiency of constitutional court proceedings.

Keywords:
fair trial, constitutional court procedures, access to justice, efficiency, legal aid, admissibility

[1] This research was carried out using the European Constitutional Communication Network (ECCN) database, within the framework of the research project of the Comparative Constitutional Law Research Group at the Ludovika University of Public Service with the support of the AURUM Lawyers' Club for Talented Students Foundation.

INTRODUCTION

The right to fair trial, which is usually described as an essential starting point of the protection of human rights,[2] as a general principle of EU law,[3] as a basic safeguard of the rule of law[4] and as "the right to a certain type of procedure – a fair procedure – when decisions affecting individuals in a certain way are taken",[5] is a basic point of reference that should guide any analysis of legal procedures or procedural laws. The reason for this central role of the right to fair trial is that "because without this one right, all others are at risk; if the state is unfairly advantaged in the trial process, it cannot be prevented in the courts from abusing all other rights".[6]

Article 6 Paragraph (1) of the European Convention on Human Rights (hereinafter: ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter: Charter) as well as the attached case-law by the European Court of Human Rights (hereinafter: ECtHR) and the Court of Justice of the European Union (hereinafter: CJEU), respectively, play a crucial role in defining the framework of judicial proceedings in the European states both in criminal and civil matters. The literature deals extensively with the question how international fora and national constitutional courts interpret and apply the safeguards stemming from this right;[7] and the compliance with the requirements of fair trial is a basic point of reference in the examination of specific (civil, criminal or administrative) procedural laws.[8] Due to recent developments, primarily the Covid–19 pandemic, the questions of applying or adapting the elements of fair trial to emergency situations seem to be in the centre of attention as well. [9]

Whether certain elements of fair trial are applicable – besides to ordinary court proceedings – also to constitutional court proceedings, and how the efficient access to

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2 Bårdsen 2007: 100–101. Similarly: Clayton–Tomlinson 2010.

3 "[T]he right to a fair trial, which derives inter alia from Article 6 ECHR, constitutes a fundamental right which the European Union respects as a general principle under Article 6(2) EU […]." CJEU, C-40/12 P, Gascogne Sack Deutschland GmbH v. European Commission, ECLI:EU:C:2013:768, para. 28.
"As regards the right to a fair trial, to which reference is made in the question referred, it must be recalled that that right results from the constitutional traditions common to the Member States […]" CJEU, C-619/10, Trade Agency Ltd v. Seramico Investments Ltd, ECLI:EU:C:2012:531, para. 52; Similarly, CJEU, C-682/15, Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes, ECLI:EU:C:2017:373, para. 44.

4 The Constitutional Court of the Republic of Croatia pointed out that the right to a fair trial guarantees the protection from the arbitrariness of the courts and other State bodies when deciding on a matter. Decision of the Constitutional Court of the Republic of Croatia U-III-3421/2021, 12 May 2022 [ECCN HR-0347]. The Hungarian Constitutional Court held that "[a] judicial judgement, which neglects the law in force without any due ground is arbitrary and conceptually unfair: it is incompatible with the principle of the rule of law". Decision of the Hungarian Constitutional Court 20/2017 (VII. 18.) AB [ECCN HU-0135], Reasoning [23].

5 Settem 2016: 11.

6 Robertson 2004: 86.

7 E.g. Grabenwarter 2022; Spano et al. 2020; Bobek – Adams-Prassl 2020; Kaufmann–Hausammann 2017; Peters–Altwicker 2012; Francioni 2007; Summers 2007.

8 E.g. Bell–Lichère 2022: 90–127; Kramer et al. 2021; Teleki 2021; Soyer 2019; Bright 2013; Rozakis 2004.

9 E.g. Matyas et al. 2022; Reiling–Contini 2022; Kamber 2022; ECLAC 2021.

such proceedings can be safeguarded, are rather seldom posed questions. Therefore, the current paper wishes to put forward these specific aspects of the implementation of the right to fair trial.

BACKGROUND AND METHODOLOGY

The research question is based on the phenomenon that in the last couple of years growing attention is paid to constitutional court proceedings both at legal and political level. Firstly, the proper functioning of the judiciary (understood in a broader sense, including constitutional justice),[10] especially in emergency situations,[11] is crucial as it offers the necessary safeguards against infringement of rights and ensures the review[12] relating to the lawfulness of emergency measures.[13] Secondly, the growing role of efficient access to constitutional court proceedings, primarily constitutional complaint procedures, might also be based on the fact that they are often considered as preconditions of bringing a case to the ECtHR,[14] and thus they play an intensive role in the international system of human rights protection as well. Thirdly, international political mechanisms like the European Commission's Rule of Law Report[15] or the monitoring procedure in the framework of the Council of Europe[16] put significant emphasis on the role of constitutional courts in the

10 As the Venice Commission stated, "judicial review of emergency measures is another guarantee against the risks of the abuse of power by the executive. […] The judicial system must provide individuals with effective recourse in the event State authorities interfere with their human rights. Judicial review may be carried out by civil or administrative courts as well as criminal courts when dealing with penalised violation of emergency legislation/measures. The highest courts, especially the constitutional court (or a court with an equivalent jurisdiction), where these exist in the country, should also be involved." Venice Commission 2020a: 21.

11 In this regard, see e.g. Váradi 2022; Krans–Nylund 2021; Matyas et al. 2022; Rozhnov 2020.

12 As the Venice Commission stated, "[t]he concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive […]. However, emergency rule is a legal regime governed by the principles of legality of administration, based on the rule of law. The rule of law means a system where governmental agencies must operate within the framework of law, and their actions are subject to review by independent courts. In other words, the legal security of individuals should be guaranteed." Venice Commission 2020b: 18–19. Furthermore Council of Europe 2020: 3.

13 This role is not only important from the abstract constitutional point of view or from the point of view of human rights protection, but it has also economic relevance. As regards the specificities of the business sector, litigation related to contract breaches, employment issues, bankruptcy filings and tax payments and legal needs relating to the rapidly-evolving emergency regulations on business conduct trigger a growing need for an efficient adjudication of the constitutionality of the newly introduced measures. OECD 2020: 6.

14 E.g. in the *Szalontay v. Hungary* case [ECtHR, (71327/13), 12 March 2019], the ECtHR ruled that the constitutional complaint before of the Hungarian Constitutional Court can be seen as an effective domestic remedy that shall be exhausted before initiating a procedure at the Strasbourg court, as required by Article 35 of the ECHR.

15 European Commission 2022.

16 See e.g. the activities of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, like: https://pace.coe.int/en/news/8921/montenegro-a-fully-functional-constitutional-court-must-be-put-in-place-without-delay-say-pace-co-rapporteurs

system of checks and balances as indicators of the protection of democracy, rule of law and fundamental rights. Taking these tendencies into account, the question is even more justified, whether and how the safeguards derived from the right to fair trial apply to these proceedings, primarily to constitutional complaint procedures.

The current paper intends to give an overview on this question with special attention to the requirement of an efficient access to justice. The research is based on the examination of the relevant laws and of the case-law of the constitutional courts in Hungary, Slovakia, Romania, the Czech Republic and Croatia,[17] – completed with findings from the secondary literature. Firstly, the paper summarises the essential elements of the right to fair trial based on the case law of the ECtHR, CJEU as well as the above mentioned constitutional courts, and identifies the applicability of their findings with regards to the specificities of the constitutional court proceedings. The study raises the following questions: What cornerstones for an efficient access can be identified in the case-law? What are the most typical obstacles of obtaining a decision by a constitutional court? How can a more efficient access to these procedures be promoted? This way the study can give useful insights not only into the understanding of the concept of fair trial but also into the possibilities of enhancing the efficiency of constitutional court proceedings.

THE CONCEPTUAL ELEMENTS OF FAIR TRIAL AND THEIR APPLICABILITY TO CONSTITUTIONAL COURT PROCEDURES

A basic feature of the right to fair trial is that it is comprised of several elements, which can be defined on the basis of the normative provisions of the ECHR and the Charter and which have been further elaborated in the relevant case-law, but which do not form a closed list:[18] e.g. the rights of the defence, the right of access to a tribunal[19] and the principle of equality of arms (also including a certain connection to the principle of respectful treatment),[20] the right to be advised, defended and represented, the adversarial principle, the independence and impartiality of the judiciary,[21] the right to a public procedure, right to a decision within a reasonable time or the right to a well-reasoned judgment.

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17 The analysis of the case-law is based on the database of the European Constitutional Communication Network (eccn.hu); therefore, the paper covers those EU Member States from which the database contains relevant decisions of constitutional courts.

18 Harris et al. 2023; Mrčela 2018, 16.; Settem 2016; Venice Commission 2016.

19 ECtHR, McVicar v. the United Kingdom (46311/99), 7 May 2002, § 46.

20 ECtHR, D.D. v. Lithuania (13469/06) 14 February 2012, §§ 118–119.

21 At this point it shall be mentioned that these elements are also strongly related to the principle of effective judicial protection. This aspect is primarily important in the context of EU law. As the CJEU concluded, "Article 6(1) ECHR, the second paragraph of Article 47 of the Charter, which corresponds to that provision of the ECHR, provides that '[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'. As the Court of Justice has held on several occasions, that article relates to the principle of effective judicial protection […]." CJEU, C-40/12 P, para. 75. Further elaborated in CJEU, C-216/18 PPU, LM., ECLI:EU:C:2018:586, paras. 51–58.

As the ECtHR stated, constitutional court proceedings do not in principle fall outside the scope of Article 6 Paragraph 1 of the Convention; [22] thus the requirements stemming from the right to fair trial – where applicable – shall be safeguarded in constitutional court proceedings as well. Some exceptions in this regard are: the principle of equality of arms, the rights of the defence, the right to a public procedure and the adversarial principle, as these are related to procedures between opponents. Due to the fact that constitutional court decisions are primarily based on an abstract argumentation, the right to a well-reasoned judgment does not seem to be a direct point of reference either. The main aim of these elements of fair trial, namely the substantive participation of the party in the proceeding, is applicable in the context of constitutional court proceedings rather through the concept of an efficient access to justice.

According to the general theory and case-law, the right to access to justice articulates at the level of fundamental rights the individual's claim to enforce his rights effectively and independently from his financial and material circumstances, legal knowledge or other possibilities. Nevertheless, access to justice is not limited to the right to institute proceedings before courts in civil matters.[23] Other particular aspects are the right to obtain a determination of the dispute by a court[24] as well as the requirement of the decision being able to remedy wrongs or asserting claims.[25] As these conceptual elements are undoubtedly transferable to constitutional court procedures, another basic element of the access to justice doctrine shall also apply to these procedures, primarily to constitutional complaints, namely that the access to such procedures cannot remain illusory.[26]

Paying attention to the fact that fair trial is a specific quality of the proceedings, which can be assessed only on the basis of all circumstances of the case,[27] the current analysis does not wish to single out certain points of the legal regulation concerned and compare these

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22 ECtHR, Ruiz-Mateos v. Spain (12952/87) 23 June 1993, §§ 59–60.; Kübler v. Germany (32715/06) 13 January 2011, §§ 47–48; Süßmann v. Germany (20024/92) 16 September 1996, § 39; Milatová and Others v. the Czech Republic (61811/00) 21 June 2005, §§ 58–66; Gaspari v. Slovenia (21055/03) 21 July 2009, §§ 50–53; Pinkas and Others v. Bosnia and Herzegovina (8701/21) 4 October 2022, § 37.

23 ECtHR, Nicolae Virgiliu Tănase v. Romania (41720/13) 25 June 2019, § 192; Naït-Liman v. Switzerland (51357/07) 15 March 2018, § 113; Brumărescu v. Romania (28342/95) 28 October 1999, § 59. Golder v. United Kingdom (4451/70) 21 February 1975, § 36.

24 ECtHR, Fălie v. Romania (23257/04) 19 May 2015, §§ 22; Brajović and Others v. Montenegro (52529/12) 30 January 2018, § 48; Kitanovska v. North Macedonia (53030/19 and 31378/20) 9 May 2023, § 52.

25 ECtHR, Cyprus v. Turkey (25781/94) 10 May 2001, § 236; Marini v. Albania (3738/02) 18 December 2007, § 122; Nicolae Virgiliu Tănase v. Romania, § 193; Dieudonné and Others v. France (59832/19 and 6 others) 4 May 2023, § 45.

26 ECtHR, Airey v. Ireland (6289/73) 9 October 1979, § 24.

27 ECtHR, Stran Greek Refineries and Stratis Andreadis v. Greece (13427/87) 9 December 1994, § 49. ECtHR, Salduz v. Turkey (36391/02) 27 November 2008, § 52.
The Hungarian Constitutional Court stated several times that "fair trial" "is a quality factor that may only be judged by taking into account the whole of the procedure and all of its circumstances. Therefore, a procedure may be 'inequitable', 'unjust' or 'unfair' even despite of lacking certain details or complying with all the detailed rules." Decision of the Hungarian Constitutional Court 20/2017 (VII. 18.) AB [ECCN HU-0135], Reasoning [16]; similarly, Decision 6/1998 (III. 11.) AB, Decision 3102/2017 (V. 8.) AB, Reasoning [17].

with the European and constitutional standards separately, but to identify on the basis of the relevant case-law some points where the judicature or the legislation could further promote an efficient access to constitutional court proceedings. The main questions can be summarised on the basis of a statement from a concurring opinion by István Balsai (member of the Hungarian Constitutional Court): "The effectiveness of judicial legal protection is affected by a number of detailed rules and other factors, such as the time limit for bringing an action, the limitation period, the formal rules for initiating proceedings, the conditions for access to legal aid, or the actual length and cost of proceedings. Refusal to seek recourse to the courts constitutes a complete lack of judicial legal protection."[28]

REALISTIC CHANCE OF STARTING THE PROCEDURE: ADMISSIBILITY

The first element of this examination is related to the initiation of constitutional court procedures, primarily constitutional complaint procedures where the question of admissibility is a basic point of reference. It is namely a basic feature of constitutional court procedures that national laws define preconditions for accepting a case, which might include far more complex elements than those applied in ordinary court procedures. The Constitutional Court of Romania stressed that "pursuant to the established case law of the Constitutional Court and the European Court of Human Rights, the right of access to justice is not absolute. Thus, the Constitutional Court ruled that the establishment of procedural conditions for the exercise of the right to bring a case before the court does not amount to a violation of Article 21 of the Constitution on free access to justice. It was thus held that the establishment of conditions for bringing actions does not constitute a violation of the right of free access to justice".[29] This argumentation seems to be applicable to constitutional court proceedings as well.

At this point, it shall be recalled that the principle of access to justice cannot be interpreted as prescribing specific procedural measures:[30] the efficient and practical possibility of litigation shall be guaranteed in the complex system of procedural law. *A contrario,* it cannot be stated that certain criteria of admissibility or the regime of admissibility itself would run contrary to the principle of effective access to justice.[31] The right to an effective access

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28 Decision of the Hungarian Constitutional Court Decision 3/2013 (II. 14.) AB, Concurring reasoning by dr. István Balsai [ECCN HU-0155], Reasoning [81].

29 Decision of the Constitutional Court of Romania 566/2021 [ECCN RO-0401], 23 November 2021, Reasoning [28].

30 ECtHR, Avotiņš v. Latvia (17502/07) 23 May 2016, § 119.

31 *Per analogiam:* the Hungarian Constitutional Court has held that "it does not follow from the right to a fair and impartial trial that the courts may decide on the rights and obligations of a party only at a hearing in all ordinary and extraordinary appeal proceedings. It is not contrary to the principles of the right to a trial, to an oral procedure and to impartiality (as a principle of civil procedure and also a principle enshrined in a constitutional rule) if the law allows the court to hear the application out of court in certain appeal proceedings, in particular extraordinary appeal proceedings." Decision of the Hungarian Constitutional Court 3115/2013 (VI. 4.) AB [ECCN HU-0148], Reasoning [43].

to justice "may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a manifest and disproportionate breach of the rights thus guaranteed".[32]

The case-law of the examined courts shows that constitutional courts usually refrain from examining whether the evidence and arguments put forward in the statement of reasons of a judicial decision or a legal norm are well founded or correctly assessed,[33] and from "taking a position on the correctness or legality of issues of legal doctrine related to any branch of law or on problems which are purely questions of interpretation of law".[34] Focus is laid on questions, which might have a significant impact on the protection of human rights and constitutional principles in general.[35] Therefore, in the analysed countries the relevant acts contain preconditions for the substantive adjudication of the case, which go beyond formal criteria and include factors subject to interpretation, for example,[36] that the complainant must be affected,[37] the available legal remedies must have been exhausted or the complaint must address a question on constitutional law issues of fundamental importance.[38] In case of all these criteria (i.e. both as regards the definition and assessment

[32] CJEU, C-619/10, Trade Agency v. Seramico, ECLI:EU:C:2012:531, para. 55. Similarly: ECtHR, Foltis v. Germany (56778/10) 30 June 2016, § 37; Staroszczyk v. Poland (59519/00) 22 March 2007, § 124. Osman v. the United Kingdom (23452/94) 28 October 1998, § 147; Nicolae Virgiliu Tănase v. Romania, § 195.

[33] "*The mere fact that the petitioner considers the reasoning of the court's judgement to be erroneous and prejudicial to himself is not a constitutional issue, nor can it be made so by reference to the right to have the reasons for the decision set out in writing*." Decision of the Hungarian Constitutional Court 3305/2020 (VII. 24.) AB [ECCN HU-0575], Reasoning [56].

[34] Decision of the Hungarian Constitutional Court 3051/2016 (III. 22.) AB [ECCN HU-0218], Reasoning [32].

[35] *Per analogiam,* this approach is in line with the ECtHR case-law, which confirmed – primarily in the context of supreme court procedures – that the application of a statutory *ratione valoris* threshold for appeals to the supreme court is a legitimate and reasonable procedural requirement having regard to the very essence of the supreme court's role to deal only with matters of the requisite significance. ECtHR, Zubac v. Croatia (40160/12) 5 April 2018, § 83 and the case law cited therein.

[36] It is not the aim of the current paper to analyse all conditions of a constitutional complaint in detail. The following examples only aim to demonstrate the complexity of criteria, which will be decisive, primarily in the context of the need for specialised and good quality legal representation.

[37] The Hungarian Constitutional Court elaborated its understanding based on the case-law of the German Federal Constitutional Court on the so-called "Betroffenheitstrias" [e.g. BVerfG, no 2 BvR 2292/13 (15 July 2015), paras. 55–64]. The complainant shall be considered to be affected by the norm or legal decision, if a direct, actual and personal involvement can be confirmed. [Decision of the Hungarian Constitutional Court 3/2019 (III. 7.) AB, Reasoning [30]–[32]; 33/2012 (VII. 17.) AB, Reasoning [61]–[62], [66]. These criteria are evaluated on a case-by-case basis.

[38] According to Section 29 of the Hungarian Act CLI of 2011 on the Constitutional Court, the Hungarian Constitutional Court declares the constitutional complaint admissible if a conflict with the Fundamental Law significantly affects the judicial decision or the case raises constitutional law issues of fundamental importance. The lack of sufficiently coherent constitutional law reasoning leads to the inadmissibility of the complaint {Decision of the Hungarian Constitutional Court 3080/2019 (IV. 17.) AB, Reasoning [27]}. The Hungarian Constitutional Court does not carry out a substantial examination if the complaint only aims at the supervision of the evidentiary procedure {Decision 3080/2019 (IV. 17.) AB, Reasoning [30]; Order 3061/2016 (III. 22.) AB, Reasoning [31]–[33]}, or it is related to the interpretation of questions affecting a special field of expertise {Order 3038/2019 (II. 20.) AB, Reasoning [17]}.

of admissibility in constitutional court proceedings, primarily constitutional complaint proceedings) the national legislator and the constitutional courts have a considerable margin of appreciation. The ECtHR just recently confirmed that "it is not the Court's task to express a view on whether the policy choices made by the Contracting Parties defining the limitations on access to a court are appropriate or not; its task is confined to determining whether their choices in this area produce consequences that are in conformity with the Convention".[39] For the evaluation of these consequences – according to the ECtHR's case-law – not only the legislative framework, but also the interpretation of the constitutional courts, the coherent judicial practice is highly relevant.[40] And in latter context it is crucial that – while paying particular attention to the legitimate aims of restricting access to such procedures and to the foreseeable assessment of the conditions of admissibility – the aim of the procedures shall not be repressed. Access to such procedures shall be ensured in light of the fact that these are the last domestic legal resort in case of violation of fundamental rights. In this spirit, a recent decision of the ECtHR warned constitutional courts against excessive formalism when interpreting the conditions for accepting a case. The specific case concerned a decision of the Portuguese constitutional court, which had declared inadmissible a part of the applicant's appeal on the grounds that an incorrect subsection of the relevant provision was indicated. The Strasbourg court "noted that the Constitutional Court had been able to identify the two grounds of appeal submitted by the applicant. The inadmissibility decision had thus been based solely on the drafting error, as the ground of appeal had been clear from the applicant's memorial and had been identified by the judges. Consequently, and in accordance with its case-law, the Court held that the approach taken

In case of the Constitutional Act on the Constitutional Court of the Republic of Croatia this factor is decisive, when the constitutional complaint is filed before all remedies have been exhausted. According to Paragraph (1) Article 63 of the Act, the Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated. A similar provision is foreseen in § 75 of the Constitutional Court Act of the Czech Republic and § 132 of the Slovakian Constitutional Court Act.
The text of the Constitutional Court Act of the Czech Republic (182/1993 Sb.) in English is available: www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Constitutional_Court_Act_2024.pdf
The Constitutional Court Act of Slovakia (314/2018 Coll.) is available: www.zakonypreludi.sk/zz/2018-314.
The text of the Constitutional Court Act of Hungary is available in English: hunconcourt.hu/act-on-the-cc.
The text of the Constitutional Act on the Constitutional Court of the Republic of Croatia in English is available: www.usud.hr/sites/default/files/dokumenti/The_Constitutional_Act_on_the_Constitutional_Court_of_the_Republic_of_Croatia_consolidated_text_Official_Gazette_No_49-02.pdf

39 ECtHR, Dragan Kovačević v. Croatia (49281/15) 12 May 2022, § 69.

40 "A coherent domestic judicial practice and a consistent application of that practice will normally satisfy the foreseeability criterion in regard to a restriction on access to the superior court." ECtHR, Zubac v. Croatia, § 88 and the case-law cited therein.

by the Constitutional Court had been excessively formalistic, having deprived the applicant of a remedy afforded by domestic law in respect of the matter at issue."[41]

From these examples – both from the national laws and the ECtHR case-law – it is apparent that the preconditions for admission of constitutional complaints elaborated in legal norms and in the case-law are usually complex, and are – at least in part – not directly derivable from the wording of the respective acts;[42] besides the normative provisions and the attached jurisprudence the requirements stemming from the ECtHR's case-law can be decisive. This is the reason, why an efficient support by a qualified lawyer and other elements of legal aid in constitutional court procedures might be considered as essential preconditions to promote an efficient protection of human rights.

PRESENTING THE CASE EFFECTIVELY: LEGAL AID

As regards the availability of legal aid, both basic justifications for its necessity can be found in the case law of the examined constitutional courts: the procedural and the social approach. The Czech Constitutional Court held that the "meaning and purpose of the principle of equality of arms, equal rights and obligations in civil (and other) proceedings before a public authority is to guarantee the conditions for a fair outcome of the proceedings; this could be absent if one of the parties is disadvantaged in the proceedings (typically by being unable to present its own arguments and evidence, etc.)".[43] A similar argumentation appears in the case law of the Constitutional Court of Slovakia stating that "the rationale for increased protection of litigants is the need to balance the procedural position of the weaker party in order to preserve functional procedural equality".[44] Thus, these courts relied on a rather procedural approach by using an argumentation closely related to the efficient access to justice[45] and to the principle of fair trial. As, however, it was mentioned in the introductory part, the principle of equality of arms is not applicable to constitutional court proceedings in strict sense. Therefore, it might be questionable, whether this argumentation is also applicable to justify the need for legal aid in constitutional court procedures.

Consequently, the more extensive argumentation used by the Constitutional Court of Romania can be a more proper point of reference. It stated namely that "free access to

41 ECtHR, Dos Santos Calado and others v. Portugal (55997/14 and 3 others), 31 March 2020, §§ 116–117. ECtHR: *Press release. The excessive formalism of the Constitutional Court deprived the applicants of their right of access to a court*. ECHR 106 (2020), 2.

42 For a detailed examination of the admissibility criteria – in Hungarian context – see e.g. Bitskey–Török 2015.

43 Decision of the Czech Constitutional Court Pl. ÚS 2/10 [ECCN CZ-0190], 30 March 2010, Reasoning [51].

44 Decision of the Constitutional Court of Slovakia I. ÚS 382/2019 [ECCN SK-0411], 28 January 2010, Reasoning [77].

45 Article 47 Paragraph (3) of the Charter of Fundamental Rights of the European Union states in a similar way that "legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". Charter for Fundamental Rights of the European Union [2012] OJ C 326/391.

justice implies access to the procedural means by which justice is administered. It is true that the rules governing the conduct of proceedings before the courts are the exclusive competence of the legislature the principle of free access to justice implies the unrestricted possibility for those concerned to use these procedures in the forms and in the manner established by law, but in compliance with the rule enshrined in Article 21 (2) of the Constitution, according to which no law may restrict access to justice, which means that the legislator may not exclude any category or social group from exercising the procedural rights it has established."[46] This approach includes, besides the procedural dimension, also an aspect of social support and equality.[47]

The Hungarian Constitutional Court used a similar interpretation in its leading Decision 42/2012 (XII. 20.) AB. It stressed that in the case of compulsory legal representation, the lack of legal aid in constitutional court procedures violates the general principle of equality as foreseen in Article XV Paragraphs (1) and (2) of the Fundamental Law. In another decision[48] from 2008,[49] the Hungarian Constitutional Court concluded that the right to efficient access to justice is not hindered by the compulsory legal representation, provided legal aid is available for those in need. This decision seems to confirm that legal aid should be interpreted as an institution safeguarding equal and efficient chances of bringing a case to court. Thus, the legislator cannot and should not exclude the possibility that certain groups of litigants can be considered as being in need in relation to their chances of bringing their case to court: the provisions on legal aid serve to enforce human rights even in the case of a lack of income and wealth. This way, such an interpretation can be derived, that is definitely applicable to constitutional court proceedings, where the underlying aim is the efficient protection of human rights.

When defining the scope and forms of legal aid, attention should be paid to the fact that due to the abstract nature of constitutional complaint procedures, the compound of the normative legal provisions and the attached case law, there is a realistic chance that a party not supported by a lawyer cannot present his case in a comprehensive, clearly understandable manner which also includes proper legal arguments. Thus, the role of legal aid is not only related to financial need but to the lack of legal knowledge.

Therefore, the costs of the procedure itself (court fees) and the costs related to the compulsory legal representation are just one dimension that makes efficient legal aid schemes in constitutional court procedures necessary. Even in this regard, largely different models exist. The procedures before the Czech Constitutional Court[50] and the Constitutional Court of Slovakia[51] are not subject to court fees, but legal representation is

46 Decision of the Constitutional Court of Romania 208/2022 [ECCN RO-0444], 24 May 2022, Reasoning [31].

47 For the relevance of neediness (means test) in legal aid schemes, see: Váradi 2016; Váradi 2014.

48 Decision of the Hungarian Constitutional Court 685/B/2001 AB, 11 November 2008.

49 As regards the reference to the decisions of the Hungarian Constitutional Court made prior to the entry into force of the Fundamental Law, see: Decision 21/2014 (VII. 15.) AB [ECCN HU-0558], Reasoning [53]; Decision 7/2013 (III. 1.) AB, Reasoning [24].

50 §§ 29, 30, 62 and 83 of the Constitutional Court Act of the Czech Republic.

51 §§ 34, 37, 71 of the Constitutional Court Act of Slovakia.

mandatory for natural and legal persons in which context legal aid (reimbursement of costs or appointment of legal representative by the constitutional court, respectively) is possible based on the personal situation or financial means of the complainant. Meanwhile, the Hungarian Act on the Constitutional Court stipulates in its Section 54 Paragraph (1) that proceedings of the Constitutional Court are free of charge and there is no obligation of legal representation; in such proceedings extrajudicial legal advice might promote the submission of an admissible complaint.[52]

From a recent judgement of the ECtHR, however, an even more extensive interpretation of legal aid might be derived in constitutional court procedures. The specific case was related to the provision of the Act on the Constitutional Court of Croatia, which states that every participant in the Constitutional Court proceedings shall pay his/her own expenses unless decided differently by the Constitutional Court. The ECtHR concluded that "this exception not only provides a necessary flexibility allowing the Constitutional Court to adapt its decisions on costs to the circumstances of each case, it also suggests that in certain cases application of the default rule may not be justified […]".[53] The fact that the Constitutional Court of Croatia did not apply the exception in the case of a low-income person in a highly vulnerable situation without a meaningful justification amounted to a violation of fair trial rights under the Convention. This decision leads to a similar conclusion as described at the end of Part IV, namely that despite the specificities of the constitutional court proceedings, the vulnerability of the person concerned – both in legal and social terms – shall be carefully assessed, and the respective national laws shall be interpreted in a way that enables the efficient access to justice in cases directly and seriously relevant for the protection of fundamental rights and freedoms.

EFFECTIVENESS OF THE DECISION: LENGTH AND OUTCOME OF PROCEEDINGS

The final element, which shall be examined as part of the analysis about access to constitutional court procedures (as a basic element of fair trial in these proceedings), is how these proceedings, primarily the constitutional complaint procedures can contribute to remedying wrongs or asserting claims in the field of human rights protection. In this regard, the length and the outcome of the proceedings are crucial.

[52] Court fees are not applicable and legal representation is not mandatory in constitutional court procedures in Romania either, but due to the specificities of the procedure most similar to constitutional complaint procedures (settlement of the exception of unconstitutionality raised before courts of law or courts of commercial arbitration), the legal aid scheme for ordinary court procedures might only be relevant. §§ 13, 29–31 of Law No. 47 of 1992 on the Organisation and Operation of the Constitutional Court. Legal aid applications cannot be addressed to the Constitutional Court itself.
The text of the law is available in English at www.ccr.ro/wp-content/uploads/2020/11/LAW-No47.pdf. See further: www.ccr.ro/intrebari-frecvente/

[53] ECtHR, Dragan Kovačević v. Croatia § 78.

The acts regulating the constitutional court procedures in the examined countries usually do not contain strict deadlines for the adjudication of the cases, particularly as regards the constitutional complaint procedures. When evaluating the fulfilment of the requirement of a decision within a reasonable time, in general, the constitutional courts of the examined states stress the need for the assessment of the complexity of the case[54] as well as the urgency of the legal protection to be offered.[55] The ECtHR's basic approach as regards the length of proceedings – in connection with the right to fair trial – is that "the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute".[56]

These factors are transposable to the constitutional court proceedings as well. The ECtHR recalled in its case-law that it "accepts that the Constitutional Court's role of guardian of the Constitution sometimes makes it particularly necessary for it to take into account considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms".[57] Thus, the fact that no strict deadlines appear in the respective acts or that different types of

[54] In a specific case, the Hungarian Constitutional Court found that under certain circumstances even a procedure lasting 22 years can be considered as complying with the requirement of a decision within a reasonable time, as "the Constitutional Court found that six proceedings had been conducted in the twenty-two years, three before the Office and three before the courts. The Constitutional Court held that, under the provisions of the relevant substantive rules, the main proceedings could not continue at the administrative stage until the preliminary questions had been clarified in law. The Constitutional Court held that the authority and the courts had each taken their decisions within a reasonable time, so that the petitioner's right to a fair trial as a right to have the case decided within a reasonable time had not been infringed." Decision of the Hungarian Constitutional Court 3115/2013 (VI. 4.) AB [ECCN HU-0148], Reasoning [32].

[55] The Constitutional Court of Slovakia found in a recent decision that "the procedure of the District Court and the court proceedings as a whole did not comply with the requirements laid down in Article 46 (1) of the Constitution and Article 6 (1) of the Convention, since the complainant's application for the lifting of the restraining order imposed on him or for the amendment of his contact with his daughters was never finally decided, and the unreasonably lengthy court proceedings were terminated instead of a judicial decision only as a result of the mere lapse of time". Decision of the Constitutional Court of Slovakia I. ÚS 414/2021 [ECCN SK-0499] 2 June 2022, Reasoning 34. The same constitutional court referred to the case-law of the ECtHR as it underlined the need for an assessment of the need for legal protection. "The Constitutional Court also referred to the Judgement in Perhacs v. SR of 24 September 2020, in which the ECtHR found a violation of the right under Article 6 (1) of the Convention in the part of the reasonableness of the length of the proceedings conducted by the administrative court of first instance, which lasted 3 years and three months in the case of free access to information. In this context, the ECtHR realised that, if the time-limits laid down by national law for the provision of the information requested are so short (8 days at first instance and 15 days at appeal), they indicate an intention on the part of the legislature to ensure the individual's prompt and effective access to information, which at the same time precludes it from being acceptable that the subsequent stage of the review proceedings before an administrative court at first instance lasted more than three years." Decision of the Constitutional Court of Slovakia II. ÚS 518/2021 [ECCN SK-0501], Reasoning 27.

[56] ECtHR, Pustovit v. Ukraine (34332/03), 18 November 2010, § 22; similarly: Bieliński v. Poland (48762/19), 21 July 2022, § 42.

[57] ECtHR, Oršuš and Others vs. Croatia (15766/03) 16 March 2010, § 109; similarly: Shorazova v. Malta, (51853/19), 3 March 2022, § 135; Gast and Popp v. Germany (29357/95), 25 February 2000, § 75.

complaints are adjudicated in a different speed is acceptable. However, the fact „what was at stake" makes a more nuanced approach necessary: the same duration of the procedure in a case which by its nature requires urgency in decision-making and of a more abstract dispute, can lead to a violation of the applicant's right to trial within a reasonable time.

Taking into account the findings on the proper assessment of admissibility criteria and legal aid schemes in constitutional court procedures, as regards the requirement of a decision within a reasonable time, the same conclusion can be derived, namely that: a) the legislator (when defining the legal provisions) and the constitutional courts (when applying these provisions) have a broad margin of appreciation; but b) the constitutional courts should apply the flexibility at their disposal in order to enable the most efficient protection of fundamental rights.

CONCLUSIONS

The current analysis did not aim to single out certain elements of national laws, and compare these with the European and constitutional standards separately, but it was intended to establish a framework for the best possible interpretation of national laws in constitutional court procedures and for the further development of the legislative provisions in line with the requirements of fair trial and with special regard to access to justice.

Considering the role of constitutional court proceedings in safeguarding fundamental rights, democracy and rule of law, as well as based on the relevant case-law and legal literature it has been concluded that a) the concept of fair trial is and should be applicable to constitutional court proceedings, primarily constitutional complaint proceedings in general; b) apart from certain elements of the concept of fair trial, which are inherently linked to the specificities of ordinary (contradictory) court procedures, the majority of the conceptual elements are applicable to the constitutional court procedures; c) the basic standard for measuring the efficient implementation of the right to fair trial in constitutional court procedures, primarily in constitutional complaint procedures, is the efficiency of access to such procedures; and d) as regards the safeguards of an efficient access to justice in constitutional court proceedings, a strong interconnection between the different elements can be witnessed: the application of the admissibility criteria, the applicability of legal aid schemes, the length and outcome of the proceedings are only in compliance with the principle of fair trial if, despite the specificities of the constitutional court proceedings, the vulnerability of the person concerned (applicant, complainant) is carefully assessed, and the respective national laws are interpreted in a way that enables the efficient protection of fundamental rights and freedoms.

All these findings can contribute to a better understanding of the right to fair trial in constitutional court procedures (primarily constitutional complaint procedures). At the same time they can support the elaboration of a legislative framework and case-law, where a proceeding related to an issue of fundamental importance about the protection of human rights or other basic constitutional principles can be initiated in front of the constitutional court

without undue difficulties, the arguments of the complainants can be presented in an appropriate manner and they are answered in a specific and express manner so that the decision can – at the end of the day – result in an efficient remedy in the field of human rights.

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Editor-in-Chief

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