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Entwicklungslinien des deutschen Zivilverfahrensrechts

Abstract

German civil procedure law has undergone numerous changes. In many cases, the basic principles of the procedure have changed. Important areas of influence have been the received Roman process, but also French civil procedure. While in the past 150 years, national ideas have characterised the forms of procedure and enabled a great deal of codification, in more recent times there has been an increasing influence of EU law.

Keywords: History of the law of civil procedure; changing principles; influence of the roman law; aspects of French law; Codification of the German civil procedure law

Es war einmal vor langer Zeit, so könnten die Überlegungen eingeleitet werden, denn es soll ein Blick weit zurück in die Vergangenheit des deutschen Zivilverfahrens geworfen werden. „Es war einmal vor langer Zeit", so lautet aber auch die klassische Einleitung in deutsche Märchen, etwa bei den Brüdern Grimm. Es geht es an dieser Stelle indessen um nichts weniger als um ein Märchen. Vielmehr soll eine kleine Zeitreise durch die deutsche Prozessrechtsgeschichte unternommen werden.

Der Weg wird weit zurück in die Vergangenheit führen. Bei dieser Rückschau sind naturgemäß die Verhältnisse umso unschärfer, je weiter sie zeitlich entfernt sind. Jüngere Entwicklungen erscheinen demgegenüber detailreicher und dynamischer. So können dann frühere Rechtseinrichtungen nur grob skizziert und uns zeitlich nähere Erscheinungen etwas genauer betrachtet werden. Dabei speist sich die Rechtsentwicklung aus vielen Quellen und wird in der Verdichtung und Verbreiterung besser wahrnehmbar.

Der Weg wird zurückführen in eine Zeit vor mehr als 1.000 Jahren, in der in Deutschland die ersten Formen eines Streitlösungsverfahrens nachweisbar ausgebildet worden sind. Von diesem Startpunkt aus wird sodann die Spannungslage zwischen

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dem partikularen und dem gelehrten Prozess behandelt, die sich ab dem 15. Jahrhundert entwickelt hat. In der Folgezeit zwischen dem Ende des 18. und des 19. Jahrhunderts traten einige entscheidende prozessuale Weichenstellungen ein. Sie führten zu der großen Auseinandersetzung um den bürgerlich-liberalen Zivilprozess ab der Mitte des 19. Jahrhunderts.

Letztlich mündeten diese Entwicklungen in der in den Grundmodellen partiell mehr idealtypisch als praktisch ausgebildeten deutschen Zivilprozessordnung, die zum 1.10.1879 in Kraft getreten ist. In manchen Windungen und Schleifen wurden ihre Verfahrenstauglichkeit hergestellt, aber auch den Erfordernissen der damaligen Kriegssituation Rechnung getragen. Seitdem ist der Zivilprozess vielfach nachjustiert und an die Verhältnisse und Bedürfnisse der modernen demokratisch-rechtsstaatlichen Massen- und Mediengesellschaft angepasst worden.

Zwei ergänzende Anmerkungen sind noch geboten. Gesprochen wird hier vom deutschen Zivilverfahren, auch für eine Zeit, in der es noch kein Deutschland gab. Vielleicht existierte noch nicht einmal das Heilige Römische Reich Deutscher Nation mit seinen vielfältigen Territorien. So liegen die Ausbildung von Staatlichkeit und von Prozess nebeneinander. Wenn in diesem Überblick Deutschland genannt wird, dann als räumliche Umschreibung eines Gebiets, das im entfernteren Sinn dem heutigen deutschen Staatsgebiet entspricht.

Ähnlich verhält es sich mit dem Begriff des Zivilverfahrensrechts. Über die Zeitenläufe hinweg existierte kein einheitliches Zivilverfahren, sondern ein bunter Strauß vielfältiger Erscheinungen. Selbst in moderner Zeit kann nicht von dem Verfahren im Sinne eines einheitlichen deutschen Zivilverfahrens gesprochen werden, ohne so unterschiedliche Erscheinungen, wie das amtsgerichtliche Verfahren, die Schiedsgerichtsverfahren oder die Massenklagen zu nivellieren. Außerdem wird das Zivilverfahren mit einem konzentrierten Blick auf den Zivilprozess thematisiert, ohne eine ganz exakte Konturierung und Abgrenzung gegenüber anderen verfahrensrechtlichen Regelungen vorzunehmen, etwa dem Insolvenz- oder familiengerichtlichen Verfahren. Diese Unschärfen mögen für den angestrebten großen Überblick vertretbar sein.

I. Ausbildung von Prozess

Am Anfang existierte kein Recht und Gerichte bestanden noch nicht.[1] Dies gilt in Deutschland jedenfalls noch im frühen Mittelalter. Gewalt und Versöhnung bildeten die Ursprungselemente von Verfahren. Sie dienten zunächst der Durchsetzung individueller Positionen und vielleicht auch deren Limitierung. Ohne eine freiwillige Mitwirkung der beteiligten Personen konnte keine Konfliktlösung erreicht werden. Allen-

[1] Oestmann, *Wege zur Rechtsgeschichte: Gerichtsbarkeit und Verfahren,* (2015) 29.

falls durch die örtliche Gemeinschaft konnte eine gewisse Einhegung von persönlicher Macht erreicht werden. Staatlich durchsetzbare prozessuale Regeln existierten zu dieser Zeit nicht. Dabei war eine Trennung zwischen Zivil- und Strafprozess im frühmittelalterlichen Verfahren noch nicht angelegt. Aus diesen frühen Erscheinungen schälten sich sukzessive mehrere Dimensionen heraus.

Eine erste Entwicklungslinie wird bei den für eine Konfliktlösung maßgebenden Personen sichtbar. Die frühmittelalterliche Rechtsfindung erfolgte zunächst in der Dingversammlung. Da hoheitliche Zwangsinstrumente zur Rechtsdurchsetzung fehlten, war für eine Konfliktlösung das Einvernehmen der Betroffenen entscheidend. Die Urteilsfindung geschah dabei durch Zustimmung der freien Männer des Orts als Dingteilnehmer.[2]

In fränkischer Zeit wurden differenziertere Rollen für Beurteiler, Parteien und andere Beteiligte ausgeformt. Die schwerfällige Dingversammlung wurde auf kleinere Versammlungen mit einem rechtserfahrenen Beurteiler- bzw. Schöffenkreis beschränkt. In einer primär noch oralen Gesellschaft bildete aber immer noch die mündliche und öffentliche Versammlung die maßgebende Kommunikationsgrundlage.[3]

An die Stelle dieses fragilen Systems aus Gewalt und Konsens traten mit einer separaten zweiten Entwicklung die neuen Ideen des Gottes- und Landfriedens. Hierzu gehörte auch ein Einlassungszwang. Es sollte nicht mehr erst nachträglich eine Einigung versucht, sondern bereits im Vorhinein eine Waffenverwendung verhindert werden. Der Weg war lang und mühselig und schränkte schrittweise die persönlichen Freiheitsdimensionen zugunsten gesellschaftlicher Ordnungselemente ein. Dies geschah zunächst vermittelt durch kirchliche Würdenträger, später unter dem Einfluss weltlicher Herrscher. So wird dann insbesondere der ewige Landfrieden von 1495 als entscheidender Schritt auf dem Weg von einer privaten zu einer staatlichen Rechtsdurchsetzung verstanden.[4] Ermöglicht wurde diese Neuformung erst durch die sukzessive Ausbildung staatlicher Gewalt.

Einerseits wird damit die Konzeption einer von individuellen Handlungen geprägten Durchsetzung von Gerechtigkeitsvorstellungen aufgelöst. Dadurch entkoppelt sich andererseits sukzessive das individuelle Einverständnis von dem Verhandlungsergebnis bei einer Beurteilung durch andere Personen. So bildete sich dann langsam ein verselbständigter Gerichtskörper heraus. Dessen Einrichtung und Institutionalisierung stellte und stellt immer noch eine hohe Kulturleistung dar. Erst sie gewährleistete die uns allgegenwärtige Friedensordnung, die heute unter dem Begriff des staatlichen Gewaltmonopols zusammengefasst wird.

[2] Ahrens, *Handwörterbuch zur deutschen Rechtsgeschichte,* (2. Aufl.) Öffentlichkeit, Sp. 113 ff.
[3] Ahrens, *Handwörterbuch zur deutschen Rechtsgeschichte,* Sp. 113 ff.
[4] Oestmann, *Wege zur Rechtsgeschichte: Gerichtsbarkeit und Verfahren,* 62 ff., 153.

II. Partikularer und gelehrter Prozess

1. Zwei Rechtsschichten

Zivilverfahrensrecht war in den deutschen Gebieten lange durch verschiedenartige Rechtsformen geprägt. Als in vieler Hinsicht wörtlich zu verstehende Basis existierte der partikulare Zivilprozess – oder richtiger bestanden die partikularen Zivilverfahrensformen – in den deutschen Landen. Diese waren oft durch die territorialen Verhältnisse geprägt. Verbreitet bestanden besondere landesrechtliche Gerichts- und Prozessordnungen. Solche Ordnungen konnten bis hinunter zur Ebene einzelner Städte reichen.

Im frühneuzeitlichen Verfahren herrschte damit ein großer Reichtum prozessualer Erscheinungen. Diese Ordnungen normierten, zumeist ab der mittelgerichtlichen Ebene nach oben – aus heutiger Perspektive –, gerichtsverfassungs- und verfahrensrechtliche Aspekte. Dabei waren diese Regelungen weniger durch konzeptionelle Modellbildungen als vielmehr durch pragmatische Ausgestaltungen bestimmt.

Neben diesen durch Ordnungen geregelten partikularen Verfahren existierten das gemeine Prozessrecht oder auch hier genauer die gemeinrechtlichen Verfahrensformen. Die Wurzeln dieser Verfahrensrechte lagen in dem kanonischen Prozessrecht, dem Statuarrecht der oberitalienischen Städte und der Gerichtspraxis.[5] Von der gemeinrechtlichen Judikatur, Lehre und partiell auch Gesetzgebung wurde dabei ein formalisierter Akten- und Instanzenprozess geschaffen. Mit dem Reihenfolgeprinzip und der Terminsequenz wurde den einzelnen Prozesshandlungen je gesonderte Termine zugeordnet.[6] Mit den daraus resultierenden zahlreichen Terminen manifestierte sich eine drohende Prozessverschleppung.[7]

Sein Verfahrensmodell sollte mit Rechtssicherheit und Ordnung der Verfahrensstadien den Rechtsschutz des Beklagten gewährleisten.[8] Hierin lagen die Ursprünge der späteren Insuffizienz des gemeinen Prozesses. Langsam bildeten sich dabei Zuständigkeitsregeln und Rechtsschutzformen im Instanzenzug heraus. Diese Verfahrensmuster galten unmittelbar in Territorien ohne spezifische eigene Prozessordnungen, wie Schleswig und Holstein, den beiden Mecklenburgs sowie Sachsen. Subsidiär wurden die für den gemeinen Prozess ausgebildeten Verständnisse aber auch verwendet, um Lücken der nicht selten rudimentären partikularen Prozessrechte zu schließen.

[5] Vgl. Nörr, *Ein geschichtlicher Abriss des kontinentaleuropäischen Zivilprozesses,* (2015) S. 18.
[6] Nörr, *Romanisch-Kanonisches Prozessrecht. Erkenntnisverfahren in erster Instanz in civilibus,* (2012) 37 ff. DOI: https://doi.org/10.1007/978-3-642-23483-5
[7] Nörr, *Ein geschichtlicher Abriss des kontinentaleuropäischen Zivilprozesses,* S. 18 f.
[8] Ahrens, *Prozessreform und einheitlicher Zivilprozess,* (2007) 12.

2. Messpunkte

An den unteren und oberen Endpunkten der Gerichtskörper wurden die unterschiedlichen Ausgestaltungen besonders deutlich sichtbar. Sie bildeten die Antipoden des Gerichtsverfahrens. Dabei wichen sie sehr weit voneinander ab, weswegen sie kaum unter der Vorstellung einer einheitlichen Rechtslandschaft zusammengefasst werden konnten.

Die Untergerichte waren oft mit den örtlichen Herrschaften verbunden. Bei ihnen existierte regelmäßig weder ein formalisiertes Verfahren noch waren akademisch geschulte Richter vorhanden. Beides wäre wohl auch oft an den Bedürfnissen der Beteiligten vorbeigegangen. Justiz war hier zumeist Laienjustiz. Vielfach wurde deswegen nach Billigkeitsgesichtspunkten judiziert. Dies galt zunächst im materiellen Recht, aber eben auch im Verfahren. Der untergerichtliche Prozess bot deswegen ein durchaus buntes Bild lebendiger, mündlicher und öffentlicher, aber wohl auch wenig strukturierter Verhandlung. Systematisierungen und Vereinheitlichung lagen hier fern und waren eher Ausdruck einer nachträglichen Theoriebildung als einer gelebten Gerichtspraxis.

Ein nahezu entgegengesetztes Bild herrschte an der Spitze des Gerichtsverfahrens. Separiert von den territorialen Gerichten bestanden das Reichskammergericht an wechselnden Orten, wie Wetzlar und Speyer, sowie der Reichshofrat in Wien. Grund für den Sitz des Reichskammergerichts war auch eine räumliche Distanz zum Herrschersitz. Diese Gerichte verfügten über eigene, mehrfach weiterentwickelte Gerichtsordnungen. Von der Gesetzgebung des Reichs wurde dadurch das Verfahren zum Kameralprozess ausgebildet.[9] Die Gerichtspersonen waren gelehrte Richter, die an den europäischen Universitäten in den Rechten geschult waren. Resultierend aus den unterschiedlichen Einflüssen setzte sich die Vorstellung eines formalisierten Prozesses durch. Schriftlichkeit ersetzte vielfach, aber nicht vollständig, die mündliche Verhandlung.[10]

Diese reichsrechtlichen Gerichts- und Verfahrensformen waren anfangs weitgehend abgelöst von den partikularen Verhältnissen. Auf unterschiedlichen Wegen flossen erstere in das partikulare Recht ein. Zunächst und ganz unmittelbar verlangten etwa § 15 des Reichsdeputationsabschieds von 1600[11] und § 137 des Jüngsten Reichsabschieds des Jahres 1654[12] von den Reichsständen, ihr eigenes Gerichtsverfahren entsprechend dem Vorbild des kammergerichtlichen Prozesses einzurichten. Unterschwellig formten die reichsrechtlichen Ordnungen das gemeine Prozessrecht mit aus

[9] Ahrens, *Prozessreform und einheitlicher Zivilprozess,* 12.
[10] Nörr, *Ein geschichtlicher Abriss des kontinentaleuropäischen Zivilprozesses,* S. 20.
[11] Bergmann, *Corpus iuris iudiciarii civilis germannici academicum,* (1819) S. 325 f.
[12] Bergmann, *Corpus iuris iudiciarii civilis germannici academicum,* S. 456.

und prägten darüber subsidiär auch das partikulare Prozessrecht dort, wo es diesem an eigenen Normierungen fehlte.

So sind nach den Entstehungsformen durch die Reichsgesetzgebung oder in den Territorien und nach der Geltung für die unterschiedlichen Gerichte sehr verschiedenartige Prozessformen zu erkennen. Dabei gab es durchaus wechselseitige Beeinflussungen, wenn auch wohl vor allem aus Richtung des gemeinen und obergerichtlichen Verfahrens hin zu den partikularen und untergerichtlichen Rechten. Eine Nivellierung dieser Divergenz erfolgte indessen bis zum großen Corpus der CPO von 1877 nicht. Allerdings erfolgte später eine Kanalisierung in wichtige Ausprägungen. Dazu später.

3. Verschriftlichung und Geheimhaltung

Mit dem Einsickern des gelehrten, also des universitär geprägten Verfahrens veränderten sich die Prozessformen. Verwendet wurde eine mehr und mehr technische Fachsprache mit lateinischen Formulierungen, die dem Publikum fremd blieb. Zudem wurde das Verfahren komplexer und formalisierter. An die Stelle einer mündlichen Verhandlung trat immer mehr ein verschriftlichter romanisch-kanonischer Prozess. Da selbst die gelehrten Richter von diesem Prozess, aber natürlich auch seiner materiellen Fundierung überfordert waren, wurden regelmäßig Akten an Universitäten versandt. Die Entscheider entfernten sich immer weiter von den Beteiligten. Dadurch verschloss sich die Tür langsam für das Publikum.

Ein weiterer Faktor trat hinzu. Dritten sollten die Prozesshandlungen unbekannt bleiben. So entwickelte sich das Abbild eines geheimen, schriftlichen Verfahrens, das den Parteien und dem Publikum weithin entzogen war. Die Mittelbarkeit dieses Verfahrens diente nicht allein dazu, eine geheime, etwa Kabinettsjustiz, zu sichern, sondern sollte das Gericht und die Richter auch gegenüber äußeren Einflüssen immunisieren. So schützte sie auch die Urteiler vor unangemessenen Einwirkungen. Zugleich gab sie Anlass zu Misstrauen und fehlender Akzeptanz.

4. Beschleunigung

Ein Grundthema des förmlichen Zivilverfahrens bildeten zumindest seit der frühen Neuzeit dessen Dauer und die möglichen Beschleunigungsmaßnahmen. Diese Aufgabenstellung hat uns bis heute nicht verlassen. Seit langem ist der Blick auf das Reichskammergericht durch bissige Anekdoten über die dort herrschende Verfahrensdauer geprägt. Das gängigste Klischee ist das von der überlangen Prozessdauer, der langen Bank, auf welche die Richter angeblich die Prozessakten schoben, um dann die herunterfallende Akte als nächste zu bearbeiten. Diese Metapher des auf die lange Bank

Schiebens ist in der deutschen Sprache sprichwörtlich geworden.[13] Eine andere Erzählung berichtet von einem Dachboden, auf dem die Akten mit Schnüren aufgehängt wurden. Erst wenn die Schnüre durchfaulten, fielen die Akten herunter und wurden sodann von den Richtern bearbeitet.[14]

Mit der damaligen Realität hatten diese Anekdoten dennoch wohl nur wenig zu tun. Allerdings soll ein 1526 begonnener Prozess zwischen Nürnberg und Brandenburg bei der Auflösung des Gerichts im Jahr 1806 noch nicht beendet gewesen sein.[15] Zwischen Anekdoten und der Rechtshistorie bestand ein Abstand, dessen Größe noch auszumessen ist.

Für unsere Überlegungen sind verschiedene Fäden zu entwirren. Einen nicht unbedeutenden Einfluss besaß die unzureichende Ausstattung des Gerichts, insbesondere das fehlende Gerichtspersonal. Weiter kam dem formalisierten Verfahren nebst den hypertrophen Rechtsschutzinstrumenten eine wesentliche Bedeutung zu. Gegen gerichtliche Entscheidungen konnten vielfältige Appellationen und Supplikationen, in heutiger Terminologie Rechtsbehelfe, eingelegt werden. So wurden endgültige Entscheidungen vielfach verzögert. Manche möglicherweise unbedeutend erscheinende Nebengleise wirkten sich ebenfalls aus. Da Advokaten auch nach dem Umfang ihrer Schriftsätze bezahlt wurden, hatten sie kein Interesse an einer konzentrierten Darstellung der Verhältnisse. Vieles fügte sich hier in wenig vorteilhafter Weise zusammen.

III. Weichenstellungen

1. Ausgangssituation

Vor allem die gemeinen, aber auch die partikularen Formen des Zivilverfahrens erwiesen sich deswegen in der Mitte des 18. Jahrhunderts als dringend reformbedürftig. Um die Wende zum 19. Jahrhundert ging zudem in Deutschland die lockere Einheit oder jedenfalls der weithin bestehende Überbau des gemeinen Zivilverfahrensrechts verloren. Auch hier sind mehrere Entwicklungsverläufe wahrnehmbar. Intensivierte Handelsströme verlangten übersichtlichere Rechtsverhältnisse, die mit den kleinteiligen Verfahrensregelungen kaum vereinbar waren. Prozessreform bildete hier, wie auch später im Deutschen Reich, einen wichtigen Antrieb für eine zunächst partikulare und später nationale Rechtsvereinheitlichung.

Als Antriebskräfte wirkten auch die offenbaren Defizite der partikularen und gemeinrechtlichen Verfahrensformen. Daneben stand die immer stärkere Ausbildung

[13] https://www.zeitenblicke.de/2004/03/cordes/index.html (letzter Zugriff: 29.12.2023).
[14] Ibid.
[15] Blasius, *Goethe und seine Zeit in Wetzlar und Gießen,* S. 55, 56, DOI: http://dx.doi.org/10.22029/jlupub-5317

staatlicher Hoheitsgewalt. Staatsgewalt verwirklichte sich vor den Gerichten. Die konsolidierten Territorien führten zu einer neuen Dynamik zur Vereinheitlichung der Prozess- und Gerichtsordnungen. Sachthemen und Organisationsgestalt – oder -gewalt – flossen hier zusammen.

2. Preußen

In Preußen verdichteten sich diese Verläufe mit der Vorstellung eines wohlmeinenden Absolutismus zu einem völlig neuen Modell von Prozess. Bereits mit dem Corpus Juris Fridericianum vom 26.4.1781 wurden die Verbindungslinien zum geltenden preußischen Zivilverfahrensrecht mit dessen gemeinrechtlichen Wurzeln zielgerichtet durchtrennt. Aus einem umfassenden gesetzgeberischen Plan wurden oberste Verfahrensgrundsätze aufgestellt, aus denen ein neuer „modus procedendi" abgeleitet wurde. Unnötige Formalitäten sollten beseitigt und die Prozesse in einem Jahr beendet werden. Zudem sollten die Gerichte die Parteien selbst hören.[16]

Vollendet wurde dieses idealtypische System in der Allgemeinen Gerichtsordnung für die preußischen Staaten von 1793–1795. Höchstes Ziel bildete die Ermittlung von Wahrheit,[17] eine aus der heutigen Vorstellung, wonach Gerichtsverhandlungen auf die Ermittlung formeller Wahrheit gerichtet sind, sehr fernliegende Vorstellung. Ein essenzielles Element bildeten auch das Misstrauen gegenüber dem Advokatenstand. Dessen Aufgaben sollten durch Gerichtspersonen übernommen werden. Begleitet wurden diese Ideen von einem Untersuchungsgrundsatz mit einer Wahrheitspflicht der Parteien. Über allem stand eine weitreichende Richtermacht.

Obwohl die fridericianischen Kodifikationen institutionelle Mängel des altpreußischen Gerichtsverfahrens beseitigen sollten, blieben doch die praktischen Ergebnisse sehr beschränkt. Binnen kurzem wurde der Versuch einer durch das Instruktionsverfahren geleiteten Suche nach Wahrheit aufgegeben. Dennoch blieb das Verfahrensmodell nicht folgenlos, denn es prägte die systembildenden Vorstellungen der naturrechtlichen Prozesslehre. So gewann die Maximendiskussion eine für die deutsche Prozessrechtslehre entscheidende Gestalt. Beginnend mit den Überlegungen von Gönner zur Verhandlungs- und Untersuchungsmaxime[18] wurden die Antagonismen der Verfahrensmaximen, heute eher als Verfahrensgrundsätze bezeichnet, über das Verfahrensverständnis gelegt.

[16] Ahrens, *Prozessreform und einheitlicher Zivilprozess,* 102 f.
[17] Ahrens, *Prozessreform und einheitlicher Zivilprozess,* 102 f.
[18] Gönner, *Handbuch des deutschen gemeinen Prozesses,* 4 Bände, (2. Aufl., 1804 f.) 1. Band, S. 175 ff.

3. Französisches Zivilverfahren in Deutschland

Unter der Gewalt der napoleonischen Expansionen und der Hegemonialmacht Frankreichs zerbrach an der Wende vom 18. zum 19. Jahrhundert die alte staatliche und gesellschaftliche Ordnung in Deutschland. In der Konsequenz wurde der *Code de Procédure Civil* von 1806 in unterschiedlichen Ausformungen in den französischen Herrschaftsbereichen eingeführt.[19] Selbst nach dem Ende der französischen Besatzungszeit galt er in den linksrheinischen Gebieten bis zum Inkrafttreten der Reichscivilprozessordnung fort. In vieler Hinsicht hat er zunächst manche territorialen Zivilprozesse, wie in Bayern, und anschließend auch den Reichszivilprozess in Deutschland beeinflusst.

Seine von der Prozesslehre ausformulierten Modellelemente unterschieden den französischen Prozess substantiell vor allem von den gemeinrechtlichen, aber auch den meisten partikularen Prozessformen. Allerdings bildeten solche Theoretisierungen oder, einfacher gesprochen, Konzeptionen nicht unmittelbar die Grundlage des französisch geprägten Verfahrens. Im Kern wurde sie erst nachträglich von einer systematisierenden Prozesslehre ausformuliert. Zu den Tragwerken des so verstandenen französischen Prozessgesetzes gehörte die Kulturerrungenschaft eines mündlich-öffentlichen Verfahrens. Zudem prägte eine starke Parteiherrschaft den Rechtsgang, denn die Parteien hatten die Fortführung des Verfahrens in der Hand.

Manches wirkte sich aber auch ungünstig aus. Durchaus künstliche Verfahrensformen hinderten allerdings einen einfachen Verfahrensgang. So musste das Verfahrensgerüst zunächst vom Mantel unnötiger Formalitäten, etwa beim Zustellungswesen, entkleidet werden. Partiell in das Zivilverfahren übernommen wurde aber auch das französisch geprägte Institut der Gerichtsvollzieher.

4. Zwischenschritte

Zahlreiche deutsche Territorien wurden von den vielfältigen Reformgedanken angesteckt. Dabei bewegten sich die Diskussionen zwischen den verschiedenen Endpunkten des gemeinen, preußischen und französischen Rechts. Neben diesen Wuchsrichtungen rückten mehr und mehr systematische Konzeptionen in den Mittelpunkt der Prozessreformen, was wohl auch dem wachsenden Einfluss einer universitären Prozesslehre geschuldet war.

Bedeutendere Prozesskodifikationen entstanden im Großherzogtum Baden und vor allem auch im Königreich Hannover. Eine kleine Glosse: der dort maßgebende Ministerialbeamte und Rechtspolitiker Gerhard Adolph Wilhelm Leonhardt hat in

[19] Ahrens, *Prozessreform und einheitlicher Zivilprozess,* 44 ff.

Göttingen studiert und promoviert.[20] Ihm kommt zunächst in gewissem Maß für die hannoversche bürgerliche Prozessordnung und später in herausragender Weise Einfluss auf die Schaffung der deutsche Reichscivilprozessordnung zu. Seiner konzeptionellen Offenheit war nicht zuletzt die mehrfache Neuorientierung bedeutender Stufen der Verfahrenskodifikation zu verdanken.

Die Allgemeine bürgerliche Prozessordnung für Hannover vom 8.11.1850 (BPO) markierte den Abschluss der kurzen Aufbruchphase nach der bürgerlichen Revolution des Jahres 1848. Ein programmatisch begründetes, aber funktionsfähig gestaltetes mündliches Verfahren, basierend auf einer kritisch-offenen Haltung der Gesetzesverfasser zum französischen Zivilprozess sowie neuartige Verfahrensgestaltungen, die unbefangen mit tradierten gemeinrechtlichen Prozessinstituten kombiniert wurde, verhalfen der BPO zu hohem Ansehen als Wendepunkt der deutschen Prozessgesetzgebung im 19. Jahrhundert.[21] Zukunftswirksam war die Ausbildung als unmittelbares Verfahren, in dem sich die Gerichtsherrschaft und die Parteienmacht begegnen konnten. Stärker gemeinrechtlich geprägte Elemente, wie das Beweisurteil bzw. Beweisinterlokut, wurden dagegen im späteren Zeitverlauf von der Rechtsentwicklung abgestoßen.

Die Prozessreform speiste sich damit aus praktischen Notwendigkeiten, wie der Überwindung des langsamen und zersplitterten Verfahrens. Sie erprobte die Kombination mit den tradierten Verfahrenselementen des Beweisinterlokuts. Vor allem aber öffnete sie sich dem Zeitgeist. In dessen Verständnis flossen unter dem Schutzschirm des als modern verstandenen französischen Verfahrens liberal-bürgerliche Vorstellungen ein.

IV. Auseinandersetzung um den bürgerlich-liberalen Zivilprozess

1. Konzeptionen

Zu den herausragenden Themen bei der Ausbildung eines vom Bürgertum mitgeprägten deutschen Nationalstaats im 19. Jahrhundert gehörte die Umformung des Zivilrechtsgangs von den veralteten Prozessformen hin zu einem freiheitlichen Verfahren. Einem erwachenden bürgerlichen Bewusstsein mussten speziell die Berührungspunkte zwischen dem Individuum und der öffentlichen Gewalt als sensible Konfliktstellen erscheinen.[22]

Zu den bemerkenswertesten Entwicklungen der jüngeren Prozessrechtsgeschichte gehört, wie aus den originellen Prozessbildungen und der Formenvielfalt der

[20] Ahrens, Von Hannover nach Berlin – Wegemarken der Prozessrechtsentwicklung, in Heun/Schorkopf, *Wendepunkte der Rechtswissenschaft,* (Göttingen, 2013) 119 ff.
[21] Ahrens, *Prozessreform und einheitlicher Zivilprozess,* 431.
[22] Ahrens, Von Hannover nach Berlin – Wegemarken der Prozessrechtsentwicklung, 119.

partikularen Verfahrensregelungen eine Vereinheitlichungsbewegung entstand und wie damit die Grundlagen des reichseinheitlichen Zivilverfahrens der CPO geschaffen wurde. Ein einigendes Leitbild vermittelte die Sicherung der bürgerlichen Freiheitsrechte. In dem zumindest noch partiell obrigkeitsstaatlichen Zivilprozess sollte der Richter als unabhängige Entscheidungsinstanz über den Wettstreit der Parteien wachen.

Als verfahrensrechtliches Modellbild diente in erster Linie das öffentlich-mündliche Zivilverfahren. Es spiegelte die Emanzipationsbedürfnisse des Bürgertums gegenüber obrigkeitlicher Herrschaft. Vielleicht fußte dieses Konzept auch auf dem Leitbild parlamentarischer Debatten, das in das Gerichtsverfahren transponiert wurde. Intensiv wurden dabei die Erfahrungen mit dem französischen Prozessrecht rezipiert.[23] In konzeptioneller Annäherung an die französischen Verfahrensformen, aber nationalistischer Distanz zu dessen Ursprung und unter Absehen von den unterschiedlichen Ausprägungen, wurde nach einer germanisch-rechtlichen Rückkopplung gesucht.[24] Jedenfalls trat damit ein Strukturwandel des deutschen Zivilprozesses[25] ein, der bis heute die Vorstellungen von Prozess formt. Als Randbemerkung mag hier der Hinweis auf Art. 6 I 1 EMRK genügen, aus der die Verpflichtung zu einer grundsätzlich öffentlichen und mündlichen Verhandlung abgeleitet wird.[26]

Insgesamt erfolgten verschiedene Strukturentwicklungen. Methodisch wurde die Grundrichtung des Zivilverfahrens langsam auf Prinzipienbildungen ausgerichtet.[27] Dessen Leitsterne bildeten die Öffentlichkeit, Mündlichkeit, Unmittelbarkeit und der Verhandlungsgrundsatz, der heute Beibringungsgrundsatz genannt wird, ergänzt durch eine freie richterliche Beweiswürdigung. Überwölbt wurde das Verfahren durch eine weitgefasste Parteiherrschaft, die in einer etwas kritischeren Wendung auch als Anwaltsherrschaft verstanden werden kann. Hinter dessen Dominanz traten die Möglichkeiten des Gerichts weit zurück.

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[23] Etwa Feuerbach, *Ueber die Gerichtsverfassung und das gerichtliche Verfahren Frankreichs, in besonderer Beziehung auf die Oeffentlichkeit und Mündlichkeit der Gerechtigkeitspflege,* (Giessen, 1825) 1. Bd., S. 194 ff.; Mittermaier, *Der gemeine deutsche bürgerliche Prozess in Vergleichung mit dem preußischen und französischen Civilverfahren und mit den neuesten Fortschritten der Prozessgesetzgebung,* (2. Aufl., Bonn, 1822, Erster Beitrag) S. 70 ff., 97 ff.

[24] Z. B. Maurer, *Geschichte des altgermanischen und namentlich altbaierischen oeffentlich-mündlichen Gerichtsverfahrens, dessen Vortheile, Nachtheile und Untergang in Deutschland überhaupt und in Baiern insbesondere,* (Heidelberg, 1824).

[25] So der Titel eines klugen Buchs von Dahlmanns, *Strukturwandel des deutschen Zivilprozesses im 19. Jahrhundert,* (Aalen, 1971).

[26] Meyer-Ladewig, Harrendorf und König, in Meyer-Ladewig, Nettesheim und von Raumer, *Europäische Menschenrechtskonvention,* (4. Auflage, 2017) Art. 6 Rn. 170.

[27] Vgl. etwa Bomsdorf, *Prozessmaximen und Rechtswirklichkeit – Verhandlung- und Untersuchungsmaxime im deutschen Zivilprozess – Vom gemeinen Recht bis zur ZPO,* (1971) S. 23 ff. DOI: https://doi.org/10.3790/978-3-428-42359-0

2. Der Weg zur Reichscivilprozessordnung

Der weitere Weg bis hin zur Reichscivilprozessordnung, die bis zur Rechtschreibreform von 1902 noch mit „c" geschrieben wurde, hat sich keineswegs zwangsläufig, sondern durchaus unter dem Einfluss einiger tatkräftiger Personen ergeben. Auf dem Nährboden der drei konkurrierenden Prozessmodelle des gemeinen, des französischen und des preußischen Rechts, die jeweils eine gewisse Variationsbreite aufwiesen, erwuchs eine Fülle von Regelungswerken. Keines dieser Prozesssysteme war dabei den anderen zweifelsfrei überlegen.

So sind dann mehrere für die deutsche Einheitsgesetzgebung maßgebende Faktoren zu identifizieren. Aus einem reichen Anschauungsmaterial konnten zahlreiche Erkenntnisse gewonnen werden. Die sich entwickelnde Prozessrechtswissenschaft trug zu einem systematisierenden Verständnis bei, welches unter dem Einfluss der großen bürgerlich-liberalen Themen die Wuchsrichtung des Zivilverfahrens bestimmte. Und schließlich war die reichsnational überformte Vorstellung bereit für ein einheitliches deutsches Zivilverfahren, das unter dem tatkräftigen Einfluss einer Zentralfigur, dem nunmehrigen preußischen Justizminister Leonhardt, Gestalt annahm.

In einer in historischen Dimensionen kurzen Zeitspanne von nur 15 Jahren wurde der reichseinheitliche Zivilprozess ausgebildet.[28] Die Basis dafür stellten die Entwürfe von zwei Prozesskonferenzen dar. In den Jahren zwischen 1862 und 1866 wurde im sog. Bundesstaaten-Entwurf ein mündliches Verfahren mit Präklusionselementen geschaffen. Nach dem Einigungskrieg von 1866 setzten sich die neuen kleindeutschen Verhältnisse – unter Ausschluss von Österreich – auch bei den prozessrechtlichen Arbeiten durch. In einer Zivilprozesskonferenz für den Norddeutschen Bund wurde in den Jahren 1867 bis 1870 ein nächster Schritt getan. Umgesetzt wurde ein mündliches Verfahren mit einer modifizierten Verfahrensgliederung. Widersprüchliche Durchbrechungen verhinderten allerdings ein klares Präklusionsmodell. Zu große, wenig kohärente Beratungsgremien waren wenig geeignet, um ein systematisch geschlossenes Prozessmodell zu entwickeln.

Die fehlende Beteiligung der süddeutschen Staaten ließ nach der Reichsgründung eine unmittelbare Umsetzung dieses Entwurfs als ausgeschlossen erscheinen. In einer glücklichen Konstellation mit einer großen nationalen Begeisterung, die mit der Reichsgründung Anfang 1871 einherging, ergriff der damalige preußische Justizminister Leonhardt die Initiative.[29] In einer zunächst sehr kleinen, interministeriellen Arbeitsgruppe, später in weiteren Runden, erfolgten die vorbereitenden Arbeiten. So wurde für die Reichsebene in drei weiteren Entwürfen schließlich die deutsche Zivil-

[28] Einen konzentrierten Überblick gibt Schubert, *Entstehung und Quellen der Zivilprozessordnung von 1877,* (1. HbBd., Frankfurt, 1987) S. 35.
[29] Schubert, *Entstehung und Quellen der Zivilprozessordnung von 1877,* S. 5.

prozessordnung konzipiert.[30] Zu den Grundprinzipien von Mündlichkeit und Unmittelbarkeit äußerte sich der preußische Justizminister Leonhardt durchaus skeptisch:

> „Die Civilprozessordnung beruht auf dem Grundsatz der Unmittelbarkeit der Verhandlungen vor dem zur Entscheidung berufenen Richter. Man kann nun ein sehr lebhafter Vertheidiger dieses Mündlichkeitsprinzip sein, und zu diesen Vertheidigern gehöre ich bekanntlich, und dennoch der Erwägung sich nicht verschließen, dass die Mündlichkeit neben ihren großen durchgreifenden Vortheilen auch Nachtheile mit sich bringt, welche vollständig schwerlich zu überwinden sind. Zu dieser Erfahrung kommt man, je länger man über die Sachen nachgedacht und die Verhältnisse im Rechtsleben hat kennen lernen. Für die verbündeten Regierungen war die Frage, ob die Civilprozessordnung auf dem Grundsatze der Mündlichkeit oder der Schriftlichkeit aufzubauen sei, keine offene mehr. Sie nehmen an, dass es eine politische Nothwendigkeit sei, den Grundsatz der Mündlichkeit der Zivilprozessordnung zugrundezulegen."[31]

Nach einer eingehenden, aber in den Grundformen wenig konfligierenden Beratung im Reichstag,[32] die CPO wurde u.a. als „nahezu vollendetes Meisterwerk" bezeichnet,[33] wurde die Civilprozessordnung am 30.1.1877 verabschiedet und trat zum 1.10.1879 in Kraft. Dennoch war die CPO oft mehr Idee als geronnene Erfahrung mit neuer praktischer Ausgestaltung. Mit ihrer klaren gedanklich-konzeptionellen Kraft besaß sie eine weit hinreichende Ausstrahlungswirkung auch auf andere Verfahrensordnungen in vielen Staaten der Erde.[34]

V. Gesetzliche Basis und praktische Defizite

1. Erste Erfahrungen

Zunächst wurde die CPO nur wenig modifiziert. Ein erster tiefergehender Einschnitt erfolgte sodann mit der BGB-Novelle von 1898.[35] Diese Änderungen waren aber weniger aus prozessrechtlichen Vorstellungen, als vielmehr aus der notwendigen materiellrechtlichen Anpassung an das BGB gedacht.[36]

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[30] Stein/Jonas/*Brehm,* 23. Aufl., vor § 1 Rn. 140 ff.
[31] Leonard, in Hahn, *Die gesammten Materialien zur Civilprozessordnung und dem Einführungsgesetz zu derselben vom 30. Januar 1877,* (2. Band, 2. Abtheilung, Berlin, 1880) S. 1292.
[32] Schubert, *Entstehung und Quellen der Zivilprozessordnung von 1877,* S. 24 ff.
[33] Dannreuther, *Der Zivilprozess als Gegenstand der Rechtspolitik im Deutschen Reich 1871–1945,* (Frankfurt/M u.a., 1987) S. 81.
[34] Wieczorek/Schütze/*Prütting/Gebauer, ZPO,* (5. Aufl.) Einleitung, Rn. 4.
[35] Stein/Jonas/*Brehm,* vor § 1 Rn. 146.
[36] Schubert, *Akademie für deutsches Recht 1933–1945, Protokolle der Ausschüsse, Zivilprozess und Gerichtsverfassung, Herausgegeben und mit einer Einleitung versehen von Werner Schubert,* (Frankfurt/M, 1997) S. 9.

Bereits kurz nach der Verabschiedung der CPO setzte eine umfassende, auch empirisch begleitete Reformdiskussion ein. Ein Faszinosum bildet dabei der dramatische, vielleicht noch nicht Ansehensverlust aber doch Stimmungswechsel gegenüber der aus prozessualen Leitbildern geformten Prozessordnung. Unter dem Einfluss der harten Prozessrealitäten erwiesen sich leitbildhafte Formengebungen nur partiell als praxistauglich. Als Grundübel der Prozessordnung erwies sich frühzeitig ein durchaus schleppender Verfahrensgang. Für diese Verzögerungen waren zu einem erheblichen Teil die Rechtsanwälte verantwortlich, die einen Prozess nicht zügig genug betrieben. Zudem behinderte der Parteibetrieb im Zustellungswesen einen schnellen Prozessfortgang.[37]

Daneben fehlte auch der prinzipiell ausgestalteten Mündlichkeit eine sachgerechte Balance. Im Urteilstatbestand durfte allein auf das mündliche Vorbringen abgestellt werden, § 284 Nr. 3 CPO 1879. Die Vorträge der Parteien waren, wie ausdrücklich bestimmt, „in freier Rede" zu halten. Eine Bezugnahme auf Schriftstücke statt mündlicher Verhandlung war weithin unzulässig, § 128 II, III CPO 1879. So fehlte dem Verfahren ein angemessener Halt und eine Einrahmung durch Schriftsätze.

Spätestens seit der Verabschiedung der österreichischen ZPO von 1895 mit ihrem Amtsbetrieb und einer gestärkten richterlichen Prozessleitung wurden die prozessualen Mängel intensiv wahrgenommen. Nach scharfen Interventionen der Anwaltschaft, etwa gegen eine Beschränkung der Berufung, wurden 1908 manche, aber letztlich noch begrenzte Erleichterungen eingeführt, jedenfalls für das amtsgerichtliche Verfahren.[38] Einspruch und Berufung konnten einfacher eingelegt werden und im amtsgerichtlichen Verfahren wurde die Richterstellung wesentlich gestärkt.[39]

2. Der erste Weltkrieg

Durch den Krieg ergab sich eine dramatische Überlastung der Gerichte, da durch Einberufungen der Personalbestand dort deutlich reduziert war. Mit der Entlastungs-Verordnung vom 9.9.1915 wurden deswegen ein obligatorisches Mahnverfahren, eine Beschränkung der Berufung auf eine Beschwerdesumme von 50 Mark und ein Sühneverfahren eingeführt. Weitere Vereinfachungen der Rechtspflege blieben überwiegend im Gesetzgebungsverfahren stecken.[40]

[37] Dannreuther, *Der Zivilprozess als Gegenstand der Rechtspolitik im Deutschen Reich 1871–1945,* S. 129 f.
[38] Wieczorek/Schütze/*Prütting/Gebauer,* ZPO, Rn. 6.
[39] Stein/Jonas/*Brehm,* vor § 1 Rn. 150 ff.
[40] Dannreuther, *Der Zivilprozess als Gegenstand der Rechtspolitik im Deutschen Reich 1871–1945,* S. 277 ff.

3. Weimarer Republik und Emminger-Novelle

Die Verordnung über das Verfahren in bürgerlichen Rechtsstreitigkeiten vom 13.2.1924, die nach dem damaligen Reichsjustizminister Emminger-Novelle genannt wird, griff tief in die Struktur des Zivilverfahrens ein. Die Verordnung stellte dabei ein Destillat der langwährenden Reformdebatte dar und nahm viele Anregungen daraus auf. Beeinflusst war auch diese Entwicklung von der österreichischen Prozessgesetzgebung.

Primärer Zweck der Reform sollte eine Verfahrensbeschleunigung sein. Erstes Element bildete dazu eine Konzentration des Verfahrens, die nicht nur auf das amtsgerichtliche Verfahren beschränkt war, sondern sämtliche Verfahrensgestaltungen ergriff.[41] Ein wichtiges Mittel dafür bildete die Stärkung der Richtermacht unter Zurückdrängung der Parteiherrschaft. Die Novelle beseitigte die Parteiherrschaft über Termine und Fristen, schuf einen allgemeinen Konzentrationsgrundsatz und erweiterte die materielle Prozessleitungspflicht des Gerichts, auch im landgerichtlichen Verfahren.[42] Unter den krisenhaften Verhältnissen in den 1920iger Jahren wurde damit ein wesentliches Element liberaler Prozessvorstellungen kupiert. Die Prozesspraxis setzte sich damit gegenüber den Prozessprinzipien durch.

4. Nationalsozialismus und zweiter Weltkrieg

Die noch in der Weimarer Zeit vorbereitete Novelle von 1933[43] führte die Vereinfachungs- und Beschleunigungsüberlegungen fort. Insoweit handelt es sich weniger um ein nationalsozialistisches, als vielmehr um ein zumeist sachgerechtes Reformvorhaben. Statuiert wurden die Wahrheitspflicht, ein nochmals gestrafftes, konzentriertes Verfahren in Richterhand und die Unmittelbarkeit der Beweisaufnahme.[44]

Originär nationalsozialistisches Gedankengut brachten die Rassenideologie mit dem Ausschluss jüdischer Richter und Rechtsanwälte sowie das Gesetz zur Wiederherstellung des Berufsbeamtentums. Letztlich wurde die persönliche und sachliche Unabhängigkeit von Richtern aufgehoben, die auch bei unliebsamen Entscheidungen entlassen werden konnten.

Im Ausschuss für bürgerliche Rechtspflege (1934–1942) der Akademie für deutsches Recht wurden zahlreiche Beratungen zur Prozessreform durchgeführt. Hierzu gab es manche Stellungnahmen der Beteiligten. Allerdings wurde das Ergebnis der Verhandlungen weder in einer Denkschrift noch etwa einem Entwurf destilliert. Spezifisch nationalsozialistische Leitthemen lassen sich nur vereinzelt, etwa beim Füh-

[41] Wieczorek/Schütze/*Prütting/Gebauer,* ZPO, Einleitung, Rn. 7.
[42] Stein/Jonas/*Brehm,* vor § 1 Rn. 160 f.
[43] Schubert, *Akademie für deutsches Recht 1933–1945,* S. 19 ff.
[44] Stein/Jonas/*Brehm,* vor § 1 Rn. 172 f.

rergrundsatz, dem Staatsanwaltschaftsmitwirkungsgesetz sowie der aufgeweichten richterlichen Unabhängigkeit erkennen. Sonst schlossen sich viele Überlegungen an frühere, etwa Weimarer Reformdiskussionen an.[45] In den Zeiten des zweiten Weltkriegs verlor das Zivilverfahrensrecht immer mehr an Bedeutung.[46]

VI. Anpassungen an die moderne demokratisch-rechtsstaatliche Gesellschaft

1. Konstitutionalisierung

Im demokratischen Verfassungsstaat setzten durchgreifende Änderungen im Zivilverfahrensrecht ein. Tiefe Spuren haben dabei die grundrechtsgleichen Verfahrensrechte und Grundrechte, aber auch das Rechtsstaatsprinzip, hinterlassen, die vielfältigen Einfluss auf den Zivilprozess gewannen. Vor allem die durch Verfassungsbeschwerden initiierte Rechtsprechung des BVerfG hat sich dabei als besonders wirkmächtig erwiesen. Aus zahlreichen Entscheidungen, die der Einzelfallgerechtigkeit dienen, sind dabei durchaus große verfassungsrechtliche Linien entwickelt worden. Vieles wirkt dabei in die prozessualen Einzelbestimmungen hinein, doch existiert eine kräftige Schicht von verfassungsrechtlich geformten Zivilverfahrensrecht oberhalb der zivilprozessualen Kodifikation.

Das Gebot des gesetzlichen Richters aus Art. 101 I 2 GG verlangt etwa eine rechtssatzmäßige, abstrakt-generelle und rechtsstaatlich bestimmte Festlegung der Zuständigkeit bis zur letzten Regelungsstufe.[47] Auch ist nur ein neutraler Richter der gesetzliche Richter.[48]

Vor Gericht hat nach Art. 103 I GG jedermann Anspruch auf rechtliches Gehör. Das Gehörsrecht ist auch aus Art. 6 I EMRK abzuleiten. Das BVerfG bezeichnet dieses grundrechtsgleiche Recht als prozessuales Urrecht.[49] Seine Wurzeln liegen in der Achtung der Würde des Menschen und dem Rechtsstaatsgedanken begründet. Dies verbietet, den Menschen durch Verweigerung des rechtlichen Gehörs lediglich zum Objekt eines Verfahrens zu machen. Allerdings gilt dieses Grundrecht nur im Verfahren vor einem mit Richtern besetzten Gericht. Im Verfahren vor einem Rechtspfleger folgt das rechtliche Gehör im autonomen Recht aus dem Rechtsstaatsprinzip.

Ein beachtliches Bündel weiterer verfassungsrechtlicher Institute wirkt darüber hinaus auf das Zivilverfahren ein. Zu nennen sind etwa der Justizgewährungsanspruch

[45] Schubert, *Akademie für deutsches Recht 1933–1945,* S. 3.
[46] Stein/Jonas/*Brehm,* vor § 1 Rn. 184.
[47] BVerfG Plenum NJW 1997, 1497, 1498.
[48] BVerfG NJW 1971, 1029 f.
[49] BVerfG Plenum NJW 2003, 1924.

und das Recht auf ein effektives und faires Verfahren. Die Garantie des effektiven Rechtsschutzes unter Berücksichtigung der Art. 3 I, 20 I GG gebietet, dass die Situation von Bemittelten und Unbemittelten bei der Verwirklichung des Rechtsschutzes weitgehend angeglichen werden muss.[50] Darin wirkt sich auch der prozessuale Gleichheitssatz aus.

2. Vereinfachung und Beschleunigung

Zu den bereits erwähnten, seit Jahrhunderten überkommenen Generalthemen der Prozessreform gehört die stete Beschleunigung von Verfahren unter den Bedingungen knapper Ressourcen. Weitreichende strukturelle Veränderungen brachte die Vereinfachungsnovelle vom 3.12.1976. Ziel war eine Konzentration der mündlichen Verhandlung auf möglichst einen Verhandlungstermin. Ergänzend wurden strikte Präklusionsregeln über verspätetes Angriffs- oder Verteidigungsvorbringen eingeführt.[51] Manche der zunächst daraus resultierenden Härten sind zwischenzeitlich in der Praxis abgeschliffen und von der Rechtsprechung abgemildert worden.

Das Zivilprozessreformgesetz vom 27.7.2001 sollte die erste Instanz stärken und modifizierte deswegen das Rechtsmittelrecht. Eingeführt wurden außerdem originäre Zuständigkeiten des Einzelrichters bei den Land- und Oberlandesgerichten. Im Berufungsrecht wurde u.a. eine strengere Bindung an die erstinstanzlichen Tatsachenfeststellungen und die Möglichkeit geschaffen, eine aussichtslose Berufung durch Beschluss zurückzuweisen.[52] Die Güteverhandlung wurde als regelmäßiger Verfahrensbestandteil ausgebaut.

Neben den vielen im Lauf der Zeit verabschiedeten Detailänderungen der ZPO waren damit zwei wichtige Grundpfeiler der Prozessgesetzgebung modifiziert. Effizienz und Beschleunigung, die zweifellos auch im Interesse der Parteien sind, gewannen mit den jüngeren Reformen eine neue Qualität.

3. Umwälzungen

Trotz der steten Bemühungen um eine Modernisierung des zivilgerichtlichen Verfahrens sind doch bedeutsame Auflösungserscheinungen festzustellen. Zwischen 2008 und 2021 ist die Zahl der bei den Amtsgerichten eingegangenen Zivilsachen von 1,27

[50] BVerfG NJW 1991, 413; NJW 1997, 2103.
[51] MüKoZPO/*Rauscher,* (6. Aufl.) Einleitung Rn. 90.
[52] MüKoZPO/*Rauscher,* Einleitung Rn. 144 ff.

Mio auf 754.000 und vor den Landgerichten erster Instanz von 360.000 auf 330.000 zurückgegangen.[53] Die Ursachen dafür sind vielfältig.

Verluste sind vor allem in den Randbereichen der Prozesse, also bei sehr einfachen oder sehr großen Verfahren zu verzeichnen. Rechtspolitisch gewünscht war noch ein Rückgang von Verfahren aufgrund von Schlichtungen oder anderer Methoden der alternativen Streitbeilegung. Weniger positiv ist der Verlust von bedeutsamen Verfahren etwa im Bereich internationaler Transaktionen an die Schiedsgerichte zu sehen. Hierdurch wird die Justiz von manchen Rechtsentwicklungen abgeschnitten.

In mehreren tastenden Schritten hat sich der deutsche Gesetzgeber an kollektive Rechtsschutzformen im Zivilverfahren angenähert. Mit dem Unterlassungsklagengesetz wurde 2002 ein Verbandsklagerecht insbesondere bei Verbraucherrechtsverstößen eingeführt. Als Reaktion auf den Dieselskandal mehrerer deutscher Automobilunternehmen ist das Musterfeststellungsverfahren in den §§ 606 ff. ZPO eingeführt worden. Die Abwägung zwischen gebotenem Rechtsschutz und Kollektivierung ist darin noch nicht vollständig gelungen. Demnächst zu erwarten ist ein Gesetz zur Umsetzung der Verbandsklagerichtlinie.[54]

Die Rechtsprechung hat zudem neue anwaltliche Geschäftsmodelle zugelassen, bei denen gegen Zahlung einer Erfolgsgebühr eine internetbasierte Rechtsdurchsetzung geschaffen worden ist. Dies betrifft massenhafte gleichartige Verfahren, etwa bei Überschreitung der Mietpreisgrenzen oder der Geltendmachung von Fluggastrechten.[55]

4. Öffentlichkeit und Digitalisierung

Aus zwei Richtungen ist auch der Öffentlichkeitsgrundsatz unter Druck geraten. Anstelle der weit zurückgetretenen Publikumsöffentlichkeit wird vermehrt über eine Medienöffentlichkeit diskutiert, wie etwa eine Fernsehübertragung von Gerichtsverhandlungen. Originale Ton-, Fernseh- und Filmaufnahmen zum Zwecke der öffentlichen Vorführung sind allerdings nach § 169 I 2 GVG grundsätzlich unzulässig.[56] Sie können aber nach § 169 II GVG bei Verfahren von herausragender zeitgeschichtlicher Bedeutung für die Bundesrepublik Deutschland zu wissenschaftlichen und historischen Zwecken zugelassen werden. Hier verhält sich das Zivilprozessrecht durchaus schüchtern, aber wohl aus gutem Grund.

[53] https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/zivilgerichte-2100210217004.pdf?__blob=publicationFile, S. 12, 42 (letzter Zugriff: 29.12.2023).
[54] BT-Drs. 20/6520.
[55] BGHZ 224, 89 Rn. 162.
[56] Stark differenzierend BVerfG NJW 2001, 1633, 1636.

Berührt wird der Öffentlichkeitsgrundsatz auch durch die Digitalisierung des Zivilverfahrens. Dies gilt noch nicht für die für Anwälte und Behörden vorgeschriebene elektronische Übermittlung von Schriftsätzen, § 130d ZPO. Er wird aber bei einer Verhandlung im Wege der Bild- und Tonübertragung nach § 128a ZPO betroffen. In der Pandemie sind zweifellos einige technische und sonstige Hemmschwellen gegenüber derartigen Übertragungen gefallen. Soeben ist dafür der Regierungsentwurf eines Gesetzes zur Förderung des Einsatzes von Videokonferenztechnik in der Zivilgerichtsbarkeit und den Fachgerichtsbarkeiten vorgelegt worden.[57] Dennoch bleiben prinzipielle Fragen, etwa bei einer dann doch möglichen Aufzeichnung der digitalen Übertragung. Wird der zivilprozessuale Instrumentenkasten in Richtung einer solchen Digitalisierung geöffnet, wird sich die Frage nach einer zulässigen Medienöffentlichkeit neu stellen.

VII. Resultate

Der Schnelldurchlauf durch die deutsche Prozessrechtsgeschichte sollte einiges sichtbar gemacht haben. Zivilprozess ist gelebte Praxis. Er bedarf der steten Rückkopplung mit den gesellschaftlichen Verhältnissen. Hierbei ist eine Balance zu wahren. Weder erscheinen übermäßige Prinzipienbildungen noch zu sehr den tagesaktuellen Entwicklungen verhaftete Regelungen angemessen. In ihrer nahezu 150-jährigen Geschichte ist die deutsche ZPO gut in der Wirklichkeit angekommen. Die Rechtspolitik hat es geschafft, die technisch großartig ausgeformte Kodifikation an die bestehenden Verhältnisse anzupassen. Dies gilt trotz der angemerkten Kritikpunkte.

Zu sehen ist aber nicht nur der Veränderungsbedarf, sondern auch die Stabilität bzw. Beharrungskraft vieler Rechtsformen. Zu denken ist etwa an das rechtliche Gehör oder die immerwährenden Beschleunigungsnotwendigkeiten.

Um die großen Entwicklungslinien in wenigen Sätzen zusammenzufassen, lassen sich für das deutsche Zivilprozessrecht folgende entscheidenden Umstände benennen: 1. Die Ausbildung des staatlichen Gewaltmonopols und die damit einhergehende Friedensordnung. 2. Die aus einer reichen Quellenlage gespeiste Reformentwicklung, für die letztlich eine systematisch ausgebildete und praktisch geeignete Form gefunden wurde. 3. Bei der ZPO handelt es sich um eine konzeptionell große Prozesskodifikation, die gleichermaßen Bindungskraft entwickelt wie Veränderungsmöglichkeiten eröffnet hat.

[57] Entwurf eines Gesetzes zur Förderung des Einsatzes von Videokonferenztechnik in der Zivilgerichtsbarkeit und den Fachgerichtsbarkeiten vom 24.5.2023, https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/2022_Videokonferenztechnik.html (letzter Zugriff: 29.12.2023).

Földi, András*

Das antike griechische und römische Recht im Spiegel des Werks von Béni Grosschmid (1851–1938), dem Begründer des modernen ungarischen Privatrechts**

Abstract

It is not widely known even among Hungarian legal scholars that Béni Grosschmid, founder of modern Hungarian private law dealt much also with classical Athenian law and Roman law. Grosschmid devoted four papers to the Athenian intestate succession. On the basis of analysis of two speeches (Isaeus 11, [Pseudo-] Demosthenes 43) concerning the Hagnias estate, Grosschmid concludes that, according to Athenian court practice, the heir, other than the male descendant, not only had to survive the *de cuius,* but also had to obtain an adjudicative judgment of the court in his favour in order to have the estate passed from him to his heir. Not considering the Romanists, Grosschmid referenced Roman law more often than any other Hungarian jurist, each time in a fully competent manner. In addition Grosschmid also wrote works on Roman law. The most important of these is his 153-page analysis of the ancient Roman law of the *portio debita.* Grosschmid's attitude towards Roman law was marked by a certain ambivalence. In connection with his conservative and nationalist mentality, he gave signs both of admiration and of aversion towards Roman law. The view, according to which Grosschmid was not particularly interested in the works of the Pandectists, needs to be fine-tuned. In his main work *(Chapters of Hungarian law of obligations),* Grosschmid referred to Windscheid in at least 107 places. Further research would be needed to clarify why Grosschmid almost avoided quoting the works of Jhering.

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** Die vorliegende Studie basiert auf dem Antrittsvortrag des Verfassers mit dem Titel *Grosschmid Béni és az antik jogok* [= B. Grosschmid und die antiken Rechtssysteme], die am 18. Oktober 2022 an der Ungarischen Akademie der Wissenschaften in Budapest gehalten wurde. Eine entspechende Studie ist zum ersten Mal ungarisch erschienen, siehe Földi A., Az ógörög és római jog Grosschmid Béni életművében [= Altgriechisches und römisches Recht im Lebenswerk von B. Grosschmid], (2023) 78 (1) *Jogtudományi Közlöny,* 1–11.

DOI: 10.56749/annales.elteajk.2023.lxii.2.27

Keywords: Celsus, Demosthenes, Hagnias estate, intestate succession, Isaeus, Jhering, S. Márai, G. Szászy-Schwarz, *transmissio,* Windscheid

1. Béni Grosschmid (auch als Benő Zsögöd bekannt[1]) war einer der größten ungarischen Juristen aller Zeiten. Mit seinem monumentalen Werk *Kapitel aus dem Kreise des ungarischen Schuldrechts* legte er nicht nur die Grundlagen des Schuldrechts, sondern des gesamten modernen ungarischen Privatrechts. Über sein Oeuvre sind eine Reihe von Studien erschienen,[2] bis heute gibt es aber keine Monographie über sein Werk, und es gibt wohl nur eine einzige Studie,[3] die sein Verhältnis zum römischen Recht behandelt. In dem vorliegenden Aufsatz werde ich versuchen zu zeigen, dass diese Lücke in der ungarischen Fachliteratur unbedingt geschlossen werden muss, nicht nur um unser Bild von Grosschmid und seiner Beziehung zu den antiken Rechtssystemen zu vervollständigen, sondern auch um unser Wissen über das antike Recht selbst zu vergrößern.

Béni Grosschmid wurde am 6. November 1851 in Máramarossziget (heute Sighetu Marmației in Rumänien) geboren.[4] Von Grosschmids Neffen, dem berühmten Schriftsteller Sándor Márai (1900–1989) erfahren wir, dass die deutschstämmige, in Ungarn siedelnde und in den Adelsstand erhobene Familie Grosschmid bereits zu Beginn des 19. Jahrhunderts magyarisiert worden war.[5]

Béni Grosschmid absolvierte seine gymnasiale Ausbildung zwischen 1860 und 1868.[6] Es ist wahrscheinlich, dass er die ersten vier Klassen des reformierten Gymnasiums in Máramarossziget besuchte. Die oberen Klassen absolvierte er am Prämonstraten-

[1] Siehe z.B. M. Görög, Béni Grosschmid [= B. Grosschmid], [auf engl.], (2021) 11 (2) *Forum: Acta Jur. et Pol. Szeged.,* 97.

[2] Siehe in der neueren Literatur Weiss E., Grosschmid Béni [= B. Grosschmid], in Hamza G. (hrsg.), *Magyar jogtudósok, III,* (ELTE ÁJK, Budapest, 2006), 99–116.; Görög, Béni Grosschmid [= B. Grosschmid]; Vékás L., *Fejezetek a magyar magánjogtudomány történetéből [= Kapitel aus der Geschichte der ungarischen Privatrechtswissenschaft],* (2. Aufl., Orac, Budapest, 2022).

[3] Biró J., A római jog hatásának jelei a dualizmus kötelmi jogában. Grosschmid Béni tevékenysége a római jog alkalmazása tekintetében [= Anzeichen für den Einfluss des römischen Rechts im Schuldrecht der Zeit des Dualismus. Die Tätigkeit von B. Grosschmid hinsichtlich der Anwendung des römischen Rechts], in Csizmadia A. (hrsg.), *Jogtörténeti tanulmányok, II*, (KJK, Budapest, 1968), 313–324.

[4] Wie Weiss, Grosschmid Béni [= B. Grosschmid], 114, Fn. 2, überzeugend darlegt, geht die in der Literatur verbreitete falsche Datierung des Geburtsjahres von Grosschmid (1852) auf Márkus D. (hrsg.), *Magyar Jogi Lexikon [= Ungarisches Rechtslexikon], VI,* (Pallas, Budapest, 1907), 1158 [s.v. „Zsögöd Benő"], zurück.

[5] Márai S., *Egy polgár vallomásai [= Bekenntnisse eines Bürgers],* (Helikon, Budapest, 1997), 91 ff. Márai (ebd. 96 ff.) erinnert sich an die eigenartige Persönlichkeit seines Onkels, die er vor allem dann erlebte, wenn er ihn an der Universität Budapest, im prächtigen Rektorenzimmer besuchte.

[6] Was die vorzeitige Einschulung Grosschmids im September 1860 betrifft, konnten nach § 59 des auch in Ungarn geltenden *Entwurfs der Organisation der Gymnasien und Realschulen in Österreich* (Kaiserlich-königliche Hof- und Staatsdruckerei, Wien, 1849) Schüler ab 9 Jahren zum Besuch des Gymnasiums zugelassen werden.

ser Gymnasium in Nagyvárad (Großwardein, heute Oradea in Rumänien). Am Gymnasium erwarb er eine sehr gründliche klassische Ausbildung. Obwohl die Regierung im Herbst 1861 den Altgriechischunterricht an den Gymnasien drastisch einschränkte, konnte Grosschmid noch mindestens vier Jahre lang Altgriechisch (zwei Stunden pro Woche) lernen, und natürlich profitierte er acht Jahre lang von dem legendären, damals durchschnittlich sechs Stunden pro Woche Unterricht in Latein.[7] Er beherrschte auch die wichtigsten westlichen Sprachen. In seinen Werken zitierte er regelmäßig nicht nur deutsche, sondern auch englische, französische und manchmal italienische Rechtsliteratur und sogar nicht-juristische Literatur.

Sein juristisches Studium begann er 1868 an der Königlich-Katholischen Rechtsakademie in Nagyvárad, wo er die ersten drei Jahre absolvierte. Anschließend studierte er ein Semester lang Jura an der Universität Pest (Budapest) und schloss 1872 sein Studium an der Juristischen Fakultät der Universität Wien ab, wo er zum Doktor der Rechtswissenschaften promoviert wurde.[8] Als Jurastudent in Wien hätte er im Studienjahr 1871/72 die äußerst beliebten Vorlesungen von Jhering noch besuchen können, der im Sommer 1872 Wien verließ, um den Ruf der Universität Göttingen anzunehmen. Wir wissen nicht, ob er Jherings Vorlesungen wirklich besuchte, keineswegs wurde er aber ein Fan von Jhering, vielmehr ist seine Haltung zu Jhering eher als problematisch zu bezeichnen, worauf ich unten noch näher eingehen werde. Jedenfalls hat sein Studium an der Universität Wien, wie sein berühmtester und treuester Schüler Károly Szladits[9] feststellte, „in dem jungen Mann nicht so sehr eine Neigung zur Nachahmung, sondern vielmehr eine leidenschaftliche Anhänglichkeit an das alte ungarische Recht geweckt".[10]

[7] Die Artikel 27 bis 30 des oben erwähnten *Entwurfs* sahen einen obligatorischen Griechischunterricht an den Gymnasien vor, der 6 Jahre lang mit durchschnittlich 5 Wochenstunden erteilt werden sollte. Im Jahr 1861 hatte der Königliche Statthalterrat dagegen angeordnet, dass die griechische Sprache an den Gymnasien nur 4 Jahre lang und 2 Stunden pro Woche unterrichtet werden sollte. Ritoók Zs., *Homéros Magyarországon [= Homer in Ungarn],* (Pesti Kalligram, Budapest, 2019), 48 ff.

[8] Siehe Eckhart F., *A Jog- és Államtudományi Kar története [= Geschichte der Rechts- und Staatswissenschaftlichen Fakultät],* (Budapest, Királyi Magyar Egyetemi Nyomda, 1936), 599; Weiss, Grosschmid Béni [= B. Grosschmid], 101; anders Markó L. (hrsg.), *Új magyar életrajzi lexikon [= Neues ungarisches biographisches Lexikon], II,* (Magyar Könyvklub, Budapest, 2002), 1109 [s.v. „Grosschmid Béni"]; Görög, Béni Grosschmid [= B. Grosschmid], 227.

[9] Károly Szladits (1871–1956) war von 1917 bis 1942 ordentlicher Professor des Privatrechts an der Universität Budapest. Er war ordentliches Mitglied der ungarischen Akademie der Wissenschaften. Vgl. B. Szabó, Károly Szladits, in M. Stolleis (hrsg.), *Juristen. Ein biographisches Lexikon* (Beck, München, 2001), 618 f. Zur grundlegenden Rolle von Szladits bei der Rezeption von Grosschmids wunderbaren, aber nicht leicht zu lesenden Werken siehe Görög, Béni Grosschmid [= B. Grosschmid], 99; B. Szabó, Béni Grosschmid, in M. Stolleis (hrsg.), *Juristen. Ein biographisches Lexikon* (Beck, München, 2001), 265.

[10] Szladits K., Zsögöd-Grosschmid Béni a magyar jogtudomány szabadságharcosa [= B. Zsögöd-Grosschmid, der Freiheitskämpfer der ungarischen Rechtswissenschaft], 1948 (1–2) *Jogászegyleti Szemle,* 3. Szladits erwähnt Joseph Unger und Lorenz von Stein unter den Professoren in Wien, die den jungen Grosschmid beeinflussen konnten (oder beeinflusst haben könnten).

Nach dem Abschluss seiner Universitätsstudien war der junge Grosschmid etwa zehn Jahre lang in der Rechtspraxis tätig, sowohl als Rechtsanwalt als auch als Richter. Ab 1882 war er Professor an der Rechtsakademie in Nagyvárad und ab 1885 an der Universität von Kolozsvár (Klausenburg, heute Cluj-Napoca in Rumänien) und lehrte dort privatrechtliche Fächer. Im Jahr 1887 wurde er zum ordentlichen Professor des österreichischen bürgerlichen Rechts an der Universität Kolozsvár ernannt. Von 1890 bis zu seiner Emeritierung im Jahr 1928 war er ordentlicher Professor des ungarischen Privatrechts an der Universität Budapest. Zweimal wurde er zum Dekan der juristischen Fakultät in Budapest gewählt, und im akademischen Jahr 1917/18 war er Rector Magnificus der Universität Budapest. Auf Ersuchen des Justizministers wirkte er an der Ausarbeitung zahlreicher Gesetze mit (z.B. Gesetz Nr. XXXI von 1894 über die Zivilehe).

Grosschmid wird oft mit seinem Kollegen und guten Freund[11] Gusztáv Szászy-Schwarz verglichen, der gewöhnlich als der „ungarische Jhering" bezeichnet wird.[12] Einige Juristen fügen hinzu, dass man Grosschmid als „ungarischen Savigny" bezeichnen kann.[13] Während es unbestritten ist, dass Szászy-Schwarz als der „ungarische Jhering" galt – er wurde ja schon zu seinen Lebzeiten zu Recht so genannt[14] – stellt sich die Frage, ob man Grosschmid wirklich als „ungarischen Savigny" bezeichnen kann.

Grosschmid selbst lobte Savigny mit Bewunderung als den größten Pandektisten,[15] doch begeisterte er sich als konservativer Jurist mit tiefen nationalen Gefühlen, trotz seiner gründlichen Kenntnisse der Rechtsgeschichte und der Rechtsvergleichung, vor allem für István Werbőczy und sein *Tripartitum*.[16] Auf dem Gebiet des Familien-

[11] Zur Freundschaft von Grosschmid und Szászy-Schwarz siehe Besnyő B., *Szászy-Schwarz Gusztáv emlékezete [= Erinnerung an G. Szászy-Schwarz],* (Katz Gusztáv, Budapest, 1933), 103; Szladits K., *Szászy-Schwarz Gusztáv emlékezete [= Erinnerung an G. Szászy-Schwarz],* (Első Kecskeméti Hírlapkiadó és Nyomda Rt., Kecskemét, 1934), 8.

[12] Gusztáv Szászy-Schwarz (1858–1920) war von 1894 bis zu seinem Tod ordentlicher Professor des römischen Rechts (später auch des Handelsrechts) an der Universität Budapest. Er war Mitglied der Ungarischen Akademie der Wissenschaften. Im akademischen Jahr 1883/1884 studierte er an der Universität Göttingen, wo er ein Lieblingsschüler von Jhering wurde. Den Rest seines Lebens widmete er teilweise der Verbreitung von Jherings wissenschaftlichen Lehren und Lehrmethoden in Ungarn (einschließlich des Lösens von Fällen auf der Grundlage von Fällen aus den Digesten), aber er entwickelte Jherings Lehren in vielerlei Hinsicht weiter. Siehe A. Földi, Aspekte der Jhering-Rezeption in Ungarn, in S. Meder und Ch.-E. Mecke (hrsg.): *Jhering Global* (Vandenhoeck & Ruprecht, Göttingen, 2023), 71–95, DOI: https://doi.org/10.14220/9783737011808.71.

[13] Vgl. Lábady T., *A magánjog általános tana [= Die allgemeine Lehre des Privatrechts],* (Szent István Társulat, Budapest, 2013), 73.

[14] Hamza G., Szászy-Schwarz Gusztáv [= G. Szászy-Schwarz], in Hamza G. (hrsg.), *Magyar jogtudósok, II,* (Professzorok Háza, Budapest, 2001), 73.

[15] Siehe unten (Nr. 4). Grosschmid B., *Magánjogi előadások. Jogszabálytan [= Vorlesungen über das Privatrecht. Rechtsnormenlehre],* (Athenaeum, Budapest, 1905), 822 f.

[16] István Werbőczy (1458–1541), ein berühmter ungarischer Jurist, fasste das Gewohnheitsrecht des Königreichs Ungarn in seinem *Tripartitum opus juris consuetudinarii inclyti Regni Hungariae* (Viennae, 1517) zusammen. Sein umfassendes Werk in lateinischer Sprache wurde von den Gerichten

rechts und insbesondere des Erbrechts verteidigte er die nationalen Rechtstraditionen wie ein Löwe, wenn auch im Einklang mit den Bedürfnissen seiner Zeit. Demgegenüber hatte Savigny für die von den Germanisten so gepriesenen mittelalterlichen deutschen Rechtstraditionen wenig Interesse, da er im klassischen römischen Recht die wichtigste Grundlage für die Entwicklung des deutschen Rechts sah. In dieser Hinsicht ist also Grosschmid nicht so sehr mit Savigny sondern vielmehr mit den Germanisten der historischen Rechtsschule zu vergleichen.

Auch der „ungarische Jhering", Gusztáv Szászy-Schwarz, war von aufrichtigen nationalen Gefühlen durchdrungen und legte dafür zeitlebens viele Zeugnisse ab.[17] Beeinflusst von seinem Göttinger Meister Jhering, sah er jedoch die optimale Grundlage für die Entwicklung des ungarischen Privatrechts im klassischen römischen Recht. Immerhin kann der „ungarische Jhering", wie Károly Szladits hervorgehoben hat, als ein würdiger Verbündeter und Mitstreiter Grosschmids bei der Entwicklung des ungarischen Privatrechts gelten, und zwar nicht zuletzt deshalb, weil er als hervorragender Romanist und souveräner Denker nicht bereit war, dem deutschen Recht und der deutschen Rechtswissenschaft seiner Zeit sklavisch zu folgen.[18]

Ausgehend von den obigen Prämissen möchte ich in der vorliegenden Schrift zeigen, dass die beiden *dioskuroi*[19] der ungarischen Privatrechtswissenschaft zwar sehr unterschiedliche Persönlichkeiten waren, Grosschmid aber, ähnlich dem Szászy-Schwarz, ebenfalls ein außergewöhnliches Interesse an den antiken Rechtssystemen hatte. Abgesehen von den Romanisten verwies er wohl häufiger als jeder andere ungarische Jurist auf das römische Recht, und zwar jedes Mal in voller Sachkenntnis, darüber hinaus verfügte er über eine bedeutende Gelehrsamkeit auch im antiken griechischen Recht.

2. In seinen Werken bezog sich Grosschmid, der sowohl im Altgriechischen als auch im Lateinischen bewandert war und an die große Bedeutung beider klassischen Sprachen glaubte,[20] häufig auf altgriechische Autoren, von den homerischen Epen bis hin zu Aristoteles, Plotin und Dionysius von Halikarnassos, aber Grosschmid interessierte

bis ins 19. Jahrhundert fast wie ein Gesetzbuch betrachtet. B. Szabó, Stephanus Werbőczy, in M. Stolleis (hrsg.), *Juristen. Ein biographisches Lexikon* (Beck, München, 2001), 668 f.

[17] Siehe hierzu Besnyő, *Szászy-Schwarz Gusztáv emlékezete [= Erinnerung an G. Szászy-Schwarz],* 48; Sándor I., Szászy-Schwarz Gusztáv munkássága [= Das Werk von G. Szászy-Schwarz], (2011) 48 *Acta Fac. Pol.-iur. Univ. Sc. Budapest.,* 148.

[18] Szladits, Zsögöd-Grosschmid Béni a magyar jogtudomány szabadságharcosa [= B. Zsögöd-Grosschmid, der Freiheitskämpfer der ungarischen Rechtswissenschaft], 5.

[19] Goethe und Schiller werden von Szerb A., *A világirodalom története [= Die Geschichte der Weltliteratur], II,* (Révai, Budapest, 1941), 190, als die „dioskuroi" der deutschen Literatur bezeichnet.

[20] Entgegen der Meinung vieler angesehener Gelehrter seiner Zeit (vgl. Ritoók, *Homéros Magyarországon [= Homer in Ungarn],* 61) hielt Grosschmid den Unterricht des Griechischen und des Lateinischen nicht für eine Qual für die Jugend. Im Gegenteil, er sagte: „Mit Entsetzen erfahre ich, dass auch in Deutschland geplant ist, das Griechische durch das Englische zu ersetzen und sogar das Lateinische als

sich auch außerordentlich für das altgriechische Recht. Es ist wenig bekannt, dass Grosschmid in den letzten beiden Jahren des Ersten Weltkriegs, in Widerlegung des Sprichworts *Inter arma silent Musae,* dem antiken griechischen Recht, und zwar der athenischen Intestaterbfolge, nicht weniger als vier Abhandlungen widmete. Als das erste öffentliche Zeichen seiner Forschungen auf diesem Gebiet galt sein Antrittsvortrag an der Ungarischen Akademie der Wissenschaften am 11. Juni 1917 mit dem Titel *Die Intestaterbfolge in den Gesetzen von Solon*.[21]

Grosschmid hatte es nicht eilig, seine Antrittsrede zu halten. Er wurde 1901 zum korrespondierenden Mitglied der UAdW gewählt, und nicht weniger als 16 Jahre ließ er die Akademie auf den Vortrag warten. Auf die Hintergründe und Folgen dieser Verzögerung, die nicht nur der Sitte, sondern auch dem jeweiligen Statut der Akademie der Wissenschaften zuwiderlief, kann ich hier nicht eingehen, aber wenn diese Verzögerung ein Ausdruck von Extravaganz war, dann war die Wahl des Themas im Hinblick auf die sich mit dem geltenden Recht beschäftigenden Juristen der Neuzeit nicht weniger extravagant.

Umso leichter ist es zu erklären, warum sich Grosschmid gerade mit der Regelung der Intestaterbfolge im athenischen Recht befasste. Ab 1879 führte Grosschmid einen regelrechten Kreuzzug gegen die Kodifizierungsbestrebungen, die zum Nachteil der ungarischen Rechtstraditionen in vielerlei Hinsicht dem österreichischen Recht[22] folgten und die so genannte Rückfallerbfolge abschaffen wollten.[23] 1890 war Grosschmids Kampf von Erfolg gekrönt: Es gelang ihm, die Rückfallerbfolge nachhaltig zu retten.[24] In jedem Fall ist klar, dass Grosschmid das athenische Recht nicht *l'art pour l'art* studierte, sondern es mit dem römischen Recht und den damals geltenden deutschen, österreichischen und ungarischen Regelungen verglich.

Das solonische Erbrecht ist, wie das athenische Recht im Allgemeinen, vor allem in Gerichtsreden überliefert, insbesondere in denen des Isaeus, des Lehrmeisters

Voraussetzung für das Jurastudium abzuschaffen". Grosschmid B., *Magánjogi előadások. Jogszabálytan [= Vorlesungen über das Privatrecht. Rechtsnormenlehre],* 74.

[21] Grosschmid B., Az intestát örökösödési rend Solon törvényeiben [= Die Ordnung der Intestaterbfolge in den Gesetzen von Solon], (1917) (11–12) *Akadémiai Értesítő,* 521–540. Eine leicht erweiterte Version dieser Studie erschien mit dem (fast völlig übereinstimmenden) Titel Az intestát örökösödési rendről Solon törvényeiben [= Über die Ordnung der Intestaterbfolge in den Gesetzen von Solon], siehe (1917) (34–37) *Jogtudományi Közlöny,* 301–303, 310–311, 319–321, 326–328.

[22] Vékás, *Fejezetek a magyar magánjogtudomány történetéből [= Kapitel aus der Geschichte der ungarischen Privatrechtswissenschaft],* 49 f.; Görög, Béni Grosschmid [= B. Grosschmid], 233–236.

[23] Die Rückfallerbfolge (ung. „ági öröklés") bedeutet, dass das Vermögen des Verstorbenen, das direkt oder indirekt von den Vorfahren stammt, mangels Abkömmlingen von den Vorfahren bzw. den Seitenverwandten entsprechend der Herkunft des Vermögens geerbt wird.

[24] Siehe neben den oben zitierten Werken auch E. Pólay, Ein Versuch zur Kodifizierung des ungarischen Erbrechts im 19. Jahrhundert, in K. Kovács (hrsg.), *Rechtsgeschichtliche Abhandlungen. Rechtsgeschichtliche Studien zum Zivilrecht* (ELTE ÁJK, Budapest, 1974), 75–99.

von Demosthenes.[25] In seinem Antrittsvortrag an der Akademie untersuchte Grosschmid zwei Plädoyers, um die solonische Regelung der Intestaterbfolge zu veranschaulichen. Beide Reden wurden in Prozessen über den Nachlass eines wohlhabenden Athener Bürgers namens Hagnias gehalten.[26]

Eine der Reden ist ein Plädoyer, das als die 11. Rede des Isaeus bekannt ist.[27] Es handelt sich um einen Strafprozess, den einer der Vormünder eines verwaisten Knaben (sein Name ist unbekannt, so dass wir ihn nur als Sohn des Stratokles bezeichnen können) gegen den anderen Vormund, Theopompos, den Onkel väterlicherseits, angestrengt hatte, weil sich Theopompos geweigert hatte, seinem Neffen die Hälfte des Vermögens von Hagnias herauszugeben.

Einer dem Demosthenes zugeschriebenen Gerichtsrede,[28] die im *corpus Demosthenicum* als Rede Nr. 43 bekannt ist,[29] ist zu entnehmen, dass Theopompos vom Gericht von der Anklage freigesprochen wurde.[30] Die letztgenannte Rede stellt ein Plädoyer dar, das mehr als ein Jahrzehnt später gehalten wurde,[31] und zwar im Namen eines anderen Knaben, Euboulides, in einem Nachlassverfahren, das sein Vater Sositheos gegen den Sohn von Theopompos, Makartatos, angestrengt hatte, der damals im Besitz des Nachlasses von Hagnias war, da Theopompos in der Zwischenzeit verstorben war. Wir kennen den Ausgang dieses Prozesses nicht, aber wir wissen, dass seine Eltern, um die Position des Euboulides, eines Verwandten 6. Grades, zu stärken, das Kind durch posthume Adoption zum Sohn seines Großvaters, des älteren Euboulides, erklären ließen, wie es nach athenischem Recht möglich war. Auf diese Weise wurde Euboulides zum Verwandten 5. Grades von Hagnias.[32]

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[25] Siehe etwa A. R. W. Harrison, *The law of Athens, I,* (Duckworth, London, 1998), 122 f.

[26] Vgl. W. E. Thompson, *De Hagniae hereditate. An Athenian inheritance case,* (Brill, Lugduni Batavorum, 1976), 52–54, DOI: https://doi.org/10.1163/9789004327610.

[27] Grosschmid benutzte zum griechischen Text insbesondere die Ausgabe von Th. Thalheim (ed.), *Isaei orationes cum deperditarum fragmentis,* (Teubner, Lipsiae, 1903), vgl. B. Grosschmid, [*Rektoratsrede*], (1917–1918) (2) *Acta Regiae Univ. Sc. Hung.,* 26.

[28] Die Urheberschaft von Demosthenes ist in der Literatur umstritten. Siehe dagegen F. Blass, *Die attische Beredsamkeit, III* (Teubner, Leipzig, 1898) 554, zustimmend zitiert von S. Avramović, *Isejevo sudsko besedništvo i atinsko pravo,* (Naučna knjiga, Beograd, 1988), 204, Fn. 1; siehe ferner A. Biscardi, *Diritto greco antico,* (Giuffrè, Mailand, 1982) 117; R. Dareste, *Les plaidoyers civils de Démosthène, I,* (Plon, Paris, 1875) vi, warnt allerdings vor Kritik. L. Gernet, *Démosthène, Plaidoyers civils, II,* (Les Belles Lettres, Paris, 1957), 92 f. hält den Text für einen der schwächsten im *corpus Demosthenicum,* zieht aber keine weiteren Schlüsse.

[29] Grosschmid benutzte zum griechischen Text insbesondere die Ausgabe von I. Reiske and G. Schaefer (ed.), *Demosthenis quae supersunt, II,* (Black & Young, Londini, 1822), 160 ff.

[30] Grosschmid, Az intestát örökösödési rend Solon törvényeiben [= Die Ordnung der Intestaterbfolge in den Gesetzen von Solon], 531, mit Verweis auf Dem. 43, 31. Vgl. D. M. MacDowell, *The law of classical Athens,* (Thames & Hudson, London, 1978), 106.

[31] Zur Datierung siehe Thompson, *De Hagniae hereditate,* 14; MacDowell, *The law of classical Athens,* 105.

[32] MacDowell, *The law of classical Athens,* 100, 107.

Die oben erwähnten Reden sind für das Studium des athenischen Intestaterbrechts insbesondere deshalb von herausragender Bedeutung, da der Fall des Hagnias-Nachlasses der einzige antike athenische Streitfall ist, bei dem uns zwei Reden zur Verfügung stehen, und zwar von beiden Seiten, so dass die Forderung *audiatur et altera pars* für die Nachwelt mehr oder weniger erfüllt ist.[33]

Mehrere Verwandte konkurrierten also um den Nachlass von Hagnias.[34] Grosschmid, der über die komplizierten, jahrzehntelangen Rechtsstreitigkeiten eine summarische Übersicht gegeben hat, wies darauf hin, dass sich die als wichtigste geltende siegreiche Partei, Theopompos, weigerte, die Tatsache zu respektieren, dass sein Bruder Stratokles ebenfalls Vorbereitungen getroffen hatte, um das Nachlassverfahren einzuleiten, die nur durch seinen Tod vereitelt wurden.[35] Diese Situation wurde von Theopompos ausgenutzt, der den gesamten Nachlass für sich beanspruchte und bestritt, dass die Hälfte des Nachlasses auf seinen Neffen übergegangen war, der minderjährig war und den Bruder von Theopompos überlebte. *Nota bene*, zu Gunsten des Sohns des Stratokles, der als ein Kollateralverwandter 7. Grades von Hagnias galt, fand das *ius repraesentationis* keine Anwendung.[36]

Grosschmid kritisierte die Haltung des habgierigen Theopompos, aber er kritisierte auch das athenische Recht und seine praktische Anwendung, die das Recht der *transmissio* ignorierte.[37] In einer für die heutigen Rechtshistoriker lehrreichen Art und Weise wünschte Grosschmid die Position des athenischen Rechts und des zuständigen Gerichts nicht nur zu kritisieren, sondern eher zu verstehen, und dies mit besonderer Rücksicht auf den Grund für die Ablehnung des Anspruchs auf *transmissio*.[38]

[33] Vgl. B. Grosschmid, [Festrede des Rektors], (1917–1918) (2) *Acta Regiae Univ. Sc. Hung.,* 23; Thompson, *De Hagniae hereditate,* ix.

[34] Der ausführlichste monographische Überblick befindet sich in Thompson, *De Hagniae hereditate,* der klarste in MacDowell, *The law of classical Athens,* 103–108.

[35] Grosschmid, Az intestát örökösödési rend Solon törvényeiben [= Die Ordnung der Intestaterbfolge in den Gesetzen von Solon], 531.

[36] Im athenischen Recht wurde der Begriff *anchisteia* verwendet, um den Kreis der Verwandten zu bezeichnen, an die der Nachlass gemäß der gesetzlichen Erbfolge übergehen konnte. Die 11. Rede von Isaeus beweist (wenn auch nicht zweifelsfrei), dass die *anchisteia* für Seitenverwandte bis zum 6. Grad reichte, d. h. Verwandte des 7. Grades fielen bereits außerhalb dieses Kreises. Siehe zusammenfassend Harrison, *The law of Athens,* 143–149. Grosschmid, Az intestát örökösödési rend Solon törvényeiben [= Die Ordnung der Intestaterbfolge in den Gesetzen von Solon], 528, merkt in diesem Zusammenhang an, dass das österreichische ABGB, dessen § 731 die Vererbung von Seitenverwandten, die weiter als der 4. Grad entfernt sind, ausschließt, dem solonischen Recht, das ebenfalls eine Begrenzung des Grades enthält, näher steht als dem deutschen BGB (§ 1928), das eine solche Begrenzung des Grades nicht kennt, während das solonische Recht, indem es den Seitenverwandten gegenüber großzügiger ist als das ABGB, mehr oder weniger in der Mitte zwischen der deutschen und der österreichischen Regelung liegt.

[37] Grosschmid, Az intestát örökösödési rend Solon törvényeiben [= Die Ordnung der Intestaterbfolge in den Gesetzen von Solon], 535 f.

[38] Ebd. 536 ff.

Nach athenischem Recht hatte der Archon mangels eines männlichen Nachkommens den Nachlass an den oder die Erben zu vergeben. (Die Rolle des Archons in diesem Zusammenhang ist also vergleichbar etwa mit der Befugnis der heutigen öffentlichen Notare in Ungarn, Nachlässe zu vergeben.) Im Streitfall lag dann die Entscheidungsbefugnis beim Gericht.[39] Im Prinzip legten die Gesetze von Solon die Erbfolge genau fest, wobei die männlichen Verwandten in der väterlichen Linie bevorzugt wurden.[40] Grosschmid vertritt aber die in der Literatur bekannte Ansicht, dass das athenische Gericht einen sehr weiten Ermessensspielraum hatte und oft nach eigenem Ermessen entschied. In diesem Zusammenhang zitiert Grosschmid aus einer Studie seines älteren Zeitgenossen Lőrinc Tóth, eines 1903 verstorbenen Richters der Königlichen Ungarischen Kurie und ordentlichen Mitglieds der Ungarischen Akademie der Wissenschaften, der seinerseits mit dem antiken griechischen Erbrecht vertraut war, dass „ein Gut im Falle eines Rechtsstreits oft nicht von der Person gewonnen wird, die nach dem Privatrecht das Recht dazu hätte, der der römische Prätor bzw. der *Landesgerichtsrath* es zuweisen würde, sondern von der Person, die vor dem Volk dessen würdig erscheint, und von der z.B. sein Repräsentant, beredt beweist, dass er sein Vermögen zum Wohle der Allgemeinheit verwenden wird".[41]

Grosschmid fügt seinerseits augenzwinkernd hinzu: „Etwas Willkürliches und sehr Menschliches: dass das Gericht in seinem Urteil auch andere Umstände berücksichtigt als den bloßen Anspruch (...). Mit anderen Worten: Es geht über Recht und Gerechtigkeit hinaus.[42] Aristophanes singt das sehr schön in seinen *Wespen*".[43] Dabei zitiert Grosschmid auch eine Zeile aus dieser Komödie: „Und vermählen die Tochter mit dem, welcher uns mit Bitten dazu hat beredet".[44] Hierbei ist anzumerken, dass der Erbschaftserwerb von Frauen nach athenischem Recht streng begrenzt war und in den allermeisten Fällen nur durch eine gerichtlich angeordnete Heirat mehr oder weniger gelöst werden konnte.[45]

[39] MacDowell, *The law of classical Athens,* 102.

[40] Siehe zusammenfassend Harrison, *The law of Athens,* 130–149.

[41] Tóth L., A magyar örökösödési jog szelleme és alapelvei más jogokkal összehasonlítva [= Der Geist und die Grundsätze des ungarischen Erbrechts im Vergleich mit anderen Rechtsordnungen], (1860) (3) *Akadémiai Értesítő. A Philologiai, Törvény- és Történettudományi Osztályok Közleményei,* 303, zitiert in Grosschmid, Az intestát örökösödési rend Solon törvényeiben [= Die Ordnung der Intestaterbfolge in den Gesetzen von Solon], 539.

[42] Der Ausdruck „Gesetz und Gerechtigkeit" in dem Zitat ist kaum zufällig, vgl. z.B. Isaeus 11, 30. i.f.: „tou dikaiou kai tón nomón".

[43] Grosschmid, Az intestát örökösödési rend Solon törvényeiben [= Die Ordnung der Intestaterbfolge in den Gesetzen von Solon], 537.

[44] Aristoph. *vesp.* 586, zitiert in Grosschmid, Az intestát örökösödési rend Solon törvényeiben [= Die Ordnung der Intestaterbfolge in den Gesetzen von Solon], 537 (die oben angeführte deutsche Übersetzung ist die von R. Lang, *Die Wespen des Aristophanes,* (Meier, Schaffhausen, 1890). Vgl. D. M. MacDowell (ed., introd., and comm.), *Aristophanes, Wasps,* (Clarendon, Oxford, 1971), 206.

[45] Vgl. Grosschmid, Az intestát örökösödési rend Solon törvényeiben [= Die Ordnung der Intestaterbfolge in den Gesetzen von Solon], 536–538; Harrison, *The law of Athens,* 132–138.

Aristophanes verspottet in seiner Komödie *Die Wespen* die prinzipienlose und schmarotzerische Mentalität der 6000 Mitglieder der athenischen *Heliaia,* der „Wespen".[46] So lesen wir bezüglich der Geschworenen, die mit 3 Obuli pro Tag belohnt werden: „Auch für unser sonstig Leben sind wir recht erfinderisch: / Jeden stechen wir und holen uns den Lebensunterhalt."[47]

Grosschmid weist auf diesen Aspekt nur *per tangentem* hin,[48] und kommt zu dem Schluss, dass nach der athenischen Gerichtspraxis der Erbe, der kein männlicher Nachkomme war, nicht nur den *de cuius* überleben musste, sondern auch eine gerichtliche Entscheidung zu seinen Gunsten erwirken musste, damit der Nachlass von ihm auf seinen Erben überging.[49]

Viele Details dieses verworrenen Falles sind in der Literatur bis heute umstritten. Einige von Grosschmids Folgerungen sind auch heute noch gültig, während andere die Grundlage für Diskussionen bilden könnten. Bemerkenswert ist Grosschmids aufschlussreiche Beobachtung, dass Theopompos' Bruder Stratokles gewisse Vorbereitungen getroffen hatte, um seinen Anspruch auf das Erbe geltend zu machen;[50] *nota bene,* der amerikanische Wissenschaftler Thompson, der Grosschmids Studie offensichtlich nicht kannte, stellte 1976 fest, dass dieser Aspekt in der einschlägigen Literatur vor ihm von niemandem beachtet worden war.[51]

Grosschmid veröffentlichte (oder besser gesagt versteckte) seine zweite Arbeit über das griechische Recht in den *Acta* der Universität Budapest unter dem Titel seiner Antrittsrede als Rektor.[52] In diesem Aufsatz setzte sich Grosschmid hauptsächlich mit der Rede gegen Olympiodoros auseinander,[53] die dem Demosthenes zugeschrieben

[46] Vgl. Grosschmid, Az intestát örökösödési rend Solon törvényeiben [= Die Ordnung der Intestaterbfolge in den Gesetzen von Solon], 537–539.

[47] Aristoph. *vesp*. 1112 f. (deutsche Übersetzung von Lang, *Die Wespen des Aristophanes*). Vgl. MacDowell, *Aristophanes, Wasps,* 269, 275.

[48] Grosschmid, Az intestát örökösödési rendről Solon törvényeiben [= Über die Ordnung der Intestaterbfolge in den Gesetzen von Solon], 327, bemerkt skeptisch: „Wer würde übertreiben, wenn nicht der Komödiendichter?". In der literaturgeschichtlichen Literatur ist umstritten, inwieweit die Komödien des Aristophanes einen sozialkritischen Einschlag hatten, vgl. z.B. MacDowell, *Aristophanes, Wasps,* 10; R. M. Rosen & H. P. Foley (ed.), *Aristophanes and politics: New studies,* (Brill, Leiden & Boston, 2020).

[49] Grosschmid, Az intestát örökösödési rend Solon törvényeiben [= Die Ordnung der Intestaterbfolge in den Gesetzen von Solon], 536.

[50] Ebd. 531.

[51] Thompson, *De Hagniae hereditate,* 37 f.

[52] B. Grosschmid, [Antrittsrede des Rektors], (1917–1918) (1) *Acta Regiae Sc. Univ. Hung.,* 17–76. Grosschmids Antrittsrede wurde wegen des Krieges nicht gehalten. Für diese Information bedanke ich mich auch an dieser Stelle bei Frau Ernőné Kulcsár Szabó, der Generaldirektorin der ELTE Universitätsbibliothek und -archive sowie bei ihren Mitarbeitern.

[53] Dem. 48. Grosschmid benutzte zum griechischen Text insbesondere die Ausgabe von Reiske and Schaefer, *Demosthenis quae supersunt,* vgl. Grosschmid, *Rektoratsrede,* 26.

wird.[54] Die rund 60-seitige Abhandlung befasst sich ausführlich nicht nur mit dem athenischen Erbrecht, sondern auch mit dem athenischen Nachlassverfahren und den schuldrechtlichen Aspekten des komplexen Falles, *nota bene*, es handelt sich hierbei um eine Klage auf Schadensersatz aufgrund des Bruchs eines Vertrages zwischen Erben über den Nachlass.

Leider hat Grosschmid seine dritte Abhandlung über das antike griechische Recht nicht veröffentlicht, es gibt jedoch Hinweise darauf, dass er ein umfangreiches Manuskript erstellt hatte.[55] Auf der Grundlage dieser scheinbar verlorenen Studie[56] hielt er am 15. April 1918 auf der Sitzung der Philosophischen und Historischen Klasse der Ungarischen Akademie der Wissenschaften einen Vortrag über die Arbeit des bedeutenden Experten des athenischen Rechts, Iván Télfy, Professor an der Universität Budapest und korrespondierendes Mitglied der Ungarischen Akademie der Wissenschaften, mit dem Titel *Télfy versus Dr. Eduard Gans und das attische Erbrecht*.[57]

Seine vierte Studie zum antiken griechischen Recht veröffentlichte Grosschmid erneut als Rektoratsrede, die er in gekürzter Form am 13. Mai 1918 in der Aula Magna der Budapester Universität gehalten hatte.[58] Gegenstand dieser etwa 190 Seiten umfassenden und damit als monographisch geltenden Abhandlung war formell eine kritische Würdigung des im November 1917 vorgelegten Gesetzentwurfs „über die Beschränkung der gesetzlichen Erbfolge von Verwandten und über das Erbrecht der Heiligen Krone [Ungarns]", der nie verabschiedet wurde. In dem Text geht es aber in erster Linie nicht um das ungarische Recht, sondern im Zusammenhang damit – oder vielmehr unter dem Vorwand dessen – um das athenische Erbrecht und zwar um solche Details, die Grosschmid in seinen oben erwähnten Studien nicht erörtert hatte.[59]

[54] Gernet, *Démosthène*, 230, bestätigt den bereits von Dareste geäußerten Verdacht, dass diese Rede angesichts des Wortlauts und der Ausdrucksweise des Textes nicht von Demosthenes stammt.

[55] Grosschmid, *Rektoratsrede,* 25, Fn. 3; dann wird an mehreren weiteren Stellen dieses Werkes auf verschiedene Kapitel der verlorenen (vgl. die folgende Fn.) Studie verwiesen.

[56] Nach der freundlichen Auskunft der Bibliothek der Ungarischen Akademie der Wissenschaften ist diese Studie mit ziemlicher Sicherheit nie im Druck erschienen, und es ist leider auch kein Manuskript davon aufzufinden. Für diese Informationen sei auch hier herzlichst gedankt.

[57] Iván Télfy (1816–1898) war Jurist, später Professor der klassischen Philologie an der Universität von Pest (Budapest). Sein Hauptwerk, das von Grosschmid häufig zitiert wird, ist eine umfangreiche Sammlung von Zitaten aus den altgriechischen Quellen mit lateinischer Übersetzung und Kommentar (ebenfalls auf lateinisch). Das Werk stellt das attische Recht in einem dogmatischen System dar. Siehe I. Télfy, *Corpus iuris Attici* (typis Reg. Sc. Univ. Pestiensis, Pestini, Lipsiae & Budae, 1868).

[58] Grosschmid, *Rektoratsrede*.

[59] Vgl. Grosschmid, *Rektoratsrede,* 5–9 (Einleitung), 9–23 (Bewertung des Gesetzes im Vergleich zum österreichischen Recht). Ab S. 23 werden fast ausschließlich athenische Erbrechtsfragen unter Einbeziehung philologischer Details eingehend untersucht, wobei der Schwerpunkt zunächst auf der bereits erwähnten Rede gegen Olympiodoros und dann ab S. 117 auf dem Rechtsstreit um den Hagnias-Nachlass liegt. Grosschmid, der sich mit wahrer Freude in die Details des athenischen Rechts vertieft, vergleicht manchmal, z.B. auf S. 141, das athenische und österreichische Recht, während auf S. 156–158 das athenische, österreichische, deutsche und ungarische Recht.

Unter Grosschmids Werken zum antiken griechischen Recht zeugen die beiden umfangreichen Abhandlungen in Form der Rektoratsreden nicht nur von außergewöhnlicher Gelehrsamkeit und Akribie, sondern bieten uns auch ein plastisches Bild eines seltsamen *homo ludens,* der keineswegs frei von intellektuellem Übermut ist, der sich über extravagante Themen hochgradig amüsiert und der es zu genießen scheint, sich in die antiquarischen und klassisch-philologischen Details und in die Tiefen der altgriechischen Quellentexte und der nicht minder esoterischen Literatur in Latein, Französisch, Deutsch und Englisch zu vertiefen. Es ist wohl dem Perfektionismus Grosschmids zuzuschreiben, dass er kein Buch auf der Grundlage seines Materials monographischen Umfangs geschrieben hat. Er hat die reiche Ernte seiner heroischen Forschungsarbeit – denn sein oben erwähntes Amüsement war letzten Endes doch heroisch – quasi im Verborgenen in den *Acta* der Universität aufbewahrt und uns vermacht.

3. Wie gründlich Grosschmid die Quellen des römischen Rechts kannte, will ich *in medias res* an einem glänzenden Beispiel aus seinem Hauptwerk, den *Kapiteln,* zeigen. Grosschmid lobt die Regel im preußischen *Allgemeinen Landrecht* (1794), wonach Schmerzensgeld nur einem Geschädigten mit niedrigerem sozialem Status zusteht.[60] Diesbezüglich fiel ihm ein wenig bekanntes Fragment von Ulpian ein, das außerhalb der Digesten überliefert ist: „*Collatio leg. Rom. et Mosaic.* I. 11. erwähnt einen Fall, in dem der Vater eines jungen Mannes, der wegen Ausgelassenheit getötet worden war, angesichts seiner Armut mit 2.000 sertertii *(impendii causa)* belohnt wurde, um den Jugendlichen von solchen Ausgelassenheiten abzubringen".[61] Aus dem Text von Ulpian geht hervor, dass sich der tragische Unfall während eines gewalttätigen Spiels ereignete, und dass der Unfall auf die Schuld eines der Spieler zurückzuführen war. Ulpian sprach diesbezüglich nicht von Schmerzensgeld, sondern von einer Art Pauschalentschädigung. Wie Grosschmid unter Bezugnahme auf D. 9.3.7 (Gai. 6 *ed. prov.*) sogleich feststellt, lehnten die römischen Juristen den Gedanken einer Entschädigung für immaterielle Schäden mit „stolzem Impetus" ab.[62]

Die Haltung Grosschmids zum römischen Recht war von einer gewissen Ambivalenz geprägt. In vielen Fällen lobte er das römische Recht in den höchsten Tönen,

[60] *Allgemeines Landrecht für die preußischen Staaten* (1794), 1.6.112.

[61] Grosschmid B., *Fejezetek kötelmi jogunk köréből I [= Kapitel aus dem Kreise des ungarischen Schuldrechts],* (2. Aufl., Grill, Budapest, 1932), 720. Der Wert dieses Hinweises ist um so größer, dass diese Ulpian-Stelle in dem unlängst erschienenen dreibändigen Standardwerk des römischen Privatrechts (laut dessen Quellenregister) bloß als eines der Beispiele der vom Kaiser erlassenen *epistulae* angeführt wird, siehe U. Babusiaux in U. Babusiaux et al. (hrsg.), *Handbuch des römischen Privatrechts,* (Mohr Siebeck, Tübingen, 2023), I, 143, Fn. 267.

[62] Grosschmid, *Fejezetek kötelmi jogunk köréből I [= Kapitel aus dem Kreise des ungarischen Schuldrechts],* 720.

aber er gab auch viele Zeichen seiner Abneigung und seiner beruflichen Vorbehalte. Betrachten wir zunächst die Anzeichen für eine positive Einstellung.

Grosschmid stellte mehrmals fest, dass „keine Nation jemals etwas Ähnliches wie das römische Recht geschaffen hat, das eine ständige Fundgrube an Wahrheiten für alle gebildeten Nationen aller Zeiten ist".[63] Er ging sogar so weit zu behaupten, dass „kein europäisches Recht etwas anderes ist als verdorbenes römisches Recht".[64] Diese scheinbar kühne These illustrierte er manchmal mit konkreten Beispielen, auf die ich gleich noch zu sprechen komme.

In seiner allgemeinen Würdigung des römischen Rechts betonte Grosschmid auch, dass drei Rechtssysteme am stärksten von nationalen Eigenheiten geprägt sind: das römische, das englische und das ungarische Recht. Er fügt hinzu, dass das ungarische Recht in dieser Hinsicht dem römischen und dem englischen Recht gleichrangig ist.[65]

Grosschmid wies auf das römische Recht vor allem im Sinne der vergleichenden Dogmengeschichte hin, nahm aber auch mehrfach Bezug auf die historische Entwicklung des römischen Rechts. Diese historische Perspektive spiegelt sich in seiner Feststellung, dass das Zwölftafelgesetz wie ein Keim war, aus dem, wie eine mächtige Eiche aus einer kleinen Eichel, ein „großes, umfangreiches Bauwerk" wuchs. Und selbst wenn das Zwölftafelgesetz viele Regeln griechischen Ursprungs enthalten haben sollte, was Grosschmid bezweifelt, so ist es doch ein hervorragender Beweis dafür, dass auch aus fremden, aber noch zarten Pflänzchen ein Recht entstehen kann, das dem Geist einer Nation vollkommen entspricht, wie dies auch durch die Geschichte des älteren ungarischen Rechts bewiesen wird.[66]

Diese scheinbar rein rechtshistorische Erörterung ist keineswegs ein Selbstzweck. Grosschmid weist darauf hin, dass die auf massiver Rezeption und Nachahmung fertiger ausländischer Vorbilder beruhende Kodifizierung, wie sie zu seiner Zeit in Ungarn üblich war, nicht erfolgreich sein kann.[67] Er weist auch darauf hin, dass der wünschenswerte Weg zur Entwicklung des Rechts darin besteht, es in kleinen Schritten, fast unmerklich, zu entwickeln, wofür neben dem römischen Recht und dem alten ungarischen Recht auch die englische Rechtsgeschichte ein passendes Beispiel ist.[68] In diesen Argumentationen scheint sich in der Tat der „ungarische Savigny" zu manifestieren, wenn auch mit einem starken nationalen Einschlag. Es ist kaum notwendig zu betonen, dass diese Ideen auch heute noch sehr aktuell sind.

[63] Grosschmid, *Magánjogi előadások. Jogszabálytan [= Vorlesungen über das Privatrecht. Rechtsnormenlehre],* 38.
[64] Ebd. 543.
[65] Ebd. 39.
[66] Ebd. 645.
[67] Ebd. 44 ff.
[68] Ebd. 43.

Grosschmid bezog sich auf das römische Recht nicht nur im Zusammenhang mit den traditionellen Themen des Privatrechts, sondern z.B. auch im Zusammenhang mit Fragen des Handelsrechts,[69] und sogar in seiner Monographie mit dem Titel *Werbőczy und das englische Recht.*[70] Aus dem umfangreichen Quellenmaterial des römischen Rechts hat er immer wieder einzelne Passagen mit fachlicher Sicherheit ausgewählt und mit der hohen Professionalität eines Romanisten kommentiert.

Wie ich bereits dargelegt habe, führt Grosschmid mehrere Beispiele an, die die Vorteile einer römischrechtlichen Konstruktion im Vergleich zum modernen Recht aufzeigen. So stellt er in seinen *Kapiteln* fest, dass § 433 des deutschen BGB (heute noch in unveränderter Nummerierung und Formulierung in Kraft), der die Übergabepflicht des Verkäufers regelt, eine ungünstigere Formulierung darstellt als die entsprechende Vorschrift des römischen Rechts.[71] An anderer Stelle seiner *Kapitel* wird § 301 BGB (mit einer gewissen Regel bezüglich des Gläubigerverzugs) mit Verweis auf das römische Recht kritisiert.[72]

Grosschmids profunde Quellenkenntnis und sein Scharfsinn ermöglichten es ihm, römisches Recht und moderne Privatrechtskonstruktionen brillant zu vergleichen. Ignác Frank[73] hatte dies bereits gelegentlich getan, aber Grosschmid erweitert den Horizont seiner privatrechtlichen Argumentation noch viel weiter, und zwar mit manchmal recht überraschenden römischrechtlichen Hinweisen. In seinen *Vorlesungen über das Privatrecht* zitiert er D. 21.1.31.20 (Ulp. 1 *ed. aed. cur.*), wonach der Käufer einen widerstrebenden Verkäufer verklagen kann, um ihn zur Abgabe einer Garantie durch *stipulatio* zu zwingen.[74] Grosschmid bemerkt geistvoll, dass diese Regel „eini-

[69] Siehe z.B. Grosschmid B., *Fejezetek kötelmi jogunk köréből II [= Kapitel aus dem Kreise des ungarischen Schuldrechts],* (2. Aufl., Grill, Budapest, 1933), 616, 963.

[70] Siehe Grosschmid B., *Werbőczy és az angol jog* [= Werbőczy und das englische Recht], (Franklin, Budapest, 1928), 12, 35, 41, usw. In diesem späten, aber wichtigen rechtsvergleichenden Werk bringt Grosschmid seine Bewunderung für das englische Recht zum Ausdruck, das seine eigenen nationalen Traditionen seit dem Mittelalter kontinuierlich bewahrt hat, im Gegensatz zu vielen anderen Rechtssystemen, einschließlich des ungarischen Rechts, die sich in der Neuzeit von ihren nationalen Traditionen mittelalterlichen Ursprungs abgewandt haben (in Ungarn vor allem von dem alten ungarischen Gewohnheitsrecht, das in Werbőczys *Tripartitum* zusammengefasst ist).

[71] Grosschmid, *Fejezetek kötelmi jogunk köréből I [= Kapitel aus dem Kreise des ungarischen Schuldrechts],* 217 f.

[72] Grosschmid, *Fejezetek kötelmi jogunk köréből II [= Kapitel aus dem Kreise des ungarischen Schuldrechts],* 141.

[73] Ignác Frank (1788–1850) war Professor des Privatrechts an der Universität Pest. Er war Mitglied der ungarischen Akademie der Wissenschaften. B. Szabó, Ignác Frank, in M. Stolleis (hrsg.), *Juristen. Ein biographisches Lexikon* (Beck, München, 2001), 221 f.

[74] Grosschmid geht nicht auf die Frage ein, ob sich Ulpian auf die Gewährleistung für Rechtsmängel oder auf die für Sachmängel bezieht. Grosschmids Zurückhaltung ist gerechtfertigt, da diese Frage auch in der heutigen römischrechtlichen Literatur nicht abschließend geklärt ist. É. Jakab, *„Praedicere" und „cavere" beim Marktkauf. Sachmängel im griechischen und römischen Recht* (Beck, München, 1997), 233 f., erörtert diesen Text ausführlich und kommt zu dem Schluss, dass Ulpian nur die Gewährleistung für Rechtsmängel meinte.

germaßen der heutigen Situation entspricht, in der die eine oder andere Partei eines Geschäfts nach gängiger Geschäftspraxis verpflichtet wäre, einen sogenannten Deckungswechsel auszustellen".[75]

Seine brillanten Assoziationen zum römischen Recht gipfelten in innovativen Ideen. So schlug er in seinen *Kapiteln* vor, die Abstraktheit der *stipulatio* an das ungarische Grundbuchrecht (das ansonsten dem österreichischen Modell folgte) anzupassen,[76] und in seiner Arbeit über die *bonorum possessio – nota bene,* es handelt sich um eine Studie zum römischen Recht! – wies er darauf hin, dass im ungarischen Nachlassverfahrensrecht die Konstruktion der *bonorum possessio* „völlig unausgenutzt bleibt".[77]

Grosschmid stand dem römischen Recht gelegentlich kritisch gegenüber. Einerseits kritisierte er die selbst für antike Verhältnisse erstaunlichen oder gar schockierenden Sitten der Römer, andererseits wies er auf die juristischen und fachlichen Schwächen der römischen Rechtsquellen hin. Seine Objektivität zeigt sich darin, dass er die bloße Veralterung der antiken römischen Rechtsregeln nicht kritisierte, sondern lediglich feststellte.

Aus Respekt vor dem römischen Recht pflegen die Romanisten, aber meist auch die Rechtshistoriker nicht, die Griechen und die Römer zum Nachteil der Letzteren zu vergleichen. Demgegenüber stellt Grosschmid ganz ungeniert fest: „Die Griechen kämpften um Schönheit, Adel und Nationalität, Rom um die Macht. Der Grieche wurde durch Charme und Kunst beseelt, der Römer durch sein Ideal der Selbststärke, das, obwohl «fractus illabatur orbis»,[78] nicht von seinem Ziel und seiner Richtung abweicht".[79]

Grosschmid sah wie Jhering[80] den Grund für den erheblichen kulturellen Unterschied zwischen den beiden Völkern darin, dass die Römer im Gegensatz zu den Griechen und anderen antiken Völkern nicht durch Blut und Abstammung miteinander verbunden waren, sondern Fremde von zweifelhafter Herkunft waren. Die kulturanthropologische Grundlage für das besondere Rechtsempfinden und -interesse der Römer sah Grosschmid in ihrem wilden, männlichen Individualismus, der durch die nicht-organische Herkunft ihres Staates bestimmt war.[81]

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[75] Grosschmid, *Magánjogi előadások. Jogszabálytan [= Vorlesungen über das Privatrecht. Rechtsnormenlehre],* 314.

[76] Grosschmid, *Fejezetek kötelmi jogunk köréből I [= Kapitel aus dem Kreise des ungarischen Schuldrechts],* 82. Weitere Beispiele befinden sich in Biró, A római jog hatásának jelei a dualizmus kötelmi jogában [= Anzeichen für den Einfluss des römischen Rechts im Schuldrecht der Zeit des Dualismus], 323.

[77] Grosschmid B. [=Zsögöd B.], *Magánjogi tanulmányok* [= Studien zum Privatrecht], (Budapest, Politzer, 1901), I, 749.

[78] Hor. *carm*. 3.3.7.

[79] Grosschmid, *Magánjogi tanulmányok* [= Studien zum Privatrecht], I, 354.

[80] R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, I,* (4. Aufl., Breitkopf und Härtel, Leipzig, 1878), 118 ff. Vgl. J. Zlinszky, Arbeit im archaischen Rom, (1989) (36) *Revue internationale des droits de l'Antiquité,* 426 f.

[81] Grosschmid, *Magánjogi tanulmányok* [= Studien zum Privatrecht], I, 354 f.

Grosschmid dachte an die unerbittlichen Regeln der *patria potestas* mit dem Schrecken des aufgeklärten modernen Menschen. Immer wieder zitiert er aus dem Werk des Tacitus, der die Germanen für ihre humane Haltung gegenüber Kindern lobt, den Römern aber umso weniger schmeichelt, wenn er sagt: „plusque ibi boni mores valent, quam alibi bonae leges".[82] Mit kaum verhohlenem Abscheu stellt er fest, dass nach der *patria potestas* „der Vater über seine Kinder genauso viel Recht hat wie über sein Vieh, *jus vitae et necis,* das heißt, das Recht auf Leben und Tod". [83]

Dennoch scheint Grosschmid auch ein eher instinktives Ich gehabt zu haben, denn er scheint sich manchmal ausdrücklich zu den archaischen Regeln des Zwölftafelgesetzes hingezogen zu fühlen, in welchem er die Grundlage des römischen Nationalgenies erkannte, das die gesamte spätere Geschichte des römischen Volkes bestimmte. Dieser archaischen Auffassung, die Grosschmid metaphorisch mit „harten Muskeln" beschrieb, entsprach die Grenzenlosigkeit väterlicher Macht.[84] Im Vergleich dazu war in der Kaiserzeit „die römische nationale Existenz bereits verblasst, verwandelt, (...) in das Stadium des sterbenden Löwen eingetreten". Zu einem offenen Bruch mit den antiken Traditionen kam es aber erst unter Justinian, dessen christlicher Geist nicht mehr durch die frühere Auffassung belastet war. Dementsprechend schränkte Justinians Novelle Nr. 115 die väterliche Macht in einem „trockenen und befehlenden" Ton ein, mehr als je zuvor.[85]

Grosschmids instinktives Ich kommt auch in seiner auf der Kritik an der kaiserlichen Dekadenz basierenden Einschätzung zum Ausdruck, dass „die justinianische Erbfolgeordnung, aus der die ausländische Erbfolge gemacht worden ist, in Wirklichkeit eine Einrichtung darstellt, die aus der Verderbnis der Familienordnung und der Moral Roms geboren wurde".[86]

Es ist nicht schwer, hier eine Parallele zu ähnlichen Ideen von Nietzsche zu erkennen. Es scheint jedoch, dass Grosschmid diese „Entartung" in seinem eigenen Erbrechtsentwurf nicht zu korrigieren suchte, z.B. wies er in Ermangelung eines Nachkommens dem überlebenden Ehegatten die Erbschaft zu,[87] mit Ausnahme des Rückfallgutes, *nota bene,* wie ich bereits dargelegt habe, zielten Grosschmids erfolgreiche *de lege ferenda*-Bemühungen hauptsächlich darauf ab, die Rückfallerbfolge zu retten.

Der oben angedeutete Widerspruch ist schwer aufzulösen. Die beiden Ansätze tauchen manchmal in ein und demselben Werk auf, während Grosschmid, wie wir gesehen haben, die archaischen römischen Verhältnisse nicht nur vom Standpunkt der

[82] Tac. *Germ*. 19. i.f. Zitiert in Grosschmid, *Magánjogi tanulmányok* [= Studien zum Privatrecht], I, 452.
[83] Grosschmid, *Magánjogi előadások*. *Jogszabálytan [= Vorlesungen über das Privatrecht. Rechtsnormenlehre],* 452.
[84] Ebd. 455.
[85] Ebd. 456.
[86] Grosschmid B. [=Zsögöd B.], *Öröklött s szerzett vagyon* [= Geerbtes und erworbenes Eigentum], (Politzer, Budapest, 1897), 233.
[87] Grosschmid, *Magánjogi tanulmányok* [= Studien zum Privatrecht], II, 260 (§ 14).

Aufklärung aus, sondern auch nach antiken Maßstäben kritisierte, indem er sie z.B. mit den Griechen oder – wie Tacitus – mit den Germanen verglich. Es ist eine dürftige Erklärung, wenn man sagt, dass die Dinge nicht schwarz und weiß sind.

Was Grosschmids Kritik an den taxonomischen und dogmatischen Fehlern im römischen Privatrecht betrifft, möchte ich diesbezüglich nur ein Beispiel nennen. In Bezug auf die Kategorie der Quasikontrakte, die im *Code civil* auch nach der umfassenden Schuldrechtsreform von 2016 immer noch überlebt hat,[88] stellt Grosschmid in seinen *Kapiteln* mit einer gewissen Häme fest, dass sein Kollege Tamás Vécsey,[89] in aufeinanderfolgenden Auflagen seines Lehrbuchs des römischen Rechts immer wieder versucht hat, das Unreinliche zu reinigen, um es salonfähig zu machen, dass es aber nicht vollständig gereinigt werden kann, weil dann seine Identität selbst völlig verloren ginge.[90] Wie Grosschmid in diesem Zusammenhang feststellt, entsteht bei der partiellen Reinigung der römischen Rechtsinstitute von taxonomisch-dogmatischen Irrtümern ein solches „mixtum compositum", das weder mit den ursprünglichen Auffassungen der römischen Juristen noch mit den Anforderungen der modernen Dogmatik übereinstimmt.[91]

Neben den regelmäßigen und ausführlichen Verweisen auf das römische Recht in fast allen seinen Werken und den manchmal mehrere Seiten langen Exkursen zum römischen Privatrecht[92] schrieb Grosschmid auch Werke zum römischen Recht. Das Wichtigste dieser Werke ist seine 153-seitige Darstellung der Entwickelung der römischrechtlichen Regelung der *portio debita,* eine monographische Studie, die sich wie *inter folia fructus* in seinem berühmten Werk über den Pflichtteil versteckt.[93]

[88] Gemäß der französischen Regierungsverordnung Nr. 2016-131 vom 10. Februar 2016, das im Auftrag des Gesetzgebers erlassen wurde, wird der Begriff der *quasi-contrats* im geltenden *Code civil* in der Neufassung von Artikel 1300 definiert, wodurch der Text des früheren Artikels 1371 erheblich modernisiert wurde, der traditionelle Begriff *quasi-contrats* jedoch beibehalten wurde, im Gegensatz zur gleichzeitigen Abschaffung des Begriffs der *quasi-délits*. Vgl. A. Földi, Appunti sulla categoria dei quasi-delitti, in *Studi in onore di Mario Talamanca, III,* (Jovene, Napoli, 2001), 436 ff.

[89] Tamás Vécsey (1839–1912), damals auch in Italien gut bekannt (z.B. in Catania), war von 1874 bis 1911 Professor des römischen Rechts an der Universität Budapest. Er war ordentliches Mitglied der Ungarischen Akademie der Wissenschaften und 1901/1902 Rector Magnificus der Universität. Er gründete 1885 das Seminar für Römisches Recht an der Universität Budapest. Sein berühmtes Lehrbuch (Vécsey T., *A római jog institutiói [= Institutionen des römischen Rechts],* (7. Aufl., Franklin, Budapest, 1907) erlebte zwischen 1886 und 1907 sieben Auflagen. Siehe neuerdings G. Hamza, *Origen y desarrollo de los ordenamientos iusprivatistas modernos con base en la tradición del Derecho romano,* (Fundación Notariado, Andavira, Santiago de Compostela, 2022), 332 f.

[90] Grosschmid, *Fejezetek kötelmi jogunk köréből* II [= Kapitel aus dem Kreise des ungarischen Schuldrechts], 1115 f.

[91] Ebd. 1115.

[92] So wird z.B. ebd. 1056–1061 die Frage, wie das römische Recht die Gefahrtragung in Bezug auf die verkaufte Sache regelte, in einem eigenen Unterabschnitt untersucht.

[93] Grosschmid, *Magánjogi tanulmányok* [= Studien zum Privatrecht], I, 352–504.

Wie Lajos Vékás feststellte, wurde der Pflichtteil, abgesehen vom Inkrafttreten des österreichischen ABGB im Jahr 1853, erst 1861 durch die so genannten „Provisorischen Regeln der Gerichtsbarkeit" in das ungarische Recht eingeführt,[94] und die Berechtigung dieses Rechtsinstituts war zur Zeit der Abfassung von Grosschmids Studie in den 1870er Jahren noch umstritten.[95] Mit der detaillierten Darstellung der einschlägigen Regeln des römischen Rechts wollte Grosschmid einerseits die Billigkeit des Pflichtteilsrechts bestätigen, andererseits lieferte er eindrucksvolle historische Grundlagen für das dogmatische Dilemma der Zuordnung des Pflichtteils zum Sachenrecht oder zum Schuldrecht.

4. Grosschmids Verhältnis zum römischen Recht soll auch im Lichte seines Verhältnisses zu den Werken der Pandektisten betrachtet werden. In der ungarischen Literatur hat sich im Anschluss an die einschlägige Auswertung von Károly Szladits[96] die Ansicht durchgesetzt, dass sich Grosschmid nicht besonders für die Werke der Pandektisten interessierte.[97] Diese Ansicht muss revidiert werden. Man muss nicht sehr viel in Grosschmids Werken blättern, um zu sehen, wie oft er Savigny, Windscheid und Arndts zitierte, aber auch, dass er gelegentlich auf die Werke von Puchta, Vangerow, Brinz, Mackeldey oder Mühlenbruch verwies. Savigny und sein *System des heutigen römischen Rechts* wurde von Grosschmid am höchsten eingeschätzt. Er lobte Savigny als den Begründer der historischen Rechtsschule und damit als den Urvater des BGB.[98]

Neben Savigny hob er Windscheids *Lehrbuch des Pandektenrechts* hervor, in dem die höchste Gelehrsamkeit eine glückliche Verbindung mit einem ausgezeichneten praktischen Sinn eingeht. Mit einer gewissen Ironie stellte er fest, dass das BGB vor allem den Einfluss von Windscheid widerspiegelt, dessen Verfasser „eine Reihe kleiner Windscheids" waren.[99] Aus nationalem Stolz fügte er hinzu, dass Windscheid mit Werbőczy verglichen werden könne, und manchmal stellte er Windscheid sogar Werbőczy gegenüber und lobte den letzteren.[100]

[94] J. Zlinszky und B. Szabó, Ungarn, in F. Ranieri (hrsg.), *Gedruckte Quellen der Rechtsprechung in Europa* (Vittorio Klostermann, Frankfurt am Main, 1992), 954.
[95] Vékás, *Fejezetek a magyar magánjogtudomány történetéből [= Kapitel aus der Geschichte der ungarischen Privatrechtswissenschaft],* 58 f.
[96] Szladits K., Grosschmid és a magyar kötelmi jog [= Grosschmid und das ungarische Schuldrecht], (1936) (1–2) *Magyar Jogászegyleti Értekezések,* 11.
[97] Zur einschlägigen (ungarischen) Literatur siehe Földi, Az ógörög és római jog Grosschmid Béni életművében [= Altgriechisches und römisches Recht im Lebenswerk von B. Grosschmid], 8, Fn. 103.
[98] Grosschmid, *Magánjogi előadások. Jogszabálytan [= Vorlesungen über das Privatrecht. Rechtsnormenlehre],* 822 f.
[99] Ebd. 823.
[100] Grosschmid, *Fejezetek kötelmi jogunk köréből I [= Kapitel aus dem Kreise des ungarischen Schuldrechts],* 304.

Die in der ungarischen Literatur Szladits zufolge weit verbreitete Ansicht,[101] Grosschmid hätte sich nur dann auf die Pandektisten bezogen, wenn er sie kritisieren wollte,[102] muss ebenfalls korrigiert werden. Grosschmid hat sich in seinen *Kapiteln* an mindestens 107 Stellen auf Windscheid bezogen, 8-mal lobend, 45-mal neutral und 54-mal – also in der Hälfte der Fälle – kritisch.[103]

Es besteht jedoch kein Zweifel daran, dass Grosschmid es zu vermeiden suchte, die Werke Jherings zu zitieren. Es ist bezeichnend, dass in seinen beiden Monumentalwerken, nämlich in den *Kapiteln* und den *Vorlesungen über das Privatrecht,* jeweils nur zwei ausdrückliche Verweise auf Jhering zu finden sind, und jeder dieser Verweise überraschend in seiner Art ist.[104] Am überraschendsten ist aber ein impliziter Jhering-Hinweis, wenn Grosschmid in seinen „Kapiteln" *en passant* anmerkt, dass „nach Ansicht einiger [Juristen] subjektives Recht = geschütztes Interesse" sei.[105] Mit „einigen" meint er vor allem Jhering, der als erster (1865) Rechte als „rechtlich geschützte Interessen" definiert hat.[106]

Trotz dieser offensichtlichen Parallele stellte Szladits fest, dass die Lehren Jherings keinen Einfluss auf Grosschmid hatten, der seine Interessentheorie eigenständig und unabhängig von äußeren Einflüssen entwickelt hat. Szladits fügte hinzu, dass „Grosschmid die Durchsetzung der Interessenlehre in der Rechtsanwendung bereits damals zu einer Kunst entwickelt hatte, als die *Interessenjurisprudenz* in der deutschen

[101] K. Szladits, Festrede zu Ehren von Béni Grosschmid, (1933) (1) *Magyar Jogászegyleti Értekezések,* 17.
[102] Siehe auch Besnyő, *Szászy-Schwarz Gusztáv emlékezete [= Erinnerung an G. Szászy-Schwarz],* 100.
[103] Die meisten der 45 neutralen Verweise beziehen sich auf den Pandektisten, während in 17 Fällen Windscheids Hauptwerk als Standardwerk zum römischen Recht angeführt wird.
[104] In den *Kapiteln* bezieht sich der erste Verweis auf Jhering auf das Beispiel der Flößerei, ohne die entsprechende Arbeit von Jhering zu erwähnen, siehe Grosschmid, *Fejezetek kötelmi jogunk köréből I [= Kapitel aus dem Kreise des ungarischen Schuldrechts],* 11. Der zweite Verweis (ebd. 83) bezieht sich auf R. von Jhering, Beiträge zur Lehre von der Gefahr beim Kaufcontract, in *Gesammelte Aufsätze, I,* (Fischer, Jena, 1881), 426, 457, im Zusammenhang mit dem Verhältnis zwischen vertretbaren Sachen und Gattungspflichten. Auf das Jhering'sche Beispiel der Flößerei wird auch in Grosschmid, *Magánjogi előadások. Jogszabálytan [= Vorlesungen über das Privatrecht. Rechtsnormenlehre],* 320, verwiesen, wiederum ohne den Titel des Werkes anzugeben. Ebd. 242 zitiert Grosschmid den Gedanken Jherings, dass die Römer auch viel von den Karthagern gelernt hatten. Auch hier verweist Grosschmid nur allgemein auf ein Buch des „renommierten deutschen Juristen und Romanisten (...) zu einem anderen Thema als der Rechtswissenschaft".
[105] Grosschmid, *Fejezetek kötelmi jogunk köréből I [= Kapitel aus dem Kreise des ungarischen Schuldrechts],* 659; Szabadfalvi J., *Múltunk öröksége. Elmélettörténeti perspektívák [= Erbe der früheren ungarischen Rechtsphilosophie. Perspektiven der Theoriegeschichte],* (Gondolat, Budapest, 2016), 44, Fn. 45, weist hin auf eine frühere Formulierung dieser Definition in Grosschmid B. [=Zsögöd B.], *Magyar magánjogi jegyzetek [= Vorlesungen über das ungarische Privatrecht. Notizen von J. Nyulászi zu den Vorlesungen von B. Zsögöd],* ([lithogr. s. ed.], Budapest, 1890), 1.
[106] R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, III.1,* (Breitkopf und Härtel, Leipzig, 1865), 333. Vgl. E. Pólay, Ursprung, Entwicklung und Untergang der Pandektistik, (1981) 28 (10) *Acta Jur. et Pol. Szeged.,* 84.

Rechtstheorie höchstens noch im Entstehen war."[107] Diese Aussage von Szladits scheint insofern strittig zu sein, als Jherings Lehren zwar um das Ende des 19. Jahrhunderts noch nicht allgemein anerkannt waren, seine erste Darlegung der Interessenjurisprudenz (1865)[108] aber der Entstehung von Grosschmids entsprechenden Ideen um Jahrzehnte vorausging. Jedenfalls spielt die Interessenlehre in Grosschmids Werken eine so herausragende Rolle, dass Grosschmid neben Szászy-Schwarz als erster Vertreter der *Interessenjurisprudenz* in Ungarn bezeichnet werden kann, wenn auch (vielleicht) unabhängig von Jhering.[109]

Es ist auch schwer zu erklären, warum sich Grosschmid nicht einmal in Bezug auf die Theorie des Besitzes,[110] oder sogar in Bezug auf die *culpa in contrahendo* auf Jhering bezogen hat.[111] Es ist ebenfalls nicht zu übersehen, dass Grosschmids organische Rechtsauffassung[112] sowie die naturwissenschaftlichen Analogien, die er bei der Analyse von Rechtsproblemen häufig anwendet, der Methode Jherings ähneln. Natürlich lassen sich diese Parallelen auch durch den Zeitgeist erklären.

Von den beiden Hauptwerken Jherings bezog sich Grosschmid bevorzugt auf den *Geist*, den er rechtshistorisch hochschätzte. Auch in seiner umfangreichen Studie zur *portio debita* des römischen Rechts bezog er sich auf den *Geist* hauptsächlich in historischer Hinsicht.[113] Im Vergleich dazu war Jherings anderes Hauptwerk, *Zweck im Recht,* für Grosschmid vielleicht allzu soziologisch. Insgesamt scheint es, dass er Jherings Werke grundsätzlich im rechtshistorischen Kontext für zitierwürdiger hielt.

Auch wenn Szladits' Aussage, dass „es keine Verbindung zwischen Grosschmids Methode und den ausländischen Rechtsschulen gibt, deren theoretische Debatten Grosschmid größtenteils nicht einmal zur Kenntnis genommen hat", etwas übertrieben ist, so ist sie doch überzeugender als seine oben genannten Aussagen.[114] In der Tat war Grosschmid wie Jhering[115] nicht an den haarspalterischen Debatten der Pandektisten interessiert.

Wie auch immer es sich mit dieser Frage verhält, bedürfte es weiterer Forschungen, um zu klären, warum Grosschmid zu Jhering so distanziert war, obwohl er, wie ich

[107] Szladits, Grosschmid és a magyar kötelmi jog [= Grosschmid und das ungarische Schuldrecht], 11.
[108] Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung,* 307 ff. Vgl. I. Kroppenberg, *Die Plastik des Rechts. Sammlung und System bei Rudolf v. Jhering,* (Duncker & Humblot, Berlin, 2015), 16 ff.
[109] Vgl. Szabadfalvi, *Múltunk öröksége [= Erbe der früheren ungarischen Rechtsphilosophie],* 44.
[110] Grosschmid, *Fejezetek kötelmi jogunk köréből I [= Kapitel aus dem Kreise des ungarischen Schuldrechts],* 220 f., 300, 378.
[111] Ebd. 237, 254, 597, 600 f., 612.
[112] Siehe z.B. Grosschmid, *Magánjogi előadások. Jogszabálytan [= Vorlesungen über das Privatrecht. Rechtsnormenlehre],* 487, 610, 895, 899 f.
[113] Grosschmid, *Magánjogi tanulmányok* [= Studien zum Privatrecht], I, 354, 361, 371, 384.
[114] Szladits, Grosschmid és a magyar kötelmi jog [= Grosschmid und das ungarische Schuldrecht], 11.
[115] R. von Jhering, *Scherz und Ernst in der Jurisprudenz,* (Breitkopf und Härtel, Leipzig, 1884).

oben bereits erwähnt habe, 1871/72 als Wiener Jurastudent sogar Jherings äußerst populäre Vorlesungen an der Universität Wien besucht haben könnte.[116]

5. Da Grosschmids Werke so gut wie ausschließlich in ungarischer Sprache veröffentlicht wurden,[117] ist sein Name in der internationalen Literatur kaum bekannt. In der ungarischen juristischen Literatur wird zwar immer noch auf Grosschmids privatrechtliche Werke, insbesondere auf seine berühmten *Kapitel des ungarischen Schuldrechts,* verwiesen, doch ist selbst unter den ungarischen Rechtswissenschaftlern nicht allgemein bekannt, dass Grosschmid Studien über das athenische Erbrecht, die zusammen eine Monographie bilden, und eine monographische Studie über die *portio debita* des römischen Rechts verfasst hat. Diese Arbeiten zeigen, dass die beiden Bereiche, nämlich das geltende Privatrecht und das römische Recht, für Grosschmid nicht zu trennen waren. Ein wichtiges Merkmal sowohl seiner als auch der Arbeiten von Gusztáv Szászy-Schwarz war, dass sie das geltende Privatrecht mit einem starken Fokus auf das römische Recht und das römische Recht mit einem starken Fokus auf das geltende Privatrecht studierten, und dass diese wechselseitige Betrachtung von ihnen nicht als Luxus, sondern als berufliche Notwendigkeit angesehen wurde. Diese intellektuelle Affinität, oder, wenn man so will, diejenige Doppelkompetenz, die beide *dioskuroi* auf einem außergewöhnlich hohen Niveau besaßen, mag die Grundlage ihrer Freundschaft gewesen sein, die die erheblichen Unterschiede zwischen ihren Persönlichkeiten und ihren Auffassungen überwand.

Reinhard Zimmermann wird heute von vielen Juristen nicht zu Unrecht mit einer Strömung in Verbindung gebracht, die bei der Erforschung des modernen Privatrechts sowohl dem römischen Recht als auch der vergleichenden Privatrechtsgeschichte große Bedeutung beimisst. Grosschmid hatte dies bereits in seiner frühen Abhandlung über den Pflichtteil als eine Art *ars poetica* proklamiert.[118]

[116] Bereits Besnyő, *Szászy-Schwarz Gusztáv emlékezete [= Erinnerung an G. Szászy-Schwarz],* 102, stellte fest (und widersprach damit der seit Szladits herrschenden Meinung), dass Jhering Grosschmid beeinflusst habe. Besnyő stellte darüber hinaus fest, dass angesichts des Einflusses von Jhering die Tatsache irrelevant sei, dass sich Grosschmid auf Jherings Werke nur ganz selten bezog. Neuerdings scheint auch J. Szabadfalvi, „A magyar magánjogtudomány jogbölcseleti alapjai". Peschka Vilmos nézeteinek rekonstrukciója [= „Die philosophischen Grundlagen des ungarischen Privatrechts". Eine Rekonstruktion der Ansichten von V. Peschka], (2016–2017) (53–54) *Acta Fac. Pol.-iur. Univ. Sc. Budapest.,* 60, zu bezweifeln, dass es keinen Zusammenhang zwischen Grosschmids Interessenlehre und der *Interessenjurisprudenz* gegeben hätte.

[117] Eine wenig bekannte Ausnahme stellt Grosschmids 1889 deutsch erstelltes Manuskript mit dem Titel „Über die Voraussetzungen der Berechtigung zum Pflichttheile aus dem Gesichtspunkte der Berufung zu der gesetzlichen Erbfolge. Versuch einer Auslegung der einschlägigen Bestimmungen des Entwurfes eines Bürgerlichen Gesetzbuches für das Deutsche Reich" dar, das in Grosschmid, *Magánjogi tanulmányok [= Studien zum Privatrecht],* II, 438–473, veröffentlicht (oder eher verborgen) wurde. Für die einschlägige Auskunft bedanke ich mich bei Herrn Prof. Lajos Vékás.

[118] Grosschmid, *Magánjogi tanulmányok* [= Studien zum Privatrecht], I, 333.

Leider ist es angesichts der zunehmenden Spezialisierung unserer Zeit fraglich, ob die frühere Einheit der beiden Disziplinen jemals wiederhergestellt werden kann. Sicher ist jedoch, dass zumindest die Romanisten und Rechtshistoriker in Ungarn die Werke Grosschmids über das antike Recht und insbesondere seine Studien über das antike griechische Recht kennen sollten, und dass es sinnvoll wäre, sie dem ausländischen Publikum vorzustellen. Da die Literatur zum klassischen athenischen Recht immer noch auf Werke zurückgreift, die etwa in der ersten Hälfte des 19. Jahrhunderts erschienen sind,[119] wären die etwa 100 Jahre jüngeren, aber selbst in Ungarn kaum bekannten Studien von Grosschmid für das internationale Fachpublikum sicherlich von Interesse.

Nun möchte ich noch auf die Frage nach der *emotionalen* Einstellung Grosschmids zum römischen Recht zurückkommen. Wie ich bereits hervorgehoben habe, handelte es sich um eine ambivalente Haltung, die von echtem Respekt, ja sogar von Bewunderung, und gleichzeitig von heftiger Abneigung geprägt war. Wie Grosschmid in seinen *Vorlesungen über das Privatrecht* schreibt: „Liest man (...) die alten römischen Rechtsquellen, (...) so findet man in ihnen zweifellos etwas, das man eine beeindruckende Höhe plastischer Vollkommenheit und gedanklicher Präzision nennen kann. Gleichzeitig gibt es aber auch eine Art von Vollkommenheit, die sowohl austrocknend als auch einfrierend ist".[120] Mit Nostalgie erinnerte er sich daran, dass er als Kind alte Männer gekannt hatte, die von bestimmten Stellen aus Werbőczys *Tripartitum* so ergreifend gesprochen hatten wie von den schönsten Zeilen der großen ungarischen Dichter.[121] Anderswo beschrieb Grosschmid dieses Gefühl folgendermaßen: „dem römischen Recht fehlt der frische Atem, der üppige Frühlingsduft, den das *Tripartitum* wahrlich verströmt".[122]

Man muss aber auch sehen, dass Grosschmid manchmal von römischrechtlichen Quellentexten tief bewegt war. Bezüglich des Fragments D. 6.1.38 (Cels. 3 *dig.*),[123] das

[119] So verweist z.B. der immer noch maßgebliche Harrison, *The law of Athens,* 125 ff., etwa auf C. Ch. Bunsen, *De iure hereditario Atheniensium,* (Libraria Vandenhoeckio-Ruprechtiana, Gottingae, 1813).

[120] Grosschmid, *Magánjogi előadások. Jogszabálytan [= Vorlesungen über das Privatrecht. Rechtsnormenlehre],* 583.

[121] Ebd.

[122] Ebd. 610.

[123] „In fundo alieno, quem imprudens emeras, aedificasti aut conseruisti, deinde evincitur: bonus iudex varie ex personis causisque constituet. Finge et dominum eadem facturum fuisse: reddat impensam, ut fundum recipiat, usque eo dumtaxat, quo pretiosior factus est, et si plus pretio fundi accessit, solum quod impensum est. Finge pauperem, qui, si reddere id cogatur, laribus sepulchris avitis carendum habeat: sufficit tibi permitti tollere ex his rebus quae possis, dum ita ne deterior sit fundus, quam si initio non foret aedificatum. Constituimus vero, ut, si paratus est dominus tantum dare, quantum habiturus est possessor his rebus ablatis, fiat ei potestas: neque malitiis indulgendum est, si tectorium puta, quod induxeris, picturasque corradere velis, nihil laturus nisi ut officias. Finge eam personam esse domini, quae receptum fundum mox venditura sit: nisi reddit, quantum prima parte reddi oportere diximus, eo deducto tu condemnandus es." Siehe zu dieser Stelle neuerdings B. Forgó-Feldner in U.

sich mit der Verpflichtung des Klägers in einer *rei vindicatio,* dem Beklagten eine Entschädigung für die Aufwendungen *(impensae)* zu zahlen, befasst, schreibt Grosschmid in seinen *Kapiteln,* dass es „eine der schönsten Stellen der Digesten darstellt, die ich je gelesen habe, und es ist fast unmöglich, dass sie den Leser nicht durch ihre Unmittelbarkeit ergreife".[124] Bei dieser Stelle war Grosschmid wahrscheinlich besonders von Celsus' Mitgefühl für den Kläger beeindruckt, einen armen und tief religiösen Menschen, der nicht in der Lage war, dem Beklagten seine Aufwendungen zu erstatten.

Abschließend möchte ich darauf hinweisen, dass Grosschmid ein möglichst hohes Bildungsniveau der Juristen als entscheidend für die Erhaltung und den Schutz des Rechtsstaates ansah. Grosschmid war der Ansicht, dass ein Jurist, der mit der Rechtsgeschichte, der Rechtsphilosophie und überhaupt mit der Literatur, der Geschichte und den Sozialwissenschaften vertraut ist, sein Fachwissen nicht missbrauchen würde.[125]

Die tragische Lektion der Geschichte des 20. Jahrhunderts zeigt, dass sich Grosschmids Glaube, ein hohes Bildungsniveau, ja sogar professionelle Kenntnisse des römischen Rechts könnten einen vor dem Bösen schützen, als Illusion erwies. Leider legt die historische Erfahrung nahe, dass es ein Fehler wäre, die Macht der Bildung bei der Veredelung des Charakters zu überschätzen. Dennoch müssen wir darauf vertrauen, dass ein hohes Maß an akademischem Wissen, nicht zuletzt über das römische Recht, einen wichtigen Beitrag zur Hebung des moralischen und fachlichen Niveaus der juristischen Arbeit leisten kann.

Die letzten Worte seien nun die des berühmten und treuen Schülers von Grosschmid, Károly Szladits. Anlässlich des 80. Geburtstages seines Meisters erinnerte er sich anlässlich der vom Ungarischen Juristenverband am 15. November 1931 in Budapest organisierten festlichen Veranstaltung an ein Treffen mit Béni Grosschmid mit den folgenden Worten:

„Unvergesslich ist mir die Szene, als 1917 Mitteis,[126] der berühmte griechisch-römische Rechtshistoriker der Universität Leipzig, als Gast des Ungarischen Juristen-

Babusiaux et al. (hrsg.), *Handbuch des römischen Privatrechts,* (Mohr Siebeck, Tübingen, 2023), II, 3046, mit weiterer Literatur sowie mit einer wichtigen Bemerkung zur Bedeutung des Zeitwortes *constituimus* in diesem Text.

[124] Grosschmid, *Fejezetek kötelmi jogunk köréből II* [= Kapitel aus dem Kreise des ungarischen Schuldrechts], 624 f.

[125] Grosschmid, *Magánjogi előadások. Jogszabálytan [= Vorlesungen über das Privatrecht. Rechtsnormenlehre],* 4, 11, 74, 244, 256 f., 583.

[126] Nach der freundlichen mündlichen Auskunft von Herrn Prof. Gábor Hamza wurde der Besuch von Ludwig Mitteis (1859–1921) in Budapest von András Bertalan Schwarz (1886–1953) angeregt und vorbereitet. Schwarz, der später Professor an der Universität Zürich, Freiburg im Breisgau und nach 1933 an der Universität Istanbul wurde, habilitierte sich 1912 bei Mitteis, nachdem er (wie etwa auch Ernst Rabel und Fritz Pringsheim) an dessen weltberühmtem Institut für Papyrologie in Leipzig geforscht hatte. Vgl. G. Hamza, András Bertalan Schwarz, der auch international hoch angesehene Romanist, Papyrologe und Privatrechtler (1886–1953), (2000–2001) (41–42) *Annales Univ. Budapest.,* 215–221.

verbandes hier in Budapest weilte und einmal auch unsere juristische Fakultät besuchte. Grosschmid schaute zufällig herein und zum großen Erstaunen des großen deutschen Gelehrten ließ sich mit ihm in eine derart lebhafte Diskussion über die Plädoyers der griechischen Rhetoren, des Isaeus und anderer ein, als ob dies sein Fachgebiet gewesen wäre."[127]

Ich hoffe, dass meine vorliegende Schrift zum Verständnis dieser wunderbaren, das unvergleichliche Genie von Béni Grosschmid illustrierenden Szene beiträgt.

[127] Szladits, Festrede zu Ehren von Béni Grosschmid, 13 f.

Beliznai, Kinga*

Code de comportement dans la salle d'audience

Judicial courtroom protocol

Abstract

„There is nothing so offensive to the dignity of the courtroom as the loss of the calmness of the court's voice." – wrote Géza Káplány, judge of the Szeged Royal Court of Appeal in 1893. If the parties did not behave in a manner befitting the courtroom, the judge could give them instructions, he could admonish, reprimand, fine, cut off, or even remove anyone from the courtroom if justified. But when the judge „himself falls out of the voice he should use", the dignity of the court and the authority of the judge have been undermined.

In my study I examine from the judge's perspective the rules of courtroom protocol in the 19th and 20th centuries, the administrative rules and service orders that determine judicial behaviour and the treatment of clients.

Keywords: Justice, judges, courtroom justice

I. Le comportement bienséant du juge

Les notes de service, adressées aux tribunaux de première instance en avril 1872, ont prévu que les juges et les employés de justice devaient adopter un comportement « respectueux, serein, calme et courtois » envers les justiciables. Un blâme pouvait être prononcé à l'encontre du contrevenant et une procédure de sanction disciplinaire pouvait être entamée en cas de « récidive ou grossièreté » commise par le juge.[1] Les règles relatives à la conduite du procès édictées en 1874 et 1891 contenaient d'ailleurs les mêmes dispositions en ce qui concerne le traitement des parties.[2]

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1 Instructions de service aux tribunaux de première instance nº 4010, adressées par le Ministre de la Justice le 4 avril 1872.

2 Arrêté du Ministre de la Justice royal hongrois nº 3436/I. M. E. 1874 du 15 octobre 1874 sur la direction des débats, et arrêté du Ministre de la Justice royal hongrois nº 4291/I. M. E. sur l'édiction des règles en matière de la direction des débats (1891).

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Malgré ces instructions, certains juges se permettaient tout de même de donner « libre cours à leur énervement » face aux justiciables et à leurs avocats,[3] ainsi les parties et leurs représentants subissaient souvent les accès de colère et d'impatience intenses de la part des juges. Les salles d'audience devenaient la scène de vives disputes ou s'echangaient des propos incisifs, et autres accrochages verbaux dépourvus de toute politesse entre le président et le procureur, ou entre les témoins, laissant fuser des expressions verbales incompatibles avec l'autorité judiciaire.[4] Aucun signe de courtoisie, bien que les « manières civilisées » aient été considérées comme un élément indispensable du pouvoir judiciaire.

Les attentes envers le juge sont semble-t-il quasi déraisonables, car il doit conserver son calme et sa dignité tout au long du procès, même dans l'hypothèse ou le comportement des parties est inacceptable il ne pourra répliquer par la moquerie ou un ton agressif. Au cours de la direction des débats, il dispose néanmoins de plusieurs moyens pour faire cesser les comportements jugés excessifs ou incorrects: il peut tour à tour informer, blâmer, rappeler à l'ordre, retirer la parole voir expulser de la salle du tribunal si l'ordre se voyait gravement troublé. Si le juge fait « *recourt à un ton non approprié, c'est la dignité de la justice qui subit un préjudice irréparable alors même que la dureté du ton semblait renforcer l'autorité du juge* ».[5] Si le juge est colérique et impatient, il endommage par ce comportement la garantie même de probité de sa décision.

Dans son rapport de 1894, le Barreau de Budapest a constaté « *que des emportements impétueux, des propos inadéquats et parfois trop conviviaux traversaient en grande variété les salles d'audience* ». Ces anomalies ont été en partie imputées au fait que les salles d'audiences hongroises étaient dépourvues « *de formes solennelles et d'ornements* ». Dans la plupart des modèles étrangers les juges entraient dans la salle d'audience ensemble, et avec solennité , dans le modèle hongrois il n'était pas rare que les juges « *prennent place un à un, dans un intervalle de temps irrégulier* ». Il a été également évoqué qu'en l'absence d'une tenue uniforme des juges « *l'audience ne sortait pas de l'ordinaire* ». Le port de la robe judiciaire devenue traditionnelle et commune en Angleterre et en France dès la fin du 19e siècle, « *est un signe extérieur de*

[3] H. Gy., A művelt modor elengedhetetlen bírói kellék [Les manières cultivées, éléments indispensables du pouvoir judiciaire], (1876) 18 (66) *Törvényszéki csarnok,* 264.

[4] Quelques expressions prononcées regrettablement par nos juges: Taisez-vous! Fermez-la! Je vous fais coffrer! Je ne veux pas savoir! Dehors! – „et ainsi de suite – a ajouté László Fényes – et tout étonné tu te demandes: il n'y a pas de justice à l'étranger car tu n'y entends pas tous ces mots ou bien tu es sur un continent inconnu où les nerfs des juges sont brossés avec de la poudre vexi, mais ceux qui entrent par la porte du tribunal sont d'abord trempés dans la sauce de toutes les malfaisances"? Fényes L., A bírósági tónus [Le ton de la justice], (1926) 54 (168) *Népszava,* 5.

[5] Justus [Káplány G.], Bírói indulatosság [L'énervement des juges], (1893) 28 (44) *Jogtudományi Közlöny,* 353–354.

la fonction de ceux qui la revètent » qui « l*es préservent de tout ce qui [...] chez nous menace le sérieux et la dignité de la justice d'une manière non négligeable* ».[6]

La situation ne semble pas s'être beaucoup améliorée dans les années suivantes, car dans le rapport du Barreau de Budapest trois ans plus tard, était malheureusement toujours évoqué un manque cuisant de dignité, de sérénité comme si « *l'esprit agité de l'époque avait aussi contaminé le monde judiciaire*». L'autorité a cédé sa place au sensationnel faisant des procès criminels les plus suivis et les plus passionnés ainsi :

> « (ils) s'étaient transformés en un spectacle de théatre gratuit auquel la foule déferlait pour exciter ses nerfs, et lorsque la conduite désespérée de l'accusé ne faisait plus son effet, l'amusement était assuré par les vives disputes des acteurs de l'audience, présidents, juges, procureurs, avocats et experts, témoignant à tour de rôle leur agacement des uns envers les autres. Et les correspondants de presse présentaient en détail ces scènes comme les moments les plus truculents et saisissants du procès, bien naturellement en ne travestissant aucuns mots, incitant ainsi le travers humain à multiplier les conflits pour les débats prennent une tournure toujours plus choquante».[7]

Selon le Barreau de Budapest, les comportements qui caractérisaient le déroulement des débats étaient en mesure de compromettre l'idéal de justice de protection des droits. Selon ce même rapport, c'est aux juges conduisant les procès que revient la charge d'anéantir ces pratiques néfastes. L'aquisition d'un savoir académique, l'obtebtion d'un diplôme juridique n'étant en soi pas suffisant, « *on attend des juges qu'ils soient des êtres tempérés doués de sérieux, et d'objectité et dont émane la passion de la cause, des êtres qui rejettent la brutalité, ou la menace comme moyen d'incitation au respect* ».[8] Naturellement, le corps des avocats est également obligé de contribuer au sérieux des débats en tant que représentants des parties.

Sont à proscrire les comportements ou propos non appropriés dans la salle d'audience, « *la commisération grossière exprimée envers les parties, les insultes faciles envers les témoins et plus généralement les propos irrespectueux ou grossiers* » qui ont aussi affecté le tribunal d'instance. Tant et si bien que :

> « Si une personne étrangère au procès venait à pénétrer la salle d'audience d'un tribunal d'instance budapestois, il serait tout prêt à croire sauf qu'il se trouvait dans la glorieuse demeure de la déesse de la justice Themis. Et cette impression est causée non seulement par l'exuiguité honteuse des salles, mais aussi par le verbe brutal et menaçant du juge qui exerce son courroux face aux justiciables traduits devant lui. »[9]

[6] A budapesti ügyvédi kamara jelentéséből [Du rapport du Barreau de Budapest], (1894) 11 (12) *Ügyvédek Lapja,* 6.
[7] A budapesti törvénykezés [La jurisprudence à Budapest], (1898) 5 (84) *Magyarország,* 10.
[8] Ibid.
[9] Brutalitások bírói székből [Des brutalités du siège du juge], (1903) 20 (37) *Ügyvédek Lapja,* 2.

Le relachement des bonnes manières dans la direction des débats devrait céder la place à la technique juridique, au travail debarsassé de tout états d'âme dans le but de rendre objectivement la justice. Selon le journal *Ügyvédek Lapja* [Gazette des Avocats], il faudrait mettre à la retraite les juges d'instance qui – heureusement en petit nombre – « *font preuve d'attitudes neurotiques ou ont tendance à l'agressivité* », avec lesquels se produisent les cas regrettables mentionnés ci-dessus, car ce type de « tempérament » est incompatible avec la dignité du juge.[10]

Le dialogue suivant a eu lieu entre le juge et le défenseur devant le tribunal d'instance royal de Budapest, il a été noté et publié par un avocat présent dans la salle d'audience:

> Juge: (Il auditionne un témoin, note sa déposition. Dans le coin, deux avocats discutent à voix basse. Il y a huit à dix personnes dans la salle.) « Silence, s'il vous plaît! Si vous voulez discuter, sortez de la salle ».
> Avocat: « Pardon, mais nous somme en train de trouve un arr... ».
> Juge: « Taisez-vous, vous n'avez pas la parole. (Pendant ce temps, un avocat entre, il met un cigare non allumé, un chapeau et un dossier sur le bout de la table.) Rangez votre cigare, s'il vous plaît, ce n'est pas un fumoir à cigares ici ».
> Avocat: « Je vous demande pardon, mais il n'est pas allumé ».
> Juge: « Rangez votre cigare ou bien quittez la salle ». (Il n'attend pas la réponse, il fait prêter serment au témoin et lui fait signer le procès-verbal. Pendant ce temps, l'avocat qui a plaidé la veille veut utiliser la pause pour poser une question au juge concernant une affaire.)
> Avocat: « Monsieur le Juge, à propos de l'affaire d'hier auriez-vous l'obligeance de me dire si aujourd'hui je ... ».
> Juge: « Je suis en train de statuer ».
> Avocat: « Pardon, mais vous avez obligation de... ».
> Juge: (Plus fort) « Vous voyez que je suis en train de statuer, ne chahutez pas! »
> L'avocat surpris par ces manières, se retire. Le greffier sourit sarcastiquement. le juge prend un autre dossier.
> Avocat: (Au greffier à voix basse) « Mais Monsieur le Greffier, vous aussi, vous savez... ».
> Greffier: (A voix basse) « Ne me parlez pas Maître, sinon vous devrez sortir... ».
> Juge: (Remarquant cela) « Ça ne vous suffit pas qu'on vous le dise une fois : aujourd'hui il n'y aura pas de communication concernant votre dossier. Vous ne pouvez pas lire? C'est affiché sur la porte à l'exterieur, tout le monde peut le voir. Et bien maintenant, quittez la salle. »[11]

Regrettablement, il arrivait aussi que le président se mette à proférer d'inlassables critiques pendant la plaidoirie de l'avocat, prononçant même des remarques déplacées et blessantes. « La qualification par le juge de l'avocat de « vieille dame » s'analyse déjà comme une

[10] Ibid.
[11] Sincerus, Modor a tárgyalási teremben [Sincerus: Les manières dans la salle d'audience], (1890) 7 (51) *Ügyvédek Lapja,* 2–3.

plaisanterie douteuse » – a commenté *Jogtudományi Közlöny* [Bulletin Juridique]. Dans ses notes, de l'automne 1905, il indique qu'un juge assesseur de la chambre pénale du tribunal d'instance pendant l'audience aurait interpellé le prévenu en lui demandant d'arrêter de parler. Le prévenu a doucement dit: « je ne fais que me défendre », mais le juge assesseur lui a infligé une amende. Un juge assesseur de la chambre civile du tribunal d'instance a aussi rappelé à l'ordre un avocat parce qu'il a affirmé à tort – manifestement de bonne foi – qu'un fait avait déjà été consigné au procès-verbal.[12]

Il n'y a aucun doute que si le juge de son siège « adresse une moquerie ou trivialité aux parties vulnérables ou aux témoins sous la protection de sa robe inviolable, cela exprime le manque de goût ou la lâcheté. Le juge civil fraternisant avec les parties n'honore pas les avocats, mais abaisse sa propre tribune et le juge pénal confrontant son esprit brillant avec la misère de l'acccusé se rend indigne de sa fonction de juge par sa cruauté ».[13]

Andor Juhász, président de la cour d'appel royale de Budapest, a déclaré dans son discours inaugural le 7 août 1915 que « pendant la durée de mon mandat [...], je m'efforcerai de faire en sorte que les tribunaux qui sont sous ma direction conservent l'entière confiance et le respect des justiciables par leur travail désintéressé, zélé et professionnel ».[14] Fin 1916, dans sa lettre circulaire adressée aux présidents des cours à l'initiative du ministre de la Justice, il a critiqué et désapprouvé « les bons mots des présidents ».

II. Les juges « grossiers »

1. Les attaques contre Leó Zsitvay, président du tribunal pénal royal de Budapest

En 1895, les parlementaires ont lancé des attaques contre Leó Zsitvay,[15] ils ont dénoncé ses manières de conduire les procès, en particulier les procès politiques et concernant la presse. La cour d'appel royale de Budapest a ouvert une enquête pour examiner les remarques et les plaintes des députés.

[12] A tárgyalási modor [Les manières de diriger les débats], (1905) 40 (48) *Jogtudományi Közlöny,* 395.
[13] Az elnöki szellemeskedés [Les bons mots des présidents], (1916) 51 (52) *Jogtudományi Közlöny,* 471.
[14] Le discours inaugural de président prononcé le 7 août 1915 devant la séance plénière de la cour d'appel royale de Budapest. Juhász A., *Beszédek – elmondotta dr. Juhász Andor a vezetésére bízott királyi bíróságok (a budapesti kir. törvényszék, a budapesti kir. ítélőtábla és a m. kir. Kúria) teljesüléseiben s más ünnepélyes alkalmakkor* [Discours prononcés par dr. Andor Juhász devant les séances plénières des cours sous sa direction (tribunal royal de Budapest, cour d'appel royale de Budapest, Curia royale hongroise) ou à d'autres occasions solennelles], (Országos Bírói és Ügyészi Egyesület, Budapest, 1935, 47–48).
[15] *Zsitvay, Leó* (1841–1915) procureur, président de tribunal, à partir de 1891 second président du tribunal pénal royal de Budapest, son président à partir de1895. De 1909 à 1913 président de chambre à la Curia. Ses oeuvres juridiques principales sont *A magyar sajtójog mai érvényében* [La loi sur la presse en vigueur en Hongrie] parue en 1900 et *A büntetőtörvénykönyv novellája* [La novelle du code pénal] parue en 1909.

Le tribunal pénal royal de Budapest présidé par Zsitvay a commencé le 4 février 1895 le procès de presse de *Pesti Napló*.[16] Győző Issekutz[17] s'est élevé contre le ton du président lors de la séance du 8 février 1895 au Parlement. Comme il le remarque, dans la déposition de l'un des témoins, Zsitvay « s'en est pris à lui: prenez garde, vous jouez votre tête, la loi m'a attribué un grand pouvoir, je peux immédiatement vous faire arrêter ». Selon le député « de tels propos ont teneur à être prononcés par les chiens féroces de Haynau ».[18]

En mars 1896, lors du débat parlementaire sur le budget du ministère de la Justice, les députés de gauche ont violemment attaqué le président du tribunal pénal. Au cours de la séance du 10 mars 1896, pendant le discours de Soma Visontai, principalement adressé au ministre de la Justice Sándor Erdély à propos du budget, « Zsitvay était la cible de la violente clameur du public », sa nomination au poste du président du tribunal pénal qui était contestée. Le ministre de la Justice a tenté d'appaiser la situation, en invitant les députés à ménager au moins les tribunaux « car rien ne sera plus respecté en Hongrie, si l'autorité judiciaire est bafouée ».[19]

Le lendemain, le 12 mars, le débat s'est poursuivi, principalement autour de Zsitvay. Gábor Ugron a longuement évoqué du ton du président en faisant référence à des affaires judiciaires:

> « Il est de notoriété publique que depuis un certain temps, au tribunal pénal de Budapest lorsque Leo Zsitvay était alors second président, qu'au cours des débats sous sa direction se produisaient des scènes d'affrontements incessants entre les avocats de la défense et le juge, celui-ci avait pour habitude aux cours des dépositions des témoins de poser des questions tendancieuses et en faveur de l'accusation, il terrorisait continuellement les défenseurs et les témoins. Ainsi [...] il menait les débats de façon à orienter la vérité dans la direction et la forme qu'il désirait. De même les procureurs royaux, qui lors de l'accusation procèdent comme des chiens féroces et non pas

[16] De l'affaire brièvement: Le journal *Pesti Napló* a publié en1892 les dépêches échangées entre le Ministère des Affaires Étrangères et le ministre de l'Agriculture concernant l'interdiction d'exporter des aliments pour animaux. Il a été révélé plus tard que les copies des dépêches ont été transmises à la rédaction de *Pesti Napló* par un commis expéditionnaire du Ministère de l'Agriculture (Géza Oszoly) où il a reçu une récompense de 15 forints. Le tribunal pénal de Budapest a chargé le juge d'instruction István Czárán d'obtenir auprès de la rédaction de *Pesti Napló* le manuscrit original pour déterminer la personne qui avait violé le secret officiel. Le député fils Kornél Ábrányi, ex-rédacteur en chef du journal a considéré qu'il s'agissait de la violation de l'immunité parlementaire et de la liberté de la presse, il s'est opposé à l'ordre du juge d'instruction et il aurait même pointé un revolver sur lui. A la fin de l'instruction des inculpations ont été présentées contre Géza Oszoly pour crime de corruption, contre Izidor Barna, rédacteur en chef de *Pesti Napló* et Sándor Braun, journaliste pour délit de corruption, contre le fils Kornél Ábrányi pour „recel de délit" et violences exercées à l'encontre des autorités. A hivatalos titok [Le secret officiel], (1895) 15 (35) *Budapesti Hírlap,* 9–10.

[17] Győző Issekutz, critique des manières de Zsitvay a défendu le fils Kornél Ábrányi au procès de *Pesti Napló*.

[18] *Képviselőházi napló* [Agenda de la Chambre des représentants], 1892, volume XXII, 19 janvier–11 février 1895, Séances 1892-426, 376–377.

[19] H. E., „Töreky-eset" 38 évvel ezelőtt [„Cas Töreky" d'il y a 38 ans], (1934) 41 (136) *Magyarország,* 15.

> comme les représentants de l'organe qui est chargé de rechercher la vérité, pourront faire l'objet de remonttrances. Un président du tribunal agissant en persécuteur, est d'une partialité évidente, cette attitude est de nature à ébranler l'autorité de la justice [...].
> Il est important que celui qui occupe les fonctions de président ait des manières convenables, dans ses contacts avec le public, les organes de la justice, les défenseurs, et même les accusés sans qu'aucune plainte ne puisse être formulée. De plus, M. Leó Zsitvay est grossier non seulement à l'égard des accusés, mais aussi à l'égard de ses collègues, ainsi j'entends dire que lorsqu'ils viennent lui demander l'assistance d'un greffier à l'audience, il répond: « Moi, je nous vous parle pas Messieurs, allez voir Monsieur le Greffier en chef! » Je m'excuse, mais un président qui sous les yeux du public se montre grossier avec les organes ayant pour mission de rechercher la vérité, qui dans son bureau est fruste avec les juges, ne leur parle pas et les envoie chez le greffier en chef, n'a pas la moindre politesse [...]. »[20]

Contrairement aux déclarations de Gábor Ugron, Sándor Erdély a défendu Zsitvay. Il a promis d'ouvrir immédiatement une instruction en cas d'inculpation fondée. Toutefois, il a également souligné qu'il ne pouvait engager aucune procédure sur la seule base « des impressions exercées sur quiconque par le comportement de quelqu'un pendant les débats finaux ». Il a ajouté qu'un député lui avait rendu visite et lui avait raconté que le président du tribunal pénal « l'avait malmené ». Erdély a examiné la situation, mais comme il a dit « je ne pouvais rien faire d'autre que constater que c'était les propres agitations du député qui étaient à l'origine des impressions exercées » par Zsitvay. [21]

Le président du tribunal pénal a été l'objet de plusieurs défiances dans les années qui suivaient. Le printemps 1905, Dezső Oláh, avocat, a décrit la procédure devant le tribunal tout simplement comme une « véritable parodie du procès » :

> « Le greffier rappelle d'une voix monocorde les faits de l'affaire; l'avocat de l'appelant, s'il est suffisamment naïf, croit être entendu, il tente de motiver le recours; hélàs, à part l'adversaire, personne ne l'écoute. Et si le malheureux appelant essaie de réagir à la réponse de la partie adverse, même s'il ne souhaite que corriger les erreurs de fait les plus grossières, Monsieur le président [Leó Zsitvay] lui retire la parole. »[22]

En avril 1908, le procès contre un organe de presse a été engagé par Géza Polónyi, ancien ministre de la Justice contre le journaliste et député Zoltán Lengyel pour diffamation par voie de presse, suscita un vif intérêt.[23] Plusieurs députés ont protesté

[20] *Képviselőházi napló* [Agenda de la Chambre des représentants], 1892, volume XXXI, 9–28 mars 1896, Séances 1892-581, 67–69.
[21] Ibid. 71.
[22] Advocatus [Oláh D.], Paródia [Parodie], (1905) 24 (15) *A Jog,* 120.
[23] De l'affaire brièvement: Lors de la formation du deuxième gouvernement de Wekerle le 8 avril 1906, le portefeuille de la Justice a été confié à Géza Polónyi. János Halmos, maire à la retraite de Budapest, gardait rancune à Polónyi qui l'avait traité de traban, c'est-à-dire partisan du gouvernement de Fejérváry

contre Zsitvay à cause de ses méthodes de conduite du procès. Selon eux le président du tribunal pénal dirigeait le débat « significativement teinté d'une attitude anti-Polónyi » et « d'une rigidité partiale », il manquait « d'objectivité qui par définition et à juste titre peut être exigée du juge rendant la justice ».[24]

C'est l'article de Gábor Ugron paru sous le titre « Juge paysan » qui illustre le mieux le déroulement de ce procès et « la rage » déployée à l'encontre de Zsitvay:

> « On a jamais vu siéger en Hongrie un juge tellement rustre [...]. Cela va contre la nature de la justice que le juge soit grossier, offensant, et ce comportement est encore moins acceptable de la part du président du tribunal. La fonction de juge exige l'impartialité, sinon comment les parties lui feraient confiance! Le président doit atténuer les passions entre les parties, leur suggérer de s'apaiser devant la justice qui ne fait que rechercher la vérité. Le juge doit veiller à ce que les jurés et le public puissent entrevoir la vérité et formuler un jugement impartial.
> Monsieur Zsitvay est un tyran et non pas un juge [...], il est injurieux, il adresse des propos insultants aux parties et au public; mais il s'acharne en particulier sur la partie civile Géza Polónyi qu'il griffe comme un chat enragé. [...]
> Un tel comportement de juge est-il tolérable? Non. Le siège de juge est un honneur et non pas un asile pour les personnes de caractère rustre. Le respect que l'opinion publique doit manifester à l'égard de la fonction du juge doit être ressenti par le juge et rejaillier sur lui car sa profession est noble et sa fonction impérative. Il ne suffit pas d'exiger le respect d'autrui comme le fait monsieur Zsitvay. Mais en agissant à sa guise, comme il le fait il détourne le pouvoir judiciaire et en fait un bouclier au service de ses opinions personnelles à l'encontre de ceux qui en principe se trouvent sous sa protection et celle de la loi. »[25]

Zsitvay en réaction à ces critiques a déclaré devant les journalistes « je considère indigne de répondre aux attaques parues dans certains journaux. Je ferai mes commentaires à ce sujet après le procès ».[26]

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de 1905–1906. (Le 18 juin 1905, François-Joseph a nommé premier ministre Géza Fejérváry, capitaine de la garde royale hongroise.) Lors de l'une des réunions du conseil municipal, l'orateur principal du groupe présidé par Polónyi „a apostrophé d'un ténor blessant" Halmos et l'ancien maire „selon lequel Polónyi était à l'origine de cette insulte, a exprimé son désespoir dans le salon". Il a fait une remarque avec énervement „M. Polónyi a utilisé son mandat au conseil de la capitale pour son enrichissement personnel!" Cette déclaration a fait sensation, le lendemain les journaux parlaient de cette affaire. Halmos, dont l'état de santé était très fragile, a sur le conseil médical trouvé un arrangement amiable avec Polónyi. Cependant, „après l'accord de paix" le député Zoltán Lengyel a formulé les reproches de Halmos à l'éditorial du journal *Nap* portant le titre „J'accuse ...". Il a déclaré vouloir prouver que Polónyi avait utilisé son mandat au conseil de la capitale pour tirer un profit personnel des affaires comme celle de Dunagőzhajózási Társaság [Compagnie de Navigation à vapeur du Danube] et celle des compagnies ferroviaires électriques urbaines. A Polónyi-ügy zavarai. Polónyi följelentése [Les confusions dans l'affaire Polónyi. La plainte contre Polónyi], (1907) 27 (26) *Budapesti Hírlap,* 6.

[24] Támadás Zsitvay ellen [Attaque contre Zsitvay], (1908) 28 (106) *Budapesti Hírlap,* 4.

[25] Ibid. 5.

[26] Ibid.

Bien qu'aucune procédure disciplinaire n'ait été engagée à son encontre, son style de conduire les débats fût par la suite vivement critiqué et pendant de longues années et faisiant de lui le sujet récurrent dans les chroniques judiciaires des journaux.

En 1929, Zoltán Füzesséry, conseiller de la cour d'appel à la retraite, a dans son interview au journal *Esti Kurír* évoqué « les enseignements tirés du comportement du juge président de chambre » Leó Zsitvay. Après le procès en diffamation devant la Cour d'assises, un avocat stagiaire a attaqué dans un journal quotidien le membre du collège des juges saisi de l'affaire. Ce procès a été confié au jeune juge Füzesséry, président de chambre. Au cours des débats, l'un des témoins a fait une déposition mensongère concernant le juge, victime dans cette affaire. « Je me suis emporté par l'esprit de collégialité – a raconté Füzesséry –, j'ai vilipendé le témoin qui a riposté et une joute verbale a commencé entre nous qui a duré jusqu'au moment où j'ai réalisé que je pourrais perdre le procès ». Le lendemain Zsitvay l'a convoqué pour lui annoncer son nouveau poste de juge assesseur et la nomination d'un nouveau président de chambre.[27]

En 1941, à l'occasion du 100ème anniversaire de la naissance Leó Zsitvay, le journal *Ujság* a publié un entretien avec son fils Tibor Zsitvay. A propos des griefs formulés à l'encontre de son père, président du tribunal pénal, en critique de son style de conduire le procès, il commenta : « sa rigueur exemplaire était l'objet non seulement de louanges mais aussi de vives critiques. Il était attaqué par la presse comme le parlement à cause de ses méthodes de conduite les débats, car en effet, il était intraitable dès lors qu'il repérait de la mauvaise volonté ou de la méchanceté. Si quelqu'un se montrait dédaigneux devant lui, il n'hésitait pas à le ridiculiser devant son audience avec un sarcasme plein d'esprit. Devant lui toute personne – même si elle avait un poste public de haut rang – était simplement « monsieur le témoin ».[28]

2. Plainte contre Zoltán Bárkányi, juge municipal de Szeged

En juillet 1913, László Ónodi, officier de la marine marchande, a déposé auprès de György Lázár, maire de Szeged, une plainte dans laquelle il a fait grief au comportement au cours des procès de Zoltán Bárkányi, juge municipal.[29] En invoquant diverses

[27] Mit mondott Zsitvay Leó a főtárgyalási elnök kötelességeiről és a tárgyalásvezetés hangjáról [Qu'est-ce que Léo Zsitvay a dit au sujet des devoirs et style du président de chambre lors de la conduite des débats], (1929) 7 (130) *Esti Kurir,* 8.

[28] Kornitzer B., Zsitvay Leó fia, Zsitvay Tibor volt igazságügyminiszter beszél apjáról, a büntető törvényszék egykori nagynevű elnökéről [Tibor Zsitvay, ancien ministre de la Justice, fils de Léo Zsitvay parle de son père, ancien président illustre du tribunal pénal], (1941) 18 (294) *Ujság,* 31.

[29] *Bárkányi, Zoltán* (1875–1966) juge municipal à partir de 1902, juge du conseil de guerre de 1915 à 1917. En 1922, il a été élu président du conseil d'orphelinat municipal, il a rempli cette fonction jusqu'aux nouvelles élections de 1929. Il est devenu impopulaire à cause de ses manières dures, il a perdu aux élections et demandé sa retraite.

négligences et anomalies, il a requis des mesures disciplinaires à son encontre. Il est reproché au juge municipal de ne pas remplir correctement ses obligations, il arrivait habituellement à son bureau entre 9 heures et 10 heures, parfois vers 11 heures et il partait peu de temps après. Il parlait aux plaideurs « sur un ton le plus grossier et impoli », il leur disait « des expressions particulièrement discourtoises » et le plaideur qui « refusait ce ton et protestait contre le comportement du juge, indigne de sa fonction »[30] était immédiatement condamné à une amende. Ónodi a cité des témoins dans sa plainte à l'appui de ses allégations.

Une instruction a été menée dans l'affaire de Bárkányi à l'issue de laquelle les griefs ont été déclarés infondés, ainsi, le 16 février 1914, le juge municipal a été relaxé par le conseil disciplinaire.[31]

3. Ivor Fayl, président du tribunal pénal déchu de ses fonctions

Ivor Fayl[32] était l'un des « juges dont les décisions, les méthodes de conduite des procès et toute la personnalité reflétaient l'esprit du temps ». Il était après 1919 l'un des juges les plus actifs, membre des chambres jugeant les affaires politiques importantes, juge assesseur au procès des commissaires du peuple, et en tant que juge unique aux procès pénaux. « Les accusés avaient très peur de lui et la salle d'audience était plus d'une fois le théâtre de scandales bruyants. »[33] Son comportement était à l'origine de nombreux affrontements avec les défenseurs. Des plaintes disciplinaires ont été déposées contre lui à cause des irrégularités commises dans la conduite des débats. Pour cette raison, il fût réprimendé à plusieurs reprises et en novembre 1927, avant d'être déchu de ses fonctions.

L'été 1926, deux avocats du Barreau de Budapest, Sándor Parragh et Henrik Hernád ont déposé une plainte disciplinaire contre Fayl, dans laquelle ils ont critiqué la manière de conduire les débats, notamment lorsqu'il « traite les avocats de manière inapropriée et se montre d'une sévèrité injutifiée avec les accusés ».

Sándor Parragh qui au cours d'un procès pénal conduit par Ivor Fayl entrait sans cesse dans des « conflits d'une extrême gravité» avec le président de chambre, avait fini par rédiger une plainte volumineuse. Entre Parragh et Fayl s'engage alors un échange de propos virulents au cours d'une audience pour non respect des règles du déroulement

[30] Följelentés a szegedi községi bíró ellen [Plainte contre le juge municipal de Szeged], (1913) 2 (168) *Délmagyarország,* 9.

[31] Bárkányi Zoltán dr. fegyelmi ügye [Affaire disciplinaire de dr. Zoltán Bárkányi], (1914) 3 (39) *Délmagyarország,* 8.

[32] *Fayl, Ivor* (1876–1940) greffier et à partir de 1915, juge du tribunal pénal royal de Budapest. En 1924, il est nommé président de chambre. A partir de 1928, juge du tribunal pénal royal de Balassagyarmat, à partir de 1939 son président de chambre.

[33] Fayl bírót hivatalvesztésre ítélték [Le juge Fayl déchu des ses fonctions], (1927) 55 (252) *Népszava,* 9.

des débats par l'avocat et pour lequel il a reçu plusieurs avertissements. A la suite d'une telle confrontation, Fayl a exclu l'acovat de la salle d'audience. Lorsque le lendemain Parragh a comparu, le président de chambre a appelé des policiers qui sur son ordre ont conduit l'avocat hors de la salle. A l'audience suivante la même scène s'est répétée et après un violent affrontement verbal le désobéissant Parragh a été de nouveau conduit hors de la salle par les agents de police.[34]

Après l'incident, Parragh a porté plainte contre Ivor Fayl auprès de l'autorité disciplinaire. Le parquet a refusé d'exercer l'accusation à l'encontre du président de chambre, ainsi Parragh devait agir en qualité de partie civile. À la suite de l'instruction, la Cour royale de justice de Budapest, en tant que tribunal disciplinaire, a suspendu M. Fayl de ses fonctions. Son affaire a été jugée en février 1927, la déchéance des fonctions – sans perdre néanmoins son droit à demander sa pension de retraite – a été prononcée le 5 novembre 1927.[35] Le 4 février 1928, la *Curia* a annulé cette décision, elle a finalement condamné Ivor Fayl à une amende de mille pengő avant de le réintégrer dans ses fonctions.[36]

Puis, Sándor Parragh suite à son exclusion répétée de la salle d'audience a déposé une plainte contre Fayl auprès du ministre de la Justice pour atteinte à sa liberté personnelle, détournement du pouvoir, injure et diffamation. Le ministère de la Justice a transmis la plainte au parquet qui le 24 mai 1926 a classé l'affaire sans suite.[37]

4. Critiques à l'encontre de Géza Töreky, président du tribunal pénal

Le 9 juin 1934, le tribunal pénal royal de Budapest, présidé par Géza Töreky, a entrepris le procès contre M. Imre Dréhr, secrétaire d'État au Bien-être social, accusé d'abus de confiance, de fraude et de détournement de fonds publics.[38]

[34] Két ügyvéd offenzívája Fayl Ivor tanácselnök ellen [L'offensive de deux avocats contre Ivor Fayl, président de chambre], (1926) 17 (122) *Az Est,* 14.

[35] Hivatalvesztésre ítéltek egy bírót [Un juge déchu], (1927) 47 (252) *Budapesti Hírlap,* 25.

[36] Dr. Fayl Ivor törvényszéki tanácselnököt a Kúria visszahelyezte állásába [Dr. Ivor Fayl, président de chambre réintégré dans ses fonctions], (1928) 50 (29) *Pesti Hírlap,* 18.

[37] Két ügyvéd offenzívája Fayl Ivor tanácselnök ellen [L'offensive de deux avocats contre Ivor Fayl, président de chambre], (1926) 17 (122) *Az Est,* 14.

[38] *Töreky, Géza* (1873–1961) à partir de 1896, auditeur au tribunal pénal royal de Budapest, plus tard greffier auprès de Leó Zsitvay. De 1900, procureur adjoint à Eger. A partir de 1903, fonctionnaire au Ministère de la Justice. En 1915, il est nommé juge à la cour d'appel royale de Budapest, en 1921 à la Curia. En 1922, il est nommé second président du tribunal pénal royal de Budapest, en 1926 son président. Il jugeait des affaires politiques et de presse et des affaires pénales «littéraires». A partir d'octobre1934, second président de la Curia et du 2 octobre1937, son président. Il a pris sa retraite le 30 juin 1944. Après l'arrivée au pouvoir des «nyilas», il a été arrêté le 1er novembre 1944 et transféré à la prison de Sopronkőhida. Tombé malade, le 6 février 1945 il a été transféré à l'hôpital militaire de Sopron, puis en Autriche et Allemagne. Il a passé ses dernières années en Suisse. Il a été très critiqué

Quelques jours plus tard, le 12 juin, le député István Friedrich bien qu'il ait admis la réserve des parlementaires envers des procès en cours, a critiqué à la chambre des députés le ton du procès Dréhr. Il a trouvé inacceptable que le président Töreky donne des leçons non seulement aux accusés, mais aux témoins et aux experts aussi, il a désapprouvé son ton grossier et méprisant envers les témoins et sa façon de « vilipendé sèchement » le secrétaire d'État accusé.

> « J'ai l'impression que ce président est incapable de maîtriser ses nerfs pendant les audiences. Je suis désolé de dire que non seulement l'accusé doit se contrôler et le témoin se comporter correctement, et plus encore c'est au président de maîtriser ses nerfs mieux que les autres, pour diriger le ton et le style des débats. »[39]

Tout en admettant « l'honnêteté et l'impartialité inébranlables » de la justice hongroise indépendante, il n'a pas intégré valablement que « le président du tribunal siège à hauteur stratosphérique d'où il adresse aux parties des propos moqueurs, méprisants, condescendants, grossiers. »[40]

Le discours d'István Friedrich n'a pas été sans résonance… Lors de la réunion de la chambre des députés du 13 juin, András Lázár, ministre de la Justice, a déclaré que «l'indépendance de la justice [...] exige que ni les députés, ni le ministre chargé de la surveillance ne s'immiscent dans le procès en cours ni ne formule aucune critique. Une quelconque intervention suscitant l'apparence de vouloir influencer le jugement ».[41]

István Friedrich a demandé l'aide du ministre en vue de mettre fin aux « scandales publics » pouvant se produire au cours des audiences. Il touve inacceptable que le président Töreky traite le défenseur ou prévenu comme « un gamin », et lui « lance des invectives » pour qu'il « bavarde moins et ne répète pas ses propos jugés ridicules ».[42]

Dans sa proposition adressée au ministre de la Justice, le Barreau de Budapest a exigé une enquête et une mesure de surveillance dans cette affaire, car les « incidents qui se sont produits » au cours de l'interrogatoire du prévenu et de l'audition des témoins sont inconciliables avec l'esprit de la procédure pénale, les obligations des juges et les droits de la défense garantis par loi.[43]

pour ses jugements, surtout en matière d'infractions contre la sûreté de l'État. Les historiens ne sont pas parvenus à un consensus sur ses activités et ses vues sur la justice pénale.

[39] *Képviselőházi napló* [Agenda de la Chambre des représentants], (1931) 23 17 mai–26 juin 1934, Séances 1931-292, 590.

[40] Ibid.

[41] Ibid. 602.

[42] Ibid. 603.

[43] Vizsgálatot követel az ügyvédi kamara a Dréhr-tárgyalás vezetése miatt [Le Barreau exige une enquête dans l'affaire de la conduite du procès Dréhr], (1934) 62 (139) *Népszava,* 4.

Sándor Márai, écrivain, a dans sa lettre ouverte adressée à Friedrich, et parue au journal *Ujság,* révélé un autre aspect de l'attaque exercée contre Töreky. Selon Márai, le comportement de Töreky dans la salle d'audience, sa voix forte souvent accompagnée d'une agressivité difficilement tolérée par les parties prouvent justement que « ce juge est impartial à l'égard de tous. Il ne se laisse impressionné ni par l'autorité, ni par le nom ou le rang. Nous qui avons entendu le président Töreky devons objectivement constater qu'il peut parler avec les moins fortunés d'un ton presque amical, humain, paternel; et qu'il peut parler avec les plus privilégiés et puissants sur le ton de Jupiter tonitruant».

L'auteur Márai était toutefois d'accord avec les députés, il a estimé que le style et les manières du président du tribunal étaient « susceptibles d'inspirer au public de l'inquiétude et des doutes envers l'une des autorités principales du pouvoir judiciaire hongrois. »[44]

5. Le style des juges dans les procès contre les écrivains dans les années 1920, 1930

Imre Németh, écrivain et député a fait une conférence intitulée « Procès littéraires » en novembre 1937, à la réunion de la Société Miklós Bartha. Les manières des juges de conduire les débats ont inévitablement été mentionnées à propos des procès des années 1930 contre les écrivains:

> « En tant que membre du Parlement hongrois aussi, je m'oppose à l'avis selon lequel les manières des juges de conduire les débats seraient insuceptibles de critique ! Je dis: c'est même une obligation, surtout quand on voit que certaines manières sont susceptibles de mettre en danger le contrat social et l'autorité judiciaire indépendante. J'élève ma voix pour la défense de cette autorité et contre certains comportements des juges dans la conduite des débats. Le juge doit questionner, interroger et juger, mais il ne doit pas se quereller avec l'accusé menotté et donc vulnérable sur le banc inférieur des accusés. Le juge doit formuler ses idées dans le jugement et s'abstenir de faire des remarques susceptibles de traduire un préjugé.
> Le juge doit être irréprochable en ce qu'il exprime la supériorité, l'intelligence, la sagesse, l'objectivité et la bonté humaine même envers le criminel le plus odieux. »[45]

[44] Márai S., Nyílt levél Friedrich István országgyűlési képviselő urhoz [Lettre ouverte à M. le député István Friedrich], (1934) 10 (132) *Ujság,* 1.
[45] Az irodalmi pörök. Németh Imre előadása [Procès littéraires. Conférence d'Imre Németh], (1937) 88 (256) *Pesti Napló,* 11.

III. Code de comportement dans la salle d'audience

Tous ces événements ont amené en juin 1934 Bódog Halmi, juge du tribunal royal de Budapest, à publier au journal *Ujság* un code de comportement au sein de la salle d'audience dont sont extraits les articles suivants:

> « 2. Au cours de l'interrogatoire demeurons strictement dans le cadre du dossier ainsi le juge ne prononce pas de critiques sociale, morale ou idéologique, car l'usage de la critique est contre productive et dépasse le pouvoir judiciaire et peut ébranler la foi dans l'impartialité absolue du juge.
> 3. L'accusé a le droit souverain de se défendre même en proférant des mensonges, et ne doit pas être soumis aux remontrances formulées par le juge qui doit se contenter de rechercher la vérité en utilisant tout son pouvoir et toute sa latitute d'investigation et ce qui n'est pas une tâche aisée [...].
> 5. Le juge devrait s'abstenir de moqueries, de sarcasmes.
> 6. Pour éviter les incidents, l'utilisation uniforme de la formule de politesse « Je vous souhaite le bonjour » serait désirable parce que l'omission par économie de « Je vous souhaite » à laquelle s'ajoute un caractère inconvenant pouvant être considéré comme une injure.
> 7. Du point de vue formel [...] un ton réservé et poli est souhaitable. Les formules vides de sens telle « je vous prie humblement » ou celles pastichant la subordination militaire « avec mon humble respect » sont superfaitatoires, tout comme les formules trop brutales comme « écoutez-moi ». L'objectivité à l'égard de l'affaire et des faits se traduit aussi par un langage et un ton reflétant la réalité quotidienne . Les débats au cours des procès ne sauraient devenir le sujet de reportages à sensation, ainsi un comportement approprié serait de nature à compléter la tranquillité des débats, renforcer la confiance en l'autorité de la fonction publique et de ses fonctionnaires. »[46]

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Malgré la situation quelque peu accablante décrite ci-dessus, il convient de souligner que les cas cités ne sont toutefois pas un phénomène généralisé dans les salles d'audience hongroises de la fin des 19ème et début du 20ème siècles. Grâce à la haute qualité de la magistrature hongroise, dans la plupart des cas, les juges n'ont pas fait l'objet de critiques dans leurs manières de conduire les débats ni de la part des justiciables, ni même des professionnels du droit.

[46] Halmi B., Illemkódex a tárgyalóteremben [Code de comportement dans la salle d'audience], (1934) 10 (143) *Ujság,* 7.

Siklósi, Iván*

Some remarks on the history and significance of the concept of "legal transaction" in a nutshell

Abstract

This study is a brief contribution to the history and significance of the concept of legal transaction (juridical act etc.).

First and foremost, the author investigates the Roman law antecedents, and emphasizes that the essence of legal transaction was described by the Roman jurisprudence using the terms "agere", "gerere", and "contrahere" (cf. Lab.–Ulp. D. 50, 16, 19).

As for the formation of the modern concept of juridical act, the author highlights that its roots can be traced back before the Pandectist legal science (see the definitions of Althusius, Nettelbladt, and Harpprecht), then the Pandectists' definition of legal transaction (cf. Windscheid) and its influence are scrutinized, with regard to modern Hungarian private law, too.

Keywords: legal transaction (juridical act), legal fact, legal relationship, Roman law, antecedents before the Pandectists, Pandectists, "pandectistic" system, general part of private law, Hungarian Civil Code (of 1959 and 2013)

I. Roman law antecedents

It is well-known – as was pointed out for instance by *Gerhard Dulckeit* as well – that there is no "clear and sophisticated" concept of legal transaction (juridical act) in Roman law.[1] Roman jurisprudence did not know and apply the "technical" term of legal transaction in the modern sense,[2] as it did not elaborate the general doctrine of legal

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[1] G. Dulckeit, Zur Lehre vom Rechtsgeschäft im klassischen römischen Recht, in *Festschrift Fritz Schulz,* (Weimar, 1951) 150.

[2] As fundamental literature for the questions of legal transactions, see e.g. W. Flume, *Rechtsakt und Rechtsverhältnis. Römische Jurisprudenz und modernrechtliches Denken,* (Paderborn, 1990); Idem: *Allgemeiner Teil des bürgerlichen Rechts II. Das Rechtsgeschäft,* (Berlin, Heidelberg and New York, 1992[4]); K. Larenz, *Allgemeiner Teil des deutschen bürgerlichen Rechts,* (München, 1989[7]) 314 et seq. We note that the concept of legal transaction – which is used in present study (in a technical legal

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transaction either.[3] As such, the abstract category of legal transaction (as a *terminus technicus*) cannot be found in the sources of Roman law;[4] furthermore, the rites of ancient Roman law cannot be considered as legal transactions in the modern sense; *András Bessenyő* plausibly points out that it would be a historically distorted approach.[5]

> The word *"negotium"* derives etymologically from the noun *"otium"*, being its negatory form, referring to business, public concerns, trade tasks, and difficulties. The noun *"negotium"* appears also in literary texts as having the same meaning; see for instance the famous Horace quote: *"Beatus ille qui procul negotiis"* (*Epod.* 2, 1).
>
> Although the word *"negotium"* appears quite often in the sources of Roman law (see e.g. Gai. 3, 140: *"Labeo negavit ullam vim hoc negotium habere"*; Gai. D. 18, 1, 35: *"Illud constat imperfectum esse negotium"*; Iul. D. 18, 2, 10: *"non potest videri bona fide negotium agi"*; Paul. D. 50, 17, 5: *"furiosus nullum negotium contrahere potest"*; Inst. 3, 19, 8: *"Furiosus nullum negotium gerere potest"*), it does not have the general, technical meaning of "legal transaction" as in modern legal Latin. For example, the denomination of *"negotium gestum"* depicts it illustratively (see the 5th title of the 3rd book of the Digest, called *"De negotiis gestis"*).[6]

Álvarez Suárez – analyzing the applicability of the modern term of legal transaction in Roman law[7] – stated briefly but precisely that the doctrine of legal transactions is a modern legal construction, which belongs to the general part of private law. Roman jurists were usually averse to abstractions, as they concentrated on specific cases, and, in addition, they had a purely procedural attitude, so they created neither the general doctrine of legal transactions,[8] nor the technical term of legal transaction.

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sense) – is not that "general" one, which is necessarily contemporaneous with the appearance of law; cf. Dulckeit, Zur Lehre vom Rechtsgeschäft im klassischen römischen Recht, 149.

3 Cf. V. Arangio-Ruiz, *Istituzioni di diritto romano,* (Napoli, 1989) 77.

4 Cf. E. Albertario, *Il diritto romano,* (Milano–Messina, 1940) 115, who states that the general doctrine and classification of *atto giuridico* was first constructed by the Pandectists in the 19th century, based on Roman legal sources from Justinian. In this context B. Albanese, *Gli atti negoziali nel diritto privato romano,* (Palermo, 1982) 7 points out that although the concept of legal transaction was elaborated by German *romanists,* it was constructed, from a certain aspect, by *Roman* jurists. Cf. e.g. A. Staffhorst, *Die Teilnichtigkeit von Rechtsgeschäften im klassischen römischen Recht,* (Berlin, 2006) 13.

5 A. Bessenyő, *Római magánjog [Roman Private Law],* (Budapest and Pécs, 2010[4]) 118.

6 For the etymology and different meanings of the word *negotium* see from recent literature A. Guzmán Brito, *Acto, negocio, contrato y causa en la tradición del derecho europeo e iberoamericano,* (Navarra, 2005) 26 et seq.

7 U. Álvarez Suárez, *El negocio jurídico en derecho romano,* (Madrid, 1954) 3 et seq. – For the problems of legal transaction in Roman law, see more from Spanish literature A. Torrent, *El negocio jurídico en derecho romano,* (Oviedo, 1984).

8 H. Honsell, Th. Mayer-Maly and W. Selb, *Römisches Recht,* (Berlin, Heidelberg, New York, London, Paris and Tokyo, 1987[4]) 86 DOI: https://doi.org/10.1007/978-3-642-61576-4_4 notes, that Roman jurisprudence was averse to the concept of legal transaction, as well as from any other abstraction. Cf. e.g. M. Kaser, R. Knütel and S. Lohsse, *Römisches Privatrecht,* (München, 2021[22]) 93.

In classical Roman law, the essence of legal transaction was expressed through the terms *agere, gerere,* and *contrahere.* This trichotomic classification appears in the next fragment of Ulpian, in which he cites the famous definition of the late classical jurist Labeo, much-discussed in Roman law literature:

> *Labeo libro primo praetoris urbani definit, quod quaedam „agantur", quaedam „gerantur", quaedam „contrahantur": et actum quidem generale verbum esse, sive verbis sive re quid agatur, ut in stipulatione vel numeratione: contractum autem ultro citroque obligationem, quod Graeci* synallagma *vocant, veluti emptionem venditionem, locationem conductionem, societatem: gestum rem significare sine verbis factam.* (Ulp. D. 50, 16, 19)

According to the classification used by Labeo in this text (the classical origin of which is debated), the terms *agere, gerere,* and *contrahere* indicate different kinds of transactions and obligations resulting from them.[9] Labeo refers to transactions in connection with *"agere",* which are made by oral formalities *(verbis)* or by the delivery of a thing *(re);* in the text Labeo mentions *stipulatio* (as a verbal contract) and *numeratio* (as a real contract); both constitute an unilateral obligation. Conversely, *"contrahere"* expresses contracts creating equally bilateral obligations (the phrase *"ultro citroque obligatio"* refers to the element of reciprocity), and, in this context, Labeo mentions *emptio venditio, locatio conductio,* and societas, namely all the consensual contracts except *mandatum,* which constitutes an unequally bilateral obligation. According to the text, the phrase *"gerere"* indicates a transaction that is made *sine verbis* by the parties. What Labeo meant by this third type of transaction, i.e. obligations, cannot be reconstructed, as the meaning of *gerere* cannot be revealed precisely in this aspect.[10]

[9] R. Zimmermann, *The law of obligations. Roman foundations of the civilian tradition,* (Oxford, 1996[3]) 562[111] is rather skeptical about the definition of *contractus* by Labeo. – Several authors share the opinion that certain parts of the text are results of post-classical interpolation. F. Gallo, *'Synallagma' e 'conventio' nel contratto, I,* (Torino, 1992) 83 states that recent literature generally accepts the genuineness of the text. For the definition of Labeo from the recent literature, see more e.g. A. Burdese, Sul concetto di contratto e i contratti innominati in Labeone, in A. Burdese (cur.), *Le dottrine del contratto nella giurisprudenza romana,* (Padova, 2006) 111 et seq.; E. Stolfi, *Introduzione allo studio dei diritti greci,* (Torino, 2006) 160 et seq.; C. Pelloso, Le origini aristoteliche del συνάλλαγμα di Aristone, in L. Garofalo (cur.), *La compravendita e l'interdipendenza delle obbligazioni nel diritto romano, 1,* (Padova, 2007) 85 et seq.; L. Winkel, Alcune osservazioni sulla classificazione delle obbligazioni e sui contratti nominati nel diritto romano, (2000–2001 [pubbl. 2009]) (103–104) *BIDR,* 61 et seq.; R. Fiori, 'Contrahere' in Labeone, in *Carmina iuris. Mélanges en l'honneur de Michel Humbert,* (Paris, 2012) 311 et seq.; K. Tanev, Il contratto labeoniano nel suo ambiente linguistico, giuridico e commerciale, in *Scritti per Alessandro Corbino, 7,* (Tricase, 2016) 129 et seq., esp. 132 et seq. On the whole problem, see e.g. P. De Francisci, *Συνάλλαγμα. Storia e dottrina dei cd. contratti innominati, II,* (Pavia, 1916) 331 et seq., and R. Santoro, *Il contratto nel pensiero di Labeone,* (Palermo, 1983) esp. 6 et seq.

[10] As was pointed out by M. Sargenti, *La sistematica pregaiana delle obbligazioni e la nascita dell'idea di contratto, Prospettive sistematiche nel diritto romano,* (Torino, 1976) 485 et seq. Cited coincidentally by G. Hamza, *Jogösszehasonlítás és az antik jogrendszerek [Comparative Law and Antiquity],* (Budapest, 1998) 197.

II. Conceptual antecedents of legal transaction before the Pandectists

Although the generally and basically used technical term of legal transaction was created by renowned Pandectists, who also elaborated the doctrine of legal transactions,[11] we would like to emphasize that the concept of legal transaction can be traced back to much earlier roots.

However, the literature does not share a unitary position on the question of which jurist first presented the concept of legal transaction.

For instance, *Stein*[12] points out that the term *negotium* was first developed by *Johannes Althusius (Althaus).* In his view, the category of *negotium* includes every transaction that affects the social life of man, either by adding something useful or necessary or by providing an obstacle to it.[13]

According to *Schermaier*[14] and *Hamza*[15] the term *actus iuridicus* was first developed by *Daniel Nettelbladt* (a student of *Christian Wolff*). According to his plausible but rather wide definition, the legal transactions (*actus iuridici* or *negotia iuridica* [*rechtliche Geschäfte*]) incorporate licit acts of men, which concern rights and obligations, regardless as to they produce rights and obligations or not:

> ...facta hominum licita, quae iura et obligationes concernunt, sive iura et obligationes... producant, sive non...[16]

In this definition, the admissibility of an act appears as a conceptual criterion of legal transaction.

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[11] For the Pandectists' doctrine of legal transaction, see from Hungarian literature comprehensively E. Pólay, *A pandektisztika és hatása a magyar magánjog tudományára [The Pandectistic and its influence on the science of Hungarian private law],* (Szeged, 1976) 60 et seq. On the Pandectists' theory of the declaration of will, and for its influence, see e.g. F. Ranieri, *Europäisches Obligationenrecht,* (Wien, 2009[3]) 128 et seq.

[12] P. Stein, *Roman Law in European History,* (Cambridge, 1999) 82. DOI: https://doi.org/10.1017/CBO9780511814723

[13] J. Althusius, *Dicaeologicae libri tres, totum et universum ius, quo utimur, methodice complectentes,* (Francofurti, 1649) esp. 2. (This work was originally published in 1617.)

[14] M. J. Schermaier, in M. Schmoeckel, J. Rückert and R. Zimmermann (hrsg.): *Historisch-kritischer Kommentar zum BGB, I,* (Tübingen, 2003) 356; Idem: *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB,* (Wien, Köln and Weimar, 2000) 287.

[15] G. Hamza, *The subsequent fate of Roman law in a comparative legal approach,* (Budapest, 2007) 38[175]; Idem: *The subsequent fate and continuity of Roman (civil) law from a historical-comparative perspective,* (Budapest, 2016) 67[175].

[16] D. Nettelbladt, *Systema elementare iurisprudentiae positivae Germanorum communis,* (Halae, 1781) 108. (This work was originally published in 1749 [*Systema elementare universae iurisprudentiae positivae communis Imperii Romano Germanici usui fori accommodatum*].)

Krampe refers to the fact[17] that the term legal transaction was already used by *Christian Ferdinand Harpprecht,* professor at the University of Tübingen, in his dissertation on the topic of conversion. Harpprecht approaches the essence of legal transactions as follows:

> Multiplicia sunt negotia, quibus tam *in iudicio* quam *extra illud* homines inter se uti solent. Sunt illa *negotia* certi quidam *modi*, quibus propositum quendam finem possumus adipisci.[18]

The diverse transactions, used in a judicial process and outside it, are types of behavior *(modi)* to achieve a proposed purpose *(finis)*. In this definition, which can be considered rather as a periphrase, the purpose of the party (who makes a declaration) appears. This will be marked as the legal effect *(rechtliche Wirkung)* in the Pandectists' doctrine of legal transactions.

III. The Pandectists' definition of legal transaction and its influence up to the present day

The modern term legal transaction or juridical act is defined within the confines of the concept of legal fact, elaborated by *Savigny* (*juristische Thatsache,* which – according to *Savigny*[19] - incorporates every event that constitutes or abolishes a right or a legal relationship [*Rechtsverhältnis*][20]).

Some civil codes *expressis verbis* defined and even define at the present time the legal transaction by means of the legal relationship (which is naturally inseparable from the term of legal fact). For instance, according to Section 88 of the Saxon Civil Code of 1863, if the intention of an act is to constitute, abolish or modify a legal relationship in accordance with the law then the act is a legal transaction.[21] The text of art. 140 of the Peruvian *Código civil* can be considered as a more recent example, in which the legal

[17] Ch. Krampe, *Die Konversion des Rechtsgeschäfts,* (Frankfurt am Main, 1980) 30. DOI: https://doi.org/10.3196/9783465013983

[18] C. F. Harpprecht, *De eo, quod iustum est, circa conversionem actuum negotiorumque iuridicorum iamiam peractorum,* (Diss. Tübingen, 1747) 3.

[19] F. C. von Savigny, *System des heutigen römischen Rechts, III,* (Berlin, 1840) 3. DOI: https://doi.org/10.1515/9783111443355

[20] It is well-known that the technical term of legal relation was also elaborated by Savigny in his work *System des heutigen römischen Rechts,* based on the Kantian theory of free will, and defining its essence as the "independent reign of the individual will". For the theory of *Savigny,* and generally, for the origin of the term of legal relation *(Rechtsverhältnis)* from the recent literature, see A. Guzmán Brito, Los orígenes del concepto de "Relación Jurídica" ("Rechtliches Verhältnis" – "Rechtsverhältnis"), (2006) 28 *Revista de estudios histórico-jurídicos,* 187–226.

[21] "Geht bei einer Handlung der Wille darauf, in Übereinstimmung mit den Gesetzen ein Rechtsverhältnis zu begründen, aufzuheben oder zu ändern, so ist die Handlung ein Rechtsgeschäft."

transaction is defined as a manifestation of an intention that constitutes, regulates, modifies, or terminates legal relationships.[22]

Compared to this, the classic definition by *Bernhard Windscheid* – although it is rather a literary difference – highlights the orientation of legal transaction to a legal effect instead of its legal relationship-constituting nature. According to *Windscheid*'s much-quoted and widely accepted definition, a legal transaction is a private declaration of will (i.e. a declaration of will made by a private individual), which aims to produce a legal effect, as stated in his *Lehrbuch des Pandektenrechts:*

> Rechtsgeschäft ist eine auf die Hervorbringung einer rechtlichen Wirkung[23] gerichtete Privatwillenserklärung.

Citing an example of positive law: art. 944 of the old Argentinian *Código civil* of 1869 – even though the Code did not have a general part – regulated legal transactions in particular, and also defined the legal transaction *(acto jurídico),* in the context of legal relationships *(relaciones jurídicas)*. According to this article, legal transactions are licit voluntary acts that directly aim to establish legal relationships between persons, and create, modify, transfer, preserve or extinguish rights:

> Son actos jurídicos los actos voluntarios lícitos, que tengan por fin inmediato, establecer entre las personas relaciones jurídicas, crear, modificar, transferir, conservar o aniquilar derechos.

Art. 259 of the new Argentinian *Código Civil y Comercial de la Nación* of 2014 (which already has a general part) defines legal transactions similarly, but slightly more concisely, compared to the earlier code:

> El acto jurídico es el acto voluntario lícito que tiene por fin inmediato la adquisición, modificación o extinción de relaciones o situaciones jurídicas.

That is, in the new Argentinian code, legal transaction is a licit voluntary act that directly aims to acquire, modify or terminate legal relationships or "legal situations".

Art. 81 of the former Brazilian *Código civil* of 1916 (which was replaced by the new Brazilian civil code of 2003) also defined juridical act *(ato jurídico),* highlighting its purpose being to produce legal effects: every licit act that aims to acquire, protect, transfer, modify or extinguish rights, is called a juridical act:

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[22] "El acto jurídico es la manifestación de voluntad destinada a crear, regular, modificar o extinguir relaciones jurídicas." – These are quite rare examples, as even civil codes that expressly use the term "legal transaction", e.g. the recent German or Portuguese civil code, do not contain its definition.

[23] The effect, which is aimed to be produced by a legal transaction, obviously can only be a legal effect. H. Dernburg, *Pandekten,* (Berlin, 1900[6]) I, 212[11] points out *expressis verbis* that a legal transaction exists only, if the parties want its binding force (in the sense of law).

> Todo o ato lícito, que tenha por fim imediato adquirir, resguardar, transferir, modificar ou extinguir direitos, se denomina ato jurídico.

The term legal transaction cannot be considered an anachronistic one; moreover, we can observe its true renaissance.

In 2005, the draft called *Avant-projet de réforme du droit des obligations et du droit de la prescription* (henceforth: *Avant-projet Catala*),[24] aimed to amend certain parts of the French *Code civil*, and defined the legal transactions in accordance with the Pandectists, specifying them as voluntary acts aiming to produce legal effects (art. 1101-1):

> Les actes juridiques sont des actes de volonté destinés à produire des effets de droit.[25]

The current text of art. 1100-1 – in accordance with the comprehensive reform[26] of 2016 of the French civil code – defines legal transaction similarly, but using the term *"manifestations de volonté"* instead of *"actes de volonté":*

> Les actes juridiques sont des manifestations de volonté destinées à produire des effets de droit.

Furthermore, the *Draft Common Frame of Reference* includes the definition of both *contract* and *juridical act*, directly one after the other and in the context of each other.

The DCFR defines the term contract first:

> A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act. (II.–1:101 [1])

Hence, the DCFR defines the term contract within the term of juridical act. The reference to legal relationship and legal effect, as well as the statement that a contract can be a bilateral or multilateral juridical act, clearly demonstrates the influence of the Pandectists' terminology.

The DCFR defines the term juridical act as follows:

> A juridical act is any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral. (II.–1:101 [2])

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[24] On this draft of great importance, see J. Cartwright, S. Vogenauer and S. Whittaker (eds): *Reforming the French law of obligations: comparative reflections on the Avant-projet de réforme du droit des obligations et du droit de la prescription ('the Avant-projet Catala'),* (Oxford, 2009).

[25] The *Avant-projet Catala* shows the significant influence of the German jurisprudence, as it defines legal fact *(fait juridique)* as follows: "legal facts are acts or events to which the law attaches legal effects" (1101-2: "Les faits juridiques sont des agissements ou des événements auxquels la loi attache des effets de droit."; art. 1101-2 of the *Code civil* [which entered into force on the 1st of October 2016] contains literally the same definition). For these definitions, see B. Fauvarque-Cosson and D. Mazeaud (eds): *European Contract Law. Materials for a Common Frame of Reference: terminology, guiding principles, model rules,* (München, 2008) 66 and 73.

[26] See *Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations.*

The reference to *legal effect* in this definition also shows the persistence of the Pandectists' tradition, as well as the statement that a juridical act can be unilateral, bilateral or multilateral, notwithstanding that words such as *"express"* and especially *"implied"* – in terms of convergence – somewhat demonstrate the influence of common law/Anglo-Saxon legal terminology.

IV. Legal transaction in the science of modern private law and some modern legal systems

The term legal transaction is significant to positive law in certain legal systems only. Principally, but not exclusively it is relevant to civil codes with a general part, because "legal transaction" as a legal institution belongs structurally to the general part of private law. In this manner, the German civil code of 1900, the Portuguese civil code of 1967, and the Brazilian civil code of 2003 contain a voluminous provision concerning legal transactions. The phrase "juridical act" ("legal transaction") also appears in the current text of the French *Code civil (acte juridique),*[27] as well as in the Austrian ABGB *(Rechtsgeschäft)*[28] – despite the fact that both civil codes are based on the institutional system.

Although the German BGB[29] does not define the term legal transaction *(Rechtsgeschäft),* it contains particular regulations concerning legal transactions (Section 104 *et seq.*), for instance on the invalidity or voidness of voluntary acts, on partial invalidity, and several other issues belonging to the general part of private law. The detailed review of this provision requires numerous monographs, so we have to move on. It displays a high level of abstraction and, in spite of all the amendments meanwhile issued, it demonstrates the indelible influence of the Pandectists concerning the general doctrine of legal transactions until this very day. It also had a determinant influence on all civil codes that are based on the "pandectistic" system (i.e. on civil codes which contain a general part; for instance the current Portuguese *Código civil* [*negócio jurídico,* art. 217 *et seq.*], or the new Brazilian *Código civil* [*negócio jurídico*, art. 104 *et seq.*]).

[27] See e.g. art. 1108-1 of the *Code civil* (before the reform of 2016, as this text of the cited article was replaced on 1 October 2016), and especially articles 1100 et seq. (after the reform).

[28] The 17th *Hauptstück* of the 2nd book (law of property) of the Austrian civil code has the following title: "Concerning contracts and legal transactions in general" ("Von Verträgen und Rechtsgeschäften überhaupt").

[29] From the rich literature on the doctrine of legal transaction of the German BGB see e.g. the cited works of Larenz, Flume and Schermaier. – In connection with the German BGB's provisions on legal transactions, we refer to the voluminous work of Raymond Saleilles from the older French literature: *De la déclaration de volonté. Contribution à l'étude de l'acte juridique dans le Code civil allemand,* (Paris, 1901).

Concerning the use of the term *"acte juridique"* in the French *Code civil* (which does not have a general part) and in French jurisprudence: the original text of the French civil code of 1804 naturally did not include[30] this term (nor other civil codes, inspired by the *Code civil,* for example the Italian *Codice civile* of 1865 or the Spanish *Código civil* of 1889). Since French jurisprudence was determined until the end of the 19th century by the positivist *école de l'exégèse,*[31] which literally interpreted the text of law, and – in connection with this – that French private law textbooks in the 19th century did not contain a general part, it should not be surprising that the category of legal transaction (so precisely defined in German jurisprudence) was not used by French jurists at this time. The impact of the doctrine of legal transaction, well defined in German jurisprudence, is demonstrable only in *Planiol*'s *Traité élémentaire de droit civil,* published in 1899, as the famous French civilist particularly discusses the doctrine of legal transactions *(théorie générale des actes juridiques),*[32] translating the German word *"Rechtsgeschäft"* into French as *"acte juridique".* Following this work, more and more 20th century French textbooks included an overview concerning *actes juridiques,*[33] even though the term juridical act did not have such importance in French law (before 1st of October 2016) like e.g. in German law.[34] French academic literature commonly used *acte juridique* with the same meaning as *Rechtsgeschäft,* in accordance with, and because of the impact of, the German jurisprudence, defining it as a declaration of will aimed to produce a legal effect, distinguishing unilateral (*actes unilatéraux;* e.g. last will and testament) and bilateral (*actes bilatéraux;* contracts) acts within this term.[35] However, in French literature *"acte juridique"* was also used in a wider sense, generally as "a juridical act", and not always in the technical (German) sense of *Rechtsgeschäft.* The reform of the law of obligations of 2016 had a crucial importance from this aspect as well, because the current text of the *Code civil,* which entered into force on 1 October 2016, also contains the definition of the juridical act (art. 1100-1), furthermore

[30] As French legal terminology did not know the term *acte juridique* at this time. The term legal transaction, inspired by natural law jurisprudence and constructed by the Pandectists, was particularly developed only later in German jurisprudence as well. The term *acte juridique* first appeared in 2004 in the text of the French civil code; since 1 October 2016, as we observed, it obtained great importance, as well as an authentic, "statutory" definition.

[31] Cf. e.g. H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte,* (Heidelberg, 2005[10]) 132.

[32] Cf. R. Sacco, *Negozio giuridico (circolazione del modello),* Digesto 4a ed. Discipline privatistiche, sezione civile, (Torino, 1995).

[33] E.g. A. Weill, *Droit civil. Introduction générale,* (Paris, 1970[2]).

[34] Due to this, recent French textbooks until now addressed the problem of *acte juridique* very briefly (see e.g. F. Terré, Ph. Simler and Y. Lequette, *Droit civil. Les obligations,* (Paris, 1996[6]); Ph. Malaurie and P. Morvan, *Droit civil. Introduction générale,* (Paris, 2009[3]); Ph. Malaurie, L. Aynès and Ph. Stoffel-Munck, *Droit civil. Les obligations,* (Paris, 2011[5]). It is meaningful that the term *acte juridique,* even in the also voluminous index of subjects of the voluminous, standard French private legal history textbook (J. Lévy and A. Castaldo, *Histoire du droit civil,* (Paris, 2002), does not appear as an independent entry.

[35] So, for example, Terré, Simler and Lequette, *Les obligations,* 5 et seq.

mentioning juridical acts as one of the sources of obligations (art. 1100).[36] As such, the juridical act appears in the new text of the French *Code civil* as a system-forming element.[37] This dogmatic and terminological solution originating from the German Pandectists can be considered as a certain split from old French legal traditions, as well as a clear influence of German jurisprudence and legal thinking.

In Italian jurisprudence and private law, the impact of the German jurisprudence, concerning the doctrine of legal transaction, can only be detected from the end of the 19th century – until this time, the impact of the French jurisprudence was exclusive.[38] Several fundamental Italian works, published in the 20th century, show the powerful influence of the German private law dogmatics.[39] In Italian legal terminology, *negozio giuridico* (not as commonly as *atto negoziale*)[40] is equivalent to the Pandectists' definition of legal transaction, while the equivalent of the French *acte juridique, atto*

[36] "Les obligations naissent d'actes juridiques, de faits juridiques ou de l'autorité seule de la loi." According to the new provision of the French civil code, obligations arise from legal transactions, legal facts or by the authority of the law. This definition refers to a completely different approach, largely of Pandectistic origin, than the earlier one, in which Roman legal traditions could be identified. {On the basis of the Institutes of Justinian [3, 13, 2], the French *Code civil* contained the quaternary division of the sources of obligations in its art. 1370 [which was replaced on 1 October 2016], which said that obligations without an agreement could arise either from quasi-contracts [*quasi-contrats*], or delicts [*délits*], or quasi-delicts [*quasi-délits*]. As a fifth source of obligations, the cited art. mentioned also the law [*loi*]; from Hungarian literature cf. A. Földi, in A. Földi [ed.]: *Összehasonlító jogtörténet [Comparative Legal History],* (Budapest, 2022[5]) 359; in connection with the problem of quasi-delicts, see A. Földi, *A másért való felelősség a római jogban, jogelméleti és összehasonlító polgári jogi kitekintéssel [Vicarious Liability in Roman Law, with a Legal Theoretical and Comparative Civil Law Outlook],* (Budapest, 2004) 221 et seq., and 317 et seq. for details.} However, this new provision also differs from the Pandectistic terminology, as it mentions legal transactions among the sources of obligations, which are dogmatically also legal facts, *beside* legal facts. The *Code civil* distinguishes within *actes juridiques* (which are declarations of will aiming to produce a legal effect, see the new art. 1100-1: "Les actes juridiques sont des manifestations de volonté destinées à produire des effets de droit.") between contracts and unilateral legal transactions (see the new art. 1100-1: "Ils peuvent être conventionnels ou unilatéraux."); within *faits juridiques* (these are such acts or events, to which the law attach legal effects; see the new art. 1100-2: "Les faits juridiques sont des agissements ou des événements auxquels la loi attache des effets de droit.") between delicts (extra-contractual liability: "responsabilité extracontractuelle"; see the new art. 1100-2; to the provisions of delictual liability see the new articles 1240 et seq.), and other sources of obligations ("autres sources d'obligations"; see the new art. 1100-2; for the *quasi-contrats*, belonging to this category, see the new articles 1300 et seq.).

[37] Cf. recently L. Vékás, *Szerződési jog. Általános rész [Law of contracts. General Part],* (Budapest, 2016) 25.

[38] Cf. e.g. F. Ranieri, Einige Bemerkungen zu den historischen Beziehungen zwischen deutscher Pandektistik und italienischer Zivilrechtswissenschaft: Die Lehre des Rechtsgeschäfts zwischen 19. und 20. Jahrhundert, in *Études à la mémoire du Professeur Alfred Rieg,* (Bruxelles, 2000) 703 et seq.

[39] E.g. V. Scialoja, *Negozi giuridici,* (Roma, 1933); L. Cariota Ferrara, *Il negozio giuridico nel diritto privato italiano,* (Napoli, 1948); E. Betti, *Teoria generale del negozio giuridico,* (Torino, 1960[3]).

[40] Cf. e.g. G. B. Ferri, *Negozio giuridico,* Digesto 4a ed. Discipline privatistiche, sezione civile, (Torino, 1995). For the Italian legal history and recent questions of *negozio giuridico* Fauvarque-Cosson and Mazeaud (eds): *European Contract Law,* 84 et seq. gives an excellent summary.

giuridico, is used in a wider sense, meaning licit and illicit acts of men,[41] as well as – within licit acts – legal acts that do not aim to produce legal effects: these are *atti giuridici non negoziali*.[42] Whilst the new Italian *Codice civile* of 1942 shows the influence of the German BGB, and it even received several elements of the German civil code, it still does not contain a general part, and in accordance with that, the new Italian civil code does not include a general provision on legal transactions either.[43] Nevertheless, the term *negozio* is used by Italian authors quite often, because of the powerful impact of German jurisprudence on the Italian.[44]

In the Anglo-Saxon legal terminology the technical term legal transaction is also known; relevant phrases are *juridical act, act in law, act in the law, juristic act, legal act,* or *legal transaction*.[45] Of course, this does not mean that the term legal transaction would be important in the positive law, or that it would be a system-forming term in legal systems belonging to the common law jurisdiction.

The Hungarian Civil Code of 1959 did not include a "doctrine of legal transaction" (the word "legal transaction" [*"jogügylet"*] itself appeared in this code once [under Section 16, subsection 2, point b)]). From this aspect, according to all indications, no change is to be expected, neither in the near future, nor in long term. Although, the word "legal transaction" appears more times in the text of the new Hungarian Civil Code of 2013,[46] as this code also lacks a general part, it also lacks the doctrine of legal transactions, as well as particular regulations on them.[47] As *Vékás* writes, "in the Civil Code, the legal transaction is not a system-forming term".[48]

[41] For instance Albertario, in his Roman law textbook (Albertario, *Il diritto romano,* 115), differentiates *negozio giuridico* and *atto illecito* within the category of *atto giuridico*.

[42] Cf. P. Cisiano, *Atto giuridico,* Digesto 4a ed. Discipline privatistiche, sezione civile, (Torino, 2003).

[43] Cf. e.g. Fauvarque-Cosson and Mazeaud (eds): *European Contract Law,* 85.

[44] Cf. Fauvarque-Cosson and Mazeaud (eds): *European Contract Law,* 84.

[45] Cf. Sacco, *Negozio giuridico (circolazione del modello),* and from the American comparative legal literature J. H. Merryman, *The Civil Law Tradition,* (Stanford, 1985[2]) 75 et seq.

[46] Section 2:23, subsection 2, point *b)*; Section 3:101, subsection 3; Section 5:154, subsection 2; Section 5:163, subsection 3; Section 5:174, subsection 2; Section 5:183; Section 6:329.

[47] See L. Vékás (ed.), *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez [Expert's Report to the Draft of the New Civil Code],* (Budapest, 2008) 61, as well as the new Hungarian Civil Code of 2013. Cf. L. Vékás and P. Gárdos (eds): *Kommentár a Polgári Törvénykönyvhöz [Commentary to the Civil Code], II,* (Budapest, 2014) 1307.

[48] See. Vékás, *Szerződési jog. Általános rész [Law of contracts. General Part],* 28. On the attitude of the new Hungarian Civil Code to legal transactions see more recently, comprehensively and critically J. Benke, *Krízis és fedezetelvonás. A csalárd fedezetelvonás elleni hitelezővédelmi jog történeti alapjai és azok mai jelentősége az új magyar Polgári Törvénykönyv tükrében [Crisis and Fraudulent Conveyance. The Historical Grounds and Their Present-day Importance of Creditor Protection against Fraudulent Conveyance in Light of the New Hungarian Civil Code],* (Budapest, 2016) 23–25.

The first part (Common provisions relating to obligations) of the sixth book of the Civil Code of 2013 includes provisions concerning legal transactions, but under the title of "legal statements" (6:4.–6:10) instead of the doctrine of legal transactions.[49]

As such, in Hungarian civil law, in principal it is not the legal transaction but the legal statement that has importance in the positive law. Subsection 1 of Section 6:4 defines legal statement instead of legal transaction, using the Pandectists' definition of the legal transaction literally. "A legal statement is a statement of will intended to have legal effect" (in Hungarian: "a jognyilatkozat joghatás kiváltására irányuló akaratnyilatkozat"); that is a definition *idem per idem,* as the word "nyilatkozat" (statement) appears twice: the legal *statement* ("jog*nyilatkozat*") is a *statement* of will ("akarat*nyilatkozat*"). We would like to note that maybe it would have been more elegant to define the legal transaction itself in this form, not the legal statement; however, this would not be particularly relevant for the jurisdiction anyway, so this is more of a theoretical-dogmatical note from our part.

The Civil Code of 2013 therefore resulted in the expansion of levels of regulation of the law of obligations in the Hungarian positive civil law with a new legal technique, the incorporation of general provisions concerning legal statements into the Civil Code. In order to reduce the effects of initial jurisdictional difficulties arising from this expansion, the Civil Code includes some provisions of a textbook nature (the definition of the term of legal statement is especially such). Although this is a didactic approach, it can be considered reasonable, as the judiciary had to deduce the answers to sometimes not even contractual legal questions from the general provisions concerning contracts, because the former Civil Code lacked the general regulation of legal transactions.[50]

"Unless otherwise provided for in this Act, the provisions on legal statements shall also apply to legal statements not pertaining to obligations" (Section 6:10);[51] this provision (also) belongs to the general part of private law from a theoretical-dogmatical aspect, and not only to the law of obligations. Taking also this into consideration, these general provisions concerning legal statements could also have been provided among the introductory provisions of the Civil Code – even considering that the Civil Code does not have a general part.

[49] See e.g. A. Osztovits, in A. Osztovits (ed.), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja [Great Commentary of the Act V of 2013 on the Civil Code and Related Legal Sources], III,* (Budapest, 2014) 38; recently Vékás, *Szerződési jog. Általános rész [Law of contracts. General Part],* 28.

[50] Cf. e.g. Vékás and Gárdos, *Kommentár a Polgári Törvénykönyvhöz [Commentary to the Civil Code],* 1307; Osztovits, *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja [Great Commentary of the Act V of 2013 on the Civil Code and Related Legal Sources],* 38.

[51] Cf. e.g. Vékás and Gárdos, *Kommentár a Polgári Törvénykönyvhöz [Commentary to the Civil Code],* 1307, and 1315 et seq.

V. Major conclusions

We cannot avoid scrutinizing, at least briefly, the question of the theoretical *raison d'être* and practical importance of legal transaction in our time. At this point, this review can be considered rather as a proposition of the problem.

As legal transaction is an artificial term, constructed with a high jurisprudential abstraction, we have to note that particular provisions in the general part, concerning legal transactions, only "overcomplicate" the system of regulation of civil law, both from a dogmatic and a terminological point of view.

According to the situation described above, in Hungarian civil law, the term legal transaction principally has theoretical and didactical importance rather than a positive legal one. We do not intend to contest that the development and definition of the term legal transaction, which involves contracts, for example, as well as testaments, can be considered a much more advantageous and successful jurisprudential abstraction than, for instance, the creation of the "superior" category of servitude through the "incorporation" of "personal servitudes" (e.g. *ususfructus*) into the concept of servitude. However, theoretical and practical relevance are two different things. It is easy to concede the jurisdictional difficulties that would arise if a general part (including detailed general provisions concerning legal transactions) were institutionalized in Hungarian civil law, especially considering that these general provisions would not have such a legal practice as in German law anyway, not to mention that modern civil codes do not possess such a precise terminology as the German BGB, which can also be described as *Professorenrecht*. A civil code with a general part would have a provision like this: most general regulations on the contract of sale could be found in the general provisions on legal transactions; this would be followed at the general part of the law of obligations by the general provisions of the law of contracts, then special provisions on the contract of sale would come at the special part of the law of obligations. This would be a model of three-level regulation, for which the Hungarian jurisdiction is not prepared – and it would not be worth the effort to institutionalize such regulation (of the contract of sale, in our example) in the same civil code either. It is not coincidental that, during the codification of the new Hungarian Civil Code, no proposal was made on the institutionalization of the general part of private law.

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Observations on the problem of theft between spouses in Roman law – forms of perpetration in D. 25, 2 (De actione rerum amotarum)**

Abstract

Although the dogmatically coherent elaboration of perpetrator forms is the merit of modern criminal law, it is quite clear that the ancient Roman jurists were conscious of the "prefigurations" of these forms of perpetration and of their main aspects. However, these regulations cannot primarily be found in Roman (public) criminal law, but in private law, as in Roman law, a significant number of criminal offences were considered a *delictum,* which was adjudicated in the framework of a procedure created especially for private law. These regulations of perpetration forms are remarkable in the examination of theft, especially of theft between spouses. The examination of sources concerning *actio rerum amotarum* (the applicable action in case of theft between spouses) therefore plays an important role with a view to perpetrators, because the act as well as the action has a close connection to *furtum* and to the *actio furti* (the applicable action in a case of common theft).

In this paper, we intend to present how different forms of perpetration appear in sources concerning theft between spouses and *actio rerum amotarum*. This essay aims to provide help in determining the *rei persecutoria* or *poenalis* nature of this action, understanding its evolution and clarifying the original Roman concept and character of the underlying act. We also examine how constructions, fundamentally developed in the framework of *furtum,* can be used by the examination of the act and the perpetrator of *actio rerum amotarum,* in order to have a closer view of the problem of theft between spouses in Roman law.

Keywords: *actio rerum amotarum, actio furti,* theft between spouses, perpetrator forms in Roman law, *poenalis* or *rei persecutoria* nature of the *actio rerum amotarum*

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I. Introduction

Despite the fact that the particular, dogmatically coherent elaboration of perpetrator forms (the different meaning of "offenders" and "accessories") is a construct of modern criminal law, it is quite clear that the ancient Roman jurists were conscious of the "prefigurations" of these forms of perpetration and their main aspects.[1] In the primary sources, a different system of perpetrator forms is recognisable, with its main characteristic features and a well-defined terminology, which shows us some conformity with the legal terms used nowadays.[2]

However – as Ferenc Benedek has already pointed out during his examination of this subject[3] – these regulations are not primarily found in Roman (public) criminal law.[4] The reason for this phenomenon is that Roman jurists, who were the main shapers of classical Roman law and whose work, examination and success in this law field was unbelievably important, directed their efforts towards private law in particular, and not criminal law. "Fortunately", in Roman law, a significant number of criminal offences were considered *delicta,* adjudicated in the framework of a procedure created especially for private law, so the statements of jurists, concerning forms of perpetration, can be found in sources dealing with these procedures. The aforementioned distinction[5] is remarkable

[1] Concerning the accessory, see V. M. Amaya Garcia, Coautoría y complicidad: estudio histórico y *jurisprudencial,* (Editorial Dykinson, Madrid, 1993).

[2] As we can see below, with reference to accessory forms, on the one hand, the definition *ope consilio* is the typically used form for both the physical and psychological abettor; on the other hand, the term *auctor* is also generally used in the meaning of instigator. From now on, we will use the modern legal terms of forms of perpetration in favour of clarity. See more Siklósi I., *Római magánjog [Roman private law],* (ELTE Eötvös Kiadó, Budapest, 2021) 1604–1605.

[3] Benedek F., A felbujtó és a bűnsegéd a római jog forrásaiban [The instigator and the abettor in the sources of Roman law], in *Studies in Honour of Professor Imre Molnár on the occasion of his 70th birthday,* (Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Szeged, 2004) 45–61., especially 45–48.

[4] This does not mean that these perpetration forms would not be important in the framework of *crimina*. See Th. Mommsen, *Römisches Strafrecht,* (Duncker & Humblot, Leipzig, 1899) 991, in connection with *crimen maiestatis* (based on Paul. 5, 29, 2 [the referred part, Paul. 5, 22, 2 is incorrect]), furthermore – also in connection with *crimen maiestatis,* and *adulterium* – G. Rizzelli, Ope consilio dolo malo, (1993–1994) (35–36) *BIDR,* 293–313. To the questions relating to criminal law in general, see Zlinszky J., *Római büntetőjog [Roman criminal law],* (Nemzeti Tankönyvkiadó, Budapest, 1991).

[5] It is not a coincidence that the Italian Romanist Paolo Ferretti examined the problems of accessories monographically in the framework of theft and the *actio furti* (additionally, he examined D. 25, 2, 20, concerning the *actio rerum amotarum,* which will also be explained later). See P. Ferretti, *Complicità e furto nel diritto romano,* (Dott. A. Giuffrè Editore, Milano, 2005). It can be generally stated that, in the literature, problems of accessories are mainly analysed with regard to theft; see L. Winkel, „Sciens dolo malo" et „ope consiliove": ancêtres des conceptions modernes?, in *Mélanges Felix Wubbe,* (Fribourg, 1993) 571–585.; G. MacCormack, Ope Consilio Furtum Factum, (1983) 51 (3) *TR,* 271–293.; J. A. Ch. Thomas, Contrectatio, Complicity and Furtum, 13 (1962) (13) *IURA,* 70–88.

in the examination of theft,[6] so the examination of sources concerning *actio rerum amotarum* (hereinafter: *a.r.a.*) plays an important role for their perpetrators, because the act, as well as the action, has a close connection to *furtum* and to the *actio furti* – even if the differences between these two are as significant and characteristic as their similarity.

During the examination of *a.r.a.*, the legal nature of this action has great importance, whether it is an *actio rei persecutoria* or *poenalis.* According to the convincing argumentation[7] of the German Romanist Andreas Wacke (with respect to Ernst Levy's previously stated theory[8]), who has processed this action in the greatest detail so far, the action had a *rei persecutoria* nature, despite it containing some penal character too. This opinion cannot be considered as a unanimous one, as different opinions also exist in the literature.[9] With respect to the underlying "original" act and life situation which motivated the development of this action, we consider it as a delict-based but *rei persecutoria* action, in accordance with its classical form and function and the next source:

D. 25, 2, 21, 5. *Haec actio licet ex delicto nascatur, tamen rei persecutionem continet (...)*

This is why the underlying act – theft between spouses – is so special and suitable for the examination of perpetration forms.

A brief summary of the main characteristic "substantive law" features of theft between spouses, which make it different from common theft and relevant to perpetration forms, belongs to the introductory part as well, and it is necessary to understand the statements that follow. The underlying act must be the *amotio* (C. 5, 21, 2; D 25, 2, 11 pr.), which is a qualified form of *contrectatio* (Gai. 3, 195), because *contrectatio* by itself is irrelevant at this point. Whether the act was considered as a *furtum* is a controversial question in the sources; more arguments exist that conclude it was considered as a theft, or more precisely, the opinion, which states its non-theft nature would be hard to prove (D. 25, 2, 1). Spending, selling, donating and usage of goods (consumption), as well as concealing of goods during divorce also underlie this action (D. 25, 2, 3, 3; D. 25, 2, 17, 1). A valid marriage *(sine manu)* must exist between the parties at the time of perpetration, otherwise there is no legal ground for the use of this type of action (although living

[6] In this question, we refer to the work of Marton, G., *A furtum, mint delictum privatum [Furtum as delictum privatum],* (Hegedüs és Sándor Könyvkiadóhivatala, Debrecen, 1911), in which the author examined and defined *furtum* and *actio furti* in an unexcelled manner, from both a substantive and procedural law perspective. We must specially highlight Marton, *A furtum, mint delictum privatum [Furtum as delictum privatum],* 178–195., because the author deals with the issue of accessories in this part (often also successfully criticising Mommsen), to which we will refer later.

[7] A. Wacke, *Actio rerum amotarum,* (Forschungen zum römischen Recht, 17. Abhandlung, Böhlau Verlag, Köln and Graz, 1963).

[8] E. Levy, *Privatstrafe und Schadenersatz im klassischen römischen Recht,* (Verlag von Franz Vahlen, Berlin, 1915) 115.

[9] E. Valiño, Las Relaciones Básicas de las Acciones Adyecticias, (1968) (38) *Anuario de historia del derecho español,* 431–437.

together during the marriage is not a condition of it). *Actio furti* can be initiated between non-married parties, or parties with a non-valid marriage (D. 25, 2, 2; D. 25, 2, 15 pr.; D. 25, 2, 3 pr.). As a rule,[10] an action can only be initiated after the dissolution of the marriage, and this status must endure until the end of the whole procedure (*secutum divortium,* following the act; D. 25, 2, 25). Finally, the sources declare that the offence is always intentional; it must be committed via *divortii causa* (moreover, it only can be committed via *divortii causa*), in order to demand the appropriated goods with *a.r.a*., the *divortii causa* of which was not identical to the *divortii faciendi causa* (C. 5, 21, 2).[11]

II. Certain perpetrator forms

Moving on to certain perpetrator forms, the fact that only one of the spouses can commit this act (as an offender) is obvious and can simply be deduced from the aforementioned circumstances.[12]

> C. 5, 21, 2. *Divortii gratia rebus uxoris amotis a marito vel ab uxore mariti rerum amotarum edicto perpetuo permittitur actio.*

[10] There is one exception in the sources – C. 6, 2, 22, 4 –, but we do not want to pay attention to it in this essay, because it is irrelevant from the aspect of perpetration forms.

[11] Concerning *divortii faciendi causa,* see Wacke, *Actio rerum amotarum,* 45. Other intentions were taken into account, i.e., if the appropriation were committed *mortis causa,* or the wife committed the act *"cum de viri vita desperasset".* In these cases, the form of the appropriate action was *a.r.a. utilis*. Since these cases are exceptional and sources do not deal with the theoretical perpetration forms of them, we shall not discuss them further.

[12] The question arises whether either spouse could have been the perpetrator of that crime or not. According to sources, originally only the wife could have committed the crime as a perpetrator, and this changed only later, in classical Roman law, when the husband could be a perpetrator too. Henceforth, we will examine the action from this classical perspective, where either spouse could have been the perpetrator of this act (or more precisely, both ex-spouses could have been sued with *a.r.a.*). – Anyway, the question is dissentingly interpreted in the literature: A. Guarino, *Diritto privato romano,* (Editore Jovene, Napoli, 2001) 581. considered the wife as the only possible perpetrator; M. Talamanca, *Istituzioni di diritto romano,* (Dott. A. Giuffrè Editore, Milano, 1990) 144. presumed that the husband became a possible perpetrator only in the late classical era; whilst M. Kaser, *Das römische Privatrecht,* (Verlag C. H. Beck, München, 1971–1975) II. 436[30]. supposed that, generally, this change occurred before Justinian. B. Forgó-Feldner, Zurückbehaltungsrecht (retentio), in U. Babusiaux et al., *Handbuch des Römischen Privatrechts,* (Mohr Siebeck, 2023) 3048. et seq. believes that suing a husband must have been a "rarity", and considers its ground to be the *honor matrimonii* and its function to be the protection of the *parapherna*. Concerning this concept, we can refer to the case in Ulp. D. 23, 3, 9, 3, which is analysed thoroughly by Siklósi I., *A custodia-felelősség problémái a római jogban [Problems of custodia-liability in Roman law],* (ELTE Eötvös Kiadó, Budapest, 2021) 313–323. In connection with the property of the wife beyond dotal goods, see however M. Garcia Garrido, *Ius Uxorium. El régimen patrimonial de la mujer casada en derecho romano,* (Consejo Superíor de Investigaciones Científicas: Cuadernos del Instituto Jurídico Español, núm. 9, Roma and Madrid, 1958) 100., who states that, despite the property management of the wife's personal property by the husband, the wife *„tiene una completa autonomía patrimonial para disponer de sus bienes".*

Only the wife and the husband were able to commit this crime as offenders, because they were the only ones who met the special subjective requirements of the underlying offence.

The next step is to examine how multiple persons' perpetration forms can be taken into consideration in this action, and we immediately face the problematics of joint offenders. Committing this act as joint offenders is impossible in a logical sense, because it obviously cannot be jointly committed by "several wives" or "several husbands"; however, free persons (we will examine the case of slaves later) other than spouses can take part in the perpetration. In these cases, almost every single general requirement[13] of joint perpetration is realised; however, one main special requirement is still missing, because a legitimate marriage cannot exist between joint offenders and the victim. With respect to joint perpetration, they cannot be regarded as joint offenders, so they can only be taken into consideration as abettors of the offender spouse, or as individual perpetrators (and so joint offenders, but only in relation to each other at most).[14] However, one thing is certain; *a.r.a.* cannot be initiated against them (D. 25, 2, 17 pr. also excludes the opportunity to initiate this action because of a missing legitimate marriage, even if not precisely in this context). The question arises; which action could be initiated against these "joint offenders"? The available sources unfortunately do not give us an unambiguous solution; *actio furti* may be an option in accordance with D. 25, 2, 17 pr. and D. 25, 2, 19.[15]

After this, we would like to examine another problematic issue, the indirect offender. Benedek points out that this kind of perpetration form also appears[16] in the sources of Roman law, typically in two situations: first, when someone commits a crime by using a person under their power (who, with respect to this, must obey their master's orders; these are mainly slaves or persons under *patria potestas*);[17] second, when the *ius imperandi* establishes the legal obligation of a *persona sui iuris* acting according to someone else's orders. The sources do not deal with the second case in the field of *a.r.a.*

[13] Marton, *A furtum, mint delictum privatum [Furtum as delictum privatum],* 182., referring to *rerum amotio: dolus,* the intent (in this case: *divortii causa*), the common object, on which the underlying act is realised and the common act of commission *(amotio).*

[14] Conversely, it is possible that a spouse acts as a "partner" of the thieves and, in this relation, she can be a joint offender, but this is irrelevant from the aspect of the *a.r.a.;* furthermore, since the *actio furti* cannot be initiated against her (even as a joint offender), the question therefore has no importance (at least not in the field of criminal law).

[15] Actually, the relation is not clear between the wife and the thieves in this source; the offence may made in the abovementioned way.

[16] Benedek, A felbujtó és a bűnsegéd a római jog forrásaiban [The instigator and the abettor in the sources of Roman law], 53–55.

[17] For these two cases see jointly D. 50, 17, 4.

and in the framework of Roman family law, regarding the position of the wife,[18] only the first case is possible, when the wife commits this act by using her slave.

> D. 25, 2, 21, 1. *Si servus mulieris iussu dominae*[19] *divortii causa res amoverit, Pedius putat nec furtum eum facere, quoniam nihil lucri sui causa contrectet nec videri furtum facienti opem ferre, cum mulier furtum non faciat, quamvis servus in facinoribus domino dicto audiens esse non debeat: sed rerum amotarum actio erit.*

The legal reasoning of the wife's status is very interesting, namely why she is an indirect offender instead of an instigator: when the slave takes away things belonging to the husband *divorti causa* on the wife's command, the slave him/herself does not commit theft, because there is one requirement missing: it must be committed *lucri sui causa;* however, the slave cannot be considered as someone used for theft, and furthermore there is no legal ground to initiate *a.r.a.* against them, because the slave does not fulfil the qualification requirements to be an offender in this act. The wife will therefore be accountable in this case as an indirect offender, because she fulfils all the special personal requirements to be an offender, and even the slave commits *rerum amotio*[20] in favour and on the command of her.

In relation to our next subject, forms of accessories, one main question arises in the field of *a.r.a.:* is it possible for a spouse to be an accessory, or can a spouse only be an offender, whose conduct can possibly be aided by an accessory? As already stated above, the perpetrator's position can be fulfilled exclusively by one of the spouses and, if someone else is involved, the liability of "fellow perpetrators" will be adjudged upon different grounds (regardless of whether they were truly perpetrators of another crime or accessories). In this way, we can narrow down our question and conceive it more precisely: does one spouse's commission as an accessory underlie his/her liability for *a.r.a.?*

Firstly, the form of instigator needs to be examined. The sources use a special term for the instigator, which is *"auctor",* and for the instigator's behaviour towards the

[18] The sources mention only this case; henceforth, we would like to pay attention also to that in this essay; however, it is also true that the husband, using his *patria potestas,* could also commit the *amotio* by using one of his family members under his power. The sources do not say anything about this case, but excluding it from the field of application of *a.r.a.* would not be reasonable. Additionally, the lack of this case in the sources may refer to the fact that this action could originally have been initiated only against the wife.

[19] This wording can also be considered consistent. As Benedek, A felbujtó és a bűnsegéd a római jog forrásaiban [The instigator and the abettor in the sources of Roman law], 53. pointed out, the expression *"mandavit vel iussit"* relating to the abettor should lead the jurists to recognise the perpetration form of indirect offender. For concrete sources see D. 9, 2, 37 pr., D. 50, 17, 169 pr. etc.

[20] Wacke, *Actio rerum amotarum,* 36. et seq. states that, actually, the wife herself is the perpetrator and the slave is merely her "extended arm". M. Pennitz, Diebstahlsklage (actio furti), in U. Babusiaux et al., *Handbuch des Römischen Privatrechts,* (Mohr Siebeck, 2023) 2619[186]. refers to the exclusion of *noxae deditio* regarding this text. See also Thomas, Contrectatio, Complicity and Furtum, 81. et seq. and 88.

offender, which is *"mandavit vel iussit"*. As mentioned above, Benedek stated that a strong connection also exists in the legal terminology between the terms used for the instigator and the indirect offender – the above cited source is a concrete example (D. 25, 2, 21, 1), where the typical term *"iussum"* refers to a case when the wife commits the crime as an indirect offender. Therefore, in this title of the Digest, there is no specific instance for instigation. However, the act set out in the next fragment can be interpreted in various ways:

> D. 25, 2, 19. *Sed et si divortii tempore fures in domum mariti induxerit et per eos res amoverit, ita ut ipsa non contrectaverit, rerum amotarum iudicio tenebitur. Verum est itaque quod Labeo scripsit uxorem rerum amotarum teneri, etiamsi ad eam res non pervenerit.*

As the relation between the wife and the thieves (who have been let into the house by the wife) is not clarified in the text, we have the opportunity to consider the consequences derived from the different constructions.[21]

Theoretically, we can consider the wife to be the instigator of the thieves; the interpretation by Wacke refers to this as well.[22] According to this, the wife did not just help the thieves to enter the house, but she incited their intention of theft. In this case, the wife will be liable for the *rerum amotio,* although she did not even commit *contrectatio,* and regardless of whether she obtained the appropriated goods and the fact that the liability of the thieves would probably have to be judged with another *actio* (e.g. *actio furti*). As such, the conclusion is that, in the field of application of *a.r.a.,* it seems to be sufficient if the special subjective requirements are fulfilled by the accessory, or, the converse, if one of the spouses commits a relevant act, at least as an accessory.[23]

[21] According to this source, we can exclude the perpetration form of offender (because the wife herself does not commit *amotio* [despite the text stating, *"per eos res amoverit";* she does not even l actually ay her hands on the taken things, and it turns out from another text that she, in a particular case, does not even obtain them: *"etiamsi ad eam res non pervenerit"*]), of indirect offender (because the liability of the thieves is not excluded) and of the psychological abettor (because, with letting the thieves into the house, she acts physically anyway), but any other activity can occur. For the consequences of the joint offenders perpetration form, see above. Regarding all these circumstances, we will henceforth examine this text with a view to perpetration forms of instigator and physical abettor.

[22] Wacke, *Actio rerum amotarum,* 38. However, in the author's opinion, this was rather exceptional, because in this case the thieves were the offenders. The exceptionality of the case is corroborated by the statement cited from Labeo.

[23] At first glance it may seem strange, because the accessory would only be accountable for the act if the offender commits the crime, but in this case, as only one of the spouses can be an offender, it is out of question. It therefore seems that the behaviour of the wife inducing the thieves, as far as we think about instigation, was originally aimed at committing a theft (thus the wife can be an instigator of theft) but, with regard to the special nature of the commission's time *(divortii tempore),* the committed act can be taken into consideration as an act underlying *a.r.a.* (but the special requirement must exist for the institution of this *actio*). – Theoretically, it cannot be excluded that the spouse has an instigator, so that another person induces the spouse to commit this crime, because the special personal qualification of the offender is achieved. Marton, *A furtum, mint delictum privatum [Furtum as delictum privatum],*

However, it is also possible to consider the wife's act as that of a physical abettor. She can be an abettor of the thieves,[24] letting them into the house; there is a remarkable similarity between this behaviour *("fures in domum mariti induxerit")* and the next one, which is mentioned in the sources expressly as abetment *(ope consilio)* in the field of theft:[25]

> Inst. 4, 1, 11. *Interdum furti tenetur, qui ipse furtum non fecerit: qualis est cuius ope et consilio furtum factum est. (...) ope consilio eius quoque furtum admitti videtur, qui (...) ostium effringit, ut alius furtum faceret (...)*

The wife will be accountable with *a.r.a.,* even for acting as an abettor; in other words, even if, as in the above cited case, she just lets the thieves into the house, without actually obtaining the stolen items afterwards: this is also corroborated by the following text:

> D. 25, 2, 20. *Si rem, quam maritus bona fide emerat, uxor amovit vel opem furi tulit idque fecit divortii causa, rerum amotarum iudicio damnabitur.*

Although, in this case too, the thief is the offender, and the wife just *"opem tulit"* (i.e. – in accordance with the consistent[26] legal parlance of the sources – she provides physical abetment to the thief), *a.r.a.* can be initiated against her, even if she does not act within the framework of the crime.[27]

III. Conclusion

Finally, we can see, even after this brief study of this topic, that although different legal terms exist in the sources for different perpetrator forms of theft between spouses, the legal consequences of this crime are not distinguished, as for instance in

189. – concerning abetment in the field of theft – also emphasises that "there is no need to fulfil the criteria of theft in the assistant's act; moreover it must not happen, otherwise the participation would no longer be assistance but joint offence". Hence, only accessories can participate in this situation, but the sources do not mention their liability for it.

[24] As we already mentioned, the text does not inform us accurately about the relation between the wife and the thieves, but the expression *"per eos res amoverit"* refers to a higher level of cooperation, which is beyond the activity of "normal" complicity.

[25] Concerning this source, see MacCormack, Ope Consilio Furtum Factum, 291., who – citing the following parts of the text as well – emphasises, that "To be made liable as an accomplice one must have contributed some positive act of assistance. This approach is reflected in the language with which Justinian introduces his comment on Gaius 3, 202 (...). As a result of this ruling the word *consilio* in the phrase *ope consilio* takes on a more extended significance. It retains the sense of 'intention that a theft be committed', but acquires in addition the sense of 'knowledge that a theft is being committed'.".

[26] The phrase *"opem ferre"* is also frequent (see e.g. the above cited D.25, 2, 21, 1).

[27] There is again no information about the thief's liability but, based on the above-mentioned circumstances, if other requirements are also fulfilled, *actio furti* can be initiated against the thief.

the case of a common theft.[28] The sources simply declare that any specific form of perpetration underlies this action *("sed rerum amotarum actio erit", "rerum amotarum iudicio tenebitur", "rerum amotarum iudicio damnabitur").*[29] All these expose the cognate (or even mutual) roots of this action with theft, but also show divergence from it, and highlight, on the one hand from a substantive law aspect, the characteristics of the act (and all of the special statutory elements of this crime) underlying the *a.r.a.,* especially the different intent *(divortii causa),* by which, during the application of this action, there is no need to examine the intention of financial gain, a fundamental element of theft (*animus lucri* [*sui*] *faciendi;* inasmuch as the crime typically results in a profit). On the other hand, from a procedural point of view, they expose the combined *poenalis* and *rei persecutoria* nature of this action, of which (at least as it is regulated in the Digest) *rei persecutoria* characteristics are ostensibly significant and much more dominant.

We can hope that this essay will provide help to determine the *poenalis* or *rei persecutoria* nature of the *a.r.a*., to understand the evolution of this action and to clarify the original character and concept of the underlying act. As was already stated as a premise, the distinctive elaboration of perpetrator forms by Roman jurists was made in the framework of "private crimes", *delicta,* particularly of *furtum.* Why the praetor decided to create a unique action, which is basically quite similar to the *actio furti* regarding the underlying act, but treats the act quite differently at the same time, can be found in the special nature and characteristics of the underlying act and, with regard to them, in principles of legal policy. In conclusion, we can affirm that constructions, fundamentally developed in the framework of *furtum,* can be well used by the examination of the act and the perpetrator of *a.r.a*.

[28] Marton, *A furtum, mint delictum privatum [Furtum as delictum privatum],* 179–181., 182[9]., 192. Marton stresses that "even if caught in the act, the abettor will be sued only with *furti nec manifesti actio*"; furthermore, "the abettor is not exposed to *condictio furtiva* and other *rei persecutoria* actions" (*cf.* D. 13, 1, 6).

[29] In the light of this statement, another question arises, namely is it possible at all for a spouse to be an accessory in this crime? If the offender can only be one of the spouses and the liability of the accessory always belongs to the offender's, an accessory will therefore only be liable for the crime if the offender actually commits the crime, then it must be excluded for a spouse to be an accessory, as well as for others to be an offender. We see however in the sources that acts of accessories also underlie the action; so the question arises whether these cases are, in a modern term, forms of a *delictum sui generis*, in which the acts of an accessory will mean the completed criminal offence. We also find it possible to assume that this may correlate with the preponderant *rei persecutoria* nature of this *actio*.

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Facilitating access to credit and economic growth in Czechia, Hungary, Poland and Slovakia through international treaty law – The Mining, Agricultural and Construction Protocol to the Cape Town Convention

Abstract

Adopted in 2019, the Mining, Agricultural and Construction Protocol (MAC Protocol) to the Convention on International Interests in Mobile Equipment (Cape Town Convention) is the world's most recent international commercial law treaty in the field of secured transactions and asset-based finance. The MAC Protocol provides a comprehensive international legal framework for the creation, registration, and protection of security interests in mining, agricultural and construction equipment. It is predicted to increase international global economic production by $30 billion annually, with the largest economic benefits for developing countries and emerging markets that ratify and implement the treaty. The Protocol would provide significant legal and economic benefits to Czechia, Hungary, Poland and Slovakia (the Visegrad Group), by facilitating regional investment, trade and cross-border business cooperation. If implemented, the MAC Protocol would improve access to credit for companies in the Visegrad countries in the face of increasingly difficult international economic headwinds.

This article provides an overview of the legal operation of the Cape Town Convention and the MAC Protocol. It then examines how the MAC Protocol will improve the legal frameworks in facilitating asset-based finance in the Visegrad Group. Finally, the article evaluates the economic benefits of the MAC Protocol for the Visegrad Group, should it be ratified by Czechia, Hungary, Poland and Slovakia.

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I. Introduction

On 22 November 2019, the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment (MAC Protocol)[1] was adopted at a Diplomatic Conference in Pretoria, South Africa.[2] The MAC Protocol is the fourth Protocol to the Convention on International Interests in Mobile Equipment (the Cape Town Convention),[3] following the adoption of the Aircraft Protocol (2001),[4] the Luxembourg Rail Protocol (2007)[5] and the Space Protocol (2012).[6] The Cape Town Convention treaty system represents

[1] Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Mining, Agricultural and Construction equipment, adopted in Pretoria in a diplomatic Conference in 2019; English text at https://www.unidroit.org/instruments/security-interests/mac-protocol/ (MAC Protocol) (Last accessed: 29.12.23.). See R. Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Mining, Agricultural and Construction Equipment, Official Commentary* (UNIDROIT, 2021).

[2] UNIDROIT, MAC Protocol – Diplomatic Conference, 'Summary Report for 22 November 2019' DCME-MAC – Doc. 43 (2019) para 3.

[3] Convention on International Interests on Mobile Equipment, jointly adopted at a diplomatic Conference in Cape Town in 2001 by UNIDROIT and the International Civil Aviation Organization (ICAO); English text at http://www.unidroit.org/instruments/security-interests/cape-town-convention (Last accessed: 29.12.23.); for a comprehensive overview of the Convention system see R. Goode, From Acorn to Oak Tree: the Development of the Cape Town Convention and Protocols, (2012) *Uniform Law Review,* 599.

[4] Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Aircraft Equipment, jointly adopted in a diplomatic Conference in Cape Town in 2001 by UNIDROIT and ICAO; English text at http://www.unidroit.org/instruments/security-interests/aircraft-protocol (Last accessed: 29.12.23.). See R. Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Objects, Official Commentary,* (5th ed., UNIDROIT, 2022).

[5] Luxembourg Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Railway Rolling Stock, jointly adopted in a diplomatic Conference in Luxembourg in 2007 by UNIDROIT and the Intergovernmental Organisation for International Carriage by Rail (OTIF); English text at http://www.unidroit.org/instruments /security-interests/rail-protocol (Last accessed: 29.12.23.). See R. Goode, *Convention on International Interests in Mobile Equipment and Luxembourg Protocol Thereto on Matters Specific to Railway Rolling Stock, Official Commentary,* (2nd ed., UNIDROIT, 2014).

[6] Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Space Assets, adopted in Berlin in a diplomatic Conference in 2012; English text at http://www.unidroit.org/instruments/security-interests/space-protocol (Last accessed: 29.12.23.). See R. Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Space Objects, Official Commentary,* (UNIDROIT, 2013).

one of the most successful international commercial law instruments in history, having been ratified by 85 States.[7]

The Cape Town Convention system utilises a two-tier framework, under which the Convention itself provides the core rules and each Protocol adapts the Convention rules to suit the category of equipment to which it applies. Article 6 of the Convention provides that the Convention is to be read and interpreted together with each Protocol separately as a single instrument, but, to the extent of any inconsistency between the two, the Protocol prevails.

While at first glance it might seem strange that the Protocol overrules the Convention, this clever mechanism allows each Protocol to adapt the core Convention rules appropriately, to suit the specific needs of the sector to which it applies. For example, the Aircraft Protocol provides specialised rules allowing for expedited authorisation from civil aviation authorities for the de-registration and export of aircraft that have been repossessed under the Cape Town Convention.[8] The Luxembourg Rail Protocol provides a specialised system for the identification of railway rolling stock for registration purposes.[9] The Space Protocol allows for parties to use command codes to allow creditors to establish control over assets in Space.[10] The MAC Protocol provides a specialised rule for the treatment of mining, agricultural and construction equipment that is being financed as inventory by a dealer.[11]

A second innovative feature of the Cape Town Convention and its Protocols is its system of declarations. In order to ensure that the international legal framework for secured transactions established by the treaty system operates smoothly, efficiently and transparently, the Convention and its Protocols do not allow Contracting States to make reservations.[12] However, the Convention and Protocols do allow Contracting States to make specific declarations under a limited number of articles, which provide Contracting States with various policy choices in relation to important aspects of the treaty. Where allowed, these declarations allow for Contacting States either to apply, set aside or modify specific articles.

One important policy choice available for Contracting States under each Protocol is in relation to whether a holder of an international interests receives additional protections in the event of the grantor's insolvency, or whether the Contracting State's domestic insolvency regime will apply instead.[13] Other examples of

[7] As of 2 August 2023.
[8] Cape Town Convention, Article XIII.
[9] Luxembourg Raul Protocol, Article XIV.
[10] Space Protocol, Article XIX.
[11] MAC Protocol, Article XII.
[12] Cape Town Convention Article 56, Aircraft Protocol Article XXXII, Luxembourg Rail Protocol Article XXVIII, Space Protocol Article XLIII and MAC Protocol Article XXX.
[13] While each individual Protocol provides slightly different insolvency remedies, all of the Protocols provide Contracting States with the opportunity to make a declaration that enhances the position

important policy choices that Contracting States can make through declarations include whether Contracting States can delay enforcement actions in relation to assets performing a public service under the Luxembourg Rail Protocol and the Space Protocol,[14] and the relationship between international interests in equipment and immovable property under the MAC Protocol.[15]

The declarations system contained in the Cape Town Convention and its Protocols is ingenious for two reasons. First, it provides a structured compromise solution on difficult policy issues for Contracting States, without allowing States simply to disapply any part of the Convention they don't like through reservations. Second, and perhaps more importantly, it allows Contracting States to make declarations that enhance the legal and economic benefits of the Convention. Under the Aircraft Protocol, the economic benefits related to specific declarations have been expressly recognised by the OECD Aircraft Sector Understanding (ASU). The ASU allows export credit agencies to grant a reduction of up to 10% off the minimum premium rate on export credit (known as the "Cape Town Discount") if the aircraft operator is (i) based in a Contracting State that has ratified the Convention and Protocol, and (ii) has made certain declarations that enhance the legal protections afforded to a holder of an international interest (known as "qualifying declarations").[16] The ASU and Cape Town Discount have brought significant economic benefits to many of the 82 States that have ratified both the Convention and Aircraft Protocol.

II. A simplified overview of the Cape Town Convention

The Cape Town Convention and its Protocols provide a widely adopted, harmonised and efficient international legal framework for financing certain categories of mobile, high value equipment. The Convention provides a comprehensive system for the creation, protection and enforcement of international interests in equipment, which through the Aircraft Protocol has come to be regarded as international best practice.

of the holder of an international interest in the event of the grantor's insolvency, instead of applying domestic insolvency law. See Aircraft Protocol Article XI, Luxembourg Rail Protocol Article IX, Space Protocol Article XXI and MAC Protocol Article X.

[14] See Luxembourg Rail Protocol Article XXV (public service railway rolling stock), Space Protocol Article XXVII (limitations on remedies in respect of public service).

[15] MAC Protocol Article VII (association with immovable property).

[16] *Sector Understanding on Export Credits for Civil Aircraft* (the ASU), Appendix I, Annex 1, page 80–81, https://one.oecd.org/document/TAD/PG(2023)7/en/pdf (Last accessed: 29.12.23.).

1. Scope of the Convention and the creation of international interests

There are three requirements for the Cape Town Convention to apply to a transaction. First, the transaction must create an "international interest". Second, the "international interest" must relate to an object of equipment within the scope of one of the Protocols to the Cape Town Convention. Third, the grantor party must be located in a State that has become party to both the Convention and the relevant Protocol. Each of these elements will now be briefly explored.

In relation to the first requirement, Article 2 of the Convention provides that an "international interest" is an interest in equipment that is (i) granted by the chargor under a security agreement, (ii) vested in a person who is the conditional seller under a title reservation agreement, or (iii) vested in a person who is the lessor under a leasing agreement. Article 6 of the Convention provides very few formal requirements for the constitution of an international interest: the agreement must simply (i) be in writing; (ii) relate to an object over which the chargor, conditional seller or lessor has the power to dispose; (iii) enable the object to be identified; and (iv) for security agreements, enable the secured obligations to be determined. The notion of an "international interest" under the Convention is *sui generis* and autonomous from any national interest that may be created over the same object under the applicable domestic law.

This streamlined approach to the creation of international interests reflects a functional approach to secured transactions law, whereby the three types of agreements that can create an international interest (security agreement, title reservation agreement and lease) are generally subject to the same basic framework throughout the Convention.[17] The functional approach to secured transactions law, as reflected in both the Cape Town Convention and the UNCITRAL Model Law on Secured Transactions,[18] has become the international best-practice standard and is the basis of the majority of secured transactions reforms being undertaken by States around the world.

In relation to the second requirement, the international interest must relate to an object within the scope of one of the Protocols. This is generally a fairly straightforward matter, as each Protocol provides definitions of the equipment to which they apply. For example, Article II of the Aircraft Protocol provides that the Convention applies to "aircraft objects", and Article I(c) of the Aircraft Protocol then

[17] See M. Deschamps, The perfection and priority rules of the Cape Town Convention and the Aircraft Protocol. A comparative law analysis, (2013) *Cape Town Convention Journal,* 51, at 53, https://ctcap.org/wp-content/uploads/2020/03/The-perfection-and-priority-rules-of-the-Cape-Town-Convention-and-the-Aircraft-Protocol-A-comparative-law-analysis.pdf (Last accessed: 29.12.23.). DOI: https://doi.org/10.5235/204976113808391189

[18] *UNCITRAL Model Law on Secured Transactions* (2016), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_st_e_ebook.pdf (Last accessed: 29.12.23.).

defines "aircraft objects" as "airframes, aircraft engines and helicopters", with each subcategory also having a more specific definition. The Luxembourg Rail Protocol and the Space Protocol respectively contain similar specific definitions of "railway rolling stock" in Article I(e) and "space asset" in Article 1(k). The MAC Protocol provides for a different approach to defining mining, agricultural and construction equipment, as will be described in more detail below.

The third and final requirement for the Convention to apply to an international interest in equipment within the scope of a Protocol is for the grantor to be situated in a Contracting State, as provided in Article 3. Under Article 4, a grantor is situated in a Contracting State if it is incorporated or formed under the law of that State, or where it has a registered office or statutory seat, or if the State is its centre of administration or place of business. Importantly, if the grantor is located in a Contracting State, the Convention will apply, regardless of the location of the creditor. As such, the Convention can apply to both domestic transactions, where both the grantor and creditor are in the same Contracting State, and international transactions where the creditor is located in another State (regardless of whether that State is a Contracting State or not).

2. Protection of international interests through registration

Each Protocol to the Cape Town Convention provides for the establishment of an individual electronic international registry for the registration of international interests. The Aircraft Protocol established the Aircraft Registry, which has been functioning since 2006 and has over 1.5 million registrations relating to interests in aircraft objects.[19] Similar registries are being established for railway rolling stock under the Rail Protocol, space assets under the Space Protocol and mining, agricultural and construction equipment under the MAC Protocol.

One a party has correctly registered their international interest in the international registry, they enjoy protection against competing claimants, including later registered international interests and unregistered international interests. This strong priority protection given to registered international interests operates regardless of whether the parties have knowledge of other international interests. Furthermore, registered international interests generally prevail over interests created over the same asset under national law, whether they are registerable or not.[20]

[19] Aviareto, *International Registry of Mobile Assets,* https://www.internationalregistry.aero/ir-web/ (Last accessed: 29.12.23.).

[20] As an exception, Articles 39 and 40 of the Convention do allow Contracting States to declare whether a limited number of non-consensual interests prevail over registered international interests.

The utilisation of a modern, electronic registry to protect international interests is an essential element of the Cape Town Convention system, as it provides transparency, predictability and certainty for parties. A creditor can be confident that if they are the first to register an international interest in the international registry in relation to a security agreement over equipment, then they will have priority over other creditors in the event of the grantor's default or insolvency. This legal certainty lowers credit risk and often allows the creditor to extend credit at a lower cost, which is the main driver of the economic benefits for States that ratify the Convention and its Protocols.

3. Enforcement of international interests

In addition to the simple creation rules and clear protection rules for international interests, the Cape Town Convention also provides strong and effective enforcement rules, largely based on the contractual agreement between the parties. Article 8 of the Convention provides that if a party defaults on its repayment obligations, the holder of an international interest may take possession or control of the asset, sell it or lease it, and collect or receive any income or profits arising from the management or use of the asset. The Aircraft, Rail and MAC Protocols also provide creditors with the additional remedy of invoking assistance from relevant administrative authorities for the export and physical transfer of equipment over borders.[21]

Contracting States may also make declarations under the Convention and Protocols that further strengthen the enforcement rights of a holder of an international interest, by allowing them to (i) apply to court for interim relief in order to preserve the object and its value,[22] (ii) exercise self-help in enforcing its remedies under the Convention without applying to a court,[23] and (iii) provide the creditor with priority protection in the event of the grantor's insolvency.[24] The majority of Contracting States under the Cape Town Convention and Aircraft have made these additional declarations that provide further protection to the holders of international interests, which in turn further enhances the legal and economic benefits of the Cape Town Convention and its Protocols.[25]

[21] Aircraft Protocol Article IX, Luxembourg Rail Protocol Article VII and MAC Protocol Article VIII.
[22] Cape Town Convention, Article 13 (relief pending final determination).
[23] Cape Town Convention, Article 54(2) (declarations regarding remedies).
[24] Aircraft Protocol, Article XI Alternative A (remedies on insolvency).
[25] For further analysis on how the Aircraft Protocol facilitates finance in the aviation sector, see A. Veneziano and W. Brydie-Watson, A modern international approach to equipment financing in Africa: The Cape Town Convention and its Protocols, in *Secured Transactions Reform in Africa,* (Bloomsbury Publishing, 2019) 378–394.

III. Expansion of the cape town convention through the MAC Protocol

The MAC Protocol was adopted in November 2019 at a Diplomatic Conference, after almost 15 years of work.[26] It represents an ambitious expansion of the Cape Town Convention system, with the express intention of improving legal frameworks and facilitating economic growth in emerging economies and developing countries that tend to derive a higher percentage of their gross domestic product (GDP) from the mining, agriculture and construction sectors. It was decided to extend the Cape Town Convention to three new sectors in one instrument in order to maximise economic benefits for Contracting States, although the MAC Protocol does allow Contracting States to disapply the Convention to specific sectors by making a declaration under Article II(2).

The MAC Protocol retains the essential features of the Cape Town Convention in providing simple requirements for the creation of international interests, clear rules for protecting international interests through registration and strong enforcement rules for holders of international interests in the event of the grantor's default or insolvency. The MAC Protocol applies where the grantor is located in a Contracting State. Chapter I retains the Convention's functional approach for the creation of international interests in MAC equipment through security agreements, title reservation agreements or leasing agreements. The basic formal requirements for the constitution of an international interest are the same as those in Article 7 of the Convention. Chapter III of the MAC Protocol provides for the creation of a separate international registry for international interests and other registerable interests in MAC equipment. Registration of an international interest continues to provide third-party effectiveness and priority over unregistered interests, subsequently registered interests and interests registered in domestic registries. Chapter II of the MAC Protocol retains the essential default remedies provided by the Convention and existing Protocols, and allows for Contracting States to make declarations that strengthen the position of the holder of an international interest. Crucially, Article X of the MAC Protocol allows Contracting States to provide the creditor with the right to take

[26] For analytical examinations of the history and development of the MAC Protocol, see H. Gabriel, The MAC Protocol: We Aren't There Yet – How Far Do We Have to Go? (2015) (4) *CTCJ,* 67. DOI: https://doi.org/10.1080/2049761X.2015.1104842; C. W. Mooney Jr, The MAC Protocol, Some Comments and a Challenge, (2015) (4) *CTCJ,* 76. DOI: https://doi.org/10.1080/2049761X.2015.1104843; C. W. Mooney Jr, M. Dubovec and W. Brydie-Watson, The Mining, Agricultural and Construction Equipment Protocol to the Cape Town Convention Project: The Current Status, (2016) (21) *Unif L Rev,* 332, 342. DOI: https://doi.org/10.1093/ulr/unw023; W. Brydie-Watson, If It Ain't Broke, Don't Fix It! The Development of the Draft MAC Protocol, (2018) (7) *CTCJ,* 3. DOI: https://doi.org/10.4337/ctcj.2018.01.01 See also, UNIDROIT, The MAC Protocol: History, www.unidroit.org/instruments/security-interests/mac-protocol/history/ (Last accessed: 29.12.23.).

possession of MAC equipment within a "waiting period" to be declared by the Contracting State (under the Aircraft Protocol, the majority of Contracting States have declared a 60 day waiting period), unless the insolvency administrator or debtor has cured all defaults and agreed to perform all future obligations under the security agreement.

Overall, the overwhelming majority of the MAC Protocol's provisions closely mirror the corresponding articles in the previous Protocols. A 2016 analysis found that over 80% of the articles in the draft MAC Protocol closely mirrored the corresponding articles in the previous Protocols.[27] This outcome was no accident; it was the result of an intentional approach in the preparation of the MAC Protocol to adhere to the rules in the Cape Town Convention and existing Protocols to the greatest extent possible.[28] This drafting approach was logical, given the outstanding success that the Cape Town Convention and Aircraft Protocol had already achieved in 2014, when the Study Group started its work on the preliminary draft MAC Protocol.

1. Adapting the Convention for the financing of MAC equipment

Necessarily, the MAC Protocol does contain additional rules that adapt the Convention to apply to the financing of equipment used in the mining, agriculture and construction sectors. In particular, the MAC Protocol had to make three major adaptations in relation to (i) identifying MAC equipment within the scope of the MAC Protocol, (ii) the relationship between international interests in MAC equipment and domestic immovable property law interests, and (iii) the treatment of inventory. Articles II, VII and XII of the MAC Protocol provided innovative solutions to each of these challenges. It is beyond the scope of this article to provide a detailed review of these provisions in the MAC Protocol, and this analysis is available elsewhere.[29] However, it is worth briefly evaluating how the MAC Protocol identifies the types of mining, agricultural and construction equipment to which it applies.

The Cape Town Convention provides a legal framework for international interests in high value, mobile and uniquely identifiable equipment.[30] As discussed

[27] Brydie-Watson, The Development of the Draft MAC Protocol, 9; UNIDROIT Governing Council, Report, (2016) 95 (15) *C.D.,* para 143, www.unidroit.org/english/governments/councildocuments/2016session/cd-95-15-e.pdf (Last accessed: 29.12.23.).

[28] Brydie-Watson, The Development of the Draft MAC Protocol, 7.

[29] For a more comprehensive analysis of how the MAC Protocol makes adaptations to the Cape Town Convention system, see W. Brydie-Watson, The MAC Protocol – a new era for the Cape Town Convention, in *The Elgar Companion to the International Institute for the Unification of Private Law (UNIDROIT),* (forthcoming, 2023).

[30] Article 51 of the Convention allows the Depositary (UNIDROIT) to create Working Groups to assess the feasibility of extending the application of the Convention through additional Protocols to categories of high-value, mobile and uniquely identifiable equipment.

above, the Aircraft, Rail and Space Protocols describe the categories of asset (airframe, aircraft engine, helicopter, railway rolling stock, or space asset) to which they apply, on the presupposition that these categories of assets are inherently high value, mobile and uniquely identifiable. However, the MAC Protocol's application to a broader and more diverse universe of equipment used in three separate sectors created challenges that required new innovations to the treaty text. In particular, it was not possible to provide simple descriptive rules to identify MAC equipment that was inherently high value, mobile and uniquely identifiable.

Rather than the descriptive approach adopted in the three earlier Protocols, the MAC Protocol uses the Harmonized Commodity Description and Coding System (HS) to identify the types of MAC equipment within its scope. The HS is a multipurpose international nomenclature, which provides a uniform system for the classification of commodities and merchandise in international trade. The HS is applied globally and covers 98% of all international trade. States use it to monitor controlled goods, calculate and collect duties and indirect taxes and compile trade and transport statistics. The HS was created by the 1983 International Convention on the Harmonized Commodity Description and Coding System,[31] and came into effect in 1988.[32] The HS comprises more than 5,000 groups of commodities; each identified by a six-digit code, arranged in legal and logical structure. The six-digit code system is supported by a set of rules to achieve uniform classification. By way of example, HS code 870195 is a six-digit HS code that covers tractors with an engine power exceeding 130kW.

Article II(1) of the MAC Protocol provides that the Convention applies to mining equipment, agricultural equipment and construction equipment as provided by the terms of the MAC Protocol and its Annexes. Article I(2)(a)(b) and (o) provides that "mining equipment", "agricultural equipment" and "construction equipment" are objects that fall within a HS code listed in the Annexes to the Protocol.[33] Annex 1 lists the HS codes for mining equipment, Annex 2 lists those for agricultural equipment and Annex 3 lists those HS or construction equipment.[34] In total, fifty-six

[31] International Convention on the Harmonized Commodity Description and Coding System (adopted 14 June 1983, entered into force 1 January 1988) 1503 UNTS 3.

[32] The HS is maintained by the WCO, an independent intergovernmental organisation based in Brussels, Belgium. See World Customs Organization, *What is the Harmonized System (HS)?,* www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx (Last accessed: 29.12.23.).

[33] "Equipment" also includes all installed, incorporated or attached accessories, components and parts that do not fall within separate HS codes listed in the Annexes, as generally consistent with the Aircraft Protocol, Art I(2)(b) and the Luxembourg Rail Protocol, Art I(2)(e).

[34] HS codes were selected for inclusion in the MAC Protocol Annexes on the basis of five criteria: (i) the codes cover equipment predominantly used in the MAC sectors; (ii) the codes cover equipment primarily used on-site rather than off site; (iii) the codes cover equipment that is predominantly of high value when new; (iv) the codes cover equipment that is individually serialised; and (v) the codes should cover complete equipment rather than parts. By selecting codes on this basis, the drafters

individual HS codes are listed in the MAC Protocol Annexes. Certain codes that apply to only one sector are only listed in one Annex.[35] Conversely, codes that apply to more than one of the mining, agriculture and construction sectors are listed in more than one annex.[36]

Utilisation of the HS is an innovative and effective approach to determining the scope of the MAC Protocol in relation to equipment. As the HS is also the basis of global trade statistics recorded in the United Nation's Comtrade database, it has the additional benefit of providing States with useful data in relation to the amount of MAC equipment within the scope of the Protocol that is annually imported and exported. For example, the total value of the MAC equipment covered by the Protocol exported globally in 2021 was 148 billion USD.[37]

Utilisation of the HS also allows the MAC Protocol to adapt its scope to accommodate future technological changes. Article XXXVI of the MAC Protocol allows for Contracting States to propose new HS codes to include within its scope, which allows the scope of the MAC Protocol to be expanded in the future to apply to new types of mining, agricultural and construction equipment that have not yet been invented. Similarly, Article XXXV provides a system for adjusting the HS codes in the MAC Protocol Annexes to accommodate revisions of the HS, which occur approximately every five years.[38]

2. Economic benefits of the MAC Protocol

Should the MAC Protocol become widely ratified to the same extent as the Aircraft Protocol, the estimated global economic benefits are significant. In 2018, UNIDROIT commissioned an independent economic assessment of the MAC Protocol, which was

of the MAC Protocol were effectively able to limit the MAC Protocol to the types of high value, commercially used equipment within the ambit of the 2001 Cape Town Convention. See R. Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Mining, Agricultural and Construction Equipment, Official Commentary,* para 3.15.

[35] For example, HS code 843410, which covers milking machines, is only listed in Annex 2, as milking machines are only used in the agriculture sector, and not in the mining and construction sectors.

[36] For example, HS code 870195 which covers tractors with an engine power exceeding 130kW (as noted above) is listed in all three annexes, as such tractors are used in all three sectors, mining, agriculture and construction.

[37] Comtrade, *UN Trade Statistics Database,* (2023), https://comtrade.un.org/data (Last accessed: 29.12.23.), data extracted on 18 July 2023.

[38] The HS codes listed in the MAC Protocol annexes are consistent with the current HS revision, which came into force on 1 January 2022. See MAC Preparatory Commission, *2022 revision of the Harmonised System,* (2022), MACPC/5/Doc. 4, https://www.unidroit.org/wp-content/uploads/2022/11/MACPC5-Doc.-4-2022-Revision-of-the-Harmonized-System.pdf (Last accessed: 29.12.23.).

conducted by Warwick Economics and Associates.[39] The economists assessed how the implementation of the MAC Protocol will directly affect the credit market, the product market and subsequently create broader macroeconomic affects (as described in more detail in section 5 below).[40] The assessment found that, by strengthening the legal rights of the holders of international interests in MAC equipment, the MAC Protocol will reduce lending risks, reduce the cost of secured finance and increase the availability of secured finance. These direct effects in the credit market will increase the number of secured loans for purchases of MAC equipment, increase the demand for MAC equipment, increase sales of MAC equipment and increase the amount of MAC equipment stock being used around the world. Finally, the indirect effects of the MAC Protocol flowing from the direct impacts in the credit market and product market will increase productivity in the MAC sectors, lower the production cost of MAC equipment, increase trade and investment opportunities, create new business and employment opportunities, upskill workforces and create spillover effects in other sectors through supply chains.[41]

Ultimately, the independent economic assessment found that the global macroeconomic benefits resulting from the broad implementation of the MAC Protocol will be substantial. Warwick Economics found that, over a ten-year period, the MAC Protocol may increase the stock value of MAC equipment in developing countries by 90 billion USD and may have a positive impact of 23 billion USD in GDP in developing countries and 7 billion USD in developed countries, for a total increase in annual global GDP of 30 billion USD.[42] It is interesting to note that, of the predicted 30 billion USD increase in global annual GDP, 76% will flow to developing countries, while only 24% would flow to developed countries.

Three key conclusions can be drawn from the MAC Protocol economic assessment. First, by strengthening the legal rights of holders of international interests and thereby allowing creditors to increase the availability of finance for the acquisition of MAC equipment, the MAC Protocol will generate direct economic benefits for States that implement the treaty. Second, these economic benefits are significant for all States, but particularly for those where the mining, agriculture and construction sectors are larger contributors to GDP. Third, if widely implemented, the MAC Protocol has the potential to be the most economically significant Protocol of the Cape Town Convention, and possibly one of the most economically significant international commercial law treaties in history.

[39] Warwick Economics and Associates, *An Economic Assessment of the Fourth Protocols to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment,* (2018) 1, www.unidroit.org/english/documents/2018/study72k/1808-final-mac-protocol-ea.pdf (Last accessed: 29.12.23.) (MAC Protocol Economic Assessment).
[40] MAC Protocol Economic Assessment, 9.
[41] MAC Protocol Economic Assessment, 9 (Figure 1).
[42] MAC Protocol Economic Assessment, 1.

IV. Legal benefits of implementing the Mac Protocol for Czechia, Hungary, Poland and Slovakia (the Visegrad Group)

Czechia, Hungary, Poland and Slovakia are all UNIDROIT Member States.[43] However, none of these four central European countries have ratified the Cape Town Convention, nor its Aircraft Protocol. This is somewhat surprising, given that the Cape Town Convention has been ratified by 85 States around the world, including several other States in central Europe, such as Bulgaria, Latvia, Moldova, Romania and Ukraine. Similarly, while Czechia, Hungary, Poland and Slovakia[44] all participated in the negotiation of the MAC Protocol, none of these countries have signed nor ratified the MAC Protocol.

Given the significant legal and economic benefits that ratification of the Cape Town Convention and the MAC Protocol will have for implementing States (as described in sections 2 and 3 above), it would seem prudent for Czechia, Hungary, Poland and Slovakia to consider ratifying these treaties as a priority. To build support for this initiative, one possibility would be to make the ratification of the Cape Town Convention and MAC Protocol an economic cooperation initiative for the Visegrad Group.

1. An overview of the Visegrad Group

In 1991 the President of Czechia, the Prime Minister of Hungary, the President of Poland and the Prime Minister of Slovakia met in Visegrad, Hungary to form the "Visegrad Group". The high-level political meeting represented a historical link to a similar meeting between three Kings in 1335, the unifying factor being a desire to intensify mutual cooperation between this grouping of Central European States.[45]

[43] Czechia became a UNIDROIT Member State in 1993, Hungary in 1940, Poland in 1979 and Slovakia in 1993. See UNIDROIT, *Membership,* https://www.unidroit.org/about-unidroit/ (Last accessed: 29.12.23.).

[44] Czechia, Hungary, Poland and Slovakia all participated in at least one session of the MAC Protocol Committee of Governmental Experts negotiations in Rome in 2017. See UNIDROIT, *MAC Protocol Committee of Governmental Experts Reports* (2017), Study 72K – CGE1 – Report, Study 72K – CGE2 – Report, https://www.unidroit.org/english/documents/2017/study72k/cge01/s-72k-cge01-report-e.pdf (Last accessed: 29.12.23.), https://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-report-e.pdf (Last accessed: 29.12.23.). Additionally, Poland participated in the MAC Protocol Diplomatic Conference in Pretoria in 2019. See UNIDROIT, *MAC Protocol Diplomatic Conference Final Act* (2019), https://www.unidroit.org/wp-content/uploads/2022/10/FINAL-ACT-22-November-2019-complet.pdf (Last accessed: 29.12.23.).

[45] Visegrad Group, *History of the Visegrad Group,* https://www.visegradgroup.eu/about/history (Last accessed: 29.12.23.).

The Visegrad Group is a non-institutional regional arrangement formed between four States to facilitate political, economic and cultural cooperation. The founding 1991 Visegrad Declaration set out five basic objectives: (i) state independence, democracy and freedom; (ii) elimination of all aspects of the totalitarian system; (iii) construction of parliamentary democracy, the rule of law and respect for human rights; (iv) creation of a modern free market economy; and (v) integration into the European political and economic system.[46] In 2021, the four Prime Ministers of the Visegrad Group reaffirmed their commitment to the forum and to pursue close collaboration in areas of common interest, with a particular focus on: (i) society, economy and innovation; (ii) environment; energy and transport; (iii) internal and external security; and international cooperation and solidarity.[47]

The structure of the Visegrad Group is informal and is not institutionalised. It achieves its collaborative goals through joint projects coordinated between respective ministries in the four countries. Cooperation occurs at various levels, from junior officers to ministers and heads of state. Presidency of the Visegrad Group rotates annually between each of the four member countries. The only formal organisation within the Visegrad Group is the International Visegrad Fund, which was established in 2000 to support the civic dimension of the Visegrad cooperation, and has financed over 6000 projects related to cultural and scientific exchange, research, education, exchange of students and tourism.[48] The Visegrad Group also partners with other countries to launch joint projects as part of the V4+ initiative, which in recent years has included Romania and Bulgaria.

As a regional bloc, the Visegrad Group has significant weight. All Visegrad countries are members of the European Union (EU), the Northern Atlantic Treaty Organisation (NATO) and the Organisation for Economic Co-operation and Development (OECD). Their combined population is over 65 million, which represents 14% of the total EU population and translates to 108 members in the European Parliament. Economically, the Visegrad Group would be the 5th largest economy in Europe and the 12th largest in the world. Historically, GDP growth in the Visegrad Group has exceeded EU averages, which would indicate that its collective economic strength is only growing.[49]

[46] Visegrad Group, *Visegrad Declaration of Cooperation 1991,* https://www.visegradgroup.eu/documents/visegrad-declarations/visegrad-declaration-110412 (Last accessed: 29.12.23.).

[47] Visegrad Group, *Declaration of the Prime Ministers of the Czech Republic, Hungary, the Republic of Poland and the Slovak Republic on the Occasion of the 30th Anniversary of the Visegrad Group,* (17 February 2021), https://www.visegradgroup.eu/calendar/2021/declaration-of-the-prime (Last accessed: 29.12.23.).

[48] Visegrad Group, *Aims and structure,* https://www.visegradgroup.eu/about/aims-and-structure (Last accessed: 29.12.23.).

[49] Hungarian Presidency to V4, *V4 Facts and Figures,* https://v4.mfa.gov.hu/page/v4-facts-infographics-tbc (Last accessed: 29.12.23.).

As an informal cooperative intergovernmental regional arrangement, the Visegrad Group is highly dependent on continual political support from each participating Government. In recent years, divergences between Visegrad countries on major political issues has inevitably put a strain on their cooperative efforts.[50] However, while political divisions currently exist, there does not appear to be any intention of dissolving the cooperative regional arrangement. Importantly, recent survey data suggests that the population in Visegrad Group countries is highly supportive of continued cooperation within the Visegrad Group.[51] Given that it has already survived for 30 years through an incredible period of cultural, economic and societal change for central Europe, it is suggested that it will remain a relevant entity into the future.

The Visegrad Group provides a useful lens through which to analyse the legal and economic benefits that the MAC Protocol could provide in central Europe. As just discussed, the MAC Protocol directly supports specific policy and economic initiatives undertaken by the Visegrad Group, and will drive economic growth within the regional grouping. On this basis, it is suggested that the Visegrad Group would benefit from including the implementation of the Cape Town Convention and MAC Protocol as part of their regional economic cooperation goals.

However, the benefits of implementing the MAC Protocol for each Visegrad country are not directly tied to it becoming a policy objective of the Visegrad Group (although this would undoubtedly help in prioritising ratification efforts in central Europe). As an international treaty, implementation of the MAC Protocol is a sovereign act undertaken by each individual State. If ratified by Czechia, Hungary, Poland and Slovakia, it will individually improve the domestic legal frameworks of each Visegrad country. If all four Visegrad countries implement the MAC Protocol, it will create a uniform legal framework for the financing of MAC equipment to facilitate cross-border financing and trade within the regional grouping, as well as with the rest of the world. As such, the legal and economic benefits of implementing the MAC Protocol can be seen as simultaneously national (for each Visegrad Group country individually), regional (for the Visegrad Group as a whole), and international (for the global economy).

[50] Politico Europe, *The not-so-fantastic 4: Central Europe's divided Visegrad alliance* (2022), https://www.politico.eu/article/central-europe-divided-visegrad-v4-alliance/ (Last accessed: 29.12.23.).

[51] A 2021 survey of citizens in the Visegrad Group countries found a strong majority of the population indicated that the "Visegrad Group was still important and had a mission to fulfil". 82% of Hungarian respondents, 78% of Slovakian respondents, 71% of Czech respondents and 59% of Polish responded answered positively, which represented an increase in support for the Visegrad Group in all countries as compared to a similar survey undertaken in 2015. See Bratislava Institute for Public Affairs, *Visegrad Four as Viewed by the Public* (2021), page 18 graph 3, https://www.visegradgroup.eu/documents/other-articles/key-findings25-years-of-160601 (Last accessed: 29.12.23.).

2. Secured transactions, legal frameworks and access to credit in the Visegrad Group

As set out in section 2 of this article, the MAC Protocol will create a uniform legal regime for the creation, protection and enforcement of international interests in MAC equipment in each State that ratifies the treaty. This international legal regime is not dependent on the domestic secured transactions regime in force in the Contracting State. If all four States ratified the MAC Protocol, each would improve access to finance for their domestic mining, agricultural and construction companies, and create new investments and export opportunities for their finance and manufacturing industries, regardless of the efficacy of their existing domestic law regimes.

While the CTC and MAC Protocol operates largely independently from domestic secured transactions law regimes in Contracting States, the extent of the legal and economic benefits created by the Cape Town Convention in the Visegrad Group will depend on how much more effective its legal rules are in creating, protecting and enforcing secured rights than those existing domestic law frameworks. For States that already have a modern and strong domestic legal regime for the creation, protection and enforcement of legal rights in movable equipment, which reflects the standards of the MAC Protocol, its introduction will result in a more modest improvement in the legal framework (to the extent it will create certainty in relation to international transactions and internationally mobile assets). Hence, a brief examination of the current domestic legal regimes in Czechia, Hungary, Poland and Slovakia needs to be undertaken to determine how large the legal (and thus economic) benefits could be.

Each of the Visegrad countries has undertaken some degree of secured transactions legal reforms in recent years. This next section will provide a brief survey of the recent reforms, describing their main features. The success of the reforms will then be assessed, using international measures such as the EBRD Core Principles for a Secured Transactions Law,[52] and the more recent World Bank Ease of Doing Business (EODB) Getting Credit Strength of Legal Rights Index.[53] The latter framework measures the legal rights of borrowers and lenders with respect to secured transactions through one set of indicators and the reporting of credit information through another. In particular, the Strength of Legal Rights Index measures whether certain features that facilitate lending exist within the applicable collateral and bankruptcy laws.[54]

[52] European Bank for Reconstruction and Development, *Core Principles for a Secured Transactions Law* (1997), https://www.ebrd.com/what-we-do/legal-reform/access-to-finance/transactions.html (Last accessed: 29.12.23.).

[53] World Bank, *Ease of Doing Business Rankings, Getting Credit* (2020), https://subnational.doingbusiness.org/en/data/exploretopics/getting-credit/what-measured (Last accessed: 29.12.23.).

[54] The data used by the World Bank to assess a country's Getting Credit score was obtained using a questionnaire administered to financial lawyers and verified through analysis of laws and regulations as well as public sources of information on collateral and bankruptcy laws. Questionnaire responses

While the World Bank suspended the Ease of Doing Business Index in late 2021 after 18 years of operation,[55] the index retains value as a limited tool for assessing the basic features of each country's legal framework for secured transactions. Furthermore, as of August 2023, it has not been replaced or superseded by any other internationally accepted framework, so for the moment, it's the best comprehensive index that exists.

In Czechia, a significant legal reform was passed in 2015, which provided for the creation, registration and enforcement of secured interests in tangible movable assets by way of pledge, security transfer of title, retention right or reservation of title.[56] Registration of an interest in an asset can be made in the Registry of Pledges. The reform also strengthened creditors rights by providing for out of court enforcement of registered interests.[57] These reforms resulted in a tangible improvement in the rights of creditors, making it possible to recover 80% of the value of an asset held as collateral within six months of a debtor's non-payment. Nevertheless, Czechia scores only 7 out of 12 on the World EODB Getting Credit Strength of Legal Rights Index, because (i) it does not have a unified legal framework for secured transactions, (ii) security rights cannot be extended to future assets and they do not automatically extend to proceeds, (iii) Czechia does not have a modern, online notice-based collateral register for functionally equivalent secured interests, and (iv) the law does not protect secured creditors' rights by providing clear grounds for relief or a time limit to enforcement stays during reorganisation procedures.[58] In relation to insolvency, Czechia has a recovery rate of 67.5 cents on the dollar and insolvency procedures take 2.1 years on

were verified through several rounds of follow-up communication with respondents, as well as by contacting third parties and consulting public sources. The questionnaire data was confirmed through teleconference calls or on-site visits in each economy. See World Bank, *Ease of Doing Business Rankings, Getting Credit* (2020), https://subnational.doingbusiness.org/en/data/exploretopics/getting-credit/what-measured (Last accessed: 29.12.23.).

[55] See World Bank, *World Bank Group to Discontinue Doing Business Report* (16 September 2021), https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report (Last accessed: 29.12.23.); G. McCormack, Why Doing Business with the World Bank may be Bad for You, (2018) 19 *European Business Organization Law Review,* 649–676, https://link.springer.com/article/10.1007/s40804-018-0116-4#Sec4 (Last accessed: 29.12.23.) DOI: https://doi.org/10.1007/s40804-018-0116-4; M. Sharma, The "Ease of Doing Business" List Deserved to Die, *Bloomberg* (19 September 2021), https://www.bloomberg.com/opinion/articles/2021-09-19/world-bank-s-ease-of-doing-business-list-deserved-to-die#xj4y7vzkg (Last accessed: 29.12.23.).

[56] M. Krejčí, P. Koblovský and D. Sobek, Lending and taking security in the Czech Republic: overview, (2015) *Thomson Reuters,* https://uk.practicallaw.thomsonreuters.com/9-617-6908?transitionType=Default&contextData=(sc.Default)&firstPage=true (Last accessed: 29.12.23.).

[57] World Bank, *Doing Business, Getting Credit*, *Subnational Studies* (2019), https://subnational.doingbusiness.org/en/data/exploretopics/getting-credit/reforms (Last accessed: 29.12.23.).

[58] World Bank Group, *Doing Business 2020 Czech Republic Economy Profile* (2020), page 34, https://archive.doingbusiness.org/content/dam/doingBusiness/country/c/czech-republic/CZE.pdf (Last accessed: 29.12.23.).

average to resolve.[59] Despite the legislative reforms and the World Bank assessing Czechia as having a strong insolvency framework, in 2019 asset recovery for secured creditors was just above 20% for bankruptcies and 60% for reorganisations.[60]

Similarly to Czechia, Hungary adopted a new legal regime on secured transactions in 2015, which implemented a functional approach to secured transactions, extended security interests to the products and proceeds of the original asset, and established a unified and notice-based collateral registry.[61] Under Hungarian law, a pledge may be established over assets, bank accounts, any type of receivables, shares (quotas) or intellectual property rights. In order to be valid and enforceable, the relevant security needs to be registered in Hungary's collateral registry, which allows the registration of bank account pledges, receivables pledges, movable assets pledges, share pledges and security assignments of receivables.[62] The 2015 reform also allowed for out of court enforcement in relation to registered security rights.[63] While the priority of security interests under domestic law is determined by the order of registration (consistent with the MAC Protocol's approach to priority between competing registered international interests), if the debtor becomes insolvent then all creditors enjoy the same security (regardless of whether they are the junior or senior creditor) and the proceeds from insolvency are settled proportionally.[64] Hungary scores an impressive 9 out of 12 on the EODB Getting Credit Strength of Legal Rights Index, with the World Bank only marking Hungary down on the basis that (i) Hungary's legal framework does not allow businesses to grant a non-possessory security right without requiring a specific description of collateral, (ii) it does not have a modern collateral registry that allows for online registrations, amendments, cancellations and searches, and (iii) Hungarian law does not protect secured creditors' rights by providing clear grounds for relief or a time limit to enforcement stays during reorganisation

[59] World Bank Group, *Doing Business 2020 Czech Republic Economy Profile* (2020), page 59, https://archive.doingbusiness.org/content/dam/doingBusiness/country/c/czech-republic/CZE.pdf (Last accessed: 29.12.23.).

[60] PRK Partners, *Chambers Global Practice Guide: Banking and Finance – Czech Republic* (2019), page 12, https://www.prkpartners.com/files/013-czech-republic.pdf (Last accessed: 29.12.23.).

[61] World Bank, *Doing Business, Getting Credit, Subnational Studies* (2019), https://subnational.doingbusiness.org/en/data/exploretopics/getting-credit/reforms (Last accessed: 29.12.23.).

[62] Chambers and Partners, *Project Finance in Hungary 2022,* https://practiceguides.chambers.com/practice-guides/comparison/709/9734/15629-15630-15631-15632-15633-15634-15635-15636-15637 (Last accessed: 29.12.23.).

[63] Hungary, *Secured Transactions Law Reform Project,* https://securedtransactionslawreformproject.org/reform-in-other-jurisdictions/europe/hungary/ (Last accessed: 29.12.23.).

[64] Chambers and Partners, *Project Finance in Hungary 2022,* https://practiceguides.chambers.com/practice-guides/comparison/709/9734/15629-15630-15631-15632-15633-15634-15635-15636-15637 (Last accessed: 29.12.23.).

proceedings.[65] However, insolvency recovery rates remain relatively low in Hungary, with 2020 data indicating that creditors only recover 44.2 cents on the dollar and that most insolvency proceedings take two years to resolve.[66]

Poland was a relatively early adopter in establishing a register for pledges in 1996.[67] A distinct electronic registry was subsequently set up for the registration of security interests in movables, including specified assets and a pool of floating assets.[68] Creditors that register pledges can recover their debts through both court enforcement and out of court enforcement if the pledge agreement so provides;[69] however, self-help repossession of collateral remains prohibited.[70] Despite these reforms, Poland only scores 7 out of 12 on the EODB Getting Credit Strength of Legal Rights Index, because (i) Poland does not have a unified legal framework for secured transactions, (ii) it does not have a modern, online notice-based collateral registry for functionally equivalent secured interests, (iii) secured creditors are subordinated to other claims upon debtor default and (iv) the law does not protect secured creditors' rights by providing clear grounds for relief or a time limit to enforcement stays during reorganisation proceedings.[71] Insolvency recovery rates are somewhat higher in Poland, at 60.9 cents on the dollar, although insolvency proceedings take an average of three years to resolve.[72]

Slovakia too has a strong history of secured transactions law reform. In 2003, it passed a secured transactions law reform based on the EBRD Model Law on Secured Transactions, which at the time *The Economist* called "the world's best rules on

[65] World Bank Group, *Doing Business 2020 Hungary Economy Profile* (2020), page 35, https://archive.doingbusiness.org/content/dam/doingBusiness/country/h/hungary/HUN.pdf (Last accessed: 29.12.23.).

[66] World Bank, *Ease of Doing Business Resolving Insolvency. Hungary* (2020), https://archive.doingbusiness.org/en/data/exploretopics/resolving-insolvency (Last accessed: 29.12.23.).

[67] European Bank for Reconstruction and Development, *Poland Law on Registered Pledges and the Pledge Registry,* (English translation provided by Commercial Law Centre Foundation) (1996), https://www.ebrd.com/downloads/legal/core/polandls.pdf (Last accessed: 29.12.23.).

[68] Secured Transactions Law Reform Project, *Poland,* https://securedtransactionslawreformproject.org/reform-in-other-jurisdictions/europe/poland/ (Last accessed: 29.12.23.).

[69] Restructuring and insolvency in Poland: overview, (2012) 4, https://uk.practicallaw.thomsonreuters.com/4-380-8479?transitionType=Default&contextData=(sc.Default)&firstPage=true (Last accessed: 29.12.23.).

[70] Art. 777 of the Polish Code of Civil Procedure allows the debtor to issue a notarised statement that they voluntarily submit themselves to enforcement in favour of a designated creditor directly from the notarial deed. This allows the creditor, in the event of default, to commence the enforcement procedure without the need for lengthy court proceedings. M. Wojtasik and M. Iwaniak, *Typical Security for Corporate Financing in Poland, The Legal 500* (2021), https://www.legal500.com/developments/thought-leadership/typical-security-for-corporate-financing-in-poland/ (Last accessed: 29.12.23.).

[71] World Bank Group, *Doing Business 2020 Poland Economy Profile* (2020), page 33, https://archive.doingbusiness.org/content/dam/doingBusiness/country/p/poland/POL.pdf (Last accessed: 29.12.23.).

[72] World Bank Group, *Doing Business 2020 Poland Economy Profile* (2020), page 58, https://archive.doingbusiness.org/content/dam/doingBusiness/country/p/poland/POL.pdf (Last accessed: 29.12.23.).

collateral".[73] The Slovakian law satisfied all ten of the EBRD secured transaction principles, including public registration of the secured asset, clear priority of title and low cost of enforcement. Furthermore, the new law was relatively effective; hundreds of thousands of interests have been filed in the register and, following the reform, it was possible to recover at least 80% of the market value of the asset taken as security in six months or less.[74] Identically to Czechia, Slovakia only scores a 7 out of 12 on the EODB Getting Credit Strength of Legal Rights Index. The World Bank marked Slovakia down on the basis that (i) Slovakia does not have a unified legal framework for secured transactions, (ii) security rights cannot be extended to future assets and does not automatically extend to proceeds, (iii) Slovakia does not have a modern, online notice-based collateral registry for functionally equivalent secured interests, and (iv) the law does not protect secured creditors' rights by providing clear grounds for relief or a time limit to enforcement stays during reorganisation proceedings.[75] Insolvency recovery rates also remain relatively low at 46.1 cents on the dollar and most insolvency proceedings take a lengthy four years to resolve.[76]

3. The legal benefits of the MAC Protocol for the Visegrad Group

Compared to an OCED high-income economy average of 6.1 out of 12 on the Getting Credit Strength of Legal Rights Index, in 2020 Czechia scored 7, Hungary scored 9, Poland scored 7 and Slovakia scored 7 respectively. As noted above, while these scores should be viewed with some caution, they provide a useful basic measurement regarding the comparative strength of the secured transactions legal frameworks in the Visegrad Group.

On the basis of the work of the World Bank, the EBRD and assessments undertaken by academics and expert practitioners, it is clear that the Visegrad Group countries have significantly improved their laws over the past quarter of a century in order to improve access to credit. They have all now have reformed and operational legal frameworks that are generally aligned with the core tenets of the Cape Town Convention and MAC Protocol; simple priority rules based on registration in an

[73] The Economist, *Slovak Solution,* (23.01.2023), https://www.economist.com/finance-and-economics/2003/01/23/slovak-solution (Last accessed: 29.12.23.).

[74] C. Calomiris, M. Larrain, J. Liberti and J. Sturgess, How collateral laws shape lending and sectoral activity, (2015) *Journal of Financial Economics,* 11–12, https://hermes-ir.lib.hit-u.ac.jp/hermes/ir/re/27317/wp020.pdf (Last accessed: 29.12.23.), DOI: https://doi.org/10.3386/w21911; EBRD, *Enforcing secured transactions in central and eastern Europe: an empirical study,* (2008), https://www.ebrd.com/downloads/legal/secured/enf.pdf (Last accessed: 29.12.23.).

[75] World Bank Group, *Doing Business 2020 Slovak Republic Economy Profile* (2020), page 31, https://archive.doingbusiness.org/content/dam/doingBusiness/country/s/slovakia/SVK.pdf (Last accessed: 29.12.23.).

[76] Ibid. 56.

electronic registry and strong enforcement rules that are effective if the debtor defaults or even becomes insolvent. As such, the difference between the legal rules in the MAC Protocol and the domestic law secured transactions rules in the Visegrad Group is smaller than in many developing countries and emerging markets that have not undertaken modern reforms.

However, there are still several areas where the MAC Protocol would strengthen the legal frameworks in the Visegrad Group countries if implemented, which will translate to significant economic benefits. In particular, the MAC Protocol would represent an improvement to the domestic legal regime in relation to secured interests in MAC equipment by (i) providing a simple and functional approach to the creation of interests, (ii) strengthening enforcement rights on debtor default, (iii) strengthening enforcement rights in insolvency and (iv) creating a uniform cross-border framework. Each of these benefits will be briefly explained.

First, the MAC Protocol provides a simple, clear and functional approach for the creation of international interests in relation to security agreements, retention of title agreements and leases. While all four Visegrad Group countries have online registers for pledges and certain other types of secured transactions, only Hungary has been assessed by the World Bank as having a modern, online notice-based collateral registry for functionally equivalent secured interests. Through its functional approach, the MAC Protocol will provide better protection for creditors for a broader range of legal interests in MAC equipment (including leases), thereby decreasing the cost of credit.

Second, the MAC Protocol will clarify and strengthen the enforcement rights of creditors upon the default of the debtor. The Cape Town Convention and MAC Protocol explicitly provide that, upon debtor default, a creditor may take possession of the MAC equipment, sell the equipment, lease it and (should the Contracting State so declare) export it from the country. Furthermore, the MAC Protocol allows Contracting States to further strengthen the position of the creditor by permitting creditors to apply for interim relief pending final determination of a claim, and to enforce their rights out of court. While many of these default remedies are available under the domestic law regimes in the Visegrad Group, the MAC Protocol improves the position of the creditor significantly by clearly allowing for interim relief and out of court enforcement, two remedies which have some limitations in the Visegrad Group.

Third, insolvency proceedings take an average of 2.8 years to resolve across the Visegrad Group countries (2.1 years in Czechia, 2 years in Hungary, 3 years in Poland and 4 years in Slovakia), which is well above the 1.7 year OECD high income economy average. If each Visegrad Group country makes a declaration under Article X of the MAC Protocol, allowing the creditor to take possession of MAC equipment within a "waiting period" upon the debtor's insolvency, the MAC Protocol would significantly increase the legal strength and economic value of international interests. Moreover, if

the four countries were to follow the 70% of Aircraft Protocol Contracting States in declaring a waiting period of between 30 – 60 calendar days under Article X, the MAC Protocol could allow creditors to receive financial relief or repossess assets 94% more quickly than it would take to resolve the insolvency procedure under their domestic insolvency law. Again, by strengthening legal protection for the creditor, the MAC Protocol will reduce the cost of credit and create economic benefits for Visegrad Group countries.

Fourth and perhaps most importantly, the MAC Protocol will apply a best practice legal framework for financing mining, agricultural and construction equipment across all Visegrad Group countries. If all of them ratify the MAC Protocol, a bank in Poland could finance the purchase of a fleet of new tractors for a large farm in Slovakia, with confidence that its legal interests would be enforceable. A construction company could move a crane from Hungary to Czechia to undertake a new project without concern that the cross-border movement of the asset might affect the lease agreement over the crane. A consortium of financiers could offer cheaper credit in relation to a retention of title agreement for high value drilling equipment to establish a new mining operation in Poland. Of course, these cross-border legal benefits would not just be limited to the Visegrad Group if its member countries ratify the MAC Protocol. They would also connect the Visegrad Group to the broader international framework for MAC equipment, allowing the better access for local mining, agricultural and construction companies to cheaper foreign finance, and create new export opportunities for Visegrad manufacturing companies.

In concluding this section, it should also be noted that while the MAC Protocol would operate independently to domestic secured transaction law frameworks in Visegrad Group countries, there is the possibility of connecting them. Article XVI of the MAC Protocol allows Contracting States to designate a domestic entry point into the future International Registry for International Interests in MAC equipment. This would allow the Visegrad Group countries to connect their domestic collateral registries to the MAC Protocol, in order to allow creditors to register both domestic and international secured interests in MAC equipment. Linking the MAC Protocol with an effective domestic collateral registry is mutually beneficial for both registries, as it allows parties in the Contracting State to continue using the domestic framework with which they are familiar in order to register international interests (including in their native language), while also ensuring that the domestic registry does not suffer a decline in registrations once the MAC Protocol enters into force in that country.

V. Economic benefits of implementing the MAC Protocol for the Visegrad Group

By providing legal benefits in relation to the financing of mining, agricultural and construction enterprises in the Visegrad Group, the MAC Protocol will have significant economic benefits. The independent economic assessment of the MAC Protocol described its impact through a theory of changes with multiple orders of benefits.[77] Improving the legal framework for the financing of MAC equipment would first impact the credit market, second the product markets, third MAC equipment suppliers and supply chains, and finally the wider economy.

1. First Order Effects: Credit Market

By improving the legal protections provided to creditors who hold international interests in MAC equipment, the first order benefits of the MAC Protocol directly impact on the credit markets in Contracting States. Through the creation of an international security interest in the MAC equipment, recognised in all Contracting States, creditors can obtain priority against subsequently registered and unregistered interests and protect their interest in the event of insolvency.[78] Accordingly, creditors can grant credit more confidently, increasingly the overall availability and decreasing the cost of credit.[79] Thus, the first order effects of the MAC Protocol on the credit market include a reduction in lending risk; reduction in cost and increase in availability of secured finance; increased demand from MAC sectors for new secured loans and refinance of existing unsecured loans; and potential for new entrants and instruments to enter the market.[80] For mining, agriculture and construction companies in the Visegrad Group, this will mean that more financiers would be willing to provide credit and invest in Visegrad companies, as well as offer lower cost credit, on the basis that their legal risk exposure will be reduced.

The Visegrad Group is an increasingly attractive destination for industrial investment as a region with rapidly developing infrastructure, stable legal systems, and a well-educated and highly qualified workforce.[81] Accordingly, the region is primed to capitalise on the increase in investment that flows from the ratification and

[77] MAC Protocol Economic Assessment, 9.
[78] Gabriel, The MAC Protocol: We Aren't There Yet – How Far Do We Have to Go? 67, DOI: https://doi.org/10.1080/2049761X.2015.1104842
[79] L. Gullifer, A comparison of the position of buyers under the Cape Town Convention, the three existing protocols and the draft MAC Protocol, (2017) (6) *Cape Town Convention Journal,* 1, DOI: https://doi.org/10.2139/ssrn.3146798.
[80] MAC Protocol Economic Assessment, 43.
[81] Polish presidency of the Visegrad Group July 2020 – June 2021: Presidency Programme, 19.

implementation of the MAC Protocol. The MAC Protocol will simplify and harmonise the legal lending framework, thereby removing the competitive disadvantage experienced by foreign lenders unfamiliar with local legal frameworks, with reduced transactional costs.[82] To some extent, the MAC Protocol may also increase access to finance for small and in particular medium enterprises (SMEs), which are vital within the Visegrad Group as the main source of job opportunities and innovation.[83] The Visegrad Group has demonstrated its desire to encourage investment in Visegrad Group SMEs at its investment forum.[84] At present, 70% of SMEs worldwide do not have access to finance at all and a further 15% are under-financed.[85] By expanding access to finance, the MAC Protocol encourages creditors to extend credit into this underserviced market. There is presently significant unmet demand for finance; if this demand can be met then there is scope for both immediate and broader market growth.[86] This is particularly critical within the context of the current and predicted shortage of workers, as technological progress and innovation will become increasingly vital to maintaining progress and competitive success.[87] This first order effect would also support the Visegrad Group policy objective of increasing access to finance through innovation in order to make the Visegrad Group region a destination for investment.[88]

2. Second Order Effects: Product Markets

The second order, or flow-on, benefits of the MAC Protocol include an increase in secured loans for purchases of MAC equipment, an increase in demand for MAC equipment and an accompanying increase in supply; and an increase in sales and the profitability of MAC equipment.[89]

The MAC Protocol's most fundamental benefit is increasing the ability for companies to acquire MAC equipment through the provision of more accessible and favourable credit. In 2021, the Visegrad Group imported $6.1 billion USD worth of

[82] P. Durham and M. Dubovec, More Good News from Cape Town: How the New MAC Protocol Will Benefit the Mining, Agriculture and Construction Industries, (2017) 35 (1) *Journal of Equipment Lease Financing,* 4.

[83] Dynamic Visegrad for Europe: Slovak presidency 2018/2019 of the Visegrad Group, 25–26, https://www.mzv.sk/documents/10182/276214/Program+predsedn%C3%ADctva+Slovenskej+republiky+vo+Vy%C5%A1ehradskej+skupine+EN/ba84a58e-6b6a-4ad4-bdd0-3043d687c95b (Last accessed: 29.12.23.).

[84] Ibid.

[85] World Bank, (2018b), *Improving Access to Finance for SMEs: Opportunities through Credit Reporting, Secured Lending and Insolvency Practices,* May 2018 (4), see MAC Protocol Economic Assessment, 62.

[86] MAC Protocol Economic Assessment, 62.

[87] Programme for the Czech Presidency of the Visegrad Group 2019/2020: V4 Reasonable Europe, 3, https://www.mzv.cz/file/3572188/programme_CZ_V4_PRES_2019_2020.pdf (Last accessed: 29.12.23.).

[88] Ibid. 4.

[89] MAC Protocol Economic Assessment, 43.

MAC equipment within the scope of the MAC Protocol.[90] These figures demonstrate the existing importance of MAC equipment to companies in the region. By lowering the cost of credit for over $6 billion USD worth of equipment, the MAC Protocol will improve the financial viability, operational efficiency and profitability of thousands of enterprises across the Visegrad Group. The MAC Protocol would also be expected to increase imports of MAC equipment significantly into the Visegrad Group, over and above the $6 billion USD worth of equipment that is already imported annually.

The MAC Protocol's second order effects on product markets are not limited to increased imports. It would also provide new export opportunities for local equipment manufacturers in the Visegrad Group, as well as improve the secondary market, allowing companies to resell second hand equipment. In 2021, the Visegrad Group also exported $3.7 billion USD worth of MAC equipment within the scope of the MAC Protocol.[91] Interestingly, cross-border trade between the Visegrad Group countries in MAC equipment is also significant, accounting for $447 million USD in 2021. This represents 27% of Slovakia's total annual global MAC equipment exports and 16% of Czechia's total annual global MAC equipment exports. Accordingly, increasing imports and exports of MAC equipment will facilitate both regional and global trade for the Visegrad Group, contributing to greater shared prosperity.

3. Third Order Effects: MAC Sectors, equipment suppliers and supply chains

The third order, or indirect, benefits of the MAC Protocol affect the MAC sectors, MAC equipment suppliers and the entirety of the MAC supply chains. Within the MAC sectors, the benefits include changes in the size and quality of equipment stock and productivity gains from the deployment of more technologically advanced equipment stock. For MAC equipment suppliers, benefits encompass building economies of scale from the expansion of exports and productivity gains. Finally, the entirety of the supply chain will benefit from new business and employment opportunities, upskilling workforces, increased sales and profitability, increases in trade and investment opportunities, and the flow on of benefits to customers and end users, as well as the "spill-over" of technology and skills to other sectors via supply chains.[92]

[90] Specifically, Czechia imported $1.4 billion USD, Hungary imported $980 million USD, Poland imported $3.3 billion USD and Slovakia $440 million USD respectively. Data extracted from the United Nations, *Comtrade database* (2021 data), https://comtradeplus.un.org/ (Last accessed: 29.12.23.).

[91] Poland and the Czech Republic exported approximately $1.6 billion USD worth of MAC equipment, Hungary $280 million USD, and Slovakia $230 million USD, respectively.

[92] MAC Protocol Economic Assessment, 43.

The Visegrad Group region is a preeminent agricultural power within Europe. It has stated that it seeks to continue their successful cooperation and competitiveness in the face of challenges stemming from Brexit, EU Common Agricultural Policy reform, climate change and the economic fallout from the COVID-19 pandemic.[93] The MAC Protocol would directly support current Visegrad Group programmes that improve the economic conditions and productivity of farmers,[94] which has become particularly pertinent in light of the growing need to ensure food security in Europe.

The Visegrad Group has also indicated that it seeks to pursue infrastructure development,[95] with a focus on improving North-South connectivity by means of a high-speed railway network between their capitals.[96] By facilitating access to finance for construction equipment, the MAC Protocol would make it cheaper for companies to undertake large cross-border infrastructure projects, such as the construction of the envisaged high-speed railway line between their capitals.

4. Fourth Order Effects: Wider Economy

The fourth order effect of the MAC Protocol includes: an overall expansion in the productive potential of the Visegrad Group economies; an increase in total output and GDP; and an increase in the pace of human and economic development.[97] As noted earlier, the macro, wider economy effects of the MAC Protocol are globally significant, when considering the independent assessment that the treaty could increase global GDP by $30 billion USD per year. As a grouping of four high-income countries, the Visegrad Group would share in the $7 billion USD GDP benefits that are predicted to flow to developed countries. However, given that the Visegrad Group is a region that both imports and exports large amounts of equipment within the scope of the MAC Protocol, the benefits flowing to the Visegrad Group countries would be higher than those benefits flowing to countries that predominantly only export MAC equipment.

Following the COVID-19 pandemic, the Visegrad Group has reiterated the need to spearhead the region's economic recovery and crisis-resilience, whilst simultaneously recognising the need to focus on economic innovation and digitalisation.[98] The adoption of the MAC Protocol presents a critical opportunity for the region to continue to accelerate its growth and strength through its compounding economic growth via modernisation. Prompt adoption of the MAC Protocol would

[93] Programme of the Presidency, Hungary 2021–2022, 20.
[94] Programme for the Czech Presidency of the Visegrad Group 2019/2020: V4 Reasonable Europe.
[95] Dynamic Visegrad for Europe: Slovak presidency 2018/2019 of the Visegrad Group, 10.
[96] Hungarian Presidency to V4, *V4 Facts and Figures,* https://v4.mfa.gov.hu/page/v4-facts-infographics-tbc (Last accessed: 29.12.23.).
[97] MAC Protocol Economic Assessment, 43.
[98] Programme of the Presidency, Hungary 2021–2022, 11.

allow the Visegrad Group to continue to benefit from its relatively strong economic position during the COVID-19 crisis.[99]

Finally, from a broader global perspective, the MAC Protocol presents benefits outside of the region of the Visegrad Group. The Visegrad Group has supported the development of third countries, particularly in Africa and the Middle East.[100] Adoption of the MAC Protocol is predicted to benefit developing countries enormously, by increasing GDP by $23 billion USD and the stock of MAC equipment by $90 billion USD. Accordingly, the MAC Protocol aids in the achievement of several United Nations Sustainable Development Goals, including: Target 9.3 "increase the access of small-scale industrial and other enterprises, particularly in developing countries, to financial services including affordable credit and their integration into value chains and markets"; Target 17.3 "mobilize additional financial resources for developing countries from multiple sources" and; Target 17.5 "adopt and implement investment promotion regimes for least developed countries".[101] In this way, the ratification of the MAC Protocol would not only be in the narrow economic interests of just the Visegrad Group. Ratification of the MAC Protocol by the Visegrad Group would also broadly support development, improve living conditions and increase economic prosperity globally.

VI. Conclusion – The future of the MAC Protocol

In concluding this article, it appears prudent to assess the future success of the MAC Protocol and how the Visegrad Group could fit into this future. To enter into force, the MAC Protocol requires a functioning international registry for MAC equipment, a Supervisory Authority for the international registry, and five Contracting States. The 2019 Diplomatic Conference tasked a group of 16 States (the "MAC Preparatory Commission") to achieve these requirements, in order for the MAC Protocol to enter into force at the soonest possible time.

With the global COVID pandemic just around the corner, November 2019 was an inauspicious time for UNIDROIT to conclude an international treaty almost 15 years in the making. Despite the challenges posed by the pandemic, the MAC Preparatory Commission has made significant headway in relation to achieving the three requirements for entry into force. Following an intensive international procurement process, in January 2023, the MAC Preparatory Commission selected a preferred entity to build and operate the international registry for MAC equipment. The MAC Preparatory Commission is currently undertaking contract negotiations

[99] Review of major events under the 2021/2022 Hungarian presidency of the Visegrad Group, 3.
[100] Dynamic Visegrad for Europe: Slovak presidency 2018/2019 of the Visegrad Group, 15.
[101] United Nations Department of Economic and Social Affairs, the Sustainable Development Goals, https://sdgs.un.org/goals (Last accessed: 29.12.23.).

with the preferred entity, with an expectation that the registry will be operational by the end of 2025.

Similarly, having undertaken a comprehensive assessment of existing entities that could perform the Supervisory Authority function, in 2021 the MAC Preparatory Commission invited UNIDROIT to consider undertaking the role of Supervisory Authority. In May 2023 the UNIDROIT Governing Council recommended that UNIDROIT undertake the role, and the matter will be formally considered at the UNIDROIT General Assembly in December 2023. As such, it appears certain that two of the three requirements for entry into force will be achieved in the near future.

In relation to the third requirement, of five Contracting States, progress has been slower. Ratification efforts across the world were significantly hampered by the understandably higher governmental priority of protecting citizens from the global pandemic. As of August 2023, the MAC Protocol has been signed by five States (the Republic of Congo, the Republic of Gambia, the Federal Republic of Nigeria, the Republic of Paraguay and the United States of America), as well as the European Union,[102] although the MAC Protocol has no ratifications. As the world started to emerge from the COVID19 pandemic in late 2022, countries began to demonstrate an increased interest in MAC Protocol ratification. This increased interest has generated renewed hope that the MAC Protocol may have the five requisite Contracting States at the point at which the Registry becomes operational.

The ratification and implementation of the MAC Protocol by the four Visegrad Group countries would ensure the soonest possible entry into force of the MAC Protocol. Once ratified and in force, the MAC Protocol would produce substantial legal and economic benefits in Czechia, Hungary, Poland and Slovakia, as outlined in this article. The Visegrad Group has repeatedly emphasised their support for economic convergence and the removal of trade barriers to promote economic recovery, stability and growth.[103] The MAC Protocol would assist them in pursuing economic convergence; improving access to finance; increasing MAC equipment exports; growing its agriculture and infrastructure sectors to respond to current international economic challenges; and, finally, contributing to overall national and global economic growth. The Visegrad Group has also expressed interest in the ability of digitally smart solutions to facilitate such convergence,[104] and the MAC Protocol and Cape Town Convention exemplify these ideals.

[102] The European Union has competency for several areas of law under the MAC Protocol, which requires the EU to sign and ratify the MAC Protocol before any EU Member States can do so. As such, the EU signature of the MAC Protocol does not automatically sign the MAC Protocol on behalf of the 27 EU Member States, but it does allow each EU Member State to individually sign the MAC Protocol.

[103] Programme of the Presidency, Hungary 2021–2022, 11; Programme for the Czech Presidency of the Visegrad Group 2019/2020: V4 Reasonable Europe, 9.

[104] Dynamic Visegrad for Europe: Slovak presidency 2018/2019 of the Visegrad Group, 5.

Given the outstanding success of the Cape Town Convention and its Aircraft Protocol, coupled with the significant economic benefits that the MAC Protocol promises around the globe, it would appear that entry into force for the treaty is a question of when, rather than if. What is less certain is whether Czechia, Hungary, Poland and Slovakia will be among the first countries to benefit from the MAC Protocol through prompt ratification, or will lag behind other countries. Given the legal and economic benefits on offer, it is suggested that it would be of significant benefit for the Visegrad Group to be early adopters of the MAC Protocol, and to prioritise ratification as an urgent policy initiative.

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"To be or not to be an EU citizen?" Who qualifies as an EU citizen in the case law of the CJEU?

Abstract

The question of who is to be regarded as a citizen of the Union and, as such, who may exercise the rights conferred by EU citizenship is an important one and, despite its apparent simplicity, is often difficult to answer. Since EU citizenship is a status derived from Member State nationality, it seems reasonable to assume that anyone who can claim EU citizenship must necessarily be considered a national of a Member State and, conversely, that any national of a Member State is free to claim all or part of EU citizenship rights to which he or she is entitled. In practice, the question of the existence of EU citizenship status is often less clear-cut, as the case law of the European Court of Justice (hereinafter referred to as CJEU) has shown: both in cases of multiple nationalities and in cases of statelessness, there may be specific circumstances that are also decisive for the assessment of the existence of EU citizenship. This paper examines these "border areas" of EU citizenship, drawing on the case law of the CJEU.

Keywords: EU citizenship, multiple nationalities, statelessness, investor citizenship programmes

I. Introduction

Nationality, in the international legal sense, is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties".[1] Citizenship is a legal relationship between an individual and the State, based on reciprocity, involving rights and duties and implying a relationship of trust and proximity between the State and its citizens.[2] According to the Advisory Opinion of the Permanent Court of International Justice on the *Nationality Decrees issued in Tunis and Morocco,* the question of

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1 ICJ, *Nottebohm (Liechtenstein v. Guatemala),* 6 April 1955, ICJ Reports 1955. 23.

2 See e.g.: Szabó M., A többes állampolgárság – Új nemzetközi és uniós perspektívák felé?, (2013) (1–2) *Állam- és Jogtudomány,* 126. Several authors also cites the finding of the International Court of Justice; see e.g.: Sonnevend P., Állampolgárság, idegenjog, in Kende T., Nagy B., Sonnevend P. and

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nationality is essentially a matter for the domestic jurisdiction of States.[3] The European Convention on Nationality, promulgated in Hungary by Act III of 2002, states in the same spirit that "Each State shall determine under its own law who are its nationals".[4] Accordingly, in public international law, the question of granting nationality is essentially a matter of States' domestic affairs, and other States are obliged to accept the nationality rules of individual States "in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised concerning nationality".[5] This also means that the instruments of public international law have very little influence on the nationality practices of individual States.[6]

In legal terms, ideally, a natural person has one (and only one) nationality recognised by all other States, and, at the same time, all natural persons have a nationality (recognised by all other States).[7] However, there may be situations in which a natural person has the nationality of several States simultaneously (multiple nationality) or, on the contrary, has no nationality at all (statelessness). It is also possible that an individual has a nationality but, for some reason (typically persecution),[8] is unable or unwilling to seek the protection of the State of nationality.[9]

The Maastricht Treaty established the institution of EU citizenship.[10] According to Article 20(1) TFEU, "Every person holding the nationality of a Member State shall

Valki L. (szerk.), *Nemzetközi jog,* (Complex, Budapest, 2014) 513.; Ganczer M., *Állampolgárság és államutódlás,* (Dialóg Campus, Budapest–Pécs, 2013) 43.

3 PCIJ, *Nationality Decrees Issued in Tunis and Morocco (French Zone) on 8 November 1921,* 7 February 1923, 72.

4 See Article 3(1) of the Convention.

5 See Article 3(2) of the Convention.

6 Szabó M., A tagállami állampolgárság és az uniós polgárság viszonya: félúton vagy tévúton?, in Gyeney L. and Szabó M. (szerk.), *Az uniós polgárság jelene és jövője: úton az egységes európai állampolgárság felé?,* (Orac, Budapest, 2023) 17–33.

7 For a long time, jurisprudence (and practice) considered multiple nationality (or statelessness) to be something of an 'anomaly'. In today's globalised world, multiple nationality is increasingly accepted and there are fewer and fewer legal problems when a natural person holds the nationality of several States at the same time.

8 See e.g. Article 1(A)(2) of the 1951 Geneva Convention relating to the Status of Refugees. For an analysis of the concept, see e.g.: *Kézikönyv a menekült státusz meghatározására szolgáló eljárásról és az azzal kapcsolatos követelményekről a menekültek helyzetéről szóló 1951. évi Egyezmény és az 1967. évi Jegyzőkönyv alapján,* (Az Egyesült Nemzetek Menekültügyi Főbiztosának Hivatala, Genf, 1992) 8–18.

9 For completeness, it should be noted that in some cases the question of citizenship may also be linked to the question of recognition of citizenship. On this point, see e.g.: Ganczer M., Az állampolgárság más államok általi elismerése és az effektivitás elve, (2012) (1) *Állam- és Jogtudomány,* 29–62.

10 On the international and EU legal nature of EU citizenship, see e.g.: Á. Mohay and D. Muhvic, The legal nature of EU citizenship: Perspectives from international and EU law, in T. Drinóczi, M. Zupan, Zs. Ercsey and M. Vinkovic (eds), *Contemporary legal challenges: EU – Hungary – Croatia,* (Pécs and Osijek, 2012) 155–175. For a comprehensive analysis, see: Gyeney L., Európai uniós polgárság,

be a citizen of the Union".[11] The wording of the Maastricht Treaty implies that EU citizenship is not an institution in its own right but a derivative status conferred on persons holding the nationality of a Member State, notwithstanding the fact that EU citizenship otherwise includes partly separate rights (e.g., the right to petition) and partly complementary rights (e.g., the extension of the right to consular protection) to Member State nationality. However, since the institution of EU citizenship is directly linked to Member State nationality, CJEU case law on EU citizenship necessarily affects the framework of nationality laws of the Member States.

II. The invocability of existing nationality – The Micheletti Doctrine and the case law beyond

Under Article 3(2) of the European Convention on Nationality, while each State has the right to determine who its nationals are, "This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised concerning nationality". The CJEU takes the same approach, adding that EU Member States must also consider EU law when defining their nationality policies.[12]

In *Micheletti,* the CJEU ultimately had to decide, on the basis of the above, whether the authorities of a Member State (namely Spain) could choose to examine the application for a permanent residence permit of an Italian-Argentine dual national (Mario Vicente Micheletti) who had previously lived in Argentina by taking only the nationality of the applicant's habitual residence into account (in this case, Argentina). This was particularly important in Micheletti's case. As an Italian national, he would have been entitled to a permanent residence permit, but as an Argentine national, his application could have been legally rejected by the Spanish authorities. Based on the (recognised) principle of effectiveness in public international law, it is well established that, in the case of multiple nationalities, the nationality to be considered effective is with which the person concerned has a genuine connection (mainly because of habitual residence).[13]

in Jakab A., Könczöl M., Menyhárd A. and Sulyok G. (szerk.), *Internetes jogtudományi enciklopédia (IJOTEN),* (2020).

[11] For a comprehensive analysis, see: Szalayné Sándor E., Az uniós polgárság: Az EUM-Szerződés 20–25. cikkéhez fűzött kommentár, in Osztovits A. (szerk.), *Az Európai Unióról és az Európai Unió működéséről szóló szerződések magyarázata,* (Complex, Budapest, 2011) 1010–1043.

[12] Case C-369/90, *Micheletti,* Judgment of 7 July 1992, ECLI:EU:C:1992:295, 10. See e.g.: Szalayné Sándor E., *A személyek jogállása az uniós jogrendben,* (Nemzeti Közszolgálati Egyetem, Budapest, 2014) 39.

[13] For details, see e.g. Ganczer, *Állampolgárság és államutódlás,* 72.

The principle of effectiveness does not mean, however, that the host State does not recognise the other (ineffective) nationality of the person concerned but merely indicates that certain rights and obligations linked to nationality (e.g., in the context of diplomatic protection) only apply concerning one of the States of nationality (and thus ultimately to only one of the nationalities).

By requiring Member States in *Micheletti* to consider EU law in addition to public international law when making certain decisions on nationality (and ultimately EU citizenship), the CJEU has essentially established that the principle of effectiveness cannot result in a Member State's national being deprived of the exercise of his or her EU citizenship rights.

This approach is justified because 'ineffective' nationality is also an existing citizenship that can be 'revived' if necessary. Indeed, by wishing to exercise one of the rights of EU citizenship, an EU citizen ultimately 'revives' their nationality. In another approach, *Micheletti* also implies that EU Member States cannot call into question the nationality of another Member State in accordance with the rules of public international law.

For completeness, the CJEU decided *Micheletti* before the institution of EU citizenship was established. However, its conclusions are still relevant in the context of EU citizenship. The Micheletti doctrine applies to all situations where a person with multiple nationalities of a Member State and a third country would like to exercise EU citizenship rights. The fact that an EU citizen also holds the nationality of a third country should not affect their rights as an EU citizen. It is also true that tensions can quickly arise when people who were originally third-country nationals and who have acquired nationality through generous naturalisation rules move to a Member State other than their own when they settle in the EU. An example is the case of Moldovan-Romanian dual nationals who, having acquired Romanian nationality, have chosen Italy as their place of residence in large numbers as EU citizens, a natural consequence of the institution of EU citizenship.

If the issue of multiple nationality arises in an intra-EU context, the transnational nature of EU citizenship could, in principle, render the issue beyond debate. In such a case, the nationality of the Member State itself is decisive. The question of which Member State the person concerned is a national is only of secondary importance. This approach is attractive in theory. However, practice in the Member States varies considerably. While most Member States recognise the institution of multiple nationalities, others continue to require renunciation of their former nationality as part of the naturalisation process. There are also cases where acquiring another nationality can lead to the loss of the original citizenship. An example of the latter is the 2010 amendment to the Slovak Nationality Act, which has dire consequences for Hungarians in *Felvidék* (the historical Upper Hungary, now part of Slovakia) according

to which a person who voluntarily applies for and obtains another nationality based on an express declaration of will loses Slovak nationality at the same time.

However, such national legislation cannot be subject to the EU legal principles limiting the institutional and procedural autonomy of Member States, in particular the principle of effective judicial review, since 'Union citizenship' of the EU citizen is not affected.[14] Nationality of a Member State is, of course, of 'high value' from the point of view of Union citizenship and the rights attached to it. Therefore, it is legitimate to demand that Member States not allow the almost unlimited acquisition of their nationality, mainly when it serves exclusively economic ends and, above all, the interests of the natural person acquiring nationality. This is why the European Commission (and, shortly, the CJEU) is trying to crack down on the purchase of nationality (and hence EU citizenship) with money. The international legal basis for this action can be traced back to the *Nottebohm* judgment of the International Court of Justice, in which the ICJ stressed the 'genuineness' of the link between state and national in the context of providing diplomatic protection. At the same time, it is questionable, at least in public international law, to what extent a relationship based essentially on economic considerations can be considered genuine. Marcel Szabó cites the example of the naturalisation of elite athletes, which primarily benefits the State that grants nationality.[15] In contrast, the elite athletes who obtain nationality primarily receive financial (and competitive) opportunities. The concept of nationality for investment (or for money),[16] on the other hand, is based on the opposite approach: in this case, the real beneficiary of nationality is the national, while the benefits for the State are only indirect and budgetary.[17] In the EU, particularly in the case of Malta and Cyprus, establishing investor programmes granting nationality (especially for Russian nationals) became so popular that the European Commission has already decided to launch infringement proceedings in 2020.[18]

[14] The above requirements and legal consequences are difficult to interpret from the point of view of EU law, particularly regarding the fundamental nature of EU citizenship and the principle of equal treatment. They are, in any case, incompatible with the Treaty's objective of closer unity between the peoples of Europe.

[15] Szabó, A tagállami állampolgárság és az uniós polgárság viszonya: félúton vagy tévúton?, 23–24.

[16] For more details, see e.g.: Horváthy B., Befektetői állampolgársági programok és az uniós polgárság intézménye, in Ganczer M. and Knapp L. (szerk.), *Az uniós polgárság elmélete és gyakorlata,* (Gondolat, Budapest, 2022) 61–80; Schiffner I., The Golden Passport – avagy a befektetési programmal elérhető állampolgárság aktuális kérdései az Európai Unióban. (2021) (4) *Forum: Acta Juridica et Politica,* 257–274.

[17] See e.g.: J. Dzankic, To Sell or Not to Sell. The Ethics of Ius Pecuniae, in J. Dzankic (ed.), *The Global Market for Investor Citizenship,* (Palgrave Macmillan, 2019) 57–89. DOI: https://doi.org/10.1007/978-3-030-17632-7_3

[18] INFR(2020)2300 Cyprus investor citizenship scheme; INFR(2020)2301 Malta investor citizenship scheme. It is interesting to note that the two-month deadline for Member States to respond has long since passed, but even though there is no indication that the Commission has launched proceedings in

Concerning similar nationality programmes based on economic considerations, the CJEU must consider two aspects at the same time: on the one hand, Member States are, in principle, free to decide on nationality issues and, on the other hand, this freedom must not lead to the EU's interests being harmed. However, since the 'economic relationship' between the State and the national is not traditionally called into question in the case of the naturalisation of elite athletes, it would be difficult, at least objectively, to justify not accepting a relationship of an economic nature. This is why the Commission has only alleged that the nationality rules of the two Member States breach the principle of loyalty in its infringement proceedings against Malta and Cyprus.

Legal guidance for the Commission in this regard is provided by Advocate General Maduro's opinion in *Rottmann,* which argues that it would be contrary to EU law if a Member State, without consulting the Commission and the other Member States, were to carry out "an unjustified mass naturalisation of nationals of non-member States".[19]

It is also interesting to note that if, in the future, the CJEU were to follow the ICJ's *Nottebohm* judgment automatically, it could even conclude that nationals who acquired such status under investor programmes are not entitled to certain rights enjoyed by EU citizens. However, such an approach is, at best theoretical: while the ICJ's *Nottebohm* case focused on an exceptional legal instrument (i.e., the granting of diplomatic protection), which allows for thorough control of the conditions for granting diplomatic protection, the concept of the internal market implies that EU citizens should be free to exercise their rights with a minimum of control. It can be seen from the above cases that the CJEU, in its jurisprudence, considers the existence of nationality 'acquired for the purpose intended' as an absolute or even factual question that can be invoked in all cases, regardless of the principle of effectiveness under international law. While undoubtedly unconventional, this approach is highly desirable for the effective and uniform application *(effet utile)* of EU law and citizenship throughout the EU.

However, the situation is different concerning nationality 'acquired by abuse', which is already fundamentally at odds with EU law (or at least its spirit). Although the CJEU has not yet ruled on this point, it seems logical to include in the category of nationality "acquired in the interest of the State" those cases where nationality can be granted on the basis of an individual assessment of the relationship between the State and the individual (rather than on a mass basis).

Finally, concerning multiple nationality, it is important to note that linking EU citizenship to nationality does not have the effect of extending the scope of the TFEU

the CJEU, of the two Member States, only Cyprus has suspended its investor programme, and Malta has explicitly defended its legality.

[19] See para. 30 of the Advocate General's Opinion.

to purely internal situations. For example, the CJEU ruled in *McCarthy* that a dual national (British and Irish) who has lived in the UK all her life, who has not been employed or self-employed, cannot rely on EU law to obtain residence for her third-country spouse.[20]

EU citizenship is not intended to extend the scope of the TFEU to internal situations that are in no way connected with the Union.[21] Thus, as a general rule,[22] a cross-border element – mainly in the form of movement – is always required to invoke the provisions of the TFEU relating to Union citizenship, regardless of whether it is a question of past or potential future movement. It is precisely because of the element of past movement that the CJEU has held that, unlike in *McCarthy,* there is a cross-border element in the case of a British-Spanish dual national who, having moved from Spain to the United Kingdom and acquired British nationality, thereby naturalisation, sought to rely on EU law.[23]

Similarly, we can distinguish from *McCarthy* the *Garcia Avello* judgment[24] of the CJEU, which arose in a case concerning the registration of children with dual Spanish-Belgian nationality and in which the future movement of the children represented the cross-border element. *Garcia Avello* essentially concerns some issues regarding the right to a name: Carlos Garcia Avello, a Spanish national, and his wife, Isabelle Weber, a Belgian national, lived in Belgium, where they had two children (Esmeralda and Diego), both of whom had dual Spanish and Belgian nationality. Under Belgian law, the Belgian registrar of births and marriages had entered the father's surname (Garcia Avello) on the children's birth certificates. Still, the couple wanted the children's surnames to be Garcia Weber (i.e., the father's first surname and the mother's first surname). The question (which the CJEU answered in the affirmative, as mentioned above) was whether children of Spanish-Belgian dual nationality living in Belgium could invoke Spanish law as their personal law against the Belgian authorities.

In its judgment, the CJEU, therefore, held that children might rely on the prohibition of discrimination based on nationality in order not to be discriminated

[20] Case C-434/09, *McCarthy,* Judgment of 5 May 2011, ECLI:EU:C:2011:277.

[21] Joined cases C-64/96 and C-65/96, *Uecker and Jacquet,* Judgment of 5 June 1997, ECLI:EU:C:1997:285.

[22] An exception to this is the recent case law of the CJEU, referred to above, according to which citizenship of the Union and the rights deriving from it can be invoked in an essentially purely national situation, provided certain circumstances apply. In *Zambrano,* the CJEU emphasised that an EU citizen has the right to reside in the territory of the EU, i.e., not in a particular Member State, irrespective of whether he or she has previously exercised freedom of movement. Case C-34/09, *Zambrano,* Judgment of 8 March 2011, ECLI:EU:C:2011:124. However, certain issues relating to EU citizenship are not only of great importance from a nationality perspective in the case law of the CJEU. See e.g.: L. Gyeney, EU Citizenship: the bumpy road away from a market-oriented approach. An analysis of the Rottmann, Zambrano, McCarthy and Dereci cases, (2012) (2) *Iustum Aequum Salutare,* 141–164.

[23] Case C-165/16, *Lounes,* Judgment of 14 November 2017, ECLI:EU:C:2017:862.

[24] Case C-148/02, *Garcia Avello,* Judgment of 2 October 2003, ECLI:EU:C:2003:539.

against as regards the rules governing their surname, which constitutes an obstacle to their freedom of movement by depriving them of the effects of documents issued based on a surname recognised in another Member State.[25] The difference in surnames can therefore cause serious inconvenience and both professional and private disadvantages for the persons concerned,[26] which in some cases are a matter for national courts to determine.[27] The above judgments (in addition to our difficulties in understanding some of the issues related to EU citizenship) also reflect the intercultural tensions that arise from different surname practices in different jurisdictions.[28]

III. Extension of EU citizenship to certain cases of statelessness – the *Rottmann* and *JY* cases

In the previous chapter, the cases where a person already had the nationality of a Member State were the subject of analysis and classification. The question was thus merely whether a national of a Member State could enjoy the rights of Union citizenship. However, given the inherent freedom of each Member State to determine certain aspects of its citizenship policy, there may be cases where a former national of a Member State (and thus an EU citizen) becomes stateless. A key case on the legal status of (former) EU citizens who become stateless is *Rottmann*.[29] According to the facts of the case, Janko Rottmann, originally an Austrian national, exercised his right to free movement and residence and settled in Germany. He applied for naturalisation, but during the procedure, he concealed the fact that he was the subject of criminal proceedings in Austria. Mr Rottmann acquired German nationality, which (under Austrian law) meant that he lost his Austrian nationality. When the suppressed criminal proceedings were subsequently brought to the attention of the German authorities, Mr Rottmann's German nationality was retroactively withdrawn as having been fraudulently acquired. However, the withdrawal of the German nationality was

[25] However, the CJEU's sharp distinction between *McCarthy* and *Garcia Avello* may be more convincing. In *McCarthy,* the CJEU held that the mere fact that McCarthy had Irish nationality in addition to her British nationality did not entail the application of measures by the Member States which impeded the exercise of her right to move and reside freely within their territory. According to the legal literature, even if the distinction is based on the effect of the different measures, the impossibility of living with a spouse is no less an obstacle than the requirement to hold documents in a different name.

[26] Case C-353/06, *Grunkin and Paul,* Judgment of 14 October 2008, ECLI:EU:C:2008:559.

[27] Case C-391/09, *Runevic-Vardyn and Wardyn,* Judgment of 12 May 2011, ECLI:EU:C:2011:291.

[28] Király M., *Az Európai Unió gazdasági joga I.,* (ELTE Eötvös, Budapest, 2010) 87.

[29] Case C-135/08, *Rottmann,* Judgment of 2 March 2010, ECLI:EU:C:2010:104. For a detailed analysis of the case, see e.g. Gyeney, EU Citizenship: the bumpy road away from a market-oriented approach. An analysis of the Rottmann, Zambrano, McCarthy and Dereci cases, 141–164; Á. Mohay, The Rottmann case: new contributions to the links between EU citizenship and nationality, (2011) (2) *Jogesetek Magyarázata,* 50–58.

not accompanied by the 'revival' of Rottmann's former, Austrian nationality and Rottmann became a stateless person. In this case, the CJEU had to consider whether it is compatible with EU law to withdraw a nationality acquired by deception (fraud) if the result is that the person concerned becomes stateless and thus loses their EU citizenship. The CJEU first had to decide whether the case of Mr Rottmann, who was a stateless person at the time, fell within the scope of EU law, which the CJEU answered in the affirmative. According to the judgment, a situation in which the German authorities withdraw the German nationality acquired by naturalisation from a German national living in Germany falls within the scope of EU law "by reason of its nature and consequences" if, as a result of that decision, the person concerned also loses their status as an EU citizen.[30] The CJEU then had to consider two aspects (having established the relevance of the case to EU law). The first was that, following *Micheletti,* each Member State is free to decide on nationality matters within the limits of public international law (and EU law). This certainly includes the withdrawal of fraudulently acquired nationality. The second was that, by having his fraudulently acquired nationality withdrawn, Mr Rottmann not only lost his 'new' (German) nationality but also became stateless, which is a much more severe legal consequence than if he had 'only' had his newly acquired nationality withdrawn. Accordingly, the fact that the granting and withdrawal of nationality and the determination of the conditions for doing so are essentially matters for the Member States was not disputed in the CJEU's judgment.[31]

However, the CJEU also confirmed that Member States' powers are not unlimited: they must consider EU law when deciding whether to grant or withdraw nationality.[32] Thus, in the present case, although the withdrawal of Mr. Rottmann's German nationality may in itself be a matter of German domestic law, it is a matter of EU law that the legal consequences of the withdrawal of that nationality should not entail disproportionate legal consequences for Mr Rottmann. According to the CJEU, the latter aspect is a matter for the German court hearing the case: in the context of the proportionality of the deprivation of nationality, it must be examined whether, in the specific, individual case, *Rottmann* had sufficient time to regain Austrian nationality.[33]

In a sense, *JY* can be seen as a mirror image of *Rottmann*.[34] According to the facts of the case, JY, an Estonian national, applied for Austrian nationality and received a prior promise from the competent Austrian provincial government that he would be granted Austrian nationality if he could prove that he had lost his Estonian nationality

[30] See para. 42 of the Judgment.
[31] Ibid., para. 39.
[32] Ibid., para. 45.
[33] Ibid., para. 58.
[34] Case C-118/20, *JY,* Judgment of 18 January 2022, ECLI:EU:C:2022:34.

within two years. JY renounced his Estonian nationality on the basis of the promise, but Austria subsequently refused to grant him nationality because JY had committed several traffic offences (which were essentially fines and therefore not driving disqualifications) which, under Austrian law, precluded the Austrian authorities from granting him nationality.

As in *Rottmann,* the CJEU held that the case fell within the scope of EU law and that the Austrian court must therefore assess whether or not the legal consequence of not allowing the acquisition of Austrian nationality for offences punishable essentially by a fine, despite the Austrian government's prior declaration, was proportionate.[35] However, it is worth noting the Austrian government's argument that JY's situation is not covered by EU law because he is no longer an EU citizen. The CJEU rejected this argument on the basis of the principle of progressive integration, holding that an EU citizen who, by exercising his right to free movement, risks losing his EU citizenship by applying for nationality of another Member State, is, by definition, subject to EU law.[36]

The following conclusions can be drawn from the cases of *Rottmann* and *JY*. While it is clear from the ancillary nature of EU citizenship that only nationals of Member States can enjoy EU citizenship if the loss of nationality is not in accordance with EU law (in particular because of the disproportionate nature of the loss of nationality and thus of EU citizenship as a legal consequence), the legality of the Member State's action leading to the loss of nationality must be assessed on the basis of EU law. This also means that although the CJEU cannot override the derivative nature of Union citizenship and cannot guarantee the enjoyment of Union citizenship rights to persons who do not hold the nationality of any Member State at a given time if the loss of nationality is considered disproportionate, the national court must ultimately declare the act of the Member State that deprived the citizen of their nationality of being unlawful.

IV. Automatic loss of nationality (and EU citizenship) – the *Tjebbes* case

Withdrawal of nationality (and ultimately EU citizenship) can not only be made by individual decision but also at a general, legislative level, as the example of *Tjebbes* shows.[37] Independently of each other, four natural persons who had previously held

[35] Ibid., para. 74.

[36] On the case, see e.g.: Schiffner I., A Rottmann-ügy öröksége, avagy az uniós polgárság elvesztésének új kérdései a JY v. Wiener Landesregierung ügy alapján, (2021) (1) *Forum: Acta Juridica et Politica,* 93–111.

[37] Case C-221/17, *Tjebbes,* Judgment of 12 March 2019, ECLI:EU:C:2019:189. On the case, see e.g.: L. Gyeney, Challenges arising from the multi-level character of EU citizenship: The legal analysis of the

Dutch nationality and a Dutch passport but had been living outside the Netherlands let their passports expire and only applied for the renewal of their passports years later. However, the Dutch authorities found that all four applicants had automatically lost their nationality without further notification, as they were all multiple nationals (i.e., they could not become stateless after losing their Dutch nationality) and had lived outside the EU for more than ten years. This ten-year period would have been interrupted by the application for a new passport, but in the present case this ten-year-period had already passed without any result. The refusals were challenged by the persons concerned, and the Dutch court hearing the case asked the CJEU whether the Dutch rule, which automatically (and possibly without informing the former national) terminates Dutch nationality when certain conditions are met, without any form of assessment of the individual circumstances of the natural persons concerned, is compatible with EU law.

The CJEU (as in the previous cases) did not dispute that the Dutch legislation fully complied with the requirements of international law, in particular because the persons concerned did not become stateless.[38] However, for the loss of nationality (and thus EU citizenship), an additional requirement of EU law is that the act of a Member State resulting in the loss of EU citizenship must meet the proportionality requirement.[39] This can only be achieved if the legislation allows for assessing the individual circumstances of the persons concerned.[40] The approach of the CJEU in *Tjebbes* is essentially the same as in *Rottmann,* notwithstanding the fact that *Rottmann* was based on an individual decision of a public authority. In contrast, *Tjebbes* was based on domestic law. However, while, the authorities can easily carry out an examination of the individual circumstances of the (former) EU citizen concerned in the case of an individual administrative decision, in the case of a legislative provision of a general nature the above requirements can most likely be met only by national legislation. This is all the more true as there is no legal provision at EU level on the procedures for granting or refusing nationality that could be invoked by national authorities on the basis of the primacy of EU law, setting national law aside where appropriate.

Delvigne and Tjebbes cases, (2020) *Hungarian Yearbook of International Law and European Law,* 276–298. DOI: https://doi.org/10.5553/HYIEL/266627012020008001017

[38] See paras 34–37 of the Judgment.

[39] In their application, the plaintiffs in the main proceedings complained, among other things, that Dutch law prohibits the national courts from taking into account other circumstances which may justify the existence of a genuine link, such as knowledge of Dutch, the maintenance of family and/or emotional ties in that Member State and the exercise of the right to vote in Dutch elections.

[40] See para. 41 of the judgment. The CJEU mentions, for example, the possibility of restoring nationality with *ex tunc* effect. See para. 42 of the Judgment.

V. Loss of EU citizenship in the light of the international treaties governing Brexit

As well as posing severe economic and political challenges for the United Kingdom and, of course, for the Union itself, the UK's exit from the EU in 2020 has raised several other issues affecting the daily lives of citizens of the States concerned. Perhaps the most intriguing of these has been the question of whether UK nationals would lose their EU citizenship rights for good after Brexit and how the exit would affect the lives of many EU citizens who reside or wish to reside in the UK.[41]

Article 20 TFEU is very vague about EU citizenship, saying only that anyone who is a national of a Member State is an EU citizen. There are three ways of acquiring EU citizenship: by birth, by naturalisation (when a natural person from a third country acquires the nationality of an EU Member State), or by the accession of a new Member State to the EU. Brexit can be seen as the reverse of the latter, with the not insignificant difference that the loss of EU citizenship is not generally regulated by EU law. However, for the purposes of the legal concept of EU citizenship, it follows directly that EU citizenship requires the possession of the nationality of a Member State, which necessarily implies not only the possession of nationality but also the existence of EU membership. However, Brexit has had a strong impact not only on the EU citizenship status of UK citizens but also on the status of EU citizens residing in the UK. According to the European Commission's 2020 report, the Brexit referendum, which led to the UK leaving the EU, has affected the lives of around 3.7 million EU citizens living in the UK, in particular their rights to move, reside and vote.[42]

After the end of the transition period, from 1 January 2021, the free movement of EU citizens in the UK ceased, which has been extremely sensitive for the masses of EU citizens then present in the UK, precisely because of the rights that come with EU citizenship. It is therefore not surprising (if only from a political and economic point of view) that the UK has given EU-27 citizens already living in the UK on 31 December 2020 the opportunity to register with the EU Settlement Scheme (EUSS) by 30 June 2021 at the latest. EU Citizens who had been resident in the UK continuously for at least five years could apply for 'settled status', while those who had been resident for less

[41] For more on the situation of EU citizens after Brexit, see e.g.: P. Mindus, *European citizenship after Brexit,* (Palgrave Macmillan, 2017) and É. Gellérné-Lukács, Á. Töttös and S. Illés, Free movement of people and the Brexit, (2009) 65 (4) *Hungarian Geographical Bulletin,* 421–432. DOI: https://doi.org/10.15201/hungeobull.65.4.9

[42] *EU Citizenship Report 2020,* https://mycitizenrights.eu/files/en/Citizen-Report-EN.pdf (Last accessed: 29.12.2023.) 5.

than five years could apply for 'pre-settled status' (which could be converted to 'settled status' after five years of continuous residence[43]).

The EU settlement scheme has been successful for many. The UK has granted 'status' to over six million EU citizens under the EU settlement scheme.[44] For completeness, however, it should be noted that the scheme's implementation is far from seamless. One of the main practical difficulties is that individuals have to apply explicitly for a change of status from pre-settled to settled status, failing which they may ultimately lose their right to reside legally in the UK.[45] Indeed, many of those with pre-settled status in the UK are unaware that they have to make a new application and, precisely because of the individual deadlines (as opposed to the previous general deadline), only find out afterward that their status has now been terminated.[46]

In light of the above, there is no doubt that Brexit, and in particular its protraction, has left deep scars on European integration, nor is there any doubt that restoring the free movement of persons between the UK and the EU in its previous form is not a realistic alternative, even if it means that the UK will also reduce the rights of its own nationals.[47] At the same time, of course, we must also recognise that the UK's emerging status already has a more or less well-established historical precedent, such as the relationship between the EU and Switzerland, where the parties have regulated the free movement of persons through bilateral treaties. However, if the (political) intention of the UK government is to take the UK out of the EU, it is questionable whether the political reality of an (international) legal solution that would restore some of the very benefits from which the UK has withdrawn is realistic.

Brexit has directly affected not only the right to move and reside (or work) but also the right to vote, as a significant number of EU-27 nationals were residents in the

[43] Settled status guarantees indefinite leave to remain (ILR) and the right to work in the UK. It also gives the holder the right to have treatment under the National Health Service (NHS), enrol in educational institutions, access various publicly-funded social benefits, and travel in and out of the UK without losing settled status, on the same terms as before. Finally, people with settled status can continue to benefit from family reunification (under the previous rules for EU citizens), and their children born in the UK will automatically acquire British nationality.

[44] According to some reports, EU-27 nationals who are in the UK but not yet settled were offered financial incentives to leave the country before the deadline for applying for settled status. See https://www.theguardian.com/politics/2021/jan/26/eu-citizens-offered-financial-incentives-to-leave-uk (Last accessed: 29.12.2023.).

[45] Under the EU Settlement Scheme, nationals who have been granted pre-settlement status must either apply for settled status or reapply for pre-settlement status before it expires. If they do not apply in time, they automatically lose their rights to access employment, housing, education, and benefits and may even be expelled.

[46] C. Barnard and F. Costello, *The EU Settlement Scheme – ongoing issues from the frontline,* https://ukandeu.ac.uk/the-eu-settlement-scheme-ongoing-issues-from-the-frontline/ (Last accessed: 29.12.2023.).

[47] A. Alemanno and D. Kochenov, Mitigating Brexit through Bilateral Free-Movement of Persons, *VerfassungsBlog,* 04.01.2021., https://verfassungsblog.de/mitigating-brexit-through-bilateral-free-movement-of-persons/ (Last accessed: 29.12.2023.).

UK before Brexit. At the time of the European Parliament elections, 4.5% of all registered voters in England and Wales and 3.2% of all registered voters in Scotland were non-British nationals with EU citizenship (and, of course, there were still British nationals with EU citizens living in the EU-27 Member States). Given that in Scotland and Wales, all residents can participate in local elections (i.e., have the right to vote) regardless of their nationality, the UK eventually decided that EU citizens would continue to have the right to vote in local elections in May 2021, but this was no longer a requirement of EU law but a decision by the UK legislature. At the same time, the UK government has concluded bilateral agreements with several EU-27 Member States (including Luxemburg, Poland, Portugal, and Spain) to ensure the participation of British nationals in local elections, and some interest groups, such as the '3 million' (referring to EU-27 citizens in the UK) and 'British in Europe'[48] (referring to EU-27 British citizens in the UK), are pushing even harder than before for bilateral agreements to ensure the broadest possible participation of citizens in local decision-making.

However, regarding EU citizens' right to consular protection, Brexit is more of a theoretical than a practical issue. In the case of the UK, it is difficult in principle to envisage the possibility of providing consular protection at the EU level. This is partly due to the development of the UK legal system and partly to the fact that all EU-27 Member States have a diplomatic mission in the UK. For British nationals, the Brexit disadvantage is also apparent, as the number of third countries where the UK would not have a diplomatic mission is negligible.

In the case of the right to complain to the European Ombudsman or the right to petition, the legal consequences are even less serious: these rights are available to EU citizens (regardless of their place of residence) and non-EU citizens living in the EU-27. Therefore, Brexit will only mean the loss of the right to complain to the European Ombudsman and the right to petition for UK citizens living in the UK.

All in all, therefore, it can be said that although Brexit has been very significant from an integration and political point of view, its impact on EU citizenship has been moderate overall, and the legal regime has significantly cushioned the natural legal consequences for EU citizens living in the UK and UK nationals living in the EU-27.[49]

[48] See: https://the3million.org.uk/ (Last accessed: 29.12.2023.); https://www.britishineurope.org/ (Last accessed: 29.12.2023.).

[49] Many Brits have applied for nationality of one of the EU-27 Member States, mainly to retain the rights of EU citizenship. For example, the father of the now-resigned British Prime Minister Boris Johnson applied for French nationality on 31 December 2020.

VI. Conclusions

In EU law, the concept of nationality is mainly taken as a matter of course, according to which the question of whether a person has the nationality of a Member State can only be answered by reference to the national law of the Member State concerned.[50] This approach has been partly confirmed by the CJEU itself, which has ruled that the conditions for acquiring and losing nationality are determined by each Member State, respecting EU law. In principle, therefore, it would be relatively easy to define the scope of EU citizens by looking at the nationality laws of the Member States.

While this is true for the 'rule of thumb' cases, in the case of exceptions and border areas, the question of the exercise of rights linked to EU citizenship can hardly be decided mechanically, given the fundamental differences in citizenship policies between Member States (mainly due to different legal systems and historical traditions). Thus, although Member States remain sovereign in deciding who their citizens are, from the point of view of the application of EU law, the rational limit to Member States' nationality policies is the effective enforcement of EU law (in this case, EU citizenship powers) *(effet utile)*. These limitations include the fact that the existence or non-existence of nationality is a question of fact (and not of law), which is essential for EU citizenship. No Member State can call into question another Member State's decision on nationality and thus, ultimately, the existence of nationality.

This is the case even though some Member States (notably Malta and Cyprus) operate extensive investor schemes that link national and, thus, EU citizenship, which could be used to devalue the institution of EU citizenship. The Commission has launched infringement proceedings against the Member States concerned precisely because the unitary nature of EU citizenship (and Member State nationality) does not allow the citizenship of the Union to be questioned once it has been granted.

A further element of the safety net is that each Member State's decision on nationality (and thus ultimately EU citizenship) is subject to the principle of proportionality, i.e., the loss of nationality can only be based on a consideration of the individual circumstances of the (former) EU citizen concerned, irrespective of whether the decision results in the person losing nationality and thus ultimately EU citizenship. However, while this individual discretion can always be exercised by the authorities in individual administrative decisions *(Rottmann),* in the case of *ipso iure* loss of nationality by legislation *(Tjebbes),* Member States are already obliged to legislate in order to comply fully with their obligations under EU law.

However, the case law of the CJEU also reveals a specific dichotomy in the case law on the acquisition of nationality (and thus EU citizenship): while the CJEU declares cases of acquisition of nationality to be contrary to EU law in extreme cases

[50] See Declaration No 2 annexed to the Maastricht Treaty.

only,[51] it seems to apply a stricter standard when judging cases of loss of EU citizenship. In a sense, the third element of the safety net is that, post-Brexit, both the UK (for EU-27 nationals remaining on its territory) and the EU (for UK nationals living in the EU-27) have ensured the continued exercise of the rights and obligations arising from acquired EU citizenship status through a series of legal provisions – in the case of the UK, not based on EU law, but rather on public international law and partly on UK domestic law. The combined significance of this legal context and jurisprudence is paramount: to assess the question of the exercise of certain rights deriving from EU citizenship, it is inevitable to examine first whether the natural person concerned is an EU citizen at all or (more permissibly) whether they can rely on certain rights and obligations deriving from EU citizenship.

[51] This could be the case, for example, of the two ongoing infringement procedures against Malta and Cyprus for their investor citizenship schemes.

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The impact of EU PIL regulations on the Hungarian domestic conflict of laws rules over the past decade

Abstract

There is an organic interaction between the private international law of the EU Member States and EU private international law. EU private international law affects the private international law of the Member States in a number of ways. As a result of the EU legislative process over the last decades, an increasing proportion of private international law issues previously governed by national law are now governed by EU law. However, the impact of EU law can also be observed where the issue is still governed by national private international law. This study examines the impact of EU private international law on the Hungarian domestic conflict of laws rules in the period between 2013 and 2023.

Keywords: private international law, conflict of laws, European Union, national law

Introduction

Many people say, especially after the Covid-19 period, that years fly by in the blink of an eye. How can we measure a year, or even a decade? A little more than ten years ago, I wrote a piece about the impact of EU private international law on the national conflict of laws rules in Hungary.[1] This time, in this contribution, I look at a possible aspect of measuring the past decade in respect of Hungarian private international law: the impact of EU private international law regulations on the Hungarian domestic conflict of laws rules in the period between 2013 and 2023.

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[1] I. Erdős, The impact of European private international law on the national conflict of laws rules in Hungary, (2013) (54) *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Sectio iuridica,* 161–189, https://www.ajk.elte.hu/file/annales_2013_08_Erdős.pdf (Last accessed: 29.12.2023.)

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I. The continuous development of EU conflict of laws rules in this period

The first decade of the 21st century was a very productive period for EU private international law. This was due to several factors, a discussion of which falls outside the scope of this contribution. Nevertheless, it is worth noting that, in this period, Rome I,[2] Rome II[3] and Rome III[4] regulations were adopted. Of course, there were several other developments that had specific effects on the domestic conflict of laws rules, for example the respective CJEU decisions on the national conflict of laws rules regarding personal law, more particularly the right to bear a name.[5] It is important to remember that the regulations mentioned brought about a significant shift in how national courts should solve situations within the Union involving conflict of laws issues. These regulations, stemming from their very nature,[6] are binding and directly applicable, and so, whenever the case falls under the scope of any of these regulations, the national courts must apply the respective regulation and not the *lex fori* conflict of laws rules of national origin.[7] Of course, the domestic rules remain applicable to those issues that are not covered by these EU regulations,[8] or where these regulations allow room for the national legislator.[9]

This trend of creating directly applicable EU conflict of laws rules continued in the second decade of the century as well. The next piece of legislation was the so-called Succession Regulation in 2012.[10] It is a complex regulation: it deals with jurisdiction, applicable law and recognition and enforcement issues, and intends to "ensure consistency between the rules relating to jurisdiction and those relating to the applicable law",[11] and "the rules of [the]regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be able to apply its

[2] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, 6–16
[3] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, 40–49.
[4] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, 10–16.
[5] For a discussion on how these regulations and CJEU affected the national conflict of laws rules in Hungary see: Erdős, The impact of European private international law on the national conflict of laws rules in Hungary, 161–189.
[6] See: TFEU Article 288.
[7] For a recognition of this effect, see e.g. Kúria (Supreme Court of Hungary) Mfv.10.008/2022/5.
[8] E.g. the determination of the content of the applicable law.
[9] See e.g. Rome II regulation, preamble 25.
[10] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession OJ L 201, 27.7.2012, 107–134.
[11] Case C-20/17, *Vincent Pierre Oberle,* ECLI:EU:C:2018:485, 52.

own law".[12] The regulation has applied as of 17 August 2015.[13] The scope of the regulation covers almost all aspects of succession,[14] and all civil-law aspects of succession to the estate of a deceased person, with a few exceptions.[15] It applies to successions with cross-border implications within the EU.[16] The concept of succession means "succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession".[17] As it is a regulation, national laws can only regulate matters that are not covered by these EU rules. Chapter III of the regulation deals with the issue of applicable law. It is quite comprehensive, containing nineteen articles, and dealing with many aspects of the determination of the applicable law. The general rule applied in the regulation was already quite a departure for many member states: it is based on the habitual residence of the deceased person.[18] Furthermore, the regulation ensures flexibility through the escape clause[19] and allows for a choice of law.[20] The introduction of the possibility of a choice of law in this area, even if it is very limited[21] and was not out of the blue,[22] was again a significant change for many.

Proceeding in chronological order, the next instrument adopted was the recast regulation on insolvency proceedings.[23] However, considering the special subject matter, this contribution will not deal with this regulation.

Family law is a sensitive area when it concerns the unification of national laws, which is the case with the conflict of laws aspects here as well. The fact that Rome III regulation could only have been adopted through enhanced cooperation (enabling Member States to move at different speeds and towards different goals) is good proof of it.[24] The same applies to the next two EU instruments, two regulations dealing with

[12] Case C-422/20, *RK v CR,* ECLI:EU:C:2021:718, 55.
[13] Art. 84.
[14] Art. 1.
[15] Case C-20/17, *Vincent Pierre Oberle,* ECLI:EU:C:2018:485, 30.
[16] Case C-20/17, *Vincent Pierre Oberle,* ECLI:EU:C:2018:485, 32.; Case C-80/19, *E. E.,* ECLI:EU:C:2020:569, 34.
[17] Art. 3.1.a.
[18] Art. 21.1.
[19] Art. 21.2.
[20] Art. 22.
[21] Art. 22.1.: A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.
[22] For comparison, see art. 5 of the 1989 Hague Convention: "A person may designate the law of a particular State to govern the succession to the whole of his estate..." Art. 5.1.
[23] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141, 5.6.2015, 19–72.
[24] See: Erdős I., A házasság, az élettársi és a bejegyzett élettársi kapcsolat nemzetközi kollíziós magánjogi szabályozásának egyes kérdései, in Szeibert O. (ed.), *Család és családtagok: Jogági tükröződések* (ELTE Eötvös Kiadó, Budapest, 2018) 137–158.

private international law aspects of certain family relationships, adopted in 2016. The first instrument regulates matters of matrimonial property regimes,[25] while the second deals with aspects of the property consequences of registered partnerships.[26] Both were adopted in enhanced cooperation, and regulate jurisdiction, applicable law, and recognition and enforcement.

And so we reach the end of the story of adopted regulations. Besides these, mention has to be made of two proposals as well. Looking at their legislative history, these proposals might or might not be adopted in the near future.

The first in this line aims to create common conflict of laws rules on the third-party effects of assignments of claims.[27,28] This regulation, when adopted, would sort of supplement the rules in the Rome I regulation. Actually, Rome I itself provides that

> "the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced".[29]

According to Rome I regulation, the deadline for this report was 17 June 2010. The respective Commission report was adopted in 2016.[30] The report concluded that, considering the divergences of both the substantive law and conflict of laws rules in the

[25] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, 1–29.

[26] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, 30–56.

[27] Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims, COM/2018/096 final – 2018/044 (COD).

[28] For a discussion of the proposal, see e.g. H. Labonté, Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 Proposal, (2018) 14 (2) *Journal of Private International Law,* 319–342. DOI: https://doi.org/10.1080/17441048.2018.1508621; C. Walsh, The law applicable to the third-party effects of an assignment of receivables: whither the EU?, (2017) 22 (4) *Uniform Law Review,* 781–807. DOI: https://doi.org/10.1093/ulr/unx050; E-M. Kieninger, European rules on the law applicable to third-party effects of assignments: a never-ending story?, (2019) 24 (4) *Uniform Law Review,* 633–648. DOI: https://doi.org/10.1093/ulr/unz035; S. V. Bazinas, The law applicable to third-party effects of assignments of claims: the UN Convention and the EU Commission Proposal compared, (2019) 24 (4) *Uniform Law Review,* 609–632. DOI: https://doi.org/10.1093/ulr/unz032

[29] Art. 27.2.

[30] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person, COM/2016/0626 final.

member states,[31] and their impact on cross-border transactions, "[u]niform conflict of law rules governing the effectiveness of assignments against third parties as well as questions of priority between competing assignees or between assignees and other right holders would enhance legal certainty and reduce inherent practical problems and legal costs relating to the current diversity of approaches in the Member States".[32] The Commission finally presented its proposal for the regulation on the law applicable to the third-party effects of assignments of claims in 2018. That was more than five years ago.[33] According to the "Joint Declaration 2023-24",[34] substantial progress is expected in the legislative process of the proposal in the legislative period 2023–2024. Time will tell.

The second proposal is quite a recent one. It was submitted by the Commission in December 2022 and aims to establish EU-wide private international law rules in matters of parenthood.[35] The Parliament adopted[36] its legislative resolution on the proposal in December 2023.[37]

II. The retirement of the 1979 Code and the rise of a new Hungarian Private International Law Act

The most notable development in the field of domestic rules on private international law in Hungary was the adoption of a new act on private international law in 2017 ("new PIL Act").[38] The new PIL Act replaced the 1979 Code,[39] the first ever codification of private international law in Hungary. As it was discussed in my previous piece, the 1979 Code was modified several times; however, almost all of these modifications were

[31] Commission Report 3.1.–3.3., 6–9.
[32] Commission Report 5., 12.
[33] According to an EP briefing, "[b]oth Parliament and Council have adopted their positions, and the proposal is currently the subject of trilogue negotiations." See: Law applicable to the third-party effects of assignments of claims, Briefing 20-09-2022, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2018)623546 (Last accessed: 29.12.2023).
[34] See: https://oeil.secure.europarl.europa.eu/oeil/popups/thematicnote.do?id=41380&l=en (Last accessed: 29.12.2023).
[35] Proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM/2022/695 final.
[36] See: https://www.europarl.europa.eu/doceo/document/PV-9-2023-12-14-ITM-007-09_EN.html (Last accessed: 29.12.2023).
[37] European Parliament legislative resolution of 14 December 2023 on the proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood COM(2022)0695 – C9-0002/2023 – 2022/0402(CNS).
[38] Act XXVIII of 2017 on Private International Law. The act was published in the official gazette on 11 April 2017.
[39] Law-Decree No. 13 of 1979 on International Private Law.

induced by the EU private international law rules and developments.[40] The last relevant modification of the 1979 Code took place in 2015 and was necessary because of the Succession Regulation. This 2015 modification[41] was the first and only amendment of the provision on succession since the adoption of the Code in 1979. Due to the wide scope[42] and the universal application[43] of the Succession Regulation, the 1979 Code was modified to regulate only the formal validity of an oral will[44] and bona vacantia.[45] Actually, the domestic provision on formal validity of an oral will is largely identical to the provision of the Succession Regulation on written wills.[46] The new PIL Act retains these rules.[47]

The codification process leading to the adoption of the new PIL Act started in 2015, and resulted in several modifications, innovations and developments as to the previous national regime. The new PIL Act, like the 1979 Code, deals with all the three areas of private international law: jurisdiction, applicable law and recognition and enforcement.[48] The conflict of laws rules in the new PIL Act were affected to a very large extent by the respective EU regulations. Both directly and indirectly.

III. On some of the conceptual impacts of the EU rules on private international law on the new Hungarian Private International Law Act

Apart from the fact that domestic law can only regulate matters not covered by EU regulations, the rules and underlying principles of the EU regulations had significant impacts on some of the general conceptual approaches of the new PIL Act as well. In this contribution I mention only three of these conceptual impacts; party autonomy, escape clause and the emergence of the concept of habitual residence.

[40] Erdős, The impact of European private international law on the national conflict of laws rules in Hungary, 163.
[41] Act LXXI of 2015.
[42] Art. 1.
[43] Art. 20.
[44] Art. 36.
[45] Art. 36/A.
[46] Art. 27.1.
[47] Arts 64–65.
[48] On the new PIL Act see e.g. Király M., Az új Nemzetközi Magánjogi Törvény, in Benisné Györffy I. (ed.), *Negyvenedik Jogász Vándorgyűlés,* (Magyar Jogász Egylet, Budapest, 2017) 58–65.; Somssich R., Új nemzetközi magánjogi törvény az uniós rendeletek szorításában, in Menyhárd A. and Varga I. (eds), *350 éves az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kara. A jubileumi év konferenciasorozatának tanulmányai I.–II. kötet.* (ELTE Eötvös Kiadó, Budapest, 2018) 669–682.

In relation to party autonomy,[49] the new PIL Act follows a broader approach than that of the 1979 Code. The 1979 Code actually followed a relatively narrow approach to this and, apart from the amendments stimulated by the introduction of Rome I regulation (and Rome Convention[50]), the provisions of the 1979 Code dealing with party autonomy remained intact over the almost forty-year lifespan of the 1979 Code. Over the past two decades, the respective EU private international law regulations introduced the principle of party autonomy in more and more areas of private international law; this principle is not only present in the field of contracts, but now also in the areas of non-contractual obligations, family law matters (e.g. divorce and separation, matrimonial property regimes), and succession. Of course, the extent of party autonomy is not the same in these areas: in some matters it is broad, in others more restrictive or limited. The widespread application of this principle had an impact on the new PIL Act as well, and now party autonomy as a core principle of the new PIL Act applies in more areas than it had in the 1979 Code.[51]

Escape clauses are widely used in the relevant EU regulations,[52] although not used in the 1979 Code. Influenced by the specific provisions of the respective EU rules,[53] the new PIL Act introduced this method into the domestic rules of private international law. However, the new PIL Act takes a slightly different approach. It actually provides for a general escape clause.[54] According to this clause, where it is clear from the circumstances that the case is manifestly more closely connected with a law of a country other than that determined based on the conflict of laws rules of the new PIL Act then this other law can be applied, as an exception.

Finally, conceptual impact can be detected in relation to the more widespread use of the principle of habitual residence. The principle was already present in the 1979 Code when it was adopted; however, its use was originally very limited. Basically, it was a subsidiary[55] or an alternative[56] principle to that of domicile, which was applied, for

[49] On party autonomy in the new PIL Act see e.g. Király M., A felek autonómiája az új nemzetközi magánjogi kódexben, in Menyhárd A. and Varga I. (eds), *350 éves az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kara. A jubileumi év konferenciasorozatának tanulmányai I.–II. kötet*. (ELTE Eötvös Kiadó, Budapest, 2018) 722–728.; I. Erdős, Re-codification of private international law in Hungary: the emergence and regulation of the principle of party autonomy in the new Hungarian private international law act, in M. Hrnčiříková (ed.), *Řešení přeshraničních sporů – pravomoc a autonomie vůle,* (Praha, 2017) 177–190.

[50] 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 /* Consolidated version CF 498Y0126(03) */ OJ L 266, 9.10.1980, 1–19.

[51] E.g. family law, non-contractual obligations.

[52] On escape clauses in EU regulations see e.g. C. S. A. Okoli and G. O. Arishe, The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation, (2012) 8 (3) *Journal of Private International Law,* 513–545. DOI: https://doi.org/10.5235/JPRIVINTL.8.3.513

[53] See e.g. Rome I regulation Art. 4.3., 5.3., 8.4., Rome II regulation Art. 4.3., 5.2., 10.4., 11.4., 12.2.c.

[54] Art. 10.

[55] Art. 11.4.

[56] Art. 25.m., 36.2.c.

example. in the areas of personal law,[57] non-contractual obligations,[58] and family law.[59] As time went on, the principle of habitual residence began to play a role in other areas as well, but the conceptual change came with the new PIL Act. The new law deliberately breaks with the application of the principle of domicile in favor of applying the principle of habitual residence. In fact, the replacement was again largely inspired by EU rules, for example in the field of non-contractual obligations, where the 1979 Code previously provided for "common domicile"[60] but the new PIL Act uses the concept of "common habitual residence".[61] The only conflict of laws area in which the principle of domicile continues to apply in the new PIL Act is the formal validity of wills made orally.[62]

IV. Some of the special impacts of the EU conflict of laws rules on some of the special conflict of laws provisions of domestic private nternational law

1. Contracts

As there are contracts that are not covered by the Rome I. regulation, the national legislator had some room to regulate contractual obligations, and the new PIL Act regulates contracts in seven sections.[63] The underlying principles and conceptual decisions of these new rules are the same as those of the Rome Convention and the Rome I. regulation respectively. There is however one area where, due to the lack of relevant EU rules, there are no similarities, namely the law applicable to arbitration agreements. The determination of the law governing arbitration agreements is a very difficult issue. It was therefore a notable move that the national legislature decided to address this issue in the new PIL Act[64] and thus take a stand on it.

The new PIL Act first provides for choice of law rules,[65] and second, in the absence of choice of law, determines the applicable law based on objective connecting principles. In relation to choice of law, the new PIL Act basically mirrors the respective

[57] Art. 11.3.
[58] Art. 32.2.
[59] Art. 39, Art. 40.
[60] Art. 32.3.
[61] Art. 61.
[62] Art. 64.d.
[63] Arts 50–57.
[64] Art. 52.
[65] See also: Erdős, Re-codification of private international law in Hungary... 177–190.

rules of Article 3 of the Rome I regulation deliberately; for example that the parties' choice can be expressed or tacit, or the parties can choose only state law. An obvious difference is that the new PIL Act does not provide for any similar provision to that of the internal market clause of the Rome I regulation.[66] It also largely takes over the rule on the validity and formation of a choice of law agreement under Article 3.5. of the Rome I Regulation, but the rules on incapacity, for example, are dealt with in the part on persons.[67] As regards the law applicable to the contract in the absence of choice, the new PIL Act follows, in some limited respects, the rules of Article 4 of the Rome Convention[68] and does not adopt the regime of Article 4 of the Rome I Regulation. It should be noted that the 1979 Code applied a system somewhat similar to the staggered system of Article 4 of the Rome I Regulation for a long time.[69] Under the new PIL Act, the law applicable to contracts has to be determined on the basis of the principle of the closest connection: in the absence of choice of law, the contract is governed by the law of the country with which it has the closest connection in relation to the essential elements of the contract.[70] The new PIL Act also omits the explicit application of the principle of characteristic performance.

2. Non-contractual obligations

The new PIL Act provides for some conflict of laws rules in the area of non-contractual obligations as well. However, the scope of application of these rules is very limited. Given that of the Rome II Regulation, the Rome II Regulation will be the applicable conflict of laws regime in many situations of non-contractual obligations. The new PIL Act only applies where the matter in question does not fall within the scope of the Rome II Regulation or where the Rome II Regulation itself leaves some room for national law. As such, the new PIL Act first supplements some rules of Rome II regulation, and second, regulates matters not covered by it.

Starting with the first situation, In the area of environmental damage, the Rome II regulation allows[71] the person seeking compensation for damage to choose between two laws: the law of the country in which the damage occurred[72] and the law of the

[66] Art. 3.4.
[67] Explanatory memorandum to Act XXVIII of 2017, comments on Art. 50.
[68] Art. 4.1.: "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected..."
[69] Arts 24–29. (until 16.12.2009).
[70] Art. 51.
[71] Art. 7.
[72] Art. 4.1.

country in which the event giving rise to the damage occurred.[73] This regulation does not however determine when this choice can be made. The regulation It provides that this question "should be determined in accordance with the law of the Member State in which the court is seised".[74] According to the new PIL Act, this choice has to be made in the pre-trial (preparatory) phase of the proceedings, in accordance with the deadline set by the court.[75]

As for the second situation, being the regulation of matters not covered by Rome II, The new PIL Act in this regard was to a large extent inspired by the rules of the Rome II regulation. In fact, it was the intention of the legislator to align the respective rules of the new PIL Act as closely as possible with the rules of Rome II.[76] Therefore, the new PIL Act adopts the approach of the regulation: it allows for a choice of law, and, in the absence of choice of law, provides for a three-level mechanism for determining the applicable law. The provisions on choice of law in the new PIL Act[77] a follow the corresponding provisions of Rome II almost identically.[78] The new PIL Act provides that the choice of law can be either expressed or tacit. If the choice of law is not expressed, it must be demonstrated with reasonable certainty by the circumstances of the case. The parties can choose whichever law they want, so the chosen law does not need to have any connection with the situation. However, where the non-contractual obligation is connected with one country only, the parties' choice of law cannot prejudice the application of the law of this country's provisions, which cannot be derogated from by agreement. There is, however, a difference. According to Rome II, the parties can choose the applicable law both before (with limitations)[79] and after the event giving rise to the damage had occurred. The new PIL Act allows retrospective option only: it can only be made after the non-contractual obligation has emerged. The parties may choose the applicable law in the pre-trial (preparatory) phase of the proceedings, in accordance with the deadline set by the court. In the absence of a choice of law, the new PIL Act provides for a three-level mechanism, similar to that[80] in the Rome II regulation. Accordingly, the main rule in the new PIL Act is that the non-contractual obligation is governed by the law of the country in which the effects of the facts establishing the non-contractual obligation took place. This concept is analogous to the underlying principle of the connecting principles "the law of the

[73] Art. 7.
[74] Preamble 25.
[75] Art. 59.
[76] Explanatory memorandum to Act XXVIII of 2017, comments on Art. 59.
[77] Art. 63.
[78] Art. 14.
[79] Parties who are pursuing a commercial activity can choose the applicable law before the event giving rise to the damage occurs. See: Art. 14.1.b.
[80] Art. 4.

country in which the damage occurs",[81] "the law of the country in which the unjust enrichment took place",[82] and "the law of the country in which the act was performed"[83] under Rome II. Introducing this new rule was a significant change, considering the *lex loci delicti commissi* principle used in the 1979 Code (even after the adoption of the Rome II regulation).[84] The common habitual residence rule was also introduced into the new PIL Act. Rome II r provides that where the parties have their habitual residence in the same country, the law of that country shall apply.[85] The new PIL Act contains a similar provision,[86] which is a slight departure from the 1979 Code, because the respective provision of the 1979 Code was based on the principle of domicile,[87] and not that of habitual residence. As discussed above, the new PIL Act adopted the idea of an escape mechanism as well. Furthermore, the new PIL Act allows the joint treatment of related legal relationships.[88] Indeed, it resembles the "pre-existing relationship" rule of the Rome II regulation where the other legal relationship can be of any kind.

3. Family law matters

As Hungary does not take part in the enhanced cooperations concerning the two 2016 property regime regulations, they are not applicable in Hungary. The national legislator therefore had the possibility to regulate the matters covered by them in the new PIL Act. The conflict of laws solutions applied in the regulations were taken into consideration during the drafting of the new PIL Act, which contains provisions similar to those in the Regulations, but which differ from them on certain points. [89]

Probably, the most notable impact is through the introduction of the principle of party autonomy into this area as well. The new PIL Act allows the spouses, the parties to choose the applicable law concerning property regimes in the case of marriage,[90] partnership,[91] and registered partnership.[92] Regarding married couples, the new PIL Act provides that the spouses can agree to designate the law applicable to their

[81] Art. 4.1.
[82] Art. 10.3.
[83] Art. 11.3.
[84] Art. 32.1.
[85] Art. 4.2., Art. 10.2., Art. 11.2., Art. 12.2.b.
[86] Art. 61.
[87] Art. 33.3.
[88] Art. 62.
[89] Erdős, A házasság, az élettársi és a bejegyzett élettársi kapcsolat nemzetközi kollíziós magánjogi szabályozásának egyes kérdései, 137–158. and Gellérné Lukács É., A családtagok kérdéskörének kapcsolata a személyek szabad mozgásával az EU-jogban, a Brexit fényében, in Szeibert O. (ed.), *Család és családtagok: Jogági tükröződések* (ELTE Eötvös Kiadó, Budapest, 2018) 109–136.
[90] Art. 28.
[91] Art. 36.
[92] Art. 37.

matrimonial property regime.[93] Although *dépeçage* is not excluded, this freedom is limited by the new PIL Act itself, since the spouses can only choose one of the following: the law of the country where they are both citizens at the time of the conclusion of the marriage, the law of the country where the habitual residence of one of the spouses is located at the time of the conclusion of the agreement, or the law of the forum, namely Hungarian law. The law applicable can be chosen by future spouses as well.[94] They can designate the applicable law in the pre-trial (preparatory) phase of the proceedings, in accordance with the deadline set by the court.[95] Unless the spouses agree otherwise, the law designated by the spouses to govern their matrimonial property regime has only prospective effect (*ex nunc* effect).[96] The agreement regarding matrimonial property regime may also be considered valid in Hungary if it is valid from the point of formal validity under the respective requirements of the law of the country where it was concluded.[97] In order to protect the interests of the family and especially those of any children, the choice of law must be expressed. These provisions apply to the choice of law concerning property regimes in partnerships[98] and registered partnerships[99] as well. Finally, concerning married couples, the act sets the time limit for choosing the applicable law under Articles 5–7 of the Rome III regulation: the parties may designate the applicable law in the pre-trial (preparatory) phase of the proceedings, in accordance with the deadline set by the court.[100]

V. Closing remarks

It is no secret that EU law has some impact, even on areas of domestic law that are not covered by EU law. This is also true in the area of private international law. Domestic rules on conflict of laws are affected by the relevant EU regulations, even if they essentially apply only to matters that are not covered by the EU legislation in question. This is the case with domestic conflict of laws rules, for example in the area of contractual and non-contractual obligations. In these areas, the national legislator deliberately sought to formulate domestic rules that are as similar as possible to the respective EU rules. Furthermore, even EU regulations that are not applicable in Hungary can have some impact on the domestic conflict of laws rules. This was the case in the areas of matrimonial property regimes and the property consequences of

[93] Art. 28.1.
[94] Art. 28.2.
[95] Art. 28.3.
[96] Art. 28.4.
[97] Art. 29.
[98] Art. 36.
[99] Art. 37.
[100] Art. 30.

registered partnerships. With the adoption of the new PIL Act, the past decade definitely counts as one of the most significant periods in the history of domestic private international law in Hungary. In many respects, the developments that occurred in this period were influenced by EU law. Partly because there were cases when the domestic legislator had an obligation to do so, but more often because the national legislator wanted to adopt domestic rules in alignment with the EU private international law sources. After all, private international law does not really remain within the confines of a national legal system. EU private international law rules and domestic rules of private international law coexist and together define the system of private international law in the EU Member States, not forgetting, of course, international conventions, which have an impact on both EU and national private international law. As always, it is difficult to predict what the next decade will bring, but it is very likely that EU private international law and national private international law will coexist and probably grow together in an even "closer relationship". As the past decade shows, the national conflict of laws regime certainly tries its best.

Westenrieder, Christoph*

Horizontalwirkung der EU-Grundrechtecharta im Arbeitsrecht – (Grund-)Recht auf Unterrichtung und Anhörung?**

Abstract

The concrete significance of the Charter of Fundamental Rights of the European Union for the application of law is still disputed. Also, in the field of labour law the question arises as to whether and to what extent individual articles of the Charter of Fundamental Rights can have an effect not only indirectly but also directly between private parties and give rise to claims for benefits. In the cases *Bauer* and *Max-Planck-Gesellschaft* the European Court of Justice has already held that employees can assert their right to paid annual leave not only from national law or the underlying directive, but also directly from Art. 31(2) of the CFR, which establishes a direct claim to benefits by the employee against his (private) employer. Other fundamental rights of the Union that could give rise to a direct effect on third parties could also be considered. In particular, the question arises whether Art. 27 CFR guarantees a directly enforceable right to information and consultation of employees or their representatives. Despite its need for concretisation, Art. 27 CFR – like Art. 31(2) CFR – contains its own enforceable core content. Art. 27 CFR is a fundamental right linked to the existence of simple statutory law and can be applied directly between private parties. However, since the interpretation of national law in conformity with EU law can already close most regulatory gaps that are contrary to EU law, the effects remain limited.

Keywords: Charter of Fundamental Rights, horizontal direct effect, collective labour law, EU law conform interpretation, participation of workers

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I. Gegenstand

Die Grundrechtecharta der Europäischen Union (GRCh) erlangte mit dem Vertrag von Lissabon zwar primärrechtliche Qualität,[1] ihre Bedeutung für die Rechtsanwendung ist jedoch nach wie vor umstritten. So stellt sich auch auf dem Gebiet des Arbeitsrechts die Frage, ob und inwieweit einzelne Artikel der GRCh nicht nur mittelbare Wirkung entfalten, sondern auch direkt zwischen Privaten wirken können. Dogmatisch geht es dabei einerseits um die Frage, ob das in Frage stehende Grundrecht geeignet ist, unmittelbare Drittwirkung zu entfalten und andererseits darum, welche Sachverhalte hiervon erfasst wären.[2]

Eingangs ist in diesem Rahmen festzustellen, dass sich kaum generelle Aussagen zur (direkten) Wirkung der Grundrechtecharta in Privatrechtsverhältnissen treffen lassen, da jeder Sachverhalt individuell zu beurteilen ist. Bevor die EU-Grundrechtecharta als unmittelbare Rechtsgrundlage in Frage kommen kann, ist stets das jeweilige Verhältnis des nationalen Rechts zu den einschlägigen europäischen Verordnungen und Richtlinien zu untersuchen. Besondere Bedeutung kommt dabei der Pflicht zur richtlinienkonformen Auslegung und Rechtsfortbildung des nationalen Rechts zu, die aus Art. 288 Abs. 3 AEUV i.V.m. Art. 4 Abs. 3 AEUV folgt.[3] Nationale Gerichte sind dazu verpflichtet, innerstaatliches Recht so weit wie möglich am Wortlaut und Zweck der Richtlinie auszulegen, wobei der Wortlaut der nationalen Vorschrift noch keine absolute Grenze der Auslegung bzw. Rechtsfortbildung darstellt.[4] Unzulässig ist nur die richterliche Auslegung *contra legem,* die den feststellbaren Willen des Gesetzgebers und damit die staatliche Kompetenzverteilung von Legislative und Judikative missachtet.[5] Das Gebot zur richtlinienkonformen Rechtsfortbildung umfasst somit sämtliche Rechtsfindungsmethoden des nationalen Rechts, soweit diese nach innerstaatlichen Grundsätzen zulässig sind.

Besonders im durch Richtlinien geprägten Arbeitsrecht lassen sich auf diesem Wege bereits die meisten Regelungslücken schließen, ohne hierfür auf die unmittelbare, das nationale Recht verdrängende Anwendung von Unionsrecht zurückgreifen zu müssen. Der Vorrang der Auslegung folgt dabei schon aus dem dogmatischen Grundsatz der Normanwendung der untersten Stufe.[6] Die unmittelbare Drittwirkung

[1] Die GRCh steht gem. Art. 6 Abs. 1 EUV gleichrangig neben dem sonstigen Primärrecht.
[2] *Bayreuther,* RdA 2022, 290, 291.
[3] Vgl. EuGH, Urt. v. 10.4.1984, Rs. 14/83, EU:C:1984:153, Rn. 26 – Van Colson und Kamann; Urt. v. 15.6.2000, C-365/98, Rn. 40 – Brinkmann; zur richtlinienkonformen Auslegung und Rechtsfortbildung *Canaris,* in FS Bydlinski, 2002, 47, 55.
[4] EuGH, Urt. v. 13.11.1990, Rs. C-106/89, EU:C:1990:395, Rn. 8 – Marleasing; Urt. v. 4.7.2006, C-212/04, EU:C:2006:443, Rn. 110 – Adeneler.
[5] Vgl. etwa EuGH, Urt. v. 16.6.2005, Rs. C-105/03, EU:C:2005:386, Rn. 47 – Pupino.
[6] Vgl. *Wank,* RdA 2020, 1, 3 ff, der die unmittelbare Drittwirkung der GRCh jedoch aus dogmatischen Gründen ablehnt.

der Grundrechtecharta kann folglich nur dann zu weiterreichenden Rechten der Arbeitnehmer und Arbeitnehmervertreter führen, wenn der Anspruch im nationalen Recht fehlt und dieser nicht schon durch richtlinienkonforme Auslegung bzw. Rechtsfortbildung begründet werden kann.[7]

Im Rahmen des kollektiven Arbeitsrechts gilt es zu untersuchen, ob Art. 27 GRCh einen solchen eigenständigen Anspruch auf eine rechtzeitige Unterrichtung und Anhörung der Arbeitnehmer oder ihrer Vertreter begründet und dieser gegenüber Arbeitgebern geltend gemacht werden kann. Hierfür sind dogmatische Grundlagen der GRCh, die Rechtsprechung des EuGH und die Grundrechtsqualität von Art. 27 GRCh zu beleuchten.

II. Begriff der unmittelbaren Drittwirkung

Die inhaltliche Diskussion über die horizontale Wirkung der Grundrechtecharta leidet oftmals darunter, dass Rechtsbegriffe in der Literatur und Rechtsprechung uneinheitlich verwendet werden.[8] Dies lässt sich einerseits durch die ungesicherte Rechtslage erklären, andererseits durch den sprachlichen Einfluss des EuGH.

Allgemein wird die Wirkung von Grundrechten zwischen Privaten als Dritt- oder Horizontalwirkung bzw. *horizontal effect* bezeichnet,[9] die in der GRCh jedoch nicht ausdrücklich vorgesehen ist. Die europäischen Grundrechte verpflichten gem. Art. 51 Abs. 1 S. 1 GRCh nur die Union und deren Stellen sowie gegebenenfalls die Mitgliedsstaaten und deren Stellen, aber keine Privatpersonen. Das bedeutet im Umkehrschluss allerdings nicht, dass die GRCh keinerlei Wirkung zwischen Privaten entfalten kann. Unbestritten ist, dass die europäischen Grundrechte zumindest mittelbar (mittelbare Drittwirkung) auch zwischen Privaten zu beachten sind. Kennzeichnend für die mittelbare Drittwirkung ist, dass das Grundrecht zwar das Privatrechtsverhältnis betrifft, die Privatpersonen aber nur mittelbar.[10] Dies ist beispielsweise der Fall, wenn nationales Recht im Lichte der Grundrechtecharta auszulegen ist oder aufgrund von dessen Grundrechtswidrigkeit unangewendet bleiben muss.

Für eine echte unmittelbare Drittwirkung muss das Grundrecht hingegen selbst ein subjektives Recht verleihen, das Privatpersonen in einem Rechtsstreit gegen

[7] *Schubert,* EuZA 2020, 302, 319.
[8] EuArbRK/*Schubert,* 4. Aufl. 2022, GRC Art. 51 Rn. 47.
[9] Vgl. SA des Generalanwalt *Cruz Villalón* zu Rs. C-176/12 (AMS) v. 18.7.2013, EU:C:2013:491 Rn. 35 ff; SA des Generalanwalt *Tanchev* zu Rs. C-414/16 (Egenberger) v. 9.11.2017, EU:C:2017:851 Rn. 119; EuArbRK/*Schubert,* 4. Aufl. 2022, GRC Art. 51 Rn. 34; Jarass/*Jarass*, EU-Grundrechte-Charta, 4. Aufl. 2021, GRCh Art. 51 Rn. 36.
[10] Vgl. EuArbRK/*Schubert,* 4. Aufl. 2022, GRC Art. 51 Rn. 36; Jarass/*Jarass,* EU-Grundrechte-Charta, 4. Aufl. 2021, GRCh Art. 51 Rn. 40; *Schubert,* EuZA 2020, 302, 313.

andere Privatpersonen geltend machen können.[11] Die unmittelbare Drittwirkung führt also nicht nur zur Unanwendbarkeit nationaler Vorschriften, sie begründet ein eigenes, gerichtlich durchsetzbares Recht. Möglich ist dies sowohl bei solchen Grundrechten, die als unmittelbar wirkende Verbotsnormen fungieren, als auch bei solchen Grundrechten, die in positiver unmittelbarer Drittwirkung echte Ansprüche zwischen Privaten begründen.

Der EuGH hat die unmittelbare Drittwirkung bislang ausdrücklich für das Diskriminierungsverbot aus Art. 21 Abs. 1 GRCh[12] sowie für das Recht auf bezahlten Jahresurlaub aus Art. 31 Abs. 2 GRCh bejaht.[13] Ob sich diese Ausführungen allerdings ohne Weiteres auf andere Grundrechte der GRCh übertragen lassen, gilt es zu untersuchen. Dabei stellt sich auch die Frage, ob Private überhaupt unmittelbar durch die GRCh verpflichtet werden können.

III. Grundrechtsverpflichtete

Damit Privatpersonen unmittelbare Rechte aus der Grundrechtecharta gegenüber anderen Privatpersonen geltend machen können, müssten diese grundrechtsverpflichtet sein können. in der Literatur herrscht hierüber Uneinigkeit.[14]

Der EuGH hat die Grundrechtsverpflichtung Privater jedoch – „von Wortlaut wie Telos des Art. 51 Abs. 1 S. 1 GRCh unbeeindruckt"[15] – ohne besondere Begründung bejaht. In der Rechtssache *Bauer* stellte das Gericht fest, dass Art. 51 Abs. 1 GRCh zwar keine Regelung darüber treffe, ob auch Privatpersonen unmittelbar zur Einhaltung einzelner Bestimmungen der Charta verpflichtet sein können. Das führe aber nicht schon dazu, dass dies kategorisch ausgeschlossen wäre.[16] Nur weil Bestimmungen des Primärrechts in erster Linie an die Mitgliedsstaaten gerichtet sind, könne nicht ausgeschlossen werden, dass diese auch zwischen Privatpersonen gelten.[17]

Bezogen auf (kollektiv-) arbeitsrechtliche Fallgestaltungen lässt sich somit festhalten, dass nach der Rechtsprechung des EuGH nicht nur der Gesetzgeber, sondern

[11] EuGH, Urt. v. 6.11.2018, Rs. C-684/16, EU:C:2018:874, Rn. 78 – Max-Planck-Gesellschaft; Urt. v. 17.4.2018, Rs. C-414/16, EU:C:2018:257, Rn. 76 – Egenberger.
[12] EuGH, Urt. v. 17.4.2018, Rs. C-414/16, EU:C:2018:257, Rn. 76 – Egenberger.
[13] EuGH, Urt. v. 6.11.2018, Rs. C-569/16 und C-570/16, EU:C:2018:871, Rn. 85 – Bauer; Urt. v. 6.11.2018, Rs. C-684/16, EU:C:2018:874, Rn. 51 – Max-Planck-Gesellschaft.
[14] Vgl. Streinz/*Streinz/W. Michl,* 3. Aufl. 2018, GRCh Art. 51 Rn. 30; EuArbRK/*Schubert,* 4. Aufl. 2022, GRCh Art. 51 Rn. 34; Preis/Sagan/*Pötters,* Europäisches Arbeitsrecht, 2. Aufl. 2019, § 3 Rn. 32; Meyer/*Borowsky,* NK-GRCh, 4. Aufl. 2014, GRCh Art. 51 Rn. 31; *Herresthal,* ZEuP 2014, 238, 254.
[15] *Picker/Rathman,* RdA 2022, 61, 64.
[16] EuGH, Urt. v. 6.11.2018, Rs. C-569/16 und C-570/16, EU:C:2018:871, Rn. 87 – Bauer.
[17] EuGH, Urt. v. 6.11.2018, Rs. C-569/16 und C-570/16, EU:C:2018:871, Rn. 88 – Bauer; Urt. v. 6.11.2018, Rs. C-684/16, EU:C:2018:874, Rn. 76 – Max-Planck-Gesellschaft; in diesem Sinne auch Urt. v. 17.4.2018, Rs. C-414/16, EU:C:2018:257, Rn. 77 – Egenberger.

grundsätzlich auch private Arbeitgeber gegenüber ihren Arbeitnehmern bzw. Arbeitnehmervertretern unmittelbar grundrechtsverpflichtet sein können, wenn der Anwendungsbereich der GRCh eröffnet ist und das Grundrecht subjektive Rechte vermittelt.

IV. Anwendungsbereich GRCh

Private können der Bindung durch die Grundrechtecharta gem. Art. 51 Abs. 1 S. 1 GRCh nur dann unterliegen, wenn deren Anwendungsbereich eröffnet ist. Dies ist der Fall, wenn es sich im betroffenen Fall um die *Durchführung von Unionsrecht* handelt.

Mangels einer Definition im Unionsrecht und unter Berücksichtigung der ständigen Rechtsprechung des EuGH ist hierbei von einem weiten begrifflichen Verständnis auszugehen.[18] Die Durchführung von Unionsrecht ist demnach immer dann zu bejahen, wenn die konkrete Fallgestaltung unionsrechtlich geregelt ist. Dies verlangt einen Zusammenhang eines gewissen Grades, der darüber hinausgeht, dass die fraglichen Sachbereiche nur benachbart sind oder der eine von ihnen mittelbare Auswirkungen auf den anderen haben kann.[19] Voraussetzung für die Anwendbarkeit der GRCh ist folglich, dass der betroffene Bereich tatsächlich durch unionsrechtliche Vorschriften geregelt bzw. mitgeregelt ist, was im Arbeitsrecht aufgrund der durch Richtlinien geprägten Gesetzgebung regelmäßig zu bejahen ist.

V. EuGH zum Recht auf Urlaub

Große mediale Aufmerksamkeit erlangten die Entscheidungen des EuGH in den Rechtssachen *Bauer*[20] und *Max-Planck-Gesellschaft*[21] aus dem Jahr 2018, in denen sich dieser im Rahmen zweier Vorabentscheidungsverfahren mit dem Recht auf Erholungsurlaub befasste. Das Gericht begründete den Leistungsanspruch der Arbeitnehmer auf bezahlten Jahresurlaub dabei im Ergebnis auch mit der unmittelbaren Drittwirkung von Art. 31 Abs. 2 GRCh, weshalb die Entscheidungen für die Bewertung von Art. 27 GRCh vergleichend heranzuziehen sind.

[18] EuArbRK/*Schubert,* 4. Aufl. 2022, GRCh Art. 51 Rn. 16.
[19] EuGH, Urt. v. 6.3.2014, Rs. C-206/13, EU:C:2014:126, Rn. 24 – Cruciano Siragusa; Urt. v. 10.7.2014, Rs. C-198/13, EU:C:2014:2055, Rn. 34 – Hernández.
[20] EuGH, Urt. v. 6.11.2018, Rs. C-569/16 und C-570/16, EU:C:2018:871 – Bauer.
[21] EuGH, Urt. v. 6.11.2018, Rs. C-684/16, EU:C:2018:874 – Max-Planck-Gesellschaft.

1. Sachverhalte

In der verbundenen Rechtssache *Bauer* hatte der EuGH zu entscheiden, ob unerfüllte Urlaubsansprüche als Teil der Erbmasse gelten. Zugrunde lagen zwei Fallkonstellationen: Im ersten Verfahren ging es um einen Beschäftigten bei der Stadt Wuppertal, im zweiten Verfahren um einen Arbeitnehmer bei einer Privatperson. Beide Arbeitnehmer verstarben im laufenden Arbeitsverhältnis, ohne ihren bezahlten Jahresurlaub vollständig genommen zu haben. Die jeweiligen Witwen, die Erbinnen ihrer verstorbenen Ehemänner waren, klagten anschließend als alleinige Rechtsnachfolgerinnen vor den zuständigen Gerichten auf Auszahlung der unerfüllten Urlaubsansprüche. Das BAG setzte beide Verfahren aus und legte dem EuGH insbesondere die Frage vor, ob Art. 31 Abs. 2 GRCh in einem Arbeitsverhältnis zwischen Privatpersonen einen Anspruch auf Mindestjahresurlaub begründen könne, wenn dies durch nationales Recht ausgeschlossen ist.[22]

Die Entscheidung in der Rechtssache *Max-Planck-Gesellschaft* war sehr ähnlich gelagert und wurde am selben Tag verkündet. Geklagt hatte ein bei der *Max-Planck-Gesellschaft* beschäftigter Wissenschaftler, der die Abgeltung seines nicht genommenen Urlaubs forderte. Nachdem der Arbeitnehmer die *Max-Planck-Gesellschaft* erfolglos zur Zahlung von 11.979 Euro als finanzielle Abgeltung von 51 nicht genommenen Urlaubstagen aus den Jahren 2012 und 2013 aufgefordert hatte, erhob er eine entsprechende Zahlungsklage. Das BAG setzte auch dieses Verfahren aus und rief den EuGH im Rahmen des Vorabentscheidungsverfahrens nach Art. 267 AEUV an.[23]

2. Unmittelbare Drittwirkung Art. 31 Abs. 2 GRCh

In den zu entscheidenden Fallkonstellationen stand jeweils das Verhältnis zwischen nationalem Recht, der Richtlinie 2003/38/EG und Art. 31 Abs. 2 GRCh in Frage. Der EuGH stellte dabei erstmals fest, dass Art. 31 Abs. 2 GRCh bereits für sich allein einen subjektiven, durchsetzbaren Leistungsanspruch des Arbeitnehmers auf bezahlten Jahresurlaub gewähre. Wenn eine nationale Regelung nicht im Einklang mit Art. 7 der Richtlinie 2003/88/EG und Art. 31 Abs. 2 GRCh ausgelegt werden könne, ergebe sich aus Art. 31 Abs. 2 GRCh, dass nationale Gerichte die nationale Regelung unangewendet zu lassen haben. Darüber hinaus ergebe sich das subjektive Recht des Arbeitnehmers auf bezahlten Jahresurlaub – einhergehend mit der Pflicht des Arbeitgebers, bezahlten Jahresurlaub zu gewähren oder den bei Beendigung des Arbeitsverhältnisses nicht genommenen Urlaub zu vergüten – direkt aus Art. 31 Abs. 2 GRCh.[24] Den Aus-

[22] EuGH, Urt. v. 6.11.2018, Rs. C-569/16 und C-570/16, EU:C:2018:871, Rn. 19 – Bauer.
[23] EuGH, Urt. v. 6.11.2018, Rs. C-684/16, EU:C:2018:874, Rn. 17 – Max-Planck-Gesellschaft.
[24] EuGH, Urt. v. 6.11.2018, Rs. C-684/16, EU:C:2018:874, Rn. 79 – Max-Planck-Gesellschaft.

führungen des Generalanwalts *Bot* folgend entschied der EuGH, dass das Recht auf bezahlten Jahresurlaub bereits in Art. 31 Abs. 2 GRCh verankert und hinsichtlich seines Bestehens zwingend sowie nicht von Bedingungen abhängig sei. Für den grundrechtlichen Kerngehalt, das Recht auf bezahlten Jahresurlaub an sich, bedürfe es keiner Konkretisierung durch unionales oder nationales Recht.[25] Der EuGH begründete den Leistungsanspruch im Ergebnis mit dem Wesen des Urlaubsanspruchs – dem eigenständigen Kerngehalt des Art. 31 Abs. 2 GRCh. Dabei sei insbesondere das Fehlen einer Regelung zur Dauer oder Wahrnehmung des Jahresurlaubs nicht so entscheidend, dass die unmittelbare Drittwirkung schon aufgrund der Konkretisierungsbedürftigkeit des Artikels ausscheiden müsse.

Der EuGH bestätigte seine Rechtsauffassung jüngst, als das Gericht abermals im Rahmen eines Vorabentscheidungsersuchens des BAG über den Verfall von Urlaubsansprüchen zu entscheiden hatte.[26] Im Wesentlichen stellte der EuGH darin fest, dass Erholungsurlaub nicht verfallen könne, wenn der Arbeitgeber den Arbeitnehmer nicht zuvor über den drohenden Verfall unterrichtet hat. Zur Begründung wurde dabei zum wiederholten Male nicht nur auf die Auslegung der Richtlinie 2003/38/EG verwiesen, sondern unmittelbar auf Art. 31 Abs. 2 GRCh abgestellt.[27]

Die Wirkung des Art. 31 Abs. 2 GRCh erschöpft sich demnach nicht im unionsrechtlichen Anwendungsvorrang oder einer bloßen Verbotswirkung, das Unionsgrundrecht vermittelt positive subjektive Rechte der Arbeitnehmer. Es stellt sich daher die Frage, ob das Recht auf Unterrichtung und Anhörung gemäß Art. 27 GRCh in gleichem Maße garantiert wird und ebenfalls gegenüber (privaten) Arbeitgebern geltend gemacht werden kann.

VI. (Grund-)Recht auf Unterrichtung und Anhörung?

Gemäß Art. 27 GRCh muss für die Arbeitnehmer oder ihre Vertreter in den Fällen und unter den Voraussetzungen, die nach dem Unionsrecht und den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten vorgesehen sind, auf den geeigneten Ebenen eine rechtzeitige Unterrichtung und Anhörung gewährleistet sein.

Obwohl der Wortlaut der Überschrift (*Recht* auf Unterrichtung und Anhörung der Arbeitnehmerinnen und Arbeitnehmer im Unternehmen) vermuten lässt, dass es sich hierbei um ein echtes, durchsetzbares Grundrecht handeln müsse, lehnt die

[25] Vgl. die Schlussanträge des Generalanwalt *Bot* zu Rs. C-569/16 und C-570/16 (Bauer) v. 29.5.2018, EU:C:2018:337, Rn. 81 ff.

[26] EuGH, Urt. v. 22.9.2022, Rs. C-518/20 und C-727/20 – Fraport AG/St. Vincenz-Krankenhaus GmbH.

[27] Mit kritischer Anmerkung zur Entscheidung *Bayreuther,* NJW 2022, 3203, 3206.

deutsche Literatur den Grundrechtscharakter und die Möglichkeit der unmittelbaren Drittwirkung überwiegend ab. Art. 27 GRCh verleihe für sich allein noch keine subjektiven Rechte und sei als bloßer Grundsatz im Sinne des Art. 52 Abs. 5 GRCh zu sehen. Für eine Bindung Privater fehle es insbesondere an der inhaltlichen Konkretisierung.[28]

Diese Betrachtung greift jedoch zu kurz. Die besseren Argumente sprechen dafür, dass auch Art. 27 GRCh unmittelbare Drittwirkung entfalten kann, insofern die Voraussetzungen vorliegen.[29] Sowohl die Struktur als auch die Entstehungsgeschichte der Norm bestätigen dieses Ergebnis.

1. Grundrechtsqualität

a) Wortlaut

Der Wortlaut des Art. 27 GRCh ist wenig aufschlussreich darüber, ob eine Grundrechts- oder bloße Grundsatzbestimmung im Sinne des Art. 52 Abs. 5 GRCh vorliegt. Im verfügenden Teil des Art. 27 GRCh ist – anders als in der Überschrift – kein ausdrückliches *Recht* vorgesehen, wie es in anderen Grundrechtsbestimmungen, wie z.B. Art. 31 Abs. 2 GRCh, der Fall ist. Art. 27 GRCh legt nur ausdrücklich fest, dass für die Arbeitnehmer oder ihre Vertreter eine rechtzeitige Unterrichtung und Anhörung *gewährleistet sein muss*. Die schwache Formulierung spricht eher dafür, Art. 27 GRCh als bloße Grundsatzbestimmung zu sehen.

Nicht entscheidend ist in diesem Kontext hingegen, dass die Beteiligung gemäß Art. 27 GRCh nur *in den Fällen und unter den Voraussetzungen, die nach dem Unionsrecht und den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten vorgesehen sind*, zu gewährleisten ist. Die verbleibende Konkretisierungsbedürftigkeit führt nicht zwingend dazu, dass Art. 27 GRCh nur ein Grundsatz sein könne.[30] Vielmehr trägt der Charta-Geber dadurch dem Umstand Rechnung, dass unionsrechtliche Vorgaben national unterschiedlich umgesetzt werden. Mit dem Verweis auf die nationalen Rechtsordnungen werden die – besonders im kollektiven Arbeitsrecht bestehenden –

[28] Vgl. etwa EuArbRK/*Schubert,* 4. Aufl. 2022, GRCh Art. 27 Rn. 13; Jarass/*Jarass,* EU-Grundrechte-Charta, 4. Aufl. 2021, GRCh Art. 27 Rn. 3; Meyer/Hölscheidt/*Hüpers/Reese,* NK-GRCh, 5. Aufl. 2019, GRCh Art. 27 Rn. 19; Calliess/Ruffert/*Krebber,* EUV / AEUV, 5. Aufl. 2016, GRCh Art. 27 Rn. 10 ff.; Preis/Sagan/*Pötters,* Europäisches Arbeitsrecht, 2. Aufl. 2019, § 3 Rn. 75 DOI: https://doi.org/10.9785/9783504386030; Streinz/*Streinz,* 3. Aufl. 2018, GRCh Art. 27 Rn. 2.

[29] *Kainer,* NZA 2018, 894, 899; *Heuschmid,* EuZA 2014, 514, 520; NK-ArbR/*Heuschmid/Lörcher,* 2016, GRCh Art. 27 Rn. 6; vgl. auch die Schlussanträge des Generalanwalt *Cruz Villalón* zu Rs. C-176/12 (AMS) v. 18.7.2013, EU:C:2013:491, Rn. 80, wonach Art. 27 GRCh aber erst durch die Konkretisierung durch eine Richtlinie zwischen Privaten geltend gemacht werden könne.

[30] Jarass/*Jarass,* EU-Grundrechte-Charta, 4. Aufl. 2021, GRCh Art. 52 Rn. 72.

Divergenzen der mitgliedsstaatlichen Systeme berücksichtigt.[31] Durch die alleinige Betrachtung des Wortlauts lässt sich demnach nicht schon feststellen, ob es sich bei Art. 27 GRCh um ein echtes Grundrecht oder einen lediglich zu beachtenden Grundsatz handelt.

b) Normstruktur

Erst durch die Betrachtung der Normstruktur von Art. 27 GRCh wird deutlich, dass hier ein echtes, unmittelbar durchsetzbares Grundrecht vorliegt. Anders als beispielsweise Art. 28 GRCh, der das gesamte Recht auf Kollektivverhandlungen und Kollektivmaßnahmen nur *nach dem Unionsrecht und den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten* garantiert, beschränkt sich der Konkretisierungsvorbehalt des Art. 27 GRCh auf *die Fälle und Voraussetzungen,* die nach dem Unionsrecht und den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten vorgesehen sind. Damit wird zum Ausdruck gebracht, dass nicht die gesamte Grundrechtsgewährleistung unter dem Vorbehalt der Konkretisierung steht, sondern nur *die Fälle und Voraussetzungen,* unter denen die Arbeitnehmer und ihre Vertreter zu beteiligen sind. Durch die Verweisklausel koppelt Art. 27 GRCh die grundrechtliche Gewährleistung an den Bestand von einfachen Recht, das damit „*conditio-sine-qua-non* für den grundrechtlichen Schutz" ist.[32]

c) Entstehungsgeschichte

Die Entstehungsgeschichte des Art. 27 GRCh bestätigt den Befund eines an legislativ konkretisierungsbedürftiges Recht gekoppelten Grundrechts. Die Beratungsprotokolle und Entwürfe des Konvents lassen darauf schließen, dass von Anfang an vorgesehen war, ein echtes Grundrecht auf Unterrichtung und Anhörung zu schaffen, auch wenn dies nicht immer klar ersichtlich war.

Der erste Entwurf der GRCh enthielt tatbestandliche Regelbeispiele, bei deren Vorliegen ein Recht auf „Unterrichtung und Aufklärung der Arbeitnehmer" garantiert werden sollte.[33] Diese wurden jedoch im ersten Gesamtentwurf vom 28. Juli 2000 durch den Verweis auf unionales und nationales Recht ersetzt. Nach diesem Entwurf war die Unterrichtung und Anhörung nicht mehr nur bei den normierten Regelbeispielen durchzuführen, sondern die gesamte Beteiligung *nach dem Gemeinschaftsrecht und nach den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten* zu gewährleis-

[31] Michl, Unionsgrundrechte aus der Hand des Gesetzgebers 2018, 160. DOI: https://doi.org/10.1628/978-3-16-156023-1
[32] Michl, Unionsgrundrechte aus der Hand des Gesetzgebers 2018, 172.
[33] CHARTE 4192/00 CONVENT 18, S. 4.

ten.[34] Diese geänderte Formulierung, die den gesamten Artikel und nicht nur die Fälle und Voraussetzungen unter einen legislativen Konkretisierungsvorbehalt setzt, würde allerdings für die Einordnung als Grundsatzbestimmung und gegen einen eigenständigen grundrechtlichen Gewährleistungsgehalt sprechen.

Die nochmals veränderte Formulierung in der Fassung vom 21. September 2000, die dem geltenden Art. 27 GRCh im Wesentlichen entspricht,[35] schuf jedoch Klarheit: Die rechtzeitige Unterrichtung und Anhörung der Arbeitnehmer war nicht mehr *nach* dem Gemeinschaftsrecht und den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten zu gewährleisten, sondern *in den Fällen und unter den Voraussetzungen,* die nach dem Gemeinschaftsrecht und den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten vorgesehen sind. Durch diese Änderung wird deutlich, dass die Verweisklausel nicht das gesamte Recht auf Unterrichtung und Anhörung betrifft, sondern nur die anfangs enthaltenen Regelbeispiele ersetzen sollte.[36]

Die grundrechtliche Gewährleistung ist damit zwar an den unionalen und nationalen Rechtsbestand gekoppelt – aber als echte Grundrechtsbestimmung. Wie bereits im ersten Entwurf der GRCh vorgesehen, sollten die Arbeitnehmer und ihre Vertreter bei Vorliegen der tatbestandlichen Voraussetzungen ein subjektives, einklagbares Recht auf Unterrichtung und Anhörung erhalten. Der konkretisierungsbedürftige Teil des Grundrechts bezieht sich damit nur auf die Fälle und Voraussetzungen, unter denen die Beteiligung der Arbeitnehmer und ihrer Vertreter zu gewähren ist, nicht auf das Beteiligungsrecht an sich.

2. Hinreichend konkretisierter Kerngehalt

In den Rechtssachen *Bauer* und *Max-Planck-Gesellschaft* stellte der EuGH fest, dass Art. 31 Abs. 2 GRCh einen eigenständigen, hinreichend konkretisierten Kerngehalt enthält, der auch zwischen Privaten Leistungsansprüche begründen kann. Die unmittelbare Drittwirkung schied dabei nicht schon deshalb aus, weil die Einzelheiten des Urlaubsanspruchs erst in Richtlinien und nationalem Recht geregelt sind.

Ebenso enthält Art. 27 GRCh einen eigenen grundrechtlichen Kerngehalt: Die Gewährleistung der rechtzeitigen Unterrichtung und Anhörung der Arbeitnehmer oder ihrer Vertreter an sich. Der Gewährleistungsgehalt lässt sich dabei nicht anhand einer Richtlinie oder des einfachen Rechts bestimmen, was der Normenhierarchie widerspräche und dazu führen würde, dass Sekundärrechtsbestimmungen oder Normen

[34] CHARTE 4422/00 CONVENT 45, S. 8, Hervorhebung durch den Autor.
[35] CHARTE 4470/1/00 REV 1 CONVENT 47, S. 12.
[36] So Meyer/Hölscheidt/*Hüpers/Reese,* NK-GRCh, 5. Aufl. 2019, GRCh Art. 27 Rn. 11; Michl, Unionsgrundrechte aus der Hand des Gesetzgebers 2018, 147.

des einfachen Rechts auf indirektem Wege Primärrechtsqualität zukämen.[37] Ob der EuGH diese strikte Trennung von Primär- und Sekundärrechtsinhalten im Rahmen der Auslegung von europäischen Grundrechten allerdings ebenso vertritt, ist nicht abschließend ersichtlich. Vielmehr werden Grundrechte und Richtlinienbestimmung häufig nebeneinander zitiert.[38] Richtigerweise sind Grundrechte jedoch autonom auszulegen, allenfalls unter Berücksichtigung der Wertungen von Richtlinienbestimmungen und den nationalen Umsetzungsvorschriften, ohne dabei durch deren Inhalt aufgeladen zu werden.[39]

Unter Berücksichtigung von Art. 153 Abs. 1 lit. e AEUV bedeutet dies für Art. 27 GRCh, dass dieser lediglich Mitwirkungsrechte garantieren kann. Beteiligungspflichtige Maßnahmen können hierdurch maximal zeitlich verzögert, nicht aber verhindert werden. Echte Mitbestimmungsrechte, die das „Ob" der Maßnahme betreffen, sind durch Art. 27 GRCh nicht garantiert. Für Arbeitnehmer und ihre Vertreter soll nur gewährleistet sein, dass sie rechtzeitig über wichtige unternehmerische Entscheidungen informiert werden und so die Möglichkeit der Einflussnahme erhalten.[40]

Rechtzeitig im Sinne des Art. 27 GRCh ist die Beteiligung dabei, wenn die Arbeitnehmervertreter vor der Umsetzung einer Maßnahme beteiligt werden und so noch die Möglichkeit haben, auf die unternehmerische Entscheidungsfindung Einfluss zu nehmen.[41] Eine rechtzeitige Beteiligung liegt hingegen nicht vor, wenn die Arbeitnehmervertretung zwar vor der tatsächlichen Durchführung einer beteiligungspflichtigen Maßnahme beteiligt wird, der Prozess der Entscheidungsfindung zu diesem Zeitpunkt aber bereits abgeschlossen ist. Dies widerspräche dem Sinn und Zweck der Beteiligung, die gerade einen Dialog zwischen Arbeitnehmervertretern und Unternehmen schaffen soll.

Die rechtzeitige Unterrichtung und Anhörung ist damit als hinreichend konkretisierter, durchsetzbarer Kerngehalt von Art. 27 GRCh zu sehen. Der Anspruch kann zwischen Privaten geltend gemacht werden, wenn eine Lücke im nationalen Recht besteht und diese nicht schon durch unionsrechtskonforme Auslegung bzw. Rechtsfortbildung geschlossen werden kann. Dabei ist zu beachten, dass der durch

[37] Vgl. *Schubert,* EuZA 2020, 302, 319; *Kainer,* NZA 2018, 894, 895.
[38] EuGH, Urt. v. 6.11.2018, Rs. C-569/16 und C-570/16, EU:C:2018:871, Rn. 63 – Bauer; Urt. v. 6.11.2018, Rs. C-684/16, EU:C:2018:874, Rn. 61 – Max-Planck-Gesellschaft.
[39] *Kainer,* NZA 2018, 894, 897.
[40] EuArbRK/*Schubert,* 4. Aufl. 2022, GRCh Art. 27 Rn. 24; Jarass/*Jarass,* EU-Grundrechte-Charta, 4. Aufl. 2021, GRCh Art. 27 Rn. 10; Calliess/Ruffert/*Krebber,* EUV / AEUV, 5. Aufl. 2016, GRCh Art. 27 Rn. 15; *Hilbrandt,* NZA 2019, 1168, 1170.
[41] EuArbRK/*Schubert,* 4. Aufl. 2022, GRCh Art. 27 Rn. 27; Meyer/Hölscheidt/*Hüpers/Reese,* NK-GRCh, 5. Aufl. 2019, GRCh Art. 27 Rn. 22.

Art. 27 GRCh Verpflichtete selbst Unionsgrundrechtsträger ist, weshalb stets eine Abwägung der betroffenen Grundrechte vorzunehmen ist.[42]

VII. Keine Ablehnung durch den EuGH

Die unmittelbare Drittwirkung von Art. 27 GRCh wird in der Literatur häufig mit dem Verweis auf die Entscheidung des EuGH in der Rechtssache *Association de médiation sociale* (AMS) aus dem Jahr 2014[43] abgelehnt.[44] Der EuGH positionierte sich darin jedoch weder zu der Frage, ob Art. 27 GRCh als echtes Grundrecht zu sehen ist, noch dazu, ob dieser unmittelbar horizontal zwischen Privaten wirken kann.

1. Sachverhalt

Der Entscheidung des EuGH lag eine Vorlage der französischen *Cour de cassation* zugrunde. Es wurde über die Rechtmäßigkeit der Einsetzung einer Arbeitnehmervertretung bei der als privater gemeinnütziger Verein organisierten *Association de médiation sociale* (AMS) gestritten. Fraglich war, ob die nach dem französischen *Code du travail* (CT) vorgesehenen Schwellenwerte für die Einsetzung eines Arbeitnehmervertreters überschritten waren. Das nationale Gesetz sieht vor, dass in Betrieben mit mindestens 11 Arbeitnehmern ein Belegschaftsvertreter und bei mindestens 50 Arbeitnehmern ein Betriebsrat einzusetzen ist. Bei der Berechnung des Schwellenwerts bleiben allerdings gemäß Art. L. 1111 3 CT insbesondere Auszubildende unberücksichtigt. Die klagende Gewerkschaft hielt die Ausschlussbestimmungen des Art. L. 1111 3 CT jedoch für unvereinbar mit dem Unionsrecht, weshalb diese unangewendet bleiben müsse. Inklusive der Auszubildenden wäre der zu erreichende Schwellenwert von 50 Arbeitnehmern bei der *AMS* weit überschritten.

In letzter Instanz setzte die *Cour de cassation* das Verfahren aus und legte dem EuGH Fragen zur Vorabentscheidung vor. Im Wesentlichen wollte das französische Gericht wissen, ob Art. 27 GRCh für sich genommen oder in Verbindung mit den Bestimmungen der Richtlinie 2002/14 dahin auszulegen sei, dass Art. 27 GRCh, wenn eine nationale Bestimmung zur Umsetzung dieser Richtlinie mit dem Unionsrecht unvereinbar ist, in einem Rechtsstreit zwischen Privaten geltend gemacht werden kann, um diese nationale Bestimmung unangewendet zu lassen.[45]

[42] Jarass/*Jarass,* EU-Grundrechte-Charta, 4. Aufl. 2021, GRCh Art. 51 Rn. 43; *Herresthal,* ZEuP 2014, 238, 254.
[43] EuGH, Urt. v. 15.1.2014, Rs. C-176/12, EU:C:2014:2 – Association de médiation sociale.
[44] So etwa EuArbRK/*Schubert,* 4. Aufl. 2022, GRCh Art. 27 Rn. 13.
[45] EuGH, Urt. v. 15.1.2014, Rs. C-176/12, EU:C:2014:2, Rn. 23 – Association de médiation sociale; vgl. zur Entscheidung auch *Heuschmid,* EuZA 2014, 514 f; *Gsell*, in: FS Köhler, 2014, S. 197.

2. Keine Positionierung des EuGH

Der EuGH entschied sich in dieser Konstellation gegen die unmittelbare Anwendbarkeit von Art. 27 GRCh. Die Vorschrift sei noch konkretisierungsbedürftig und könne deshalb nicht dazu führen, die mit der Richtlinie 2002/14/EG nicht konforme nationale Bestimmung unangewendet zu lassen.[46] Obwohl die nationale Regelung im Widerspruch zu unionsrechtlichen Vorgaben stehe, könne zudem auch die Richtlinie keine horizontale Wirkung entfalten, da sich im Rechtsstreit Private gegenüberstehen.[47]

Der Entscheidung ist unter dogmatischen Gesichtspunkten zuzustimmen. Es ist richtig, dass Art. 27 GRCh inhaltlich konkretisierungsbedürftig ist, da die Beteiligung nur in den Fällen und unter den Voraussetzungen gewährleistet sein muss, die nach dem Unionsrecht und den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten vorgesehen sind. Dies heißt jedoch nicht, dass der EuGH die unmittelbare Drittwirkung von Art. 27 GRCh kategorisch ausgeschlossen hätte.[48] In Frage stand hier nicht die grundrechtliche Gewährleistung der rechtzeitigen Unterrichtung und Anhörung an sich, sondern die zu konkretisierenden Fälle und Voraussetzungen, unter denen die Beteiligung der Arbeitnehmer durchzuführen ist. Der Ausschluss bestimmter Gruppen bei der Berechnung des Schwellenwerts für die Errichtung einer Arbeitnehmervertretungen ist eine solche, vom nationalen Gesetzgeber geschaffene, konkretisierende Rechtsvorschrift im Sinne des Art. 27 GRCh.

Gegenstand der Entscheidung war also eine französische Vorschrift, die die Fälle und Voraussetzungen der Mitwirkung konkretisieren sollte. In diesem Rahmen kann Art. 27 GRCh richtigerweise keine unmittelbare Drittwirkung entfalten, da nur die Grundrechtsgewährleistung an sich hinreichend konkretisiert ist, nicht aber die Fälle und Voraussetzungen. Ob Art. 27 GRCh in anderen Konstellationen unmittelbare Wirkung zwischen Privaten entfalten kann, ließ der EuGH unbeantwortet.

VIII. Fazit: Begrenzte Auswirkungen der unmittelbaren Drittwirkung

Wortlaut, Normstruktur und die Entstehungsgeschichte von Art. 27 GRCh sprechen für die Einordnung als echtes Grundrecht, das grundsätzlich auch unmittelbar zwischen Privaten wirken kann. Die an den Bestand von einfachem Recht gekoppelte Grundrechtsgewährleistung der rechtzeitigen Unterrichtung und Anhörung vermag

[46] EuGH, Urt. v. 15.1.2014, Rs. C-176/12, EU:C:2014:2, Rn. 43 – Association de médiation sociale.
[47] EuGH, Urt. v. 15.1.2014, Rs. C-176/12, EU:C:2014:2, Rn. 37 – Association de médiation sociale.
[48] So aber EuArbRK/*Schubert,* 4. Aufl. 2022, GRCh Art. 27 Rn. 12.

dabei außergewöhnlich erscheinen, spiegelt im Ergebnis aber nur die Vielfalt der nationalen kollektivarbeitsrechtlichen Regelungssysteme wider.

Die praktischen Auswirkungen bleiben dabei begrenzt. Die unmittelbare Drittwirkung von Art. 27 GRCh führt nur dann zu weiterreichenden Rechten der Arbeitnehmer und ihrer Vertreter, wenn der Anspruch im nationalen Recht fehlt und dieser auch nicht durch richtlinienkonforme Auslegung bzw. Rechtsfortbildung begründet werden kann. Scheidet die unionsrechtskonforme Interpretation des nationalen Rechts aufgrund des entgegenstehenden Regelungswillens des Gesetzgebers aus, kann Art. 27 GRCh unmittelbare Ansprüche zwischen Privaten begründen. Einer Vermischung des grundrechtlichen Gewährleistungsgehalts mit den Inhalten von Richtlinien oder nationalem Recht, wie es der EuGH teilweise praktiziert, ist dabei unter Berücksichtigung der Normenhierarchie zu widersprechen.

Relevant kann die unmittelbare Drittwirkung von Art. 27 GRCh beispielsweise dann werden, wenn ein Europäischer Betriebsrat im Sinne der RL 2009/38/EG im Vorfeld einer beteiligungspflichtigen Maßnahme nicht oder nur mangelhaft unterrichtet und angehört wurde und daher deren Unterlassung begehrt, bis die Beteiligung nachgeholt wurde. Weder die Richtlinie noch das deutsche Recht sehen einen Unterlassungsanspruch vor, der sich aber aus Art. 27 GRCh ergeben könnte.[49] Die deutsche (Instanz-) Rechtsprechung lehnt dies bisher wenig überzeugend ab,[50] wobei eine Entscheidung des BAG oder des EuGH in naher Zukunft nicht zu erwarten ist.

[49] Vgl. hierzu auch den Beitrag zum Unterlassungsanspruch im europäischen Betriebsverfassungsrecht von *Westenrieder,* in Freyler/Gräf, Arbeitsrecht als Richterrecht?, 2023, S. 71-90. DOI: https://doi.org/10.5771/9783748939627-71

[50] LAG Baden-Württemberg, Beschluss v. 12.10.2015, 9 TaBV 2/15, NZA-RR 2016, 358; LAG Köln, Beschluss v. 8.9.2011, 13 Ta 267/11, BeckRS 2011, 76804.

Kovács, Réka*

Health professionals on the move: analysing Brexit's influence on diploma recognition and the employment of health care workers

Abstract

In the area of healthcare Britain has long relied on foreign labour, including EEA professionals benefiting from the automatic recognition of their qualifications based on EU law. As a result of the negotiations on future relationship after Brexit, the previous regime for the recognition of professional qualifications has been completely abolished, and a solution of possible agreements on the initiative of professional organisations has been adopted. The UK however introduced measures unilaterally to maintain previous EU rules concerning the recognition of qualifications, and facilitated the inflow of foreign healthcare staff by easier immigration rules for professionals with NHS or adult social care job offer. The article examines – based on the analysis of the data of the British General Medical Council and the Nursing and Midwifery Council and of Hungarian authorities – how the 2016 British referendum affected the UK health sector as for the health workforce concerned.

Keywords: health workforce, mobility, Brexit, recognition of qualifications

I. Introduction

The historic decision by the United Kingdom of Great Britain and Northern Ireland to exit the European Union, commonly known as Brexit, marked a pivotal moment in the European Union's history. On the 23rd of June 2016, the UK population cast their votes, the majority in favour of leaving the EU, setting in motion a complex and protracted process that culminated on the 31st of January 2020, when the UK officially severed its ties with the EU, being the first country to make use of the possibility provided by Article 50 of the Lisbon Treaty. This decision, shaped by various political,

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economic, and social factors, had far-reaching consequences, significantly impacting the dynamics of relations between the EU and UK.

One of the most contentious issues that underscored the referendum leading up to Brexit was the substantial presence of foreign workers, particularly those from Central and Eastern Europe, within the UK.[1] Prime Minister David Cameron's declaration at the EU summit in February 2016, in which he emphasised the necessity for the UK to distance itself from the principle of "ever closer integration" within the EU, served as a critical turning point. He expressed a firm commitment to ensure that British taxpayers' money would no longer be utilised without constraints to fund the social benefits of EU citizens, particularly those from Central and Eastern Europe, who were actively contributing to the British workforce.[2]

The United Kingdom has historically been a preferred destination for healthcare professionals due to a combination of factors, including competitive salaries, state-of-the-art medical technology, ample opportunities for professional growth and development, and the relative ease of communication thanks to English being the most widely used language. These factors, together with the strong demand for healthcare services, made the UK an attractive proposition for healthcare workers, including those from the European Union. However, as the UK formally separated from the EU, several uncertainties arose, reshaping the landscape of healthcare employment in the region.

The healthcare labour market within the EU has faced severe challenges in the past years. The European Union's 2012 Action Plan for Health Workforce had already foreseen a significant shortage of healthcare professionals, projecting a deficit of one million workers by the year 2020.[3] In addition to the existing challenges, the COVID-19 pandemic has had a profound impact on the health workforce. Healthcare professionals worldwide have faced increased workloads and burnout due to the surge in COVID-19 cases, extended working hours, staff shortages and the emotional toll of the pandemic.

At present, UK media are abuzz with the news of healthcare professionals in the UK embarking on strikes, which were triggered by the government's pay declaration in July 2022 and have endured through the entirety of Autumn 2023. The strikes were initiated due to concerns among some NHS workers and their trade unions about the

[1] É. Gellérné-Lukács, Á. Töttös and S. Illés, Free movement of people and the Brexit, (2016) 65 (4) *Hungarian Geographical Bulletin,* (421–432) 422; É. Gellérné Lukács, Brexit – a Point of Departure for the Future in the Field of the Free Movement of Persons, (2018) (1) *ELTE Law Journal,* 141–162. DOI: https://doi.org/10.15201/hungeobull.65.4.9

[2] Kovács R., A Brexit hatása a diplomák kölcsönös elismerésére, illetve az egészségügyi szakemberek külföldi munkavállalására, in Fazekas M. (szerk.), *Jogi tanulmányok 2021,* (ELTE ÁJK Doktori Iskola, Budapest, 2021) 448–466; Bóka J., Halmai P. and Koller B., Válás „Angolosan" – A BREXIT politikai, jogi és gazdasági agendái. (2016) (2) *Magyar Közigazgatás,* 58–79.

[3] Commission Staff Working Document on an Action Plan for the EU Health Workforce, 2012., https://health.ec.europa.eu/system/files/2016-11/staff_working_doc_healthcare_workforce_en_0.pdf (Last accessed: 29.12.2023.).

adequacy of their pay increases, as they believed they did not keep pace with the rising cost of living. Additionally, health workers sought to improve patient safety, which they believed was compromised by inadequate staffing levels and staff burnout. The dispute also stemmed from concerns that, without better pay, it would be challenging to attract and retain healthcare professionals, exacerbating existing staffing issues.[4]

This article delves into the multifaceted ramifications of Brexit on the UK's healthcare sector and its ability to attract, retain and ensure a skilled and diverse healthcare workforce in the post-Brexit era. It examines the post-Brexit regulatory framework for the recognition of professional qualifications and the impact of Brexit on the willingness of the EEA and Hungarian healthcare workforce to work in the UK, based on data from the British professional chambers and the National Directorate General for Hospitals of Hungary (OKFŐ).

II. EU and post-EU rules regulating the mutual recognition of professional qualifications

1. Secondary legislation of the EU: Directive 2005/36/EC – main rules concerning health professionals

To facilitate the freedom of establishment and the freedom to provide services, the European Parliament and the Council adopted Directive 2005/36/EC on the mutual recognition of professional qualifications on 7 September 2005.[5] The Directive applies to nationals of a Member State wishing to pursue a regulated profession in a Member State other than that in which they obtained their professional qualifications, on either a self-employed or employed basis. It only applies to regulated professions, meaning a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject to the possession of specific professional qualifications. According to the provisions of the Directive, the recognition of professional qualifications by the host Member State shall allow beneficiaries to gain access in that Member State to the same profession as that for which they are qualified

[4] K. Garratt, *NHS strike action in England,* Research Briefing, 17.10.2023., https://commonslibrary.parliament.uk/research-briefings/cbp-9775/ (Last accessed: 29.12.2023.).

[5] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (consolidated version of 09/10/2023), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005L0036-20231009 (Last accessed: 29.12.2023.); Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare was also adopted to give effect to mobility of patients; É. Gellérné Lukács, Prior and Subsequent Authorization of Cross-Border Healthcare under Directive 2011/24/EU, (2023) 11 (1) *Hungarian Yearbook of International and European Law,* 50–73. DOI: https://doi.org/10.5553/HYIEL/266627012023011001005

in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.[6] It includes that the professional not only possesses the diploma but fulfils all the necessary requirements of the home country (e. g. professional experience, membership of the chamber, etc.).

The Directive retained the framework for health professions that had been evolving since the 1970s, allowing automatic recognition of qualifications between Member States on the basis of common minimum training requirements for certain health professions. In fact, under Article 21 of the Directive, each Member State recognises evidence of formal qualifications in general medical practice, specialised medicine, nursing, dentistry, specialised dental practice, midwifery and pharmacy listed in Annex V, which satisfy the minimum training requirements laid down in the respective Articles of the Directive and, for the purposes of access to and pursuit of the professional activities, gives such evidence the same effect on its territory as the evidence of formal qualifications which it itself issues.

Regarding the recognition of health qualifications not covered by automatic recognition, the main rule of the Directive applies: under the so-called general system of recognition, the authorities of the host Member State will examine the professional content of the training received and will consider it as equivalent to the training required under their national law, provided that it attests to a level of professional qualification at least equivalent to the lower level of qualification required in their country, immediately preceding the level of professional qualification described in Article 11.[7] Where necessary, the authority may lay down compensatory measures to remedy the substantial shortcomings identified in the Directive, namely a maximum of three years' adaptation period or an aptitude test.[8]

It is important to mention the European Professional Card, introduced by the comprehensive amendment of Directive 2005/36/EC (2013/55/EC), to further facilitate mobility in certain professions via the adoption of implementing acts. The introduction of a European Professional Card for a particular profession is only possible if there is significant mobility or potential for significant mobility in the profession concerned; there is sufficient interest expressed by the relevant stakeholders; and the profession or the education and training geared to the pursuit of the profession is regulated in a significant number of Member States.[9] Until now, this possibility – meaning a simpler alternative for a recognition procedure to be initiated electronically in the sending country – has only been introduced for five professions, three of which are health professions – nursing, pharmacy and physiotherapy. Although experience in Hungary and Europe shows that the European Professional Card has been less

[6] Ibid, Article 4.1.
[7] Ibid, Article 12(1b).
[8] Ibid, Article 14.
[9] Ibid, Article 4a (7).

widespread in the health professions subject to automatic recognition (pharmacists, nurses),[10] and has not yet been introduced for doctors, it can possibly become a serious alternative to the previous procedures.

2. Rules of the Withdrawal Agreement on the regime on professional qualifications

The Withdrawal Agreement,[11] which was adopted on 17 October 2019 following lengthy negotiations and entered into force on 1 February 2020, provided for the continuation of the previous regulatory regime and the retention of acquired rights during the transitional period. According to Article 27 of the Agreement, the legal effects of the recognition of professional qualifications acquired by EU or UK nationals and their family members before the end of the transitional period by the host or host country of employment under Title III of Directive 2005/36/EC will continue to apply in that country, including the right to practise their profession on equal terms with nationals. Article 28 contains a provision on pending proceedings, stipulating that proceedings initiated during the transitional period would continue to be governed by EU law, even after the exit of the UK from the EU. Finally, Article 29 introduced a cooperation obligation to facilitate the application of Article 28 and allowed the United Kingdom to use the Internal Market Information System for procedures under Article 4d[12] for a period not exceeding nine months from the end of the transitional period.

3. EU-UK Trade and Cooperation Agreement – new rules on the recognition of qualifications

a) Regulatory solution

After nine months of intensive negotiations, the Trade and Cooperation Agreement (TCA), governing the UK's future relations with the EU, was finally agreed on 24 December 2020, days before the end of the transition period.[13] In view of the expiry of

[10] Kovács R., Az Európai Szakmai Kártya bevezetésének első hazai tapasztalatai, (2020) (2) *Munkajog,* (20–27) 20.

[11] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *Official Journal of the European Union,* CI 384/1. 12.11.2019., https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02) (Last accessed: 29.12.2023.).

[12] Issuing of a European Professional Card for the purpose of establishment and the temporary and occasional provision of services covered by Article 7(4).

[13] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the

the transitional period, the Agreement was provisionally applied from 1 January 2021 by Council Decision.[14]

The new agreement did not maintain the EU system of mutual recognition of professional qualifications, but introduced in Article 158 a framework under which professional bodies and authorities can develop and submit to the Partnership Council joint recommendations on the recognition of professional qualifications, demonstrating its economic value and the compatibility of regulations. This will therefore allow for agreements on the recognition of professional qualifications between the UK and EEA Member States on a case-by-case, profession-specific basis, modelled on the free trade agreement with Canada, CETA, where cooperation between professional bodies results in such a proposal. To assist, Annex 24 provides guidelines for professional organisations on the recommendations to be submitted to the Partnership Council.

It is interesting to compare the solution used by the UK-EU Trade and Cooperation Agreement and the Canada-EU Comprehensive Economic and Trade Agreement (CETA) on the recognition of professional qualifications. CETA contains a whole Chapter on the mutual recognition of qualifications. As having no previous common history of the recognition of professional qualifications between the contractual parties, Chapter eleven of CETA provides more specific provisions, including definitions for terms such as "jurisdiction", "negotiating entity", "professional experience", "professional qualifications", "relevant authority", and "regulated profession", describes the scope and objective and it also gives a more detailed description of the negotiation procedure of a Mutual Recognition Agreement (MRA) in the respective Joint Committee (MRA Committee). However, it seems to be evident that the main elements from the CETA agreement were taken over, including that joint recommendations have to be developed for the respective body (CETA established a special Committee, while the UK-EU Agreement uses the Partnership Council), having taken into account the economic value (explained in more details in CETA) of such an agreement and the compatibility of the respective regimes.

It is important to refer to the footnote to Article 158(1) of the UK-EU Agreement (there is no such footnote in CETA), according to which the Parties may conclude an agreement between themselves laying down conditions and requirements other than those provided for in this Article. This provision, according to the majority view,[15] allows the UK and the Member States to settle their ideas on the recognition of

other part, *Official Journal of the European Union,* L149/10, 30.04.2021., https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430(01) (Last accessed: 29.12.2023.).

[14] EU-UK Trade and Cooperation Agreement – Press Release, 24 December 2020, https://ec.europa.eu/commission/presscorner/detail/hu/IP_20_2531 (Last accessed: 29.12.2023.).

[15] I. Jozepa, UK-EU Trade and Cooperation Agreement: professional qualifications, *House of Commons Library Briefing Paper,* No. 9172, 27 May 2021. 5., https://researchbriefings.files.parliament.uk/documents/CBP-9172/CBP-9172.pdf (Last accessed: 29.12.2023.); Deloitte, *Mutual recognition of*

professional qualifications in bilateral agreements, which, if subsequently agreed at EU level for certain professions, could lead to a complex picture in the systems of recognition of diplomas.[16]

b) Evaluation and current developments

Based on the information available on the negotiations, it seems that the resulting regulation is mainly closer to the position of the European Union.[17] Statements by UK government politicians[18] suggest that the UK would have preferred to include more ambitious provisions in the agreement. A complex solution was proposed which, while retaining regulatory autonomy, would still provide for a joint assessment mechanism whereby EU and UK regulators would have the possibility to reject candidates with insufficient experience. According to the UK Trade Policy Observatory,[19] the agreement is disappointing and half-baked. They believe that little progress can be expected from a solution such as CETA, given that, in the three years since the Canadian FTA came into force, no recognition agreements have been concluded.

It seems however that some progress has been made from the UK side, as Leo Docherty, Parliamentary Under-Secretary (Foreign, Commonwealth and Development Office) announced on the 29th of March 2023 in the UK Parliament that the UK government is actively supporting regulators and professional bodies proposing professional qualifications for recognition through the TCA framework by technical guidance published in May 2021 on GOV.UK and by launching a Recognition Arrangements Grant Programme to support regulators' financial costs to agree recognition arrangements in August 2022.[20]

The most recent developments concern the adoption of the first joint recommendation, pursuant to Article 158 of the TCA. The first proposal on the recognition of architects' qualifications was submitted to the Partnership Council on 3 October 2022 by professional bodies from the EU and the United Kingdom. The

professional qualifications, Brexit deal analysis, https://www2.deloitte.com/uk/en/pages/about-deloitte-uk/articles/fta-mutual-recognition-of-professional-qualifications.html (Last accessed: 29.12.2023.).

[16] There are, however, divergent interpretations, e.g. Catherine Barnard, Professor at the University of Cambridge, has pointed out that the text of Article 158 does not make it clear that a bilateral agreement that bypasses the EU as a contracting party to the TCA is possible: it is possible to argue both [Cambridge University Centre for European Legal Studies (CELS), Rapid Response Seminar on the EU-UK Trade and Cooperation Agreement (TCA) and the EU (Future Relations) Act; 1h 48 min, 14 Jan 2021].

[17] Jozepa, UK-EU Trade and Cooperation Agreement: professional qualifications, 4.

[18] Ibid.

[19] Ibid. 6.

[20] UK-EU Trade and Cooperation Agreement: Qualifications, Question for Foreign, Commonwealth and Development Office UIN 172446, tabled on 23 March 2023., https://questions-statements.parliament.uk/written-questions/detail/2023-03-23/172446/ (Last accessed: 29.12.2023.).

Partnership Council is due to review the consistency of the joint recommendation with the rules on services and investment of the TCA.[21] The first discussions took place on the recommendation at the Services, Investment and Digital Trade Specialised Committee on 20 October 2022; however, according to the minutes of this meeting, no real discussion took place on the substance.[22] The developments are rather slow, as the Services, Investment and Digital Trade Specialised Committee convened its next meeting a year later, the 6th of October, the report of which is not yet available, but, according to the agenda, the issue was planned to be discussed further. It is worth noting that the first MRA under CETA will be adopted in the near future, and the profession is the same, architects. According to the Report of the Committee on the Mutual Recognition of Professional Qualifications to the Joint Committee on 10th of March 2022, the negotiations have been concluded after nine rounds, and the text will be finalised and formally adopted at a CETA MRA Joint Committee meeting to be scheduled, if possible, in the second half of that year.[23] The process at the end has slowed down somewhat, as the Proposal for a Draft Decision of the Joint Committee is scheduled for 12th of October 2023,[24] but it seems that the first MRA will be adopted in the very near future, showing that there is hope to provide results in the frame of the TCA as well. However, t cannot be seen yet if there will be a similar initiative concerning any of the health professions in the near future.

[21] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation and application of the Trade and Cooperation Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland 1 January – 31 December 2022 Brussels, 15.3.2023 COM(2023)118 final, 7., https://commission.europa.eu/system/files/2023-03/COM_2023_118_en.PDF (Last accessed: 29.12.2023.).

[22] *In addition, the Parties took note of the receipt of the Joint Recommendation for a Mutual Recognition Arrangement for Architects from the Architects Council of Europe and the Architects Registration Board. The Parties took note of the relevant procedures on professional qualifications in Article 158 of the TCA, also noting that the TCA requires the Partnership Council to review the consistency of a joint recommendation with the Services and Investment Title within a reasonable period of time.* Joint Minutes of The second Trade Specialised Committee on Services, Investment and Digital Trade under the EU-UK Trade and Cooperation Agreement Brussels, 20 October 2022., https://commission.europa.eu/system/files/2023-02/Minutes%20-%20Second%20meeting%20of%20TSC%20on%20Services%2C%20Investment%20and%20Digital%20Trade.pdf (Last accessed: 29.12.2023.).

[23] Report of the Committee on the Mutual Recognition of Professional Qualifications to the Joint Committee, March 10, 2022., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/2022-03-10-joint-report-rapport-conjoint.aspx?lang=eng (Last accessed: 29.12.2023.).

[24] Draft DECISION OF THE JOINT COMMITTEE ON MUTUAL RECOGNITION OF PROFESSIONAL QUALIFICATIONS setting out an agreement on the mutual recognition of professional qualifications for architects. Brussels, 12 October 2023 (OR. en) 11527/22 ADD 1., https://data.consilium.europa.eu/doc/document/ST-11527-2022-ADD-1/en/pdf (Last accessed: 29.12.2023.).

III. Rules on employment of foreign health professionals in the UK after Brexit

1. Special visa arrangements for health professionals

From 1 January 2021, workers from EEA and non-EEA countries are subject to the same immigration rules, namely a so-called points-based immigration system.

To facilitate international recruitment into the health sector for employers and workers, the UK government is offering an accelerated, exceptional opportunity for the majority of health professionals with a job offer in the NHS (National Health Service) and qualified social workers coming into adult social care (Health and Care Worker Visa[25]). The visa is not only designed to help address the health professional crisis within the UK healthcare sector by offering an attractive route for foreign nationals to work in the UK and to be joined by close family members, but also offers the potential to settle permanently in the UK in the long term. According to the information provided on the government website, eligible and successful applicants can work in the UK for a period of up to five years and can apply to extend their visa as many time as they like, provided they remain eligible, and after 5 years they can also apply to settle permanently in the UK (also known as 'indefinite leave to remain'). Successful visa applicants in this category are also exempt from the health immigration surcharge.[26] In early 2023, the UK government announced £15 million in funding to help health and care sector employers hire from overseas under the Health and Care worker route.[27]

2. Standstill provisions concerning diploma recognitions

As far as the recognition of qualifications is concerned, the government, according to the European Qualifications (Health and Social Care Professions) (Amendment etc.) (EU Exit) Regulations (2019/593),[28] has decided to recognise health care diplomas

[25] Health and Care Worker visa, https://www.gov.uk/health-care-worker-visa (Last accessed: 29.12.2023.).

[26] Guidance. Immigration health surcharge: guidance for health and care reimbursements, Updated 1 October 2021, https://www.gov.uk/government/publications/immigration-health-surcharge-applying-for-a-refund/immigration-health-surcharge-guidance-for-reimbursement-2020 (Last accessed: 29.12.2023.).

[27] P. Barbato, *Health and Care Visa Guide 2023*. 4 October 2023., https://www.davidsonmorris.com/health-and-care-visa/ (Last accessed: 29.12.2023.).

[28] The European Qualifications (Health and Social Care Professions) (Amendment etc.) (EU Exit) Regulations 2019, https://www.legislation.gov.uk/uksi/2019/593/contents/made (Last accessed:

obtained in the EEA and Switzerland that are subject to automatic recognition under a transitional regime unilaterally for a further two years after the end of the transitional period, under almost the same rules.[29] In addition, Regulation 14 of the EU Exit Regulations obliges the Secretary of State for Health and Social Care to review the operation of the provisions concerned after the end of the period of two years beginning with the day on which those Regulations came into force (meaning January 2023) and provide a report on the findings within 6 months of the start date.

The UK government issued a written Call for Evidence on 25 August 2020, which ran until 23 October 2020,[30] in order to discuss and review the UK's approach to the recognition of professional qualifications from other countries with regulators, trade associations, other organisations and academics from all parts of the UK. The consultation process has served as an important input to the revision of the registration requirements for EEA qualified practitioners for the period after January 2023.[31]

The government conducted the analysis placed on it as a legal duty by Regulation 14 of the EU Exit Regulations and published its findings in July 2023.[32] The report includes a data analysis, the results of the stakeholder consultation and also some wider considerations. According to the analysis, data demonstrated a decline in the number of applications from EEA or Swiss-qualified professionals in 2021 and 2022 compared to 2019, likely influenced by the COVID-19 pandemic. However, there was a notable increase from Q1 2021. While it is challenging to project future application numbers due to the volatility linked to pandemic-related deferred applications, the upward trend between 2021 and 2022 reinforces the importance of standstill provisions in maintaining a simplified application process and mitigating potential negative impacts on EEA-qualified healthcare professional inflow, according to the governmental considerations. Stakeholders indicated support for the short-term retention of standstill provisions, thereby preventing operational challenges for EEA-qualified applicants in the UK. Stakeholders generally favoured maintaining these provisions for now, with possible re-evaluation in the future. Regulators also suggested additional legislative changes, such as extending the provisions to Gibraltese qualifications and enhancing

29.12.2023.).

[29] Guidance. EEA-qualified and Swiss healthcare professionals practising in the UK, https://www.gov.uk/guidance/eea-qualified-and-swiss-healthcare-professionals-practising-in-the-uk (Last updated. 11.05.2022, last accessed: 29.12.2023.).

[30] The Recognition of Professional Qualifications and Regulation of Professions: Call for Evidence, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005090/recognition-professional-qualifications-regulation-professions-cfe-summary-responses.pdf (Last accessed: 29.12.2023.).

[31] Jozepa, UK-EU Trade and Cooperation Agreement: professional qualifications, 8.

[32] E. Parr, *Automatic recognition of EU doctors to continue for at least five years,* 12 July 2023, https://www.pulsetoday.co.uk/news/workforce/automatic-recognition-of-eu-doctors-to-continue-for-at-least-five-years/ (Last accessed: 29.12.2023.).

flexibility in accepting European qualifications under specific circumstances. According to them, extending the standstill provisions will allow further exploration of these legislative improvements over the next 2 to 3 years. Taking also wider considerations into account, such as the need for amending, revoking or replacing retained EU law, a wider regulatory reform and some issues relating to Northern Ireland, the government decided on retaining the standstill provisions for a temporary period of 5 years, in order to support the department's ambition to attract and recruit overseas healthcare professionals, without introducing complex and burdensome registration routes. The Department of Health and Social Care is taking on some additional responsibilities: it will explore the legislative improvements suggested by regulators in the consultation and the viability of delivery between 2024 and 2026, determine what is required to establish emergency cross-border working arrangements on the island of Ireland and also determine whether to carry out a further review of the operation of the standstill provisions in 5 years' time, as part of the wider programme of regulatory reform.[33]

3. Bilateral agreements – Switzerland

Collaboration between Switzerland and the United Kingdom regarding the mutual recognition of professional qualifications commenced more than two decades ago, primarily under the Swiss-EU Agreement on the Free Movement of Persons (AFMP).[34] This agreement ruled on the extension of Directive 2005/36/EC to Switzerland, including the rules on the mutual recognition of healthcare diplomas. According to the press release of the Swiss Ministry of Economics, Education and Research,[35] following the United Kingdom's departure from the European Union and by extending the AFMP, a Swiss-UK bilateral agreement was established to safeguard the rights of their citizens, allowing for a transitional period until the end of 2024. They also report that, in preparation for a robust framework for the mutual recognition of professional qualifications from 2025 onward, Switzerland and the United Kingdom have recently

[33] Department of Health and Social Care: Decision. Professional qualifications - EU Exit standstill provisions: review by the Secretary of State (Updated 7 September 2023), https://www.gov.uk/government/publications/professional-qualifications-eu-exit-standstill-provisions-review-by-the-secretary-of-state/professional-qualifications-eu-exit-standstill-provisions-review-by-the-secretary-of-state#fn:1 (Last accessed: 29.12.2023.).

[34] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02002A0430%2801%29-20210101 (Last accessed: 29.12.2023.).

[35] Switzerland and United Kingdom sign agreement on mutual recognition of professional qualifications, Press releases, 14.06.2023., https://www.eda.admin.ch/countries/united-kingdom/en/home/news/news.html/content/europa/en/meta/news/2023/6/14/95673 (Last accessed: 29.12.2023.).

forged a new agreement,[36] poised for public consultation in the near future. The agreement awaits ratification by the Swiss Parliament, a process expected to take place in 2024. The new agreement concerns regulated professional activities, and has no specific provisions upholding the previous rules on the automatic recognition of healthcare qualifications; special privileges (e.g. automatic recognition) could be established either through mutual recognition arrangements (MRAs) or by adding annexes to the current agreement. These two options furnish the contracting parties with the essential tools to adjust the system as necessary over time.

IV. Measurement of health professional mobility

In order to examine changes in the mobility of health professionals in the light of Brexit, it is important to look at what data can help us identify trends. Given that health professionals can accept job offers anywhere and at any time, using their right to free movement even in the framework of circular migration,[37] there are no mandatory statistics on their work abroad, and we can only estimate their movements. We can use the statistics on those requesting certain certificates required by Directive 2005/36/EC (home country information), as well as on recognition decisions, operational registries (host country information) and international data collections.

Passive intention to work abroad[38] is shown by the different certificates issued by the home country on the basis of the provisions of Directive 2005/36/EC of the European Parliament and the Council on the mutual recognition of professional qualifications as implemented by national legislation. Directive 2005/36/EC makes it possible for Member States authorities to require those who want their qualifications recognised to receive different certificates, to be issued by the authority of the country of establishment.[39] Since it is not possible to know whether the applicants will eventually work abroad, we therefore consider them as attesting a passive intention to work. As in most cases these certificates are requested for employment abroad, those who wish to do so usually ask the authorities to issue one or more of the certificates.

[36] At their meeting in London on 14 June 2023, Federal Councillor Guy Parmelin and British Secretary of State for Business and Trade Kemi Badenoch signed the agreement on the mutual recognition of professional qualifications, as the second agreement signed with a partner outside the EU, after Quebec.

[37] I. Sándor and É. Gellérné Lukács, Dual nature of international circular migration, (2022) 19 (2) *Migration Letters,* 149–158. DOI: https://doi.org/10.33182/ml.v19i2.1554

[38] Z. Aszalós, R. Kovács, E. Eke, E. Kovács, Z. Cserháti, E. Girasek and M. Van Hoegaerden, *Health workforce mobility data serving policy objectives: D042 Report on Mobility data – Joint Action on European Health Workforce Planning and Forecasting 2016.,* 36 and 67., https://ja-archive.healthworkforce.eu/wp-content/uploads/2016/03/160127_WP4_D042-Report-on-Mobility-Data-Final.pdf (Last accessed: 29.12.2023.).

[39] Directive 2005/36/EC, Article 50(1), Annex VII.

The certificates can attest compliance, acquired rights or the good standing/character of the person concerned. The certificate of conformity/compliance confirms that the training led to the qualification satisfies the minimum training requirements laid down in the relevant Articles (24, 31, 34, 40–41, 44) of the Directive in the case of professions under automatic recognition. It is necessary if the training started before a country acceded the EU (and training did not have to be conformant), or the name of the training changed (so cannot be recognised among those listed in the respective Annex of the Directive). The certificate of acquired rights – based on Articles 23, 27, 30, 33, 37 and 43 of the Directive in the case of health professions – issued for those, who qualified before the reference date set out in Annex V to the Directive and whose qualification does not meet the minimum requirements for training, and in other specific situations provided for in the Directive, attests as a main rule (with certain exceptions) that the applicant has been effectively and lawfully engaged in the relevant healthcare activity for at least three consecutive years during the five years preceding the award of the certificate. A third certificate is often required from the foreign authorities; it is the so-called good standing certificate, which is proof that the professional is of good character or repute or has not been declared bankrupt, or is not under suspension or prohibition in the pursuit of the profession because of serious professional misconduct or a criminal offence.[40]

The provisions of the Decree C of 2001 on the recognition of foreign certificates and diplomas for doctors, dentists, (general) nurses, midwives and pharmacists have implemented the above possibilities into Hungarian law. Certificates of acquired rights[41] are issued under Article 60/B of the Act on the Recognition of Qualifications, while Certificates of Conformity[42] are issued under Article 60/C of the same act. Certificates of good standing can be issued under Article 110/A of Act CLIV of 1997 on Health Care for persons with any kind of health professional qualification.

More information on working abroad can be found in the host country's statistics on recognition decisions, as well as in the European Commission's database on official decisions on the recognition of professional qualifications.[43] The recognition of a diploma abroad already reflects a so-called active intention to work,[44] since the person concerned has not only requested the official certificate(s) from the authorities

[40] Országos Kórházi Főigazgatóság (OKFŐ), Humánerőforrás-fejlesztési Igazgatóság, *Hatósági bizonyítványokkal kapcsolatos általános tájékoztató,* https://www.enkk.hu/index.php/hun/elismeresi-es-monitoring-foosztaly/hatosagi-bizonyitvanyok/hatosagi-bizonyitvanyokkal-kapcsolatos-altalanos-tajekozato (Last accessed: 29.12.2023.).

[41] Directive 2005/36/EC, Article 23.1.

[42] Ibid, Articles 23.6, 24, 25, 28, 31, 34, 35, 40 and 44.

[43] European Commission, *Regulated Professions Database,* https://ec.europa.eu/growth/tools-databases/regprof/ (Last accessed: 29.12.2023.).

[44] Aszalós, Kovács, Eke et al., *Health workforce mobility data serving policy objectives: D042 Report on Mobility data*... 36.

of the sending country, but has also initiated the procedure for the recognition of the professional qualification. Similarly useful information on the country of qualification can be found in each country's operational registers, although even here we do not know whether the licensed professional is actively practising. However, these registers might not be accessible, but reports from their data are often available.

It is also very important to mention the different international data collections, the most known and used of which is the Joint Questionnaire (JQ) on non-monetary health care statistics. The data collection covers the Member States of the European Union, the OECD and the WHO European Region. To improve the monitoring of international health workforce migration through the collection of a minimum dataset that is relevant to both source and destination countries, the JQ was complemented in 2015 by the Health Workforce Migration module, for which Member States provided data on the stock of doctors and nurses abroad and annual inflows back to 2000. The data collection focuses mainly on the place of training (defined as the place of first qualification) and collects immigration data from destination countries by all countries of origin, based on the available national sources (e.g., professional registries, specific surveys of health personnel), according to the concept of 'practising' (i.e. healthcare professionals directly providing services to patients). If not possible, the data can be reported for professionally active physicians or physicians licensed to practise.[45] The legal basis for this data collection in the EU is Regulation (EC) No 1338/2008 of the European Parliament and of the Council on Community statistics on public health and health and safety at work, implemented by Commission Regulation (EU) 2022/2294 as regards statistics on healthcare facilities, healthcare human resources and healthcare utilisation. The latter legislative measure encompasses data categories for which compulsory collection has been in effect since either 2021 or 2023, it's worth emphasising that the provision of migration data is not obligatory. Derogations to the requirements of the legislation are specified in Commission Implementing Decision (EU) 2022/2306 (5) granting derogations to certain Member States with respect to the transmission of statistics pursuant to Regulation (EC) No 1338/2008 of the European Parliament and of the Council, as regards statistics on healthcare facilities, healthcare human resources and healthcare utilisation.[46]

[45] *Healthcare non-expenditure statistics manual and guidelines for completing the Joint questionnaire on non-monetary healthcare statistics, 2023 edition,* (Publications Office of the European Union, Luxembourg, 2023) 38–39, https://ec.europa.eu/eurostat/documents/3859598/17120833/KS-GQ-23-001-EN-N.pdf/f7584d59-88c5-b263-f6e2-4670ed8e89a3?version=1.0&t=1688982804201 (Last accessed: 29.12.2023.).

[46] Ibid, 13.

V. Employment of health workers in the UK after Brexit

In the wake of the Brexit referendum, there has been much writing about how the UK healthcare system will be affected by the possible departure of healthcare professionals. For example, a 2017 qualitative study[47] found that although the majority of doctors felt they would not be forced to leave due to staff shortages, some were concerned about the uncertainty caused by Brexit. Perhaps more significantly, doctors said the Brexit vote made them feel unwelcome and undervalued in the UK. It is worth examining whether the available data support or refute these fears.

1. UK as a receiving country – examining data on EEA immigrants, with special focus on Hungarian-trained professionals

a) Analysis of data on doctors

In order to analyse the developments of UK health workforce we don't even need to dig into the international data collections, but we are served by the yearly reports of the British Medical Council (GMC) on the data available for qualified doctors from the European Economic Area (including Switzerland for the purposes of analysis). The latest study published in November 2021[48] on the EEA workforce – forming 8.7% of the total medical workforce, including 5% of general practitioners and 13.4% of specialists[49] – introduces the annual number of people entering and leaving the UK healthcare system, the proportion of those entering from EEA countries in aggregate and by specialisation, and their employment in each part of the country, and also analyses recent trends.

Concerning the number of EEA doctors on the register, the report displays how the proportion of those with a licence to practise has been evolving in the last decade. It concludes that while the number of EEA doctors has been decreasing as a proportion of those registered – as graduates from the UK and outside the EEA have grown at faster rates than EEA graduates –, their absolute number has increased slightly since the 2016 referendum.

[47] W. Chick and M. Exworthy, *Post-Brexit views of European Union doctors on their future in the NHS: a qualitative study,* (University of Birmingham, 2017), https://bmjleader.bmj.com/content/2/1/20 (Last accessed: 29.12.2023.). DOI: https://doi.org/10.1136/leader-2017-000049

[48] General Medical Council, *Our data about doctors with a European primary medical qualification in 2021,* Working paper, 12, November 2021., https://www.gmc-uk.org/-/media/documents/eea-pmq-report-2021-final_pdf-88482214.pdf (Last accessed: 29.12.2023.).

[49] Ibid. Figure 9.

Of particular interest to us is the graph[50] in the study showing the regional breakdown of EEA doctors with a licence. Among the trends is noteworthy – and the report also emphasises it in its conclusions – that there has been a change in the mix of doctors joining UK registers from the EEA in recent years; in 2021 the number of graduates from Central and Eastern Europe and Baltic countries exceeded those from North-western Europe for the fourth year in succession. According to the data presented in the report, the number of North-western Europe doctors is roughly constant, Southern Europe reached the lowest point in 2018 and a considerable increase can be observed since then. The most significant surge, from 2016 onward, has become evident in the new Member States encompassing Central Europe, Eastern Europe, and the Baltic countries (namely Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) and in Bulgaria from Southern Europe. Another interesting figure[51] which concerns our region is that while more than half (5,563) of the more than 10,000 EEA licensed specialists came from four countries, Ireland, Greece, Italy and Germany, one sixth of all lower-ranked and locally employed (SAS – Specialty and Associate Specialist or LE – Locally Employed) doctors came from Romania, and the incidence is higher than average for the other CEE countries as well. It can also be seen that Hungary ranks tenth among the countries of origin; the first ten includes five countries from the CEE region (Romania, Poland, Czechia, Bulgaria and Hungary).

To examine the wider perspective, it is useful to look at the GMC report on the whole medical workforce from 2022,[52] which highlights a dramatic increase in international medical graduates (IMGs) practicing in the country. The number of UK medical graduates joining the workforce rose by only 2% from 2017, while IMGs increased by 121%. According to the report's statement, it has a real relevance concerning the Brexit vote, as the growing trend of IMG doctors joining has increased significantly after 2016, while the joiners from EEA countries has already more or less stabilised at a decreased level since 2015. This heavy reliance on IMGs presents challenges too, not only because the inflow is unpredictable, but data indicate that IMGs leave the UK workforce at a higher rate. There has been an overall increase in the number of doctors joining the workforce by around 17% over the last five years. According to the report, there are however huge variations in workforce growth across different categories, including trainees, GPs, specialists, SAS, and LE doctors. The number of GPs has grown by 7%, and specialists by 11% with variations among specialties, while the number of SAS and LE doctors has surged by 40%. This increase is attributed to the rising demand for healthcare services, leading to more opportunities

[50] Ibid. Figure 8.
[51] Ibid. Table 2.
[52] *The state of medical education and practice in the UK. The workforce report 2022,* (General Medical Council, October 2022.), http://www.gmc-uk.org/workforce2022 (Last accessed: 29.12.2023.).

for SAS and LE doctor recruitment, where IMGs have played a valuable role. This trend is expected to continue.

To conclude, according to the report on the EEA workforce, the slow and steady increase in the number of licensed EEA graduates in the UK since the EU exit referendum suggests that the results of the referendum itself have not affected the number of EEA doctors who want to come and work in the UK. However, on the other hand, in order to cover the increasing demand for a medical workforce in the UK, the inflow of IMG doctors provides the most prominent contribution, which trend has accelerated since 2016 and showing an obvious connection to the Brexit vote. Concerning the EEA workforce, the report is also uncertain as to how the end of the standstill period – which has now been postponed – will affect the number of EEA graduates coming to the UK.

b) Data on nurses

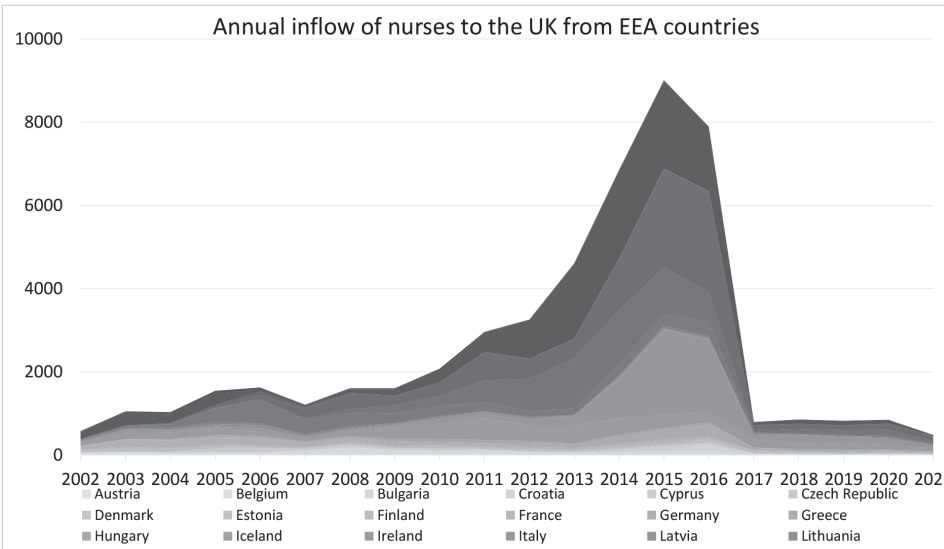
The Nursing and Midwifery Council (NMC) issues an annual report on healthcare professionals, which includes nurses, midwives, and nursing assistants registered with the council. The latest report covers the period from April 1 2022, to March 31 2023, and also provides insights into trends over the past five years.[53] According to the report, the number of registered nurses, midwives and nursing associates practicing in the UK has reached a new record high, totalling 788,638 by 2023. The year 2022–2023 marked a significant milestone, as it witnessed the highest number of new entrants joining the register in a single year, with over 52,000 individuals. Among these, 27,142 were newly educated professionals in the UK, while 25,006 professionals received their education from various parts of the world, primarily outside of Europe. In parallel to this significant increase, however, the number of EEA nationals has been steadily decreasing over the last seven years, starting from 2016[54] (from 38,024 to 28,082). This led to a composition of 17.1% professionals from the EEA and 82.9% from other countries of origin among those professionals on the register whose initial registration was outside the United Kingdom. The count of professionals departing the professions decreased marginally last year, totalling just below 27,000. Nevertheless, apprehensions regarding the future retention of staff persist, as 52 percent of professionals who left the register stated they departed earlier than initially intended.

[53] Nursing and Midwifery Council, *The NMC register 1 April 2022 – 31 March 2023,* [NMC 2023], https://www.nmc.org.uk/globalassets/sitedocuments/data-reports/may-2023/0110a-annual-data-report-full-uk-web.pdf (Last accessed: 29.12.2023.).

[54] Comparing data from Nursing and Midwifery Council, *The NMC register 1 April 2020 – 31 March 2021,* https://www.nmc.org.uk/globalassets/sitedocuments/data-reports/annual-2021/0005b-nmc-register-2021-web.pdf (Last accessed: 29.12.2023.) and Nursing and Midwifery Council, *The NMC register 1 April 2022 – 31 March 2023.*

To support the most recent NMC analysis –which is not as detailed as the GMC1s one – with numbers broken down by EEA country, we have to check the OECD database[55] for migration data about nurses. The annual inflow of foreign-trained nurses in the UK has witnessed a striking decline – see Figure 1 – across nearly all EEA countries, coupled with a consistent decrease in the overall stock notably from all regions, including Spain, Romania, Italy, Portugal and Ireland, being the top five in the stock, as also emphasised by a previous report.[56] This latter also contained a survey on the reasons for leaving. Of the 21,800 professionals who left the register between July 2019 and June 2020, 14,996 were asked to complete the questionnaire, with 5,639 respondents (37.6%). Each respondent could select three reasons for leaving. The results show that the 342 respondents who were educated in the EU were on average the youngest of the leavers (78.4% aged 21-40), with a significant number (79.2%) indicating that they were leaving or had left the UK, while the second most important reason given was Brexit itself (52.7%), followed by a change in personal circumstances (21.9%). The latest report used a new approach concerning the questionnaire; however, of the respondents from the EU, 57% listed leaving the UK as a reason without explicitly mentioning Brexit, along with 30% stating a change in personal circumstances.[57]

Figure 1. Annual inflow of EEA nurses to the UK



Source: Joint Questionnaire of Eurostat, OECD and WHO, OECD database

[55] OECD Statistics, https://stats.oecd.org/Index.aspx?QueryId=68336# (Last accessed: 29.12.2023.).
[56] Nursing and Midwifery Council, *The NMC register 1 April 2020 – 31 March 2021,* 13.
[57] Nursing and Midwifery Council, *The NMC register 1 April 2022 – 31 March 2023,* 22.

The above-introduced increase in nursing workforce numbers, and especially in overseas nurses is the result of a conscious political programme. The Conservatives, who won the December 2019 election and are now in government, recognising the problem, committed in their 2019 election pledges to recruit 12,000 nurses for the NHS by 2024/2025[58] as part of a wider commitment to increase the numbers of registered nurses in the NHS in England by 50,000 by the end of the Parliamentary term. The government issued a policy paper in March 2022, which sets out the programme in more detail, including the progress so far, the plans for meeting the target, the uncertainties, risks and mitigations and the next steps.[59] According to the analysis of the report and official statistics, as of March 2022, over 27,000 more nurses are working across the NHS since the programme began, including over 12,000 more nurses in training and over 15,000 more registered nurses. The sources of the increase in the number of registered nurses include a 40% increase in international nurses recruited to the NHS since 2019. The report is positive, saying the programme is on track to meet its target, but there are a number of challenges that need to be addressed. One challenge is the recruitment and retention of nurses. The government is taking a number of steps to address this, including increasing the number of nurse training places, offering bursaries to student nurses and improving the working conditions for nurses. Another challenge is the impact of the COVID-19 pandemic on the NHS. The pandemic has put a significant strain on the NHS workforce, and it has also led to delays in nurse training and recruitment. Despite these challenges, the government is committed to delivering the 50,000 Nurses Programme and believes in its success.

British sources[60] state that it was the failure of human resources planning in health that has resulted in the NHS now incorporating a programme of overseas recruitment into its long-term plans for 2019. Recruitment from third countries gained momentum in the wake of the COVID-19 epidemic, which began in 2020, with more than 8,000 (including more than 300 critical care nurses) recruited to the NHS in the 10 months following the first wave (April 2020 to January 2021). Hospitals in England were given £28 million in October 2020 to help provide flights, airport transfers and accommodation for nurses arriving as part of the international recruitment drive to get them to the UK as soon as possible.

[58] J. Holmes, *What have the parties pledged on health and care?* 28 November 2019, https://www.kingsfund.org.uk/publications/parties-pledges-health-care-2019#international-recruitment (Last accessed: 29.12.2023.).

[59] *50,000 Nurses Programme: delivery update.* Policy paper. 7 March 2022., https://www.gov.uk/government/publications/50000-nurses-programme-delivery-update/50000-nurses-programme-delivery-update (Last accessed: 29.12.2023.).

[60] S. Lintern, NHS recruits thousands of overseas nurses to work on understaffed wards. *independent,* 10.03.2021., https://www.independent.co.uk/news/health/coronavirus-nurses-nhs-overseas-recruitment-b1815367.html (Last accessed: 29.12.2023.).

So, for the time being, the UK has turned to overseas recruitment as one the main inputs to keeping the UK care system viable post-Brexit, which is ethically questionable, especially in the context of the WHO Global Code of Practice on the International Recruitment of Health Personnel,[61] adopted by WHO member states in 2010, which prohibits recruitment from countries with serious shortages. This voluntary Code has been taken over by the UK in a Code of practice for the international recruitment of health and social care personnel in England,[62] clearly specifying that active recruitment from countries categorised as 'red list' is discouraged, although individual applications from health and social care personnel are not restricted. According to a recent analysis,[63] since the 2019/20 period, there has been a tenfold surge in the count of new NMC registrants from countries on the red list. In the year 2022/23, more than one in ten (12%) of the new NMC registrants – just over 6,000 individuals – received their training in red list countries, with Nigeria accounting for over half of this group. Notably, Ghana has also experienced a substantial rise in the number of new NMC registrants over the past five years, increasing from 19 in 2017/18 to 1,263 in 2022/23.

2. The example of Hungary – what can we know from the available data?

a) Composition of Hungarian-trained doctors moving to the UK

In his PhD thesis on the monitoring of health professional mobility from Hungary, Cserháti[64] analysed data between 2010 and 2018 on official certificates requested for foreign employment and also compared them with the data on new entrants in the receiving countries register to determine the composition of those migrating. According to his work, the United Kingdom was the second most popular destination for doctors migrating out of Hungary between 2010 and 2018, following Germany. The peak of

[61] *WHO Global Code of Practice on the International Recruitment of Health Personnel,* https://iris.who.int/bitstream/handle/10665/3090/A63_R16-en.pdf?sequence=1 (Last accessed: 29.12.2023.).

[62] Department of Health and Social Care, *Guidance, Code of practice for the international recruitment of health and social care personnel,* 25 February 2021. Last updated: 23 August 2023, https://www.gov.uk/government/publications/code-of-practice-for-the-international-recruitment-of-health-and-social-care-personnel/code-of-practice-for-the-international-recruitment-of-health-and-social-care-personnel-in-england#guiding-principles (Last accessed: 29.12.2023.).

[63] J. Buchan, N. Shembavnekar and N. Bazeer, How reliant is the NHS in England on international nurse recruitment? *The Health Foundation,* 12 June 2023., https://www.health.org.uk/news-and-comment/charts-and-infographics/how-reliant-is-the-nhs-in-england-on-international-nurse-recruitment (Last accessed: 29.12.2023.).

[64] Cserháti Z., *Egészségügyi szakemberek Magyarországról külföldre irányuló mobilitásának monitorozása,* Doktori értekezés, (Semmelweis Egyetem Mentális Egészségtudományok Doktori Iskola, Budapest, 2023), https://phd.semmelweis.hu/vedesek/2670/dolgozatDokumentumLetoltese (Last accessed: 29.12.2023.).

this mobility was in 2011 based on Hungarian data, and in 2012 based on UK registration data. Afterward, the trend showed a decreasing and then stabilising pattern.

The analysis showed that the majority of applicants for these certificates were Hungarian citizens, while the number of British citizens who graduated in Hungary and applied for these certificates was quite low. In the case of the United Kingdom, the mobility of British medical students to Hungary was not significant, except in 2017 and 2018. Noteworthy is the trend in the number of Hungarian citizen doctors who requested these certificates for the first time. Between 2012 and 2016, this trend correlated most closely with the number of Hungarian-trained doctors registered in the destination country. Based on this, it can be assumed that the influx into the United Kingdom primarily consists of Hungarian doctors with Hungarian citizenship migrating for work purposes. Cserháti also adds that, among the certificate applicants, an average of about 30 doctors who had graduated in Hungary and were citizens of other countries applied each year. This indicates that the United Kingdom is a popular destination, not only for Hungarians but also for doctors from other countries who studied in Hungary. Among the certificate applicants, there are generally more than 20 Hungarian citizens each year who were not born in Hungary, including Hungarians from beyond the borders of Hungary who migrate further.

To conclude, in order to examine the post-Brexit mobility situation, it is a good estimate to rely on the aggregate numbers of certificates, as the major directions of mobility are determined by the largest groups being Hungarian citizens going to the UK for employment.

b) Analysis of sending country data

After having examined the data available in UK reports and international databases, it is also useful to have a look at the data of the Hungarian authority, the National Directorate for Hospitals (OKFŐ) in order to draw conclusions within the limitations of data expressing only the intention to leave. First, it is worth checking whether there has been any change in the number of qualifications obtained in the UK and recognised in Hungary following the Brexit referendum, as it is possible that Hungarians living/working abroad may have their new qualifications recognised if they move home. According to OKFŐ data, there has been a slight shift in the recognition of qualifications obtained in the UK compared to the 0-1 cases in previous years, particularly for allied health professionals, where there have been more cases than in previous years since 2016, with 11 such decisions in 2017, the year following the referendum, and 11 in 2020, the year of exit, and yearly 5-8 in other years, among which almost all are Hungarian citizens (Table 1). These numbers are rather low, but the increase after 2016 concerning allied health professionals might have been caused by the situation following the referendum.

Table 1. Number of recognition decisions for UK qualifications 2011–2022, including HU citizens

	Doctors all	Doctors HU citizen	Dentists all	Dentists HU citizen	Pharmacists all	Pharmacists HU citizen	Allied HPs all	Allied HPs HU citizen
2011	0	0	0	0	0	0	1	1
2012	0	0	0	0	0	0	1	1
2013	0	0	0	0	0	0	0	0
2014	0	0	0	0	0	0	0	0
2015	0	0	0	0	0	0	1	1
2016	0	0	1	1	0	0	3	2
2017	4	2	0	0	0	0	11	11
2018	0	0	0	0	0	0	8	8
2019	1	1	0	0	1	1	5	4
2020	1	1	0	0	0	0	11	11
2021	0	0	0	0	0	0	5	5
2022	1	1	0	0	0	0	5	5

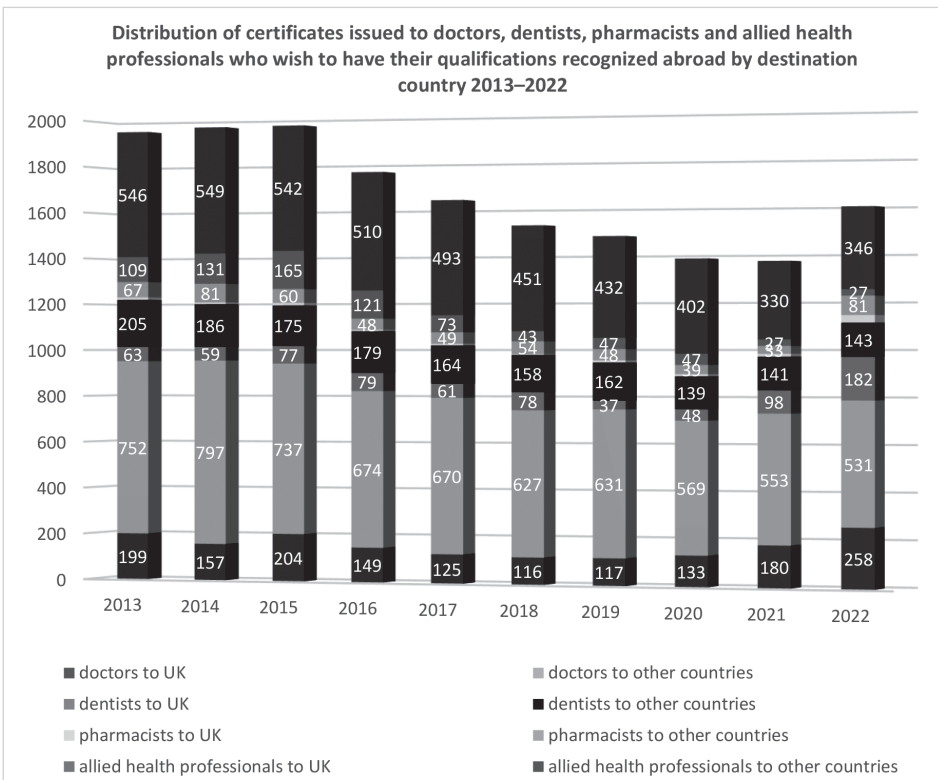
Source: OKFŐ data, 30 October 2023.

To examine the impact of Brexit on working abroad, it is even more important to look at the number of people applying for any of the certificates which the home country authorities might require. OKFŐ has only estimates of the country of destination, as it asks applicants on a voluntary basis in the procedure for issuing the official certificate, but a comparison of the respondents over several years shows the trends in choosing UK as a destination country. OKFŐ has been asked for data for the purpose of this study on doctors, dentists, pharmacists and allied health professionals (including mainly nurses).

For doctors, the Brexit referendum does not seem to have caused major disruption, with a steady decline in both total and UK employment intentions until 2019, and an increase since then, meaning that the popularity of the UK among destinations is increasing since the turning point in 2018, while the number of the remaining certificates (required to other countries or without stating the destination) is still decreasing (two bottom parts of the column in Figure 3). As the number of doctors with an intention to move to the UK decreased only until 2018, together with the overall number (so not because of Brexit but perhaps due to measures taken by Hungary to retain the workforce), and has been increasing since then, I tend to agree with the conclusions of the GMC in the previous chapter that Brexit had no influence on CEE doctors' intention to work there, but, on the contrary, their number and

proportion of the total has been increasing since then. As far as dentists are concerned, we see stable numbers with small fluctuations, followed by a drop in 2019 and a significant upswing in numbers since then, showing a similar trend to that seen for doctors. The flow of pharmacists to the UK was quite negligible, fluctuating between 4 and 12 from 2013 to 2021; however, there was a jump to 32 in 2022 following the pattern of the overall number, so it most probably has nothing to the with Brexit or UK policies. As expected however, the picture is completely different for allied health professionals, the majority of whom are nurses. For them, too, we observe a decrease in both total and emigration intentions to the UK (from 655 to 373 in total and from 109 to 27 to UK respectively between 2013 and 2022), while since 2016, following the Brexit referendum, we see a considerable decrease in the popularity of the UK as a destination (between 2013 and 2022, the proportions within the total were 16.64% 19.26% 23.34% 19.18% 12.90% 8.70% 9.81% 10.47%, 7,56% and 7,24%, the two upper parts of the columns in Figure 2).

Figure 2. Intention to work in the UK for each health profession, compared to other destinations 2013–2022



Source: OKFŐ data, 30 October 2023.

VI. Conclusions

In the initial phase of the Brexit negotiations, specifically during the adoption of the Withdrawal Agreement, a mutual decision was reached by the parties to uphold the existing regime throughout the transition period. It would have been in the best interest of the United Kingdom to extend this system for the recognition of professional qualifications post-Brexit. This continuity could have been crucial for facilitating the seamless attraction of the essential workforce, particularly in occupations facing shortages, of which the majority falls within the healthcare professions. Maintaining the simplest possible procedures via a reciprocal EU arrangement would not only have benefited the United Kingdom but also enabled British nationals to gain recognition on favourable terms within other EU Member States. Despite the British government's efforts, the previous regime on the mutual recognition of professional qualifications has however been discontinued and is only maintained unilaterally by the UK.

In the absence of a specific agreement on recognition, legal relations between the two jurisdictions on the mutual recognition of diplomas have been severed since the UK left the EU. A first initiative concerning architects is now on the table of the Partnership Council, but progress is slow. Previously, experts assessed it as highly uncertain whether the possibility of agreements based on the initiative of individual professional organisations, as introduced by the Trade and Cooperation Agreement governing future relations, would lead to results, as the Free Trade Agreement with Canada has not yet produced anything substantive. However, the fact that Canada-EU relations have never been characterised by a level of integration comparable to that of the UK-EU cannot be overlooked in this assessment, and this may influence the development of possible profession-specific agreements, especially where the training content is very similar. As architects were among the professionals who previously benefited from automatic recognition, it will be interesting to see how quickly an agreement can be reached, especially compared to the CETA, where the same profession has been the primary proposal.

As regards bilateral agreements, no EU country has yet concluded one, however Switzerland, having had the same EU rules in force previously, has just concluded an agreement with the UK, stating that, in order to reach the strategic objective of the international recognition of Swiss professional qualifications, additional mutual recognition agreements are needed to cover qualifications awarded in countries with a comparable education system is to Switzerland's. As both UK and Switzerland have an outstanding education system, the United Kingdom is an ideal partner for Switzerland to support this objective.[65] This agreement does not yet have special rules on healthcare

[65] *Switzerland and United Kingdom sign agreement on mutual recognition of professional qualifications,* Press releases, 14.06.2023., https://www.eda.admin.ch/countries/united-kingdom/en/home/news/news.html/content/europa/en/meta/news/2023/6/14/95673 (Last accessed: 29.12.2023.).

qualifications, but can later be modified by adding Annexes or special recognition agreements. It will be interesting to observe whether any EU Member States will follow the Swiss example. The question is of course how the political will of the UK government and especially individual Member States will evolve, given the growing shortage of health professionals in all Member States.

In terms of the evolution of Hungarian work preferences following Brexit, the number of official certificates requested in Hungary, which are usually required for employment abroad, decreased for doctors in the UK as a destination country between 2013 and 2019 at a similar rate as the number of people requesting a certificate overall, so not because of Brexit, and has been increasing since then, meaning that UK as a destination country has not lost its popularity for Hungarian-trained doctors, but the opposite. UK data on doctors also show that Brexit disruption is not visible in the employment of EEA-trained doctors. The absolute number has been increasing slightly since 2016, and the regional breakdown of the data clearly shows that the largest and continuous increase in arrivals is from the new Member States.

The situation of Hungarian and EEA nurses however are completely different. The data from Hungary indicates a notable decline in the attractiveness of the UK as a destination for nurses after 2016. Simultaneously, the data from the British Chamber reveals a substantial departure of EEA nurses in recent years, coupled with a considerably reduced annual intake of new entrants from the EEA since that period. There have been many studies and articles analysing the possible causes for such a huge decline.

As the article examining the situation and migrant NHS nurses' sense of being only tolerated citizens in post-Brexit Britain[66] collects, apart from blaming Brexit,[67] the outward mobility of EU NHS nurses and the lower interest of new EU nurses in joining the NHS have been attributed also to other factors, such as: uncertainty connected to the position of EU citizens post-Brexit, as the report of the Nursing and Midwifery Council of 2018 suggested,[68] the increased incidents of xenophobia and racism[69] and the introduction of English language requirements for EU nurses by the

[66] G. Spiliopoulos and S. Timmons, Migrant NHS nurses as 'tolerated' citizens in post-Brexit Britain, (2023) 71 (1) *The Sociological Review,* 183–200. DOI: https://doi.org/10.1177/00380261221092199 (Last accessed: 29.12.2023.).

[67] D. Campbell, Brexit blamed as record number of EU nurses give up on Britain, *The Guardian,* 25.04.2018., www.theguardian.com/society/2018/apr/25/brexit-blamed-record-number-eu-nurses-give-up-britain (Last accessed: 29.12.2023.).

[68] New figures highlight 'major concern' as more EU nurses leave the UK, *The NEN – North Edinburgh News,* 28.04.2018., https://nen.press/2018/04/28/new-figures-highlight-major-concern-as-more-eu-nurses-leave-the-uk/ (Last accessed: 29.12.2023.).

[69] S. Johnson, EU workers in the NHS: 'I've faced racial abuse and will head home', *The Guardian,* 06.07.2016., www.theguardian.com/healthcare-network/2016/jul/06/eu-workers-nhs-faced-racial-abuse-head-home (Last accessed: 29.12.2023.); B. Quinn, Hate crimes double in five years in England and Wales, *The Guardian,* 15.10.2019., www.theguardian.com/society/2019/oct/15/hate-crimes-double-england-wales (Last accessed: 29.12.2023.).

NMC in 2017, already in place for non-EU nurses.[70] In order to compensate for the loss and lack of inflow of EEA nurses, and to meet the constantly increasing demand for NHS nurses, as part of a government programme, a significant increase in the number of overseas nurses could be observed in the last couple of years. The increased international recruitment however – also with regard to doctors where the number of IMG doctors has also considerably increased – raises questions about the implementation of the WHO Global Code of Practice on the International Recruitment of Health Personnel, especially towards countries on the "red list", from where international recruitment should not happen according to its provisions.

The King's Fund, an independent think tank involved in work relating to the health system in England suggests in its analyses of 2019[71] that the NHS and the social care system will not be able to survive without an international workforce. In the short term, the NHS shortage in nursing is such that 5,000 more nurses would be needed each year until domestic training capacity is strengthened. A long-term and more complex solution would be needed to keep up with the NHS's increasing needs, including measures increasing the number of training places, reducing the drop-out rate during training, and encouraging more people to join the NHS once they qualify. Additional measures such as improving pay and working conditions in order to make the NHS a more competitive employer and helping to retain staff, investing in health workforce planning, creating a more supportive workplace culture to reduce stress and burnout and also the need to address the wider social determinants of health, such as poverty and inequality to reduce the demand for healthcare services in the long term, are among their not surprising proposals. The King's Fund concludes that the UK government must take urgent action to address the workforce crisis in the health and care system, which requires a long-term commitment to investment and reform. It will be interesting to follow what decisions Britain will take in the future to establish and maintain a sustainable heath workforce.

[70] S. Lintern, Exclusive: 'Crash' in EU nurses working in UK since 'Brexit' referendum. *HSJ,* 12.06.2017., www.hsj.co.uk/topics/workforce/exclusive-crash-in-eu-nurses-working-in-uk-since-'Brexit'-referendum/7018591.article?blocktitle=News&contentID=15303 (Last accessed: 29.12.2023.); News and updates: Read our latest registration data report, *Nursing and Midwifery Council,* 08.05.2019., www.nmc.org.uk/news/news-and-updates/nmc-register-data-march-2019/ (Last accessed: 29.12.2023.).

[71] J. Beech, S. Bottery, H. McKenna, R. Murray, A. Charlesworth, H. Evans, B. Gershlick, N. Hemmings, C. Imison, P. Kahtan and B. Palme, Closing the gap: key areas for action on the health and care workforce, *The King's Fund,* 21.03.2019., https://www.kingsfund.org.uk/publications/closing-gap-health-care-workforce (Last accessed: 29.12.2023.).

Budai, Péter*

The complexity of the development of environmental policy within EU law: a case study

Abstract

The paper aims to show that the development of European Union law needs further examination, which could help to understand the factors involved in the process. The expansion of competences cannot be explained with the sole focus of the Court of Justice of the European Union and the legislative work of the European Commission. For this purpose, the paper presents a case study concerning the development of environmental law within EU law until the adoption of the Single European Act. The international trends influenced the work of international organizations that later became an example for the Commission. The conduct of the Member States and the growing role of the European Parliament emphasised the importance of protecting the environment by highlighting the everyday issues relating to that matter. The Commission experienced its own personal struggles between the commissioners regarding environmental protection, which led to the adoption of action programmes and directives concerning the environment. All of these however highlighted the question of their legal basis. Finally, it was the Court of Justice that legitimised the process by providing the acceptance of the protection of the environment in its case law. These contributed to the emergence of environmental policy as a competence of European integration, which became explicitly embedded in the founding treaties with the adoption of the Single European Act.

Keywords: protection of the environment, environmental policy, EU law, legal history, development of EU law

I. Introduction

The issue of protecting the environment is not an invention coming from the European integration project. It is also not true that it was the Single European Act that introduced this issue to EU law. However, the emergence of environmental policy

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within the European Economic Community (EEC) was not plucked from the ether. Although the history of the environmental competence of the EEC is usually traced back, as its starting point, to the amendment of the Treaties, there is a long history preceding the treaty revision.

The aim of this paper is to present a multi-faceted history and to provide a more complex picture of the development of environmental law within the Union. This paper specifically points out that an international regulatory trend, the initiative and dedication of the Member States, the work of the European Commission (the 'Commission'), and the "rise" of the European Parliament all contributed to the development of environmental law within the Community law. The Member States were dedicated to improving the ability of the EEC to tackle the problems of the environment. The Commission presented convincing action programmes for the protection of the environment and enacted legislation and to receive more and more competences concerning the matter. The EP invoked issue of the environment to gain a growing weight in European politics. Finally, the Court of Justice of the European Union decided on the legal bases concerning the environment, and on its context with the common market to add further legitimization to the process.

The structure of the article follows this logic. Chapter II deals with the context in which the regulatory need for protecting the environment emerged. This is followed by an examination of the positions of the Member States (covering the European Council and the Council) in Chapter III, and then the approach of the European Commission ('the Commission') in Chapter IV and that of the European Parliament ('EP') in Chapter V. A subchapter [IV.2.*b)*] examines the legal bases which were used for the adoption of legal instruments concerning the protection of the environment. It then examines the case law of the Court of Justice of the European Union ('the Court of Justice') (Chapter VI). In that regard, the chapter focuses on the findings of the Court of Justice concerning the legal bases were used to adopt legal instruments as well as connection between the protection of the environment and the common market.

The article examines the sources of EU law, also highlighting the case law of the Court of Justice. For ease of reference, it also draws on studies that examine the phenomenon from a legal and historical perspective. In addition, to give a fuller picture on the underlying processes and mechanisms, this article draws on the resources of the archives concerning the European Union (Historical Archives of the European Union, Archive of European Integration), which contain a large number of legislative and other documents.

II. The international law context of environmental protection

The protection of the environment did not originate from the institutions of the EEC but rather it was the result of a trend within the international community. The relationship between people and the environment has fundamentally changed in the second half of the 1960s. There have been, for a long time before, legal regulations governing smoke or noise pollution.[1] However, for the first time, the risks posed by nuclear tests, industrial and domestic waste, air and water pollution, the conservation of nature, and animal welfare were brought together in a single approach.[2] This corroborated by popular scientific works, such as Rachel Carson's Silent Spring, which dealt with the harmful effects of chemical inputs in agriculture,[3] or Limits to Growth, which warned that population growth, industrialisation, pollution, food production, energy consumption, and resource depletion were making the prevailing lifestyle unsustainable.[4] National policies also sensed this change, or instance, legislation was made at both state federal level in the US between 1965 and 1970.[5]

Second, environmental protection also occurred at the international level. A series of conferences put the question of the environment in the spotlight and brought modern international environmental law to life. In 1961, the Council of Europe proposed the need for a permanent system to protect the countryside, natural reserves and natural resources. A committee was set up in 1962 and, later, an information centre on the matter was also established. The problem of water pollution and air pollution also appeared on the agenda of Council of Europe.[6] The UNESCO Conference on Man and the Biosphere in 1968[7] and the United Nations Conference on the Human Environment in Stockholm in 1972 were the first significant steps. For the latter, 113 countries attended the conference. Despite the fact that the German Democratic Republic was not invited to the conference and the Soviet bloc stayed

[1] A. Rome, Coming to Terms with Pollution: The Language of Environmental Reform, 1865–1915, (1996) 1 (3) *Environmental History,* 11–15. DOI: https://doi.org/10.2307/3985154

[2] J. I. Engels, Modern Environmentalism, in F. Uekötter (ed.), *The Turning Points of Environmental History,* (University of Pittsburgh Press, Pittsburgh, 2010) 119–131. DOI: https://doi.org/10.2307/j.ctt5hjsg1.11

[3] The Story of Silent Spring – How a courageous woman took on the chemical industry and raised important questions about humankind's impact on nature, https://www.nrdc.org/stories/story-silent-spring (Last accessed: 29.12.2023.).

[4] J. Muhrel, The Birth of Global Environmentalism, https://voelkerrechtsblog.org/the-birth-of-global-environmentalism/ (Last accessed: 29.12.2023.).

[5] T. Schulz, Das Europäische Naturschutzjahr 1970 – Versuch einer europaweiten Umweltkampagne, (2006) (7) *WZB-Discussion Papers,* 3.

[6] B. Andemicael, *Regionalism and the United Nations,* (Brill Archive, 1979) 508–510.

[7] The Biosphere Conference, 25 years later, https://unesdoc.unesco.org/ark:/48223/pf0000147152 (Last accessed: 29.12.2023.).

away, these states also subsequently endorsed the conference's recommendations on the environment.[8] The development of soft law norms began immediately after the Stockholm conference.[9] The topics raised there were carried forward to the 1973 Conference in Vienna, which dealt with European aspects of the environment.[10] In 1970, the Council of Europe held the European Year of Sustainability (the same year Earth day was introduced as well as the environment was the issue of the year in the TIME magazine).[11] At the conference concerned, ministers agreed that both the Council of Europe and other international organisations should take steps to establish the necessary industrial policy requirements for the production of pesticides, and the reduction of unwanted effects of vehicle exhausts and aircraft engines. They also stressed the need for a European authority to monitor Europe's natural environment.[12]

This internationalization of the environmental matters (specifically after the Stockholm conference) led to the realization for the countries that they need ministries, agencies, departments and offices that they are specialized on a domestic level. Furthermore, Stockholm also led to the increase of national legislation that regulated the different types of pollution in accordance pursuant to the principles set out in the Stockholm UN Declaration on the Human Environment.[13]

III. Member States and environmental protection

Similarly to the US, EC Member States have also started to adopt national environmental legislations during this period. Some authors argue that the Member

[8] Láng L., Faragó T., Schmuck E., Vásárhelyi J. and Nemes Cs., *Az ENSZ Közgyűlés rendkívüli ülésszaka: a fenntartható fejlődés nemzetközi programjának értékelése és a további feladatok,* (Fenntartható Fejlődés Bizottság, Budapest, 1997) 7., http://real.mtak.hu/65840/1/ENSZ1997_Fenntarthato_fejlodes.pdf (Last accessed: 29.12.2023.).

[9] P-M. Dupuy, Soft Law and the International Law of the Environment, (1990) (12) *Michigan Journal of International Law,* 422.

[10] Results of the European Ministerial Conference on the Environment, Vienna, (28–30 March 1973), https://pace.coe.int/en/files/3589 (Last accessed: 29.12.2023.).

[11] O. B. Wxman, They Were there as the Modern Environmental Movement Began. Earth Day Turns 50, They Say the Planet's Problems Gotten Worse, https://time.com/5822525/earth-day-50th-anniversary/ (Last accessed: 29.12.2023.); Issue of the Year: The Environment https://content.time.com/time/subscriber/article/0,33009,942377-5,00.html (Last accessed: 29.12.2023.).

[12] Council of Europe, Déclaration sur l'aménagement de l'environnement naturel en Europe. Conférence européenne sur la Conservation de la Nature, Strasbourg, 9–12 February 1970, https://www.e-periodica.ch/cntmng?pid=hab-001%3A1970%3A43%3A%3A1165 (Last accessed: 29.12.2023.).

[13] H. G. Angelo, R. E. Stein and J. L. Hargrove, International Environmental Protection: Policy, Legal and Trade Aspects, (1977) 71 *Proceedings of the Annual Meeting (American Society of International Law),* 49–50.; J. B. Eisen, From Stockholm to Kyoto and Back to the United States: International Environmental Law's Effect on Domestic Law, (1998) 32 *University of Richmond Law Review,* 1458–1460.

States played a somewhat greater role within the EEC than the European institutions.[14] In parallel with the Stockholm Conference, the Heads of State and Government of the EEC Member States held a summit in Paris in 1972. In their declaration of intent, they stressed the importance of a Community environmental policy. To this end, they called on the institutions (in practice, the Commission) to draw up a programme of action. The deadline for this was 31 July 1973,[15] which was confirmed by the Member States in Bonn.[16]

In addition, Member States also sought to put certain environmental problems explicitly on the EEC political agenda. In this case, it is safe to say that the Member States' efforts were disaster-driven; for instance, after the Amoco Cadiz wreck, a very large crude carrier under a Liberian flag of convenience that sank near the coast of Brittany, France, which resulted in the largest oil spill in history of that date. After that, the European Council agreed to a specific programme on sea pollution.[17] The same phenomenon can be observed in the case of harmful acid rain effects on the Black Forest in Germany, which brought the issue of environmental protection back to the fore for the Member States.[18] The 1985 European Council summits emphasised the importance of environmental protection when it appointed 1987 as the European Year of the Environment.[19]

In the Council, Member States' ministers followed a similar approach, although certain differences appeared more explicitly in that forum. Denmark, the Netherlands and Germany took a strong stance on environmental issues, often in contrast to the Mediterranean countries. In addition, the United Kingdom in the Thatcher era objected for a long time to uniform emission standards for water quality control and the use of catalytic converters in favour of a lean burn engine solution to char exhaust emissions.[20] However, Freestone underlines that these differences at ministerial level were not surprising. National environmental policies were underdeveloped at that time

[14] E. Rehnbinder, Umweltschutz in der Rechtsordnung der Europäischen Gemeinschaften, https://www.uni-trier.de/fileadmin/fb5/inst/IRP/03_Events/02_Bitburger_Gespraeche/1983/Doc/05_Rehbinder_Umweltschutz_in_der_Rechtsordnung_der_Europ%C3%A4ischen_Gemeinschaft.PDF (Last accessed: 29.12.2023.).

[15] Declaration of the Heads of State or Government at the end of the conference in Paris, Paris 19–21 October 1972, 8.

[16] Meeting in Bonn of the environment ministers, 31 October 1972, SEC(72)4042, Memorandum distributed on the instructions of Altiero Spinelli, Brussels, 13 November 1972.

[17] Commission staff paper for the Environment, SEC(84)449; D. Freestone, European Community Environmental Policy and Law, (1991) 18 (1) *Journal of Law and Society,* 138, DOI: https://doi.org/10.2307/1410105

[18] C. Van de Velde, Environmental and Consumer Protection, in *The European Commission 1973-86 – History and memories of an institution* (2014), https://op.europa.eu/en/publication-detail/-/publication/da0dc0fb-1c5b-4e2b-aef9-d233579efd20 (Last accessed: 29.12.2023.).

[19] Freestone, European Community Environmental Policy and Law, 138.

[20] S. P. Johnson and G. Corcelle, *The Environmental Policy of the European Communities* (Graham & Trotman Ltd., London, 1989) 126–136.

and there was a consensus among the member states to tackle the problem but with the presence of prevailing economic interests as well.[21]

IV. The European Commission and the protection of environment

1. Turning to the environment

For a long time, the Commission had not taken a a unified approach to environmental protection, because there was no interest in environmental protection when the EEC was born. At the time, the Member States and the institutions were both more concerned with how to tackle the setbacks of the European Coal and Steel Community and, later to clarify the exact nature of the Treaty of Rome. This approach changed over time, following the transitional period established for the creation of the common market.[22]

Within the Commission, Sicco Mansholt, who was Commissioner for Agriculture between 1958 and 1972, was among the first politicians who realised that the environment needed to play an increasingly important role in the development of agricultural policy. As a member of the Club of Rome, he realized that the demographic explosion, food shortages, and future energy shortages posed major risks.[23] In his letter to the President of the Commission, Franco Malfatti, he stressed that society could no longer be based on growth alone. He underlined that the market must produce goods with a longer life cycle and as little waste as possible.[24] However, his approach was harshly criticised by Commission staff.[25]

Altiero Spinelli, Commissioner for Industrial Affairs at that time, on the other hand, was more cautious in his criticism, because Mansholt's position was in line with the Commission's earlier communications on environmental issues in 1971 and 1972. In that regard, in 1969, Spinelli had delegated Director-General Robert Touleman to focus on environmental issues, and asked Michel Carpentier to head the division responsible for environmental affairs. Carpentier's first task was to draw up a

[21] Freestone, European Community Environmental Policy and Law, 139–140.
[22] L. Brinkhorst, The Road to Maastricht, (1993) 20 (1) *Ecology Law Quarterly,* 9.
[23] J. Van der Harst, Sicco Mansholt: courage and conviction, in *The European Commission, 1958-1972, History and memories of an institution,* (European Union, Belgium, 2014) 175., https://op.europa.eu/en/publication-detail/-/publication/ebec8b45-1aab-4d57-887f-0da73489b19e (Last accessed: 29.12.2023.).
[24] Brief Mansholt over 'Testament' van Commissie (February 1972), https://www.cvce.eu/en/obj/letter_from_sicco_mansholt_to_franco_maria_malfatti_february_1972-en-51303966-0532-46bc-89c7-271ef294eb13.html (Last accessed: 29.12.2023.).
[25] Van der Harst, Sicco Mansholt: courage and conviction, 178.

programme of substantive measures,[26] which Spinelli himself presented to the other Commissioners, later known as the First Action Programme.[27] At the same time, Wilhelm Heferkamp, Commissioner for Energy, also presented a document containing a proposal to harmonise the rules on pollution, particularly water pollution.[28] The turnaround was gradually institutionalised within the Commission. In addition, in the Bonn speech, Spinelli drew attention to the need to set up a special body to deal specifically with this problem. The Environment and Consumer Protection Service was accordingly set up on 1 January 1973, which continued to exist as a separate Directorate-General until 1981.[29]

2. The approach of the Commission

a) An ever-expanding comprehensive approach

The first time that the Commission (after Mansholt and Spinelli's activism and the recent changes in the international environment) drew attention to the Community's crucial role in this field was in its Communication issued in 1971. The text began by stressing the need to improve living conditions for society, which can be traced back to earlier economic policy programmes. The document also recommended drawing up a general action programme to make the necessary legislative proposals, setting up a Community-level network to assess existing infrastructures in the Member States, and establishing a Community-level research programme.[30] The document also covered the reduction of the most dangerous pollutants, the reduction of pollution from industrial and agricultural processes, and the protection of the natural environment.[31] Needless to say, action programmes and legislation followed this communication.

In its proposals, the Commission defined environmental protection as a cross-cutting concept very early on. This follows from the fact that the Commission drew on the programmes of the international organisations mentioned earlier, which had taken

[26] Ibid.
[27] É. Bussiére, *An improbable industrial policy, History and memories of an institution,* (European Union, Belgium, 2014) 468.
[28] Travaux effectues dans la cadre du rapprochement des legislations dans le domaine de la protection de l'environnement, notamment en ce qui concerne le droit des eaux (lutte contre la pollution des eaux), Communication de. M. Heferkamp, 12 February 1971., SEC(71)602.
[29] J-H. Meyer and B. Poncharal, L'européanisation de la politique environnementale dans les années 1970s, (2012) (1) *Vingtième Siècle. Revue d'histoire,* https://www.cairn.info/revue-vingtieme-siecle-revue-d-histoire-2012-1-page-117.htm (Last accessed: 29.12.2023.) DOI: https://doi.org/10.3917/vin.113.0117
[30] European Commission, First Communication of the Commission about the Community's Policy on the environment, SEC(71)216 final, 22 July 1971, 3.
[31] Ibid. 2.

a similarly broad approach. It is not surprising that the Commission appeared, sometimes officially, on the preparations of the documents concerned within the framework of these organisations.[32] The Commission's approach therefore included (fresh and sea)[33] water and air pollution,[34] radioactive pollution, noise pollution, conservation of natural resources, and the prevention of deforestation as well.[35] The first action programme (1972–1976) explicitly emphasised both the short and long-term effects of such pollution.[36] The second action programme (1977–1981) placed particular emphasis on pollution prevention, land use, the use of mineral fertilizers and waste management.[37]

In addition, the Commission identified the relationship of the environment with other policies within the EEC. One of the most important aspects is the relationship with the common market, as earlier legislation regarding the issue of the four freedoms occasionally contained provisions related to the environment.[38] In this respect, the Commission stressed that if Member States alone regulated these issues, they may constitute obstacles to the common market in the future. This finding is not surprising: it shows that common market thinking was also at the forefront at this time, and that thinking about the environment in the single market context was very new.[39] It should be noted that the third action programme placed greater emphasis on common market issues in addition to environmental protection.[40] However, the protection of the environment had a relationship with other policies, such as

[32] J-H. Meyer, Appropriating the environment: Who the European institutions received the novel idea of the environment and made it their own, (2011) (31) *KFG Working Paper Series,* 15.

[33] Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting within the Council of 17 May 1977 on the continuation and implementation of a European Community policy and action programme on the environment, OJ. 1977, C 139/1., 27–49.

[34] European Commission, Programme of Action of the European Communities on the Environment, 22 November 1973. C:1973:112:TOC.

[35] Communication from the Commission to the Council on a European Communities' programme concerning the environment, SEC(72)666, 22. March 1972., 12, http://aei.pitt.edu/4647/1/4647.pdf (Last accessed: 29.12.2023.).

[36] European Commission, Programme of Action 1973.

[37] Resolution of the Council 1977.

[38] C. Knill and D. Lieffering, The Establishment of the EU Environmental Policy, in A. Jordan and C. Adelle (eds), *Environmental Policy in the EU. Actors, institutions and processes,* (Routledge, Abingdon, 2013) 14.

[39] Meyer and Poncharal, L'européanisation de la politique environnementale dans les années 1970s; Knill and Lieffering, The Establishment of the EU Environmental Policy, 3.

[40] Resolution of the Council of the European Communities and of the Representatives of the Government of the Member States, meeting within the Council of 7 February 1983 on the continuation and implementation of a European Community policy and action programme on the environment (1982 to 1986), 11.

the common agricultural policy, competition policy, energy policy,[41] regional policy, and social policy[42] as well.[43]

This highlights that a comprehensive approach emerged relatively early on from the Commission to tackle the protection of the environment. In addition to seeking to address the issue at policy level in a way that was consistent with the common market, the Commission sought to identify as many sub-problems as possible at the EEC level. At the same time, the question logically arose as to the legal basis for binding rules within the EEC.

b) The question of legal basis

Although the Euratom Treaty stressed the issue of human health and the impact of nuclear energy, this document can hardly be seen as taking a comprehensive approach.[44] In addition, the Treaty of Rome did not contain provisions on environmental policy at the time. Even in its preamble, it merely stated that the contracting parties would lay the foundations for a closer union in order to ensure their economic and social development to ensure their economic and social development. However, there were directives that were enacted that can be related to the protection of the environment, such as the one concerning the classification, packaging, and labelling of dangerous substances,[45] and the permissible sound level and the exhaust system of motor vehicles.[46] Regardless, it should be pointed out that the Commission (more precisely, Spinelli representing the Commission in the Paris Summit) had the necessary powers to enact legislation on the environment.[47]

However, this was not so self-evident in the text of the Treaty of Rome. In its communication on the subject, the Commission explained that Article 2 explicitly referred to the harmonious development of the economy and the improvement of the quality of life in the Member States as being a prerequisite for protecting the

[41] Progrès nécessaires de la politique énergétique communautaire (Commission communication to the Council), COM(72)1200, 4 October 192, European Commission 1977, 71–75.
[42] European Commission, Preliminary guidelines for a community social policy programme, 17 March 1971.
[43] European Commission 1972.
[44] Bándi Gy., A környezeti szabályozás útja az európai integrációban, példákkal illusztrálva, (2014) (2) *Iustum Aequum Salutare,* 123.
[45] Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, OJ 196, 16.8.1967, 1–98.
[46] Council Directive 70/157/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the permissible sound level and the exhaust system of motor vehicles, OJ L 42, 23.2.1970, 16–20.
[47] Intervention de A. Spinelli a la conférence ministérielle sur l'environnement, Bonn, 31 October 1972, http://aei.pitt.edu/13036/1/13036.pdf (Last accessed: 29.12.2023.).

environment.[48] However, this only represented the objectives of the Treaty, which was not considered to be an adequate legal basis.

What is certain is that environmental legislation led to the Commission (and therefore the Communities) being criticised as having no competence in the field of the environment.[49] The lack of an adequate legal basis was confirmed by legal experts at the time.[50] It is also clear, however, that neither the Commission nor other institutions, such as the European Parliament (and sometimes even the Member States) attached too much importance to this. Although there have been references to this from time to time in the legislation of Member States, no Member State has ever challenged the legal basis of any relevant EU instrument before the Court of Justice of the European Union.[51]

The first Action Programme only referred to Article 2 of the EEC Treaty. It should be noted that, during the development of environmental policy, much of the legal literature agreed that Article 2 could include environmental protection as an objective to be achieved, an interpretation which, incidentally, was also heavily influenced by circumstances.[52] The majority of EU legal scholars agreed on the need for an environmental policy at the Community level. It should be noted that Carpentier himself authored a number of studies in which he was in line with this approach. For example, in his 1973 study, he only explicitly mentions Article 2 of the EEC Treaty as a legal basis, but at the end of the study he concludes that the first environmental action programme was sufficient for the Commission to envisage a very ambitious programme for the future.[53] However, as regards the legal basis for the various legal instruments (directives), it can be seen that, until the Single European Act, reference was made to other legal bases that already existed but did not relate to the environment, such as Articles 100 and 235 of the EEC Treaty.

Article 100 (now Article 115 TFEU) covered cases where certain environmental legislation in a Member State would directly affect the establishment or functioning of the common market. This required the unanimity of the Council and prior consultation of the General Assembly and the Economic and Social Committee. Article 100 was

[48] European Commission 1973.

[49] E. Renbinder and R. Stewart, *Environmental Protection Policy,* Vol 2., (De Gruyter, Berlin, 1985) 21.

[50] Inter alia R. C. Béraud, Fondements juridiques du droit de l'environnement dans la Traité de Rome, (1979) *Revue du Marché Commun,* 35; M. Carpentier, L'action de la Communauté en matière d'environnements, (1972) *Revué du Marché Commun,* 385; G. Close, Harmonisation of Laws: Use or Abuse of the Powers under the EEC Treaty, (1978) *European Law Review,* 461; C. Offermann-Clas, Das Abfallrecht der Europäischen Gemeinschaften, (1981) 96 *Deutsches Verwaltungsblatt,* 1125–1126.

[51] L. Krämer, The Single European Act and Environmental Protection: Reflections on Several New Provisions in Community Law, (1987) 24 (4) *Common Market Law Review,* 660, DOI: https://doi.org/10.54648/COLA1987032

[52] Renbinder and Stewart, *Environmental Protection Policy,* 21.

[53] M. Carpentier, Un Programme Communautaire en Matiere D'environnement, (1973) *Annuaire Européen,* 52–65, DOI: https://doi.org/10.1007/978-94-015-1218-3_4

the legal basis for many directives, such as the approximation of laws relating to the packaging of dangerous substances, on the permissible sound level and the exhaust system of motor vehicles, and on the approximation of law relating to measures to be taken against air pollution by emissions from positive-ignition engines of motor vehicles.[54] However, it was argued that this provision could not be used to develop a coherent environmental policy, since it was mainly concerned with harmonising a single approach, and excluded the possibility of any innovation.[55]

By contrast, Article 235 (now Article 352 TFEU) allowed the Communities to legislate in cases where it was necessary to achieve the Community's objective but the Community did not have the competence to do so. This also required unanimity in the Council and consultation: with the Assembly. Examples of this are the directives on waste and on the conservation of wild birds.[56] It is clear that the authors agreed very early on that the term "common market" had grown beyond simple economic issues,[57] and this was sufficient to allow the legal basis to be applied to environmental issues.[58]

V. The European Parliament and the protection of the environment

For the first time, although not yet elected, the European Parliament was one of the first institutions to put the environment on the EU political agenda on a regular basis, even before it became a mainstream issue within European integration. In 1969, a significant amount of the Rhine's fish population had been destroyed,[59] and several MEPs strongly criticized those involved. Later, in 1970, members of the EP's Committee on Public Health and Social Affairs, Jacob Boersma and Hans Edgar Jahn, produced reports calling for joint action, on the environment, including the use of DDT.[60] It is important to note that it was one of Boersma's reports on the pollution

[54] Council Directive 70/157/EEC and Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles, OJ L 76, 6.4.1970, 1–22.

[55] Renbinder and Stewart, *Environmental Protection Policy,* 21.

[56] Council Directive 75/442/EEC of 15 July 1975 on waste, OJ L 194, 25.7.1975, 47–49 and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds OJ L 103, 25.4.1979, 1–18.

[57] F. Behrens, *Rechtsgrundlagen der Umweltpolitik der Europäischen Gemeinschaften,* (Erich Schmidt Verlag, 1971) 243–244; Carpentier, L'action de la Communauté en matière d'environnements; Offermann-Clas, Das Abfallrecht der Europäischen Gemeinschaften, 1127.

[58] See H. Lesguillons, L'extension des compétences de la Communauté économique européenne par l'aricle 235 du Traité de rome, (1974) 20 *Annuaira Francais de Droit International,* 886–904, DOI: https://doi.org/10.3406/afdi.1974.2306

[59] J-H. Meyer, Pushing for a Greener Europe – The European Parliament and Environmental Policy in the 1970s and 1980s, (2021) (1) *JEIH Journal of European Integration History,* 60, DOI: https://doi.org/10.5771/0947-9511-2021-1-57

[60] Meyer and Poncharal, L'européanisation de la politique environnementale dans les années 1970s.

of the Rhine that influenced Spinelli (who himself was there at the plenary during Boersma's speech) to take the issue of environmental protection seriously.[61]

This trend only intensified when MEPs were elected in 1979. As in the case of the Rhine pollution, the European Parliament also urged the European Communities to enforce a more serious environmental policy following the *Seveso dioxins* case. It should be stressed that the EP's action at this time seems to have only served to strengthen the push for Community-level competence in environmental protection. It should be underlined that the EP did not only stress the introduction of action programmes. For example, the it adopted a specific resolution on Seveso dioxins, and welcomed the Commission's proposal to bring the management of hazardous waste under Community management, and expressed concern at the lack of Community legislation in this area.[62] It is no coincidence that, in this context, the Council adopted a Directive on the supervision and control of transboundary movements of hazardous wastes by sea in 1985, on a proposal from the Commission.[63] It is also worth noting that the focus of the parliamentary debates on the issue had shifted,. While common market issues had dominated, even in relation to the environment, this had changed: from 1983 onwards, the arguments increasingly focused on the Commission acquiring more powers in the field of environmental protection.[64]

It must be noted that the European Parliament, similarly to the Commission, also identified different environmental aspects in its approach to the problem; not only water pollution, but also air pollution, the protection of wildlife, but including nuclear waste, and the disposition of waste in general were on the political agenda of the European Parliament.[65]

VI. Legitimation of the protection of the environment: task of the Court of Justice

It should be noted that the Court of Justice had to deal with the issue of the protecting the environment. In its case law, the Court made comments, not only on the legal basis of the policy but its relationship with the common market as well. In doing so, the

[61] Meyer, Pushing for a Greener Europe – The European Parliament and Environmental Policy in the 1970s and 1980s, 64, 71.
[62] EP, Resolution on the application of the Community Directives on toxic substances and the shipment and storage of the Seveso dioxin, in *OJEC,* C 128, 16.5.1983, 60.
[63] Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, OJ L 326, 13.12.1984, 31–41.
[64] Meyer, Pushing for a Greener Europe – The European Parliament and Environmental Policy in the 1970s and 1980s, 77.
[65] C-91/79, *Commission of the European Communities v. Italian Republic,* 6–8.

Court identified the main problems that were fundamentally identifiable from the point of view of Community law when a policy was introduced to the Community: the Court's interpretation helped to legitimise the policy by pointing out how the legal bases should be dealt with, and clarified the relationship of the issue of environmental protection to the common market.

1. Legal basis

Cases 91/79 and 92/79 raised the question of the legal status of the directives on the approximation of laws of the Member States in relation to detergents[66] and on the approximation of laws of the Member States relating to the sulphur content of certain liquid fuels.[67] In these cases, the Court of Justice emphasised that the subject matter of the directives in question was already covered by the 1973 Environmental Action Programme, as well as by the 1969 general programme for the elimination of technical barriers to trade. As both directives imposed technical requirements, the Court stressed that this had an impact on the situation of the common market. However, it noted that there was no reason that environmental rules could not be based on Article 100. It also pointed out that provisions made necessary by environmental and health considerations could impose a burden on businesses if national provisions were not harmonised on the matter. In this respect, it should also be noted that, although the Court referred to the justification for the legal basis, the Italian Government (which introduced arguments on its behalf), did not actually question the legal basis in those cases.[68] More importantly, the Italian Government explicitly stated that it did not intend to raise whether the directive was valid in the light of the fact that combating pollution was not one of the tasks entrusted to the Community by the Treaty.[69] However, perhaps on policy considerations, the Court introduced this explanation in the decision.

2. Relationship with the Common Market

One of the most important cases where the Court of Justice had to weigh up the question of the common market with environmental protection was the *ADBHU* case. It concerned a preliminary ruling on the Directive on the treatment of waste soils, insofar as only certain organisations were allowed to burn such oils. The main issue was

[66] Council Directive 73/404/EEC of 22 November 1973 on the approximation of the laws of the Member States relating to detergents, OJ L 347, 17.12.1973, 51–52.
[67] Council Directive 75/716/EEC of 24 November 1975 on the approximation of the laws of the Member States relating to the sulphur content of certain liquid fuels, OJ L 307, 27.11.1975, 22–24.
[68] C-91/79, *European Commission v. Italy,* para. 8.
[69] Ibid. 1103.

the compatibility of certain provisions of the directive with the freedom of trade, the free movement of goods and free competition.[70] It should be noted that the background to this was the so-called *Inter-Huilles* case, in which the Court of Justice was confronted with the type of system introduced in France, which made it impossible to export waste oils legally to other sites in other Member States. The French government tried to justify the regulation on environmental grounds, which the Court rejected at the time since no Member State should organise its system in such a way as to prevent exporting to legal installations in other Member States.[71] This was subsequently confirmed by the Court of Justice in other judgments, even following the Single European Act.[72]

It should be noted that the Court of Justice dealt with the issue of the protection of the environment on the merits, unlike in the previous cases. According to the Court, the free movement of goods and free trade, although fundamental but not absolute rights, may in certain cases be restricted in order to achieve the Community's interest. In this context, the Court identified environmental protection as precisely such a fundamental objective,[73] despite the fact that it was not included among the objectives to be achieved in the Treaty of Rome at that time and that the policy did not have a corresponding legal basis. It is important to highlight that the Commission submitted a written submission in this regard, in which it stressed that environmental protection had already become a fundamental interest and objective of the Community. Moreover, the reasoning in the Commission's submission did not emphasise the logic of the common market, but rather the environmental aspect of the case.[74] This is no coincidence, as the Directive itself does not deal much with the issue of the common market or, for that matter, competition; its recitals placed greater emphasis on the harmful effects of such oils on the environment. This was reflected in the legal basis chosen: the Directive referred to both Articles 100 and 235.[75] However, the Court did not appear to refer to it in any way, merely to the recitals of the Directive and the Directive as a whole.[76] It felt no need to justify this part of the reasoning. Jacobs points out that even the qualification of human rights as a fundamental principle of law required justification by the Court.[77] This is interesting, if only because it is clear that

[70] C-240/83, *Procureur de la Répulique v. Association de défense des bruleurs d'huiles usagées.*
[71] C-172/82, *Syndiact National des Fabriacants Raffineurs d'Huile de Graissage et al v. Groupement d'Intérét Économique „Inter-Huiles" et al.,* paras 9–16.
[72] C-295/82, *Rhones Alpes Huiles;* C-37/92, *Vanacker;* C-203/96, *Chemische Afvalstoffen.*
[73] C-240/83, paras 10–11.
[74] Ibid. 541–542.
[75] Commission Directive 75/349/EEC of 26 May 1975 on detailed rules concerning equivalent compensation and prior exportation under inward processing arrangements.
[76] C-240/83, para. 13.
[77] F. Jacobs, The Role of the European Court of Justice in the protection of the environment, (2006) 18 (2) *Journal of Environmental Law,* 188, DOI: https://doi.org/10.1093/jel/eql012

the Court applied a teleological interpretation of the law in the case in question without providing any evidence to support it.

The other similar case was the *Danish Bottles* case, which was not a preliminary ruling but an infringement procedure against Denmark. The measure in question was Denmark's introduction of legislation requiring that beer and soft drinks could only be sold in reusable containers and also requiring producers and importers to set up a deposit and return system.[78] To this end, the Court examined the system of mandatory requirements then adopted in the *Cassis de Dijon* case. Under *Cassis de Dijon,* such requirements could serve, inter alia, to protect public health or even consumers, and that justified being an exception to the free movement of goods.[79] In this context, the Court held (citing *ADBHU*)[80] that, since the issue of environmental protection is a fundamental interest of the Community, a Member State may rely on this interest to restrict imports of goods from another Member State. This, in addition to confirming the previously mentioned case-law, confirmed that it is not necessary to invoke the protection of public health, but that environmental protection itself can also serve as a justifiable ground for Member States to impose certain restrictions on the free movement of goods. It is also true that the Commission did not then question the environmental justification, but the proportionality of Denmark's measure.[81] It should be noted, however, that the Court of Justice had already referred to the Single European Act in its judgment.[82] This could highlight the fact that although the concept of the protection of the environment as an essential objective still did not get its explanation (as the Court only referred to the *ADBHU* case), the introduction of the Single European Act could finally serve as an adequate justification for that argument.

VII. Conclusion

It can be seen that the question of the environmental protection was present within the European integration before the Single European Act. The trend emerged in the legislation of various states, including the EU Member States. This influenced the work of international organisations as well, in which the European Commission also participated. This and the disasters occurring in the Member States were convincing enough for certain individuals in the Commission to work on creating an environmental policy for the European Commission. Despite the fact that the Treaty of Rome did not

[78] P. Sands, European Community Environmental Law: Legislation, The European Court of Justice and Common-Interest Groups, (1990) 53 (2) *Modern Law Review,* 696, DOI: https://doi.org/10.1111/j.1468-2230.1990.tb01834.x
[79] C-120/78, *Rewe-Zentral AG v. Bundesmopolverwaltung für Branntwein,* paras 11–15.
[80] C-302/86, *European Commission v. Denmark,* paras 8.
[81] Jacobs, The Role of the European Court of Justice in the protection of the environment, 188.
[82] C-302/86, paras 8–11.

have legal bases for environmental policy, the Commission could nevertheless rely on these flexible legal provisions. Neither the Member States, nor the EP protested against such an approach. For the EP, this was an appropriate approach that could also help the will of the Parliament to push forward the issue of the protection of the environment in the Community. In the end, the Parliament even urged for the Community to create its competence for the matter. Finally, the Court of Justice settled the matter concerning the legal bases and the relationship between the protection of the environment and the common market. This was enough for the Community to gain, finally, competence of the environmental protection to the Single European Act.

Juhász, Bence*

Privacy protection amid surveillance capitalism: a cross-atlantic comparative legal enquiry**

Abstract

This essay researches privacy laws related to the analysis of big data performed by global online service (GOS) corporations such as Google and Facebook. First, I expose the business model of GOS corporations, 'surveillance capitalism' and discuss its potential to undermine the dignity of individuals and the integrity of the democratic process.[1] Next, I perform a comparative legal investigation between the USA and the EU to evaluate their regulatory frameworks amid surveillance capitalism. Additionally, I propose an initiative to enhance individuals' data protection. I conclude that the current US framework is unable to provide an effective protection of data and privacy, due to the absent horizontal effect of the Fourth Amendment and its limited protective scope due to the third party doctrine. The EU regime, however, could effectively protect citizen's data amid surveillance capitalism by considering the criteria for free user consent in conjunction with tests following from consumer protection and competition law. I therefore suggest that in the US a federal legislative bill that mimics the GDPR should be passed, while the GDPR should be adjusted to accept the exploitation of User-Generated Content (UGC) data, as opposed to User-Generated Traces (UGT) data, according to the logic of the reasonable expectation of privacy test.

Keywords: Digital Privacy, Surveillance Capitalism, GDPR, Qualified Consent, Democratic Resilience, Autonomy, Exploitation

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[1] S. Zuboff, *The Age of Surveillance Capitalism,* (Public Affairs Books, New York, 2019, ISBN 139781610395694).

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I. Introduction

While the technological revolution of the last decades enabled continuous access to information and communication, it also provided novel challenges for citizens and policy-makers to overcome. Citizens face addictive urges towards online platforms,[2] feelings of depression due to their excessive, agonistic use[3] and feelings of stress due to the relative scarcity of their attention compared to the constant overload of information online.[4] Simultaneously, a major regulatory challenge concerns the legal status attached to vast data sets produced by the users of online services and collected or rather 'aggressively hunted' by surveillance capitalists.[5] Global Online Service (GOS) provider corporations such as Google, 'the pioneer of surveillance capitalism', are in the business of commodifying private human experiences.[6] Their surveillance tools, cookies or mobile cell towers gather and translate human experiences into standardized data sets. These are consequently fed into powerful artificial intelligence neural networks where machine learning capabilities generate predictions on the potential future needs, desires and activities of agents, driven by the aim of maximizing user attention paid to the online platform.[7] The knowledge derived from these predictions is then sold to firms seeking to advertise on these influential platforms, generating the vast majority of the GOS corporations' revenue.[8] Provided the extensive analyses of rich behavioural data, the content eventually shown to users has the potential to exploit human psychological vulnerabilities, to nudge and manipulate citizens into feelings and

[2] M. C., D'Arienzo, V., Boursier and M. D., Griffiths, Addiction to Social Media and Attachment Styles: A Systematic Literature Review, (2019) (17) *Int J Ment Health Addiction,* 1094–1118, DOI: https://doi.org/10.1007/s11469-019-00082-5

[3] C. Sagioglou and T. Greitemeyer, Facebook's emotional consequences: Why Facebook causes a decrease in mood and why people still use it, (2014) (35) *Computers in Human Behavior,* 359–363, DOI: https://doi.org/10.1016/j.chb.2014.03.003

[4] C. C. Bueno, *The Attention Economy: Labour, Time and Power in Cognitive Capitalism,* (Rowman & Littlefield International, 2016, ISBN-13 978-1783488230).

[5] Zuboff, *The Age of Surveillance Capitalism,* 94.

[6] Ibid. 9.

[7] Bueno, *The Attention Economy: Labour, Time and Power in Cognitive Capitalism,* and Predicting by Machine learning: Good Questions, Real Answers: How Does Facebook Use Machine Learning to Deliver Ads?, *Facebook Business,* (11.06.2020), https://www.facebook.com/business/news/good-questions-real-answers-how-does-facebook-use-machine-learning-to-deliver-ads (Last accessed: 29.12.2023.)

[8] "In 2019, about 98.5 percent of Facebook's global revenue was generated from advertising, whereas only around two percent was generated by payments and other fees revenue." Facebook: advertising revenue worldwide 2009-2019 Published by J. Clement, Feb 28, 2020, https://www.statista.com/statistics/271258/facebooks-advertising-revenue-worldwide/ (Last accessed: 29.12.2023.). "In the most recent fiscal period, advertising revenue through Google Sites made up 70.9 percent of the company's revenues." Google: annual advertising revenue 2001-2019 Published by J. Clement, Feb 5, 2020, https://www.statista.com/statistics/266249/advertising-revenue-of-google/ (Last accessed: 29.12.2023.).

actions the advertising customer and the surveillance capitalists see fit.[9] Given such potent capabilities to manipulate and exploit the users of online services, the legal status attached to these big data sets and the regulatory framework that ought to control their collection, use and transfer are the focus of this normative research.

The underlying hypothesis of this essay – the empirical testing of which falls outside the scope of the study – is that by limiting the data we feed into the AI neural networks of GOS corporations, we can effectively temper the manipulative capabilities of the social networks, upon which we are so reliant upon. Consequentially, my assumption is that by taming the manipulative power of online services, we can meaningfully contribute to a greater protection of individual dignity and social cohesion amid surveillance capitalism. Therefore, the primary aim of this study is to contribute to a legal framework of data protection that (1) secures cheap and wide access to information for people combined with (2) respect for personal and collective autonomy, while (3) providing a reasonable revenue stream for innovative GOS corporations. Contributing to the development of such an 'ideal' regulatory framework is the primary aim of this thesis, motivated by ultimate objective of protecting individual dignity and social cohesion in constitutional democratic regimes.

Pursuant to these aims, I first establish the groundwork of the research. In section three, I proceed with normative arguments from liberalism and Marxism converging upon a critique calling for reforms amid surveillance capitalism. Then, I assess the (il)legitimacy of state intervention into the private contractual relationship between GOS corporations and their users. In section four, the frameworks of data protection of the USA and the EU will be scrutinized by means of a primarily doctrinal, internal[10] comparative research focusing on authoritative texts and relevant case law from the apex courts of the jurisdictions, followed by a concluding section.

The study concludes that the current US framework is unable to provide an effective protection of data and privacy, due to the absent horizontal effect of the Fourth Amendment and its limited protective scope due to the third party doctrine. However, the EU regime could effectively protect citizen's data amid surveillance capitalism by considering the requirements for free user consent in conjunction with tests following from consumer protection and competition law. Finally, I remark that a federal privacy bill, mimicking the GDPR, ought to be institutionalized in the US,

[9] These studies revealed that a person's online context influences her emotions and actions. Thus, the authority or algorithm that determines the posts in one's feed, can influence the person's emotions and actions. D. I. A. Kramer, J. E. Guillory and J. T. Hancock, Emotional contagion through social networks, (2014) 111 (24), *Proceedings of the National Academy of Sciences,* 8788–8790, DOI: https://doi.org/10.1073/pnas.1320040111 and R. Bond, C. Fariss and J. Jones, et al., A 61-million-person experiment in social influence and political mobilization, (2012) (489) *Nature,* 295–298, DOI: https://doi.org/10.1038/nature11421

[10] C. McCrudden, Legal Research and the Social Sciences, (2006) (122) *Law Quarterly Review,* 632–650.

although a slight reform to the GDPR framework should be pursued, by accepting the exploitation of User-Generated Content (UGC) data, as opposed to User-Generated Traces (UGT) data. This way the tripartite aim of the 'ideal' regulatory framework would be ensured: citizens would continue with unprecedented communication capabilities, the manipulative capabilities of GOS providers would be tempered, while GOS providers would still enjoy stable revenues.

II. Groundwork

The aim of the second section is to establish and legitimize the methodological and theoretical approach of the research. Additionally, it aims to create a common understanding of key concepts that appear throughout the following sections.

1. Relevance of the project

There are several factors that justify, or indeed necessitate that scholars engage in a multidisciplinary project to examine the nature of surveillance capitalism. On the one hand, behavioural data as the raw material of surveillance capitalism produced some of the most valuable corporations of the 21st century.[11] Some even refer to data as the oil of the 21st century.[12] In turn, corporations who refuse to collect the 'surveillance dividend'[13] face significant comparative disadvantages vis-á-vis their peers. Therefore, data protection is highly relevant from the perspective of corporate competition, wealth generation and innovation. On the other hand, the collection and exploitation of behavioral data is relevant for those whose experiences are analyzed and exploited by surveillance capitalists to maximize profits. Some might be concerned by a violation of their privacy, while others by the loss of their autonomy, as data analysis enables GOS to manipulate the future feelings and actions of their users.[14]

Additionally, the social aspect of individual privacy is also concerning. Liberal democratic regimes are based on the assumption that individual citizens comprising

[11] Out of the 10 largest corporations in the world by market capitalization, a minimum of four are GOS corporations using methods of surveillance capitalism, https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/ (Last accessed: 29.12.2023.).

[12] The metaphor was allegedly coined by mathematician Clive Humby, https://www.theguardian.com/technology/2013/aug/23/tech-giants-data (Last accessed: 29.12.2023.).

[13] 'Surveillance dividend' refers to the marginal advertising profits a corporation can reap as a result of exploiting behavioural data. S. Zuboff, You are now remotely controlled, *NY Times,* (24.01.2020), https://www.nytimes.com/2020/01/24/opinion/sunday/surveillance-capitalism.html (Last accessed: 29.12.2023.).

[14] Kramer, Guillory and Hancock, Emotional contagion through social networks.

the sovereign power and supplying authority to its constitution[15] are autonomous agents of society capable of collectively and indirectly leading society.[16] Under surveillance capitalism the validity of this assumption is severely threatened. As humans increasingly inform themselves from online sources, nowadays increasingly the algorithms of GOS corporations determine their informational input instead of their general situatedness in the matrix of timespace.[17] This is relevant for constitutional democracy as citizens formulate political opinion on the basis of that information input. If the fundamental assumption of liberal democracy concerning the autonomy of citizens ceases to be valid, the logical hierarchy of these regimes is severely undermined. Afterall, as Jürgen Habermas put it, 'the institutions of constitutional freedom are only worth as much as a population makes of them'.[18] Are not then liberal democracies running the risk of handing over sovereign power to private corporations and undermining their own logical and moral basis? Therefore, individual privacy should also be thought of as a public good under liberal constitutionalism, the protection of which justifies the present research.[19]

2. Methodological Approach

The methodology of this enquiry is multidisciplinary in its nature. Additional to the central role that the legal perspective occupies, insights from psychology, ethics, economics and machine learning are essential in claiming that the core values of liberal democracy are under siege. As such, novel explanatory theories of modern-day capitalism such as surveillance capitalism[20] and the attention economy[21] help to understand the new method of wealth generation and means of production. Key behavioural insights revealed by social psychologists[22] identified those vulnerabilities of the human mind that are rather easily exploited by modern day capitalists operating

[15] A. Sajó and R. Uitz, *The Constitution of Freedom, An introduction to legal constitutionalism,* (OUP, New York, 2017) 87, DOI: https://doi.org/10.1093/oso/9780198732174.001.0001

[16] J. Waldron, Autonomy and Perfectionism in Raz's Morality of Freedom, (1989) (62) *S. CAL. L. REV.,* 1097–1152, https://heinonline.org/HOL/LandingPage?handle=hein.journals/scal62&div=31&id=&page= (Last accessed: 29.12.2023.).

[17] L. M. Alcoff, Epistemologies of Ignorance, Three Types, in S. Sullivan and N. Tuana (eds), *Epistemologies of Ignorance,* (State University of New York Press, 2007).

[18] J. Habermas, Citizenship and National Identity: some reflections on the future of Europe' Praxis International, (1992) 12 (1) 1–19, (1992) (7) in W. Kymlicka, *Contemporary Political Philosophy an Introduction,* (Oxford University Press, 2002) 285.

[19] Zuboff, *The Age of Surveillance Capitalism*.

[20] Ibid.

[21] Bueno, *The Attention Economy: Labour, Time and Power in Cognitive Capitalism*.

[22] D'Arienzo, Boursier and Griffiths, Addiction to Social Media and Attachment Styles: A Systematic Literature Review; Sagioglou and Greitemeyer, Facebook's emotional consequences: Why Facebook causes a decrease in mood and why people still use it.

GOS, thus, helping policy-makers to understand how exploitation in the 21st century might be widespread. In addition, computer scientists engaged in AI and machine learning capabilities informed policy-makers of how neural networks function, identified their raw material and highlighted the crucial role that their objective has in the logic of GOS corporations.[23] Building on the immense work of these scientists and engaging in a multidisciplinary discourse to create synergies, legal and political theorists might propose reform initiatives to preserve the foundational values of liberal democratic societies. To contribute to the embryonic discourse around overcoming the challenge posed by surveillance capitalism is precisely the aim of this research.

Yet, the core of the investigation involves a comparison of authoritative legal texts from the perspectives of constitutional and human rights law. This legal endeavor is motivated, supported and legitimized by the underlying normative aim of preserving individual dignity, collective self-ownership and the integrity of the democratic process. These considerations necessitate the inclusion of a particular theory of justice, exposing the basis of the thesis rooted in ethics and natural law. In other words, one might refer to this primarily comparative legal enquiry, as a 'universalist' pursuit of moral principles that should compel societies, as being posited upon the citizenry by means of the law.[24] However, this essay does not attempt to argue for a novel theory of justice, as a truly universal attempt would do. Instead, it limits itself to operate within the boundaries of liberal democratic constitutionalism - the adequacy of which I hereby assume explicitly - and employs the strategy of 'aversive precedents'.[25] Thus, the study aims to establish principles and practices that societies properly committed to liberal democracy should institutionalize amid the challenge of surveillance capitalism. This limitation is legitimate and necessary, as the scope of the essay does not allow for a meaningful discussion of theories of justice, yet without an explicit normative framework, the objectives of the 'ideal' theory would be arbitrary.

In narrowing the focus to the comparative legal exercise there are additional methodological issues to justify. As such, the decisive factors determining the selection of comparators include their shared historical traditions and common liberal democratic constitutional identities and the substantive market power that the USA and the EU, with their roughly 800 million citizens, represent. Similarly, the significant normative power of these entities also motivated their inclusion. Moreover, as the EU has created a substantive data protection framework, notably the GDPR, and that many GOS corporations reside in the USA these jurisdictions in theory could practice

[23] J. Schmidhuber, Deep learning in neural networks: An overview, (2015) 61 *Neural Networks,* 85–117, DOI: https://doi.org/10.48550/arXiv.1404.7828

[24] V. C. Jackson, Comparative Constitutional Law: Methodologies, in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law,* (OUP, 2012, ISBN: 9780199578610), DOI: https://doi.org/10.1093/oxfordhb/9780199578610.013.0004

[25] Ibid. 6.

substantive control over surveillance capitalists. Furthermore, the choice of these jurisdictions, both being of a federal type, is motivated by the global nature of the phenomena under scrutiny and the appearance of 'new spheres of normativity distinct from the nation state'.[26]

3. Theoretical Framework

To proceed meaningfully, establishing a common denominator of key concepts appearing in this research is necessary. First, I attempt to introduce a distinction in terms of the data that lie in the core of this dissertation. The line of demarcation in this case should follow the intention of users and demarcate data that are intentionally shared by the user of a GOS, from data that are not intentionally shared, but rather left behind as an online fingerprint or trace that any user's online behaviour generates automatically, 'by dint of the online service's operation'.[27] The intentionally shared data is referred to herein as user-generated content (UGC) and the unintentionally shared data as user-generated traces (UGT). This distinction is relevant when determining the validity of claims of privacy, since the intentional sharing of information could undermine one's 'legitimate expectation of privacy'.[28] However, this might imply that the data generated unintentionally, which are compiled as a seemingly unavoidable consequence of the functioning of the services – UGT – should fall under privacy protection. The aim of performing this distinction is to work towards the 'ideal' theory.

The revolutionary changes of communication technologies unfolding during the previous decades, altered the way in which individuals and societies relate to information. This transformation, which I refer to as the information revolution, shifted the human struggle from receiving information, to the struggle of distinguishing between harmful, manipulative and overwhelming versus valuable, trustworthy and necessary qualities of information. The 'information revolution' alleviated the human struggle of receiving information, as this resource is nowadays constantly and abundantly available to the members of the online community. The difficulty is no longer gaining access to the continuous flow of global information, but rather exercising one's capability to process overwhelming quantities of information and to judge their quality against one's particular objectives became the key challenge instead.[29] The constant overload of information highlights the limited human capacity to process

[26] R. Leckey, Review of Comparative Law, (2017) *Social & Legal Studies,* (3–24) 16, DOI: https://doi.org/10.1177/09646639166707

[27] 'by dint of its operation' this phrase referring to cell site location information was a significant expression determining the US Supreme Court decision *Carpenter v. USA,* 585 US (2018).

[28] *Katz v. United States,* 389 US (1967) and *Barbulescu v. Romania,* 61496/08.

[29] Ibid.

information and assess its reliability, value and utility. According to the law of supply and demand scarcity of a raw material drives up its value, explaining why the competition for human attention is so fierce as to involve constant surveillance and exploitation of private human behaviour.

According to Zuboff, Google was the first corporation to realize how to effectively commodify the immense amount of behavioral data compiling in their systems and simultaneously, how to maximize the absorbed human attention by their platform.[30] This revolutionary method consists in 'aggressively hunting' UGC and UGT as behavioral data, standardizing and feeding them into powerful neural networks, tasked with figuring out how best to engage the user to maximize the attention absorbed.[31] The better the behavioral data analysis, the more user engagement. The more engagement, the more place for ads and the more revenue for surveillance capitalists. As shown by psychological studies, often what maximizes engagement is content that provokes either complete surprise, fear and outrage[32] or content that resonates well with the already existing opinion of the user.[33] Thus, the spreading of fake news and the proliferation of echo chambers online might also be linked to the logic of surveillance capitalism. Thus, it seems that people's novel capability to communicate and access information online on unprecedented scales, reciprocally translates into GOS corporations ability to control and steer the information a particular person or community receives. As experiments showcase, by means of their immense agenda setting power, GOS corporations can manipulate the emotions and actions of users which is not only concerning from the perspective of individual mental health, but also from the perspective of voter behavior and the integrity of the democratic process.[34]

Moreover, approaching the challenge of surveillance capitalism from a legal perspective, a crucial theoretical debate concerning the distinction between public and private law must be clarified. After all, in both jurisdictions there are constitutional

[30] Zuboff, *The Age of Surveillance Capitalism*.
[31] Ibid. 94.
[32] S. Vosoughi, D. Roy and S. Aral, The spread of true and false news online, (2018) 359 (6380) *Science,* DOI: https://www.science.org/doi/10.1126/science.aap9559
[33] "Again, we find support for the hypothesis that platforms implementing news feed algorithms like Facebook may elicit the emergence of echo-chambers." M. Cinelli et al., Echo Chambers on Social Media: A comparative analysis, (Cornell University, 2020), DOI: https://doi.org/10.48550/arXiv.2004.09603. While certain studies do establish this link between GOS algorithms and echo chambers, it is worth mentioning that humans in themselves are more prone to interact with opinions that align with their identity. See: D. M. Kahan, Misconceptions, Misinformation, and the Logic of Identity-Protective Cognition, (2017) (164) *Cultural Cognition Project Working Paper Series, Yale Law School, Public Law Research Paper,* No. 605, *Yale Law & Economics Research Paper,* No. 575., DOI: http://dx.doi.org/10.2139/ssrn.2973067
[34] Kramer, Guillory and Hancock, Emotional contagion through social networks; Bond et al., A 61-million-person experiment in social influence and political mobilization.

provisions that ensure individual privacy. Nevertheless, the core of the public-private law debate is whether fundamental and constitutional rights should have a horizontal direct effect in private disputes. Meaning, whether fundamental rights, originally conceived as limiting the exercise of state powers vis-á-vis individuals, should also influence the relationship between private parties and if so, to what an extent. There are generally two sides to this debate: some legal theorists would argue that fundamental rights are exogenous, while others would contend that they are endogenous to private law.[35] Those arguing that fundamental rights are exogenous recall the historical development of such rights, which were conceived to limit intrusions by the state into a citizen's private life. Hence, the application of fundamental rights should be limited to the domain of public law, while private parties should be free to engage in voluntary contractual relationships.

In contrast, legal theorists who argue that fundamental rights are endogenous to private law emphasize the hierarchical normative structure of legal systems. Afterall, constitutions are the basis of jurisdictions, creating the state itself, which posits other laws. They claim that it is in the nature of fundamental rights that their normative value trumps that of other laws. They logically uphold the entire legal system, so their provisions should also constrain parties to voluntary private contracts.[36] The EU has also undertaken to provide horizontal applicability to some of its fundamental rights provided in its Charter of Fundamental Rights (CFR), such as the right to non-discrimination (Article 21) in the *Kücükdeveci* decision.[37] Moreover, through directly applicable regulations such as the GDPR, the EU has provided for their direct application in private disputes. This theoretical debate will be a crucial perspective during the comparative exercise of Section IV.

III. The Normative Basis for Privacy Regulation

In section III, I discuss two normative arguments following from sharply different philosophical traditions, namely liberalism and Marxism, but converging on their conclusions as to the present case. Moreover, as most online services are products of private corporations, this section also attempts to establish the legitimacy of governmental intervention into the horizontal relationship between GOS corporations and their users.

[35] M. de Mol, The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?, (2011) 18 (1–2) *Maastricht Journal of European and Comparative Law,* 109–135, DOI: https://doi.org/10.1177/1023263X1101800106

[36] Ibid.

[37] E. Frantziou, The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle, (2020) 22 *Cambridge Yearbook of European Legal Studies,* 208–232, DOI: https://doi.org/10.1017/cel.2020.7

1. Two arguments for data protection

Under the school of liberal egalitarianism, it is generally assumed that a person is free, equal to other persons and is capable of being the author of her own life, to behave autonomously.[38] As Rawls put it, 'citizens recognize one another as having the moral power to have a conception of the good (...) capable of revising and changing this conception on reasonable and rational grounds'.[39] Based on these assumptions concerning the nature of a person, in liberal democratic regimes confer a huge responsibility on citizens, the collective leadership of the constituency through elected representatives. Now, the question remains: how is the political opinion of the individual formed? In that regard, the crucial role of the media becomes apparent, as it is the institution that is supposed to supply the citizen with information about the state of the world, complementing her own sensory experience. Based upon such information about a particular state of the world X, a citizen develops a moral judgement concerning the adequacy of X. This judgement subsequently becomes a constituent part of her own conception of the good. Therefore, if one accepts that politics might be defined as the arena where competing conceptions of the good supply alternative solutions to collective action problems, one sees that there is a straightforward relationship between the informational input of citizens – largely supplied by the media – and their political alignment, action or inaction. Hence, it is clear that the institution of the media – often referred to as the 4th branch of power – exerts a significant influence on citizens' political stance. Now, is the third liberal assumption regarding the nature of a person still valid in the era of surveillance capitalism?

While citizens' vulnerability towards the media has remained largely unchanged during the modern history of mankind, when technological changes increased the manipulative capabilities of the media, the development of novel regulatory frameworks was necessary to secure the continued integrity of liberal democratic regimes. With the development of the community of continuous flow of information online and the employment of the logic of surveillance capitalism, the service providers of such a community – GOS corporations – possess an unprecedented capability to manipulate and nudge citizens' conception of the good.[40] Today it is overwhelmingly human-made online service algorithms that determine who receives what information and when.

[38] See Waldron, Autonomy and Perfectionism in Raz's Morality of Freedom, furthermore, the classical works of I. Kant, Grounding for the Metaphysics of Morals, in I. Kant*, Ethical Philosophy,* James W. Ellington (trans.), (Hackett Publishing Co., Indianapolis, IA, 1785 [1983]) and J. S. Mill, *On Liberty,* David Spitz (ed.), (New York, Norton, 1859, [1975]).

[39] J. Rawls, Kantian Constructivism in Moral Theory: The Dewey Lectures 1980, (1980) 77 Journal of Philosophy, 515–572, in W. Kymlicka, *Contemporary Political Philosophy an Introduction,* (Oxford University Press, 2002, ISBN 100198782748) 215. DOI: https://doi.org/10.2307/2025790

[40] Kramer, Guillory and Hancock, Emotional contagion through social networks; Bond et al., A 61-million-person experiment in social influence and political mobilization.

More accurately, the content a user is served with online is determined by artificial neural networks working toward the human created objective of maximizing user engagement. With the constant surveillance of people on private GOS platforms, citizen's very reactions are fed back into algorithms tasked with exploiting psychological vulnerabilities to maximize user engagement, including by exposing the citizen to false, misleading or superfluous information. Therefore, those who create and control these algorithms substantiate an enormous amount of control and consequent responsibility over the users of GOS. Therefore, I maintain that the third liberal assumption is at best under a serious threat by the largely unregulated business model of GOS corporations. From a liberal perspective the unrestricted operation of GOS corporations, under their right to property, freedom of business and contractual freedom, threatens the personal and collective decision-making process. Thus, perhaps it should be regulated to preserve the state's core liberal characteristics in the form of personal self-ownership and the integrity of the democratic process.

On the other side, one finds argumentative grounds for the regulation of GOS corporations in Marxist moral philosophy. The centrepiece of that school is the exploitation of the less powerful, by the more powerful. Exploitation is often defined as taking unfair advantage of someone, or 'using another person's vulnerability for one's own benefit'.[41] Here the emphasis is on "unfair", since few would condemn a person for taking advantage of the inattention of the opponent in an otherwise structurally fair setting such as a football game.[42] What makes taking advantage unfair is the element of coercion or necessity to submit oneself to a particular treatment. In the famous account of Marx, without ownership of the means of production, the workers' need to sustain themselves effectively forces them to sell their labor. If the wage they receive for labour is insufficient to secure a meaningful life, their vulnerability is being exploited by the more powerful.[43]

The application of the Marxist account of exploitation to the subject of the present enquiry is elegantly performed by Celis Bueno in his book 'The Attention Economy'. His point of departure is that as societies grow richer in terms of the production and consumption of information, comparatively they become poorer in terms of human attention.[44] With the overabundance of information online, human attention becomes an 'intrinsically scarce and therefore valuable resource'.[45] Provided that advertising companies derive profit from capturing human attention, there is a fierce competition to maximise user engagement including by employing constant

[41] M. Zwolinski and A. Wertheimer, Exploitation, in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2017 Edition), https://plato.stanford.edu/archives/sum2017/entries/exploitation/ (Last accessed: 29.12.2023.).
[42] Ibid.
[43] Ibid.
[44] Bueno, *The Attention Economy: Labour, Time and Power in Cognitive Capitalism,* 1.
[45] Ibid. 3.

surveillance. Similarly, Zuboff[46] claims that GOS corporations regard human experience – data derived about the allocation of attention – as 'free raw material for hidden commercial practices of extraction, prediction and sales'.[47] 'At first such data was found', but as the pioneers of surveillance capitalism became conscious of the possibilities behind the resource, it was 'hunted aggressively' by means of mass surveillance.[48] Effectively, the act of paying attention became a new form of labor creating surplus value.[49] This simultaneously 'blurs the line between labor time and leisure time', while alienating the spectator from her own vision.[50]

The only premise missing from legitimately claiming that the structure of the attention economy amounts to exploitation of the user of a GOS corporation is the element of necessity or coercion. In that regard, I claim that humans of the 21st century are effectively obliged to be members of the online community. While I expand this argument in the next section, suffice to say that not only is membership essential for participation in the job-market, it also became a prerequisite of receiving an education and essential for maintaining social relationships. Thus, it is not far-fetched to claim that under the status quo, GOS corporations are effectively exploiting their users by performing a constant surveillance of their actions to exploit their psychological vulnerabilities, creating addiction to their sites and reaping profits from the maximized user engagement.

All in all, it is rather alarming that the application of such diverse moral traditions as liberalism and Marxism jointly imply that the status quo necessitates reforms to protect and respect people's autonomy. Uniting the forces of these arguments, I intend to claim that undermining personal and collective autonomy by manipulation and exploitation amounts to using people as a mere means as opposed to ends in themselves. This conduct goes against the second formulation of the Kantian Categorical Imperative (CI) prescribing that one must treat humanity 'always at the same time as an end, never merely as a means'.[51] Now, the violation of this deontological principle is crucial in this primarily legal enquiry, for this formulation of the CI has been highly influential in constructing a meaning for the term 'dignity', often referred to as a supreme, legitimating value of human rights protection.[52] This is the case under

[46] Zuboff, *The Age of Surveillance Capitalism*.
[47] Ibid. 1.
[48] Ibid. 94.
[49] Bueno, *The Attention Economy: Labour, Time and Power in Cognitive Capitalism*.
[50] Ibid. 6.
[51] Kant, Grounding for the Metaphysics of Morals, 429.
[52] M. Mahlmann, Human Dignity and Autonomy in Modern Constitutional Orders, in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law,* (OUP, Oxford, 2012) 371–393, DOI: https://doi.org/10.1093/oxfordhb/9780199578610.013.0020. Mahlmann recalls that dignity appears in the Preamble and Art 1. to the Universal Declaration of Human Rights and the Preamble to the ECHR among many other examples.

the EUCFR and the jurisprudence of the ECtHR.[53] Thus, it seems that if the argument for the violation of dignity remains intact, it might have severe consequences for the legality of the behavior of GOS corporations.

2. The (il)legitimacy of state intervention

While the above arguments exposed the troublesome nature of GOS corporations, it is yet to be determined whether a public intervention into the investigated private relationship would be legitimate. Given that the present research operates within the boundaries of liberal democracy, the legitimacy of state intervention must also be established within that paradigm. This might result to be a challenging task, since state neutrality is often praised as a foundational liberal principle.[54] This principle shall be understood as requiring the state to refrain from prioritizing any particular conception of the good over others and to respect and secure the autonomy of citizens. Afterall, from the perspective of liberal neutrality, 'no life goes better by being led from the outside according to values the person does not endorse'.[55]

Nevertheless, there is another strand of liberal thought that positions itself closer to communitarianism and objects to the atomistic perspective employed by scholars endorsing state neutrality.[56] This latter position is defended and elaborated for example by Charles Taylor, for example, in his 'social thesis' arguing that individual autonomy might only be exercised in a particular community with an enabling environment, sustained by a non-neutral government of the common good.[57] 'Some limits on individual self-determination are required to preserve the social conditions which enable self-determination'.[58] The degree of autonomy available for a particular individual is largely determined by the surrounding social environment. In order for the community as a whole to be free and for its members to enjoy the beauty of self-ownership, the state shall be under a positive obligation to actively protect the community's dominant way of life. The state's duty is to maximize the aggregate level of autonomy enjoyed by the members of the community and often this requires some

[53] German BL Article 1., EUCFR Article 1. and *Christine Goodwin v. The United Kingdom,* no. 28957/95, in § 90 the Court provides that: 'the very essence of the Convention is respect for human dignity and human freedom'.
[54] W. Kymlicka, *Contemporary Political Philosophy an Introduction,* (Oxford University Press, 2002) 217, referring to endorsements of liberal neutrality by Rawls, Ackerman and Dworkin. DOI: https://doi.org/10.1093/hepl/9780198782742.003.0003
[55] Ibid. 216.
[56] Ibid.
[57] Ibid. 245.
[58] Ibid.

agents' autonomy to be limited. Indeed, even Rawls concedes in the formulation of his 'First Priority Rule' that liberty might be limited, however, only for the sake of liberty.[59] This position is not alien to legal thinking, more so, the often and rightly praised proportionality analysis between competing fundamental rights is a prime example of the social thesis in practice. The state attempting to maximize overall enjoyment of liberty, often limits some citizens' ability to do so on the basis of a rule of law.

Turning from abstract principles to the concrete controversy at hand, there is certainly a natural reaction to the attempt of intervening into the horizontal relationship between GOS corporations and users. If the use of GOS poses such a threat to individual dignity, people should just stop using them. After all, it is their decision to be online or not and governmental regulation should not restrict the private contractual relationship between GOS corporations and their users. While there is certainly some legitimacy to this remark, there is a tripartite counterargument that I defend below.

Firstly, I maintain that leaving citizens with a choice between giving up their capability for self-ownership or abandoning the tremendous benefits that GOS provide them would impose an undue burden on individuals. Composing this research in 2021 perfectly showcases citizens' high level of dependency upon online services and thus, the undue burden that avoiding them would impose on citizens. From library access to a 10 year old's math class, from communication with the state to participation in remote work opportunities, from social engagement to political participation, humans of the '20s are to rely upon online services to participate meaningfully in society. Specifically, as education migrated to online services due to Covid-19, students who faced difficulties in accessing online communication experienced a decrease in their capabilities to participate in education, which increased the already existing achievement gaps due to social backgrounds.[60] If one accepts the premise that access to education is constitutive of human flourishing, then one should also accept the conclusion that – at least with Covid-19 – membership of the online community became a prerequisite for achieving social flourishing.[61] Provided that both self-ownership and access to GOS are integral to human flourishing, the supposedly free decision, actually imposes an undue burden on individuals. This choice should not be forced upon citizens. Therefore, governmental regulation of data protection remains legitimate.

[59] Ibid. 56.

[60] E. Dorn et al., New evidence shows that the shutdowns caused by COVID-19 could exacerbate existing achievement gaps, *McKinsey,* (01.06.2020), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime# (Last accessed: 29.12.2023.).

[61] US Supreme Court case *Carpenter v. USA,* 585 US (2018). The Court asserted that "carrying one (a mobile device) is indispensable to participation in modern society." Although strictly speaking mobile devices and GOS differ, if carrying a mobile device "is indispensable to participation in modern society", one should ask: whether this logic – especially with the disruption of C-19 – should or could be extended to cover GOS?

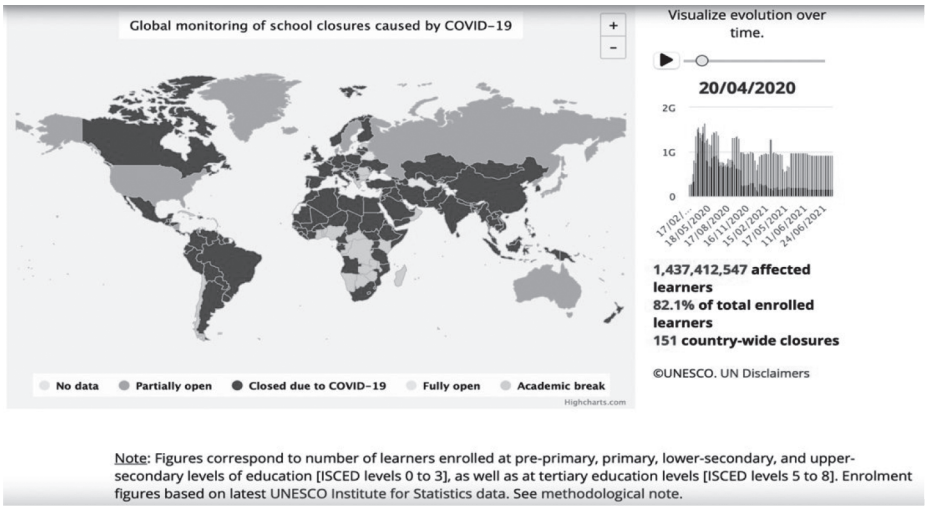

Figure 1. Number of children forced to participate in online education. Source: Unesco, *Global Monitoring of School Closures,* https://en.unesco.org/covid19/educationresponse (Last accessed: 29.12.2023.)

Another argument for the legitimacy of intervention rests on the social relevance of individual privacy in liberal democratic regimes. This has been duly considered above in Section III.1 as part of the liberal critique of the status quo. The business model of GOS threatens the foundational values of liberal democratic regimes – autonomy, dignity and the integrity of the democratic process. Therefore, recalling Taylor's social thesis, it is not only legitimate, but should be a duty of a state properly committed to the above values to develop a regulatory framework that effectively protects its citizens and itself from the threat of surveillance capitalism. The preservation of the liberal democratic constitutional identity legitimizes intervention.

The third line of defense of state intervention targets the validity of the contractual relationship between corporations and individuals. In developing this account, the normative foundations of consumer and competition law become relevant, particularly the notions of exploiting a dominant position and operating under an information and power asymmetry.[62] The freedom of economic competition is at the heart of a liberal market economy. Economic actors should be free to practice their autonomy within the provided limits of the law, however, the aim that those limits ought to promote remains contested. Some argue that the overall welfare created by a

[62] R. Nazzini, The Objective of Article 102, in R. Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102,* (Oxford Studies in European Law, OUP, Oxford, 2011, ISBN 0191630128, 9780191630125) 109–110, DOI: https://doi.org/10.1093/law-ocl/9780199226153.001.0001

regulatory framework – the sum of consumer and producer surplus – should be maximized by regulation.[63] Nevertheless, others maintain, notably Adam Smith, that market regulation should make 'consumer preferences the ultimate controlling force in the process of production', a principle also known as consumer sovereignty.[64] While the producers that might benefit by 'escaping the burden of competition' will inevitably only represent a segment of producers and will conflict with others, a market regulation that favours consumer sovereignty will benefit all consumers indiscriminately, thus assuring a general compensation for any particular cost they have as a producer.[65] A similar conclusion is implied by assessing the specific objectives behind EU competition law. In that regard, referring to Articles 101 and 102 TFEU, Botta and Wiedemann asserts that by sanctioning the anticompetitive behavior of undertakings, EU competition law indirectly 'safeguards the aggregate welfare of consumers'.[66] Furthermore, crucially for the present essay, they also assert that the application of these provisions is horizontal: they apply directly to private undertakings.[67] All in all, this limited account of the normative basis of consumer and competition law implies that consumer interest should be prioritized by maintaining healthy competition in the market.

Finally, one additional line of argument could be developed concerning the public importance of the functions that certain GOS corporations perform.[68] For example, operating the most wide-reaching contemporary political agora and the consequent sensitive regulatory functions associated with freedom of speech or the reliability of news. While there is no space here to duly expand this counterargument, I believe the case is made that for the protection of the liberal democratic constitutional identity and its foundational values, governmental intervention into the investigated relationships is legitimate. This position implies that the constitutional protection of privacy should have a horizontal effect on the private contractual agreements between GOS providers and their users.

[63] V. Vanberg, Consumer welfare, total welfare and economic freedom: on the normative foundations of competition policy. Competition Policy and the Economic Approach: Foundations and Limitations, (2011) 09 (3) *Freiburg Discussion Papers on Constitutional Economics,* 15, http://hdl.handle.net/10419/36471 (Last accessed: 29.12.2023.) DOI: https://doi.org/10.4337/9780857930330.00008

[64] Ibid. 15.

[65] Ibid. 16–17.

[66] M. Botta and K. Wiedemann, The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey, (2019) 64 (3) *The Antitrust Bulletin,* (428–446) 434, DOI: https://doi.org/10.1177/0003603X19863590

[67] Ibid.

[68] See for example: O. Pollicino, *Digital Private Powers Exercising Public Functions: The Constitutional Paradox in the Digital Age and its Possible Solutions,* (ECHR, 2021), https://echr.coe.int/Documents/Intervention_20210415_Pollicino_Rule_of_Law_ENG.pdf (Last accessed: 29.12.2023.).

IV. Cross-Atlantic Comparison: Does Regulation Keep the Pace of Technology?

In this section, I investigate in a comparative fashion the legal protection of data privacy in the jurisdictions of the USA and the EU. For sake of space, I omit the otherwise significant discussion of the structural differences between the jurisdictions and I perform a textual and contextual analysis of the main authoritative texts.

1. The Basis of Privacy Protection – A Textual and Contextual Analysis

First, I turn towards the US Constitution. Its particular structure with seven main Articles and the following Amendments is a result of the tense political debates between the federalist and the anti-federalists.[69] Known as the Massachusetts Compromise, a sufficient number of states of the Confederation agreed to ratify the new Constitution provided that certain amendments would be proposed rather soon in order to prevent the freshly established executive power from usurping too much power and threatening individual rights.[70] Thus, in the context of protecting the rights of individuals against encroachments of the federal government, 10 Amendments were codified into the Constitution. One of such is the 4th Amendment:

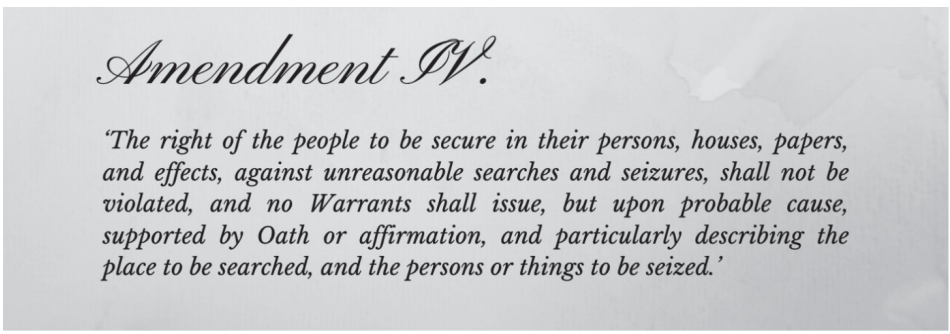

Figure 2. The Fourth Amendment to the US Constitution, own illustration[71]

Without any doubt this Amendment primarily aims to protect US citizens' privacy and security from arbitrary interferences by the government.[72] The Fourth Amendment

[69] M. Tushnet, *The Constitution of the United States of America, A Contextual Analysis, 1. An Overview of the History of the US Constitution,* (Hart Publishing, 2015, ISBN 9781841137384) 10–14.
[70] Ibid.
[71] Own illustration.
[72] *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

does not confer an absolute right upon citizens, but similarly to its European counterparts,[73] only a limited one. The phrase 'The right of the people to be secure (...) against unreasonable searches and seizures' implies a balancing exercise between the competing interest of the government and the individual as an inherent part of determining which interferences meet the reasonability criteria. The reasonable expectation of privacy test was fleshed out in *Katz v. United States*.[74] First it must be evaluated whether the individual concerned had a subjective expectation of privacy and second, whether society would be prepared to recognize that subjective expectation as a reasonable one.[75] Interestingly, this test has migrated to the other side of the Atlantic as well, where the ECtHR has integrated it into its own jurisprudence, and there are references to it even in the GDPR.[76]

Similarly, the fundamental rights provided in the ECHR primarily entail negative obligations on states. Nevertheless, to undertake positive obligations by contracting parties was a clear intention among the framers of the Convention. Positive state obligations originate from the state's duty to protect citizens under its jurisdiction (Article 1 ECHR).[77] For the state to violate its positive duties, the conduct of private parties allegedly contrary to the Convention must arise from the contracting party's failure to act or toleration.[78] In line with the principles of conferral and subsidiarity, in controversies involving positive duties, the Court grants a certain margin of appreciation to the states.[79] Nevertheless, under certain circumstances, especially where vulnerable parties are concerned, contracting states are under the positive obligation to develop regulatory frameworks that provide practical and effective[80] protection to citizens from foreseeable infringements of their rights resulting from the actions of private parties.[81] Similarly to the US, the rights entailed in Article 8 ECHR

[73] See: Article 8 §2 ECHR and the case *Privacy International v. Secretary of state,* C-623/17. In this case the CJEU ruled that despite national security being the reason for surveillance, the general and indiscriminate retention of data is disproportional.

[74] *Katz v. United States,* 389 U.S. 347.

[75] *Smith v. Maryland,* 442 U.S. 735.

[76] See M. de Mol, The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (unbridled) expansionism of EU law?, (2011) 18 (1–2) *Maastricht Journal of European and Comparative Law,* 109–135, DOI: https://doi.org/10.1177/1023263X1101800106 for ECHR and Recital §47 referring to GDPR Article 6(1).

[77] J.-F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights,* (CoE, Human rights handbooks, No. 7., 2007) 14, https://rm.coe.int/168007ff4d (Last accessed: 29.12.2023.) and *Barbulescu v. Romania,* App no. 61496/08 (ECtHR, 5 September 2017).

[78] Akandji-Kombe, *Positive obligations under the European Convention on Human Rights* and *Barbulescu*.

[79] Akandji-Kombe, *Positive obligations under the European Convention on Human Rights*.

[80] The practical and effective doctrine is present e. g. in *X and Y v. Netherlands,* no. 8978/80, 26 March 1985 and *Airey v. Ireland,* No. 6289/73, 11 September 1979.

[81] *Barbulescu,* §115 and *X and Y,* §§ 23, 24 and 27.

are not absolute, but are limited in various ways. Thus, like in the USA, the interest of the individual in the form of the enjoyment of her right must be balanced against the state interest of providing the enlisted public goods.

The European focus on the universality of fundamental rights[82] constitutes a major textual difference compared to the US Constitution. Nevertheless, in the USA human rights also have their foundations in natural law, implying a universalistic conception of rights and an objective value order.[83] This is exemplified by the famous lines of the Declaration of Independence: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights.' Therefore, while from a textual perspective[84] and from one perspective of the contextual analysis the Constitution implies a clear intention to create only negative obligations for the state, another contextual perspective undoubtedly implies that the theoretical foundation of human rights in the US lies in natural law, implying and objective value order. From this theoretical perspective, it would not be overambitious to maintain that constitutional rights such as the Fourth Amendment should have a radiating effect into private disputes.

Moreover, crucial for the present enquiry is whether and when the 4th Amendment could cover online communications and if so, what kinds of data? Concerning online data flows the case law is divided as it is not straightforward whether a person has a legitimate expectation of privacy when using an online service and thus sharing information with a third-party service provider. Cases concerning access to one's location information through GPS tracking were deemed to raise justified privacy expectations.[85] However, the Supreme Court found no justified expectation of privacy with regards to financial records being accessed through the network of a bank[86] or dialled phone numbers beings accessed by means of installing a pen register device to a telephone line.[87]

Interestingly, if one consents to a warrantless search or does not object to one, it becomes legitimate in the eyes of the law,[88] a logic that lies at the heart of EU privacy protection.[89] What are the safeguards surrounding consent in the US? The Supreme Court decided that the burden of proof rests with the prosecution as for the voluntariness of the consent and the awareness of the right of choice.[90] While these are

[82] See CFR Article 1, and Article 1 ECHR all implying an objective value order.
[83] C. S. Desmond, Natural Law and the American Constitution, (1953) 22 (3) Article 1 *Fordham Law Review,* https://ir.lawnet.fordham.edu/flr/vol22/iss3/1 (Last accessed: 29.12.2023.).
[84] See the Fourteenth Amendment's 'state action doctrine'.
[85] *United States v. Jones,* 565 U.S. 400.
[86] *United States v. Miller,* 425 U.S. 435.
[87] *Smith v. Maryland,* 442 U.S. 735.
[88] *Amos v. United States,* 255 U.S. 313 (1921).
[89] In the EU under the GDPR, not objecting to surveillance, such as cookies does not constitute legal grounds for the search. The consent has to be an affirmative act from the user.
[90] *Bumper v. North Carolina,* 391 U.S. 543 (1968) and *Johnson v. United States,* 333 U.S. 10, 13 (1948).

important safeguards, from the perspective of surveillance capitalism, would sharing data with a service provider with the intention of using a service qualify as consenting to a warrantless search? This brings us to the 'third party doctrine'. This principle was developed in *Smith v. Maryland* where it has been asserted that information that is voluntarily turned over to a third party can no longer fall under one's legitimate expectation of privacy.[91]

Nevertheless, the case *Carpenter v. United States* will offer some more appealing conclusions. Here the surveillance of cell site location information (CSLI) by government agents was the subject of the controversy. CSLI is a 'detailed, encyclopedic, and effortlessly compiled' data set, which is generated when a phone routinely connects to a nearby radio antenna.[92] The FBI accessed 13,000 data points illustrating the movement of a robbery suspect without a warrant and tried to use the information as evidence at the trials. Carpenter petitioned the Supreme Court to suppress the data and eventually won. In its reasoning the Court recalled that despite *Smith,* individuals have a 'reasonable expectation of privacy in the whole of their physical movements', and access to CSLI would enable the government to 'near perfectly retrace a person's whereabouts'.[93] Moreover, an individual does not truly voluntarily expose her CSLI, rather the 'cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up'.[94] Finally, having regard to the fact that 'cell phones and the services they provide are such a pervasive and insistent part of daily life that carrying one is indispensable to participation in modern society',[95] the Court refuses to apply the doctrine here. Rather, the Court recognized Carpenter's legitimate expectation of privacy and in similar cases requires a warrant upon probable cause to access the information.[96] With *Carpenter,* I attempt to illustrate that the Supreme Court in its Fourth Amendment jurisprudence has the tools to protect citizens' privacy in the 21st century's digital reality. However, applying *Carpenter's* logic in a contractual, horizontal dispute would be at best contentious due to the lacking horizontal applicability of the Fourth Amendment and the third party doctrine's negative implications.

As for EU community law, the fundamental rights relevant to the present analysis are provided for in Article 7 and 8 of the CFR and Article 16 of TFEU. Concerning the context of these provisions, it should be noted that according to Article

[91] *Smith v. Maryland,* 442 U.S. 735.
[92] *Carpenter v. U.S.,* 138 S.Ct. 2206 (2018).
[93] *Carpenter* (1).
[94] *Carpenter* (2).
[95] *Carpenter* (2).
[96] The Court referred to its conclusion as a "narrow" one: "does not disturb the application of Smith and Miller or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security." *Carpenter,* 9.

1 CFR: 'Human dignity is inviolable. It must be respected and protected.' This formulation, similarly to the ECHR,[97] endorses an objective value order and a universal theory of fundamental rights, a key textual difference compared to the US Constitution. Another difference between the three textual bases is that the protection of personal data is explicitly covered under EU law. However, this need not result in a substantively wider protection since both Article 8 ECHR and the 4th Amendment apply to online communication data.[98] Another difference from the textual perspective is found in Article 8 §2 CFR: data processing should be based on consent. The element of consent is central in the protection of privacy under EU law. To investigate how this principle is further specified, I turn to the analysis of EU secondary legislation but, for the sake of space, I omit a general evaluation of the GDPR and focus on the element of consent.

The use of most GOS is conditional upon consenting to controversial contracts or privacy policies.[99] Thus, the conditions for the legitimacy of consent is the most important aspect of this enquiry. Consent should be a freely given, specific, informed and unambiguous indication from the data subject.[100] Controllers shall request consent in a 'clearly distinguishable', 'intelligible and easily accessible form', 'using clear and plain language'.[101] While, the right to withdraw consent is provided for, given GOS conditionality on consent, this right is effectively void. In 7(4) the lawgiver asserts that in assessing whether a consent is freely given it shall be considered whether the requested service is 'conditional on consent to personal data processing that is not necessary for the performance of that contract'. This provision echoes the moral arguments elaborated above, however, it is difficult to interpret the exact meaning of the phrase. After all, one might argue that whatever purpose is included in the contract and hence consented to by the data subject, is thus necessary for the performance of that very contract. Nevertheless, an opposing argument could be developed from the fact that one uses Facebook or Google for specific communicative purposes and additional services such as personalized marketing are not necessary for the primary function of GOS (as reasonably expected by users). As such, making the use of services conditional on such profiling cookies for marketing purposes would render the consent constrained. If the first interpretation is applied, the provision fails to be effective in data protection amid surveillance capitalism, while in the second case it does provide an effective safeguard.[102]

[97] The preamble to the ECHR provides: "this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared".

[98] See *Barbulescu v. Romania,* 61496/08) and *Carpenter v. U.S.,* 138 S.Ct. 2206 (2018).

[99] See *Figure 3.* below concerning Facebook. The same is applicable when attempting to create a Google account.

[100] GDPR Article 4(11).

[101] GDPR Article 7(2).

[102] The WSJ claims that the EDPB decided that Meta cannot force users to agree to personalized ads by way of making their service conditional on such consent as part of the Terms and Conditions. See

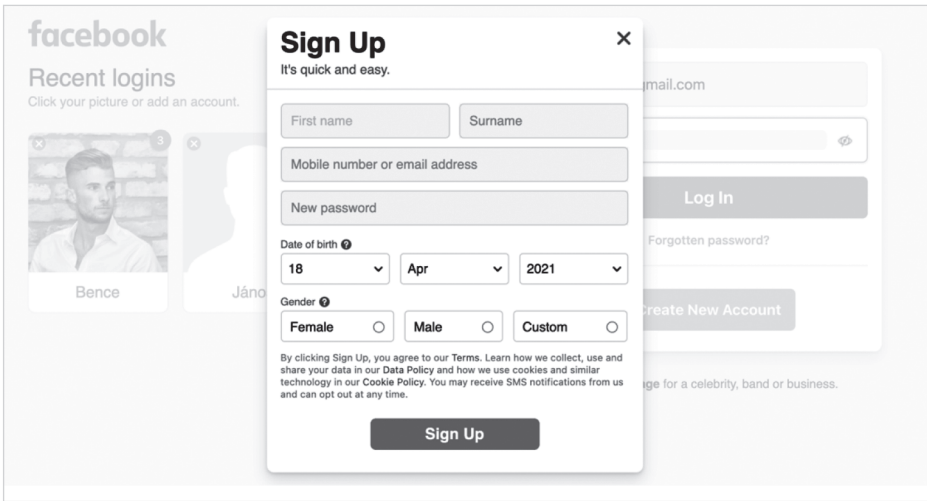

Figure 3. Attempting to Register for Facebook in 2021.[103]

Further sophistication is provided by the recitals: 'Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment'.[104] Additionally, if there is a 'clear imbalance between the data subject and the controller', the consent should not provide a lawful basis for processing.[105] Similarly, if 'the provision of a service, is dependent on the consent despite such consent not being necessary for such performance', then the consent is presumed not to be freely given.[106] While one should treat these recitals with due limitations, they clearly support the second interpretation of Article 7(4).

Finally, to consider a counterargument, some might argue that automated profiling for marketing is necessary for the provision of the contract as it generates the capital inflow that provides for the primary function without monetary fees. Nevertheless, 'necessity' implies that something cannot be otherwise. At least one possibility comes to mind, namely a subscription-based system. Thus, I maintain that the second interpretation of Article 7(4) GDPR should be applied in judging the

S. Schechner, Meta's Targeted Ad Model Faces Restrictions in Europe, *WSJ,* (06.12.2022), https://www.wsj.com/articles/metas-targeted-ad-model-faces-restrictions-in-europe-11670335772?mod=hp_lead_pos1 (Last accessed: 29.12.2023.).

[103] "Sign up It's quick and easy" while the contract you must agree to is well-hidden. A typical example of the many levels of nudging exerted by GOS corporations. One is required to accept the Terms, the Data Policy and the Cookie Policy which together comprise of 10786 words. Based on my estimation, roughly a person would need 89,88 minutes to read these terms.

[104] Recital to the GDPR §42.

[105] Recital to the GDPR §43.

[106] Ibid.

legitimacy of consents and therefore, I argue that the qualification of consent under the GDPR could provide a meaningful privacy protection amid surveillance capitalism.

The utmost importance of the requirements for free consent is also underlined by Article 9 GDPR, which prohibits the processing of 'special categories of data' revealing 'ethnic origin, political opinions, religious or philosophical beliefs, trade union membership' or sexual orientation. The reason why this provision underlines the previous discussion is that the prohibition of the exploitation of such special data is inapplicable, if the data subject consented to such practices.[107] This reveals that lawmakers are entirely aware of the threats posed by the exploitation of sensitive data, however, they trust the decision-making capabilities of data subjects and avoid paternalistic prohibition. From the liberal philosophical standpoint this is not a manifestly mistaken agenda. However, recalling GOS providers extensive manipulative capabilities, the utmost importance of their services and their conditionality upon consent, the legitimacy of relying on user consent even regarding such sensitive data is severely undermined as there is no substantive choice.

2. Evaluation of the jurisdictions

I conclude this comparative enquiry by assessing the different jurisdictions' ability to protect individuals' privacy amid surveillance capitalism. Two crucial questions should be answered: 1) Does privacy protection have a horizontal effect or is there a positive duty for the government to protect citizens' privacy in private contractual relationships? and 2) Does the material scope of privacy protection cover the kinds of data exploited by private corporations?

As for horizontality, in the USA the theoretical foundation of fundamental rights in natural law is perhaps the only grounds upon which a radiating effect could be argued for. Nevertheless, as far as I can judge, the intention of the framers of the Amendments and the textual basis arguments pointing to the opposite direction outweigh the natural law argument. The 'state action doctrine' established that individual rights provisions, except the Thirteenth Amendment, 'bind only governmental actors and not private individuals'.[108] The doctrine is derived from the language of the 14th Amendment. Nevertheless, Gardbaum argues that the state action doctrine does not rule out indirect influences of the Constitution to horizontal

[107] GDPR Article 9(2)a.

[108] S. Gardbaum, The "Horizontal Effect" of Constitutional Rights, (2003) 102 (3) *Michigan Law Review,* 1, https://repository.law.umich.edu/mlr/vol102/iss3/2 (Last accessed: 29.12.2023.) DOI: https://doi.org/10.2307/3595366

disputes, exemplified by the cases *NYTimes v. Sullivan*[109] and *Shalley v. Kramer.*[110] Gardbaum claims that all US law is 'directly and fully subject to the Constitution' and individual rights provisions have a substantive indirect effect on the lawful behavior of individuals.[111] While this argument does allow for a more positive view of US as for the first question, all in all it seems that the 4th Amendment could not be used as grounds for successful litigation in a horizontal dispute against a GOS provider.

As for the protective scope, the third party doctrine 'allows for very far reaching access to private data that is much more restricted in other legal systems'.[112] The US Supreme Court seemed reluctant to extend the otherwise progressive logic of *Carpenter*[113] to cover the relationship between GOS providers and their users, although *de facto* there are various similarities between CSLI data and UGT data. They are both generated automatically, without an affirmative act of the user and as far as my argument goes, access to Facebook or Google is similarly to a mobile phone 'indispensable for participation in modern society'.[114] Thus, I conclude that the third party doctrine would probably in most cases render user's expectation of privacy unreasonable, while the 4th Amendment would not be applicable to a dispute between a data subject and a private GOS corporation. Thus, the current US system fails to provide effective protection amid surveillance capitalism.

Concerning the EU, it seems that despite the ECHR's explicit requirement of positive obligations, the margin of appreciation and the emphasis on the principles of conferral and subsidiarity would preclude a meaningful, short-term protection of privacy amid surveillance capitalism. While the standards of the court resemble that of EU community law, leaving the construction of the precise legislative frameworks to domestic legislatures would not provide a short term solution to the pressing issue of surveillance capitalism.

Nevertheless, my limited analysis found that EU citizens could rely on the GDPR for a meaningful protection against GOS providers and thus, the GDPR could function as an effective gatekeeper of democracy and protector of individual dignity. The reasons for this position include the qualification of free consent provided for in Article 7(4). According to its appropiate interpretation, GOS providers' requirement of consent to unnecessary data processing, from the perspective of the primary purpose of the service, provides grounds for regarding that consent constrained. Hence, such consents should fail to be legal bases for data processing. Additionally, there seems to

[109] 376 U.S. 254 (1964).
[110] 334 U.S. 1 (1948).
[111] Gardbaum, The "Horizontal Effect" of Constitutional Rights, 390.
[112] M. Mahlmann, Normative Universalism and Constitutional Pluralism, in I. Motoc et al. (eds), *Liber amicorum András Sajó: Internationalisation of Constitutional Law,* (2017) 19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998526 (Last accessed: 29.12.2023.).
[113] *Carpenter* (2)d.
[114] *Carpenter* (2).

be clear information and power asymmetries between the actors which further reinforce the constrained nature of consents.[115] Concerning the EU framework I conclude that if (a) the CJEU pays due attention to the crucial importance of GOS for realizing one's potential for social flourishing, if (b) the CJEU recognizes that consent for processing of value added services is often required for the use of GOS, (c) that both refusing to use the services and consenting to the exploitation of one's most sensitive data impose an undue burden on individuals and (d) that GOS corporations exploit their dominant position resulting from the previous premises, then, the Court should not accept forced consents to privacy policies such as the one exemplified by *Figure 3.* above and the GDPR could provide substantive protection for citizens amid surveillance capitalism.

V. Conclusion: Towards an 'ideal' regulatory framework of privacy protection

To conclude the project I reflect on the 'ideal' data protection framework for an international community properly committed to the protection of individual dignity and the integrity of the democratic process, while aiming to provide a reasonable capital inflow for innovative GOS providers. Based on the normative arguments and the comparative legal enquiry, I argue that the GDPR framework with the focus on qualified user consent should be institutionalized as an effective international practice in relation to the investigated jurisdictions. However, as detailed below, I maintain that the GDPR should be further reformed following the logic of the reasonable expectation of privacy principle, to secure reasonable revenue streams for GOS corporations and to facilitate its acceptance in the USA.

Crucially, the adequate interpretation of the qualifications of consent under the GDPR supplied by the thresholds of Article7(4), the 'genuine choice without detriment'[116] and the 'clear imbalance between actors',[117] should function as effective protections of citizen's privacy. Effectively, an adequately implemented qualified consent approach leaves citizens with the freedom to decide for themselves what data are they willing to share for exploitation, while it secures GOS corporations capability to reap profits from providing personalized marketing for users who truly freely consent to it. Moreover, this approach marries data protection law to competition and consumer protection law, as it applies the logic of Article 102 TFEU under the rules of competition, prohibiting the abuse of a dominant position by imposing unfair trading

[115] See the tests elaborated in recitals §§42–43.
[116] Recital in §42.
[117] Recital in §43.

conditions.[118] the USA also has a long history of antitrust laws[119] and a powerful Federal Trade Commission protecting both competition and consumers.[120] Therefore, achieving data and privacy protection through sanctioning unfair and deceptive trading practices, like the one illustrated in *Figure 3.,* by jointly enforcing data protection, competition and consumer protection laws should be the strategy adopted in internationally.

However, an objection to the qualified consent GDPR framework might arise from the perspective of the third aim of the 'ideal' approach – GOS revenues. It is conceivable that merely a fraction of users would agree to the exploitation of behavioural data for personalized marketing purposes, provided a substantive choice. Thus, GOS corporations would lose substantial revenues and this could result to be an excessive intrusion into the market. Hence finally, I argue that in line with the reasonable expectation of privacy test and the distinction introduced between UGC and UGT, GOS corporations should be allowed to use UGC data for profiling and other value added purposes, based on a consent contingent on the use of the service. Afterall, data subjects share such information intentionally, making it publicly available and they have an effective control over what they share as UGC. However, GOS providers should not be able to exploit one's online traces, only contingent on user consent that one can decline without detriment and that meets the strengthened consent qualifications of the GDPR interpreted through the lenses of competition and consumer protection law. Crucially, this does not contradict previous arguments concerning the legitimate conditions of necessity for the provision of the service, since GOS corporations' claim for revenues from innovative marketing practices is legitimate, to the extent that their business model does not manipulate and exploit people, or threatens the integrity of the democratic process. By allowing the use of intentionally shared UGC such as posts and comments, and substantively restricting the use of unintentionally produced UGT such as CLSI, the capabilities of GOS corporations that threaten the fundamental values of constitutional democracies would be sufficiently tempered.

This framework is I think the one that maximizes overall expected utility for our societies. GOS manipulative capabilities would be substantively lower as a considerably lower number of users would allow the exploitation of UGT data. Citizens would continue having unprecedented communication capabilities without monetary fees and they could effectively decide what information they allow for exploitation,

[118] Botta and Wiedemann, The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy, 429.

[119] See the 1890 *Sherman Act*.

[120] A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority, *FTC,* (2009) https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (Last accessed: 29.12.2023.).

coinciding with the information they intentionally share online. Meanwhile, GOS providers would still secure stable revenues. Moreover, if the GDPR incorporates the reasonable expectation of privacy logic with the UGC-UGT distinction, the US could more easily internalize this framework as a federal privacy bill. With this conclusion I hope the paper could somewhat contribute to an ideal data protection framework for the international liberal democratic community.

Habilitation

Fazekas, János*

Political question doctrine in Hungary and Europe. An overview

This paper is a brief summary of my habilitation lecture, which was held on 3 November 2022 at ELTE's Faculty of Law. The title of lecture and the thesis was "Judicial review of governmental acts and the political question doctrine". The thesis will be published in book form in 2024. At the end of this paper, I will briefly introduce my three-year-long (2022–2025) research project funded by the MTA Bolyai Scholarship, which is a sequel to my habilitation research.

The main question of my habilitation research is whether governmental actions can be subject to judicial review. Although holding the government to account is an important element of democracy, it is not obvious that every action of the executive branch can be reviewed by the judiciary. Government is a complex activity that has an essentially political nature but regulated by law. It involves setting strategic goals for a political community and monitoring their implementation, and ideological choices between alternatives that express values.[1] As a result, governance largely means taking discretionary decisions with political content. That's why governing politicians must be accountable to the people.[2] On the other hand, implementing political decisions is not the government's but the public administration's task, which is, as a bureaucratic administrative apparatus, the "engine room" of the state.[3]

Distinguishing between government and public administration is not easy because of the organizational and personal overlaps.[4] However, differentiation is crucial because it must be decided which decisions can be challenged before a court and which cannot (justiciable and non-justiciable acts). Political decisions cannot be reviewed by courts, only by politicians or the people itself. On the other hand, public administration,

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1 I. Marosi and L. Csink, Political Questions in the United States and in France, (2009) 4 (1) *Studia Iuridica Caroliensia,* 113–124, http://www.kre.hu/portal/doc/sic/2009/sic4_10_marosi-csink.pdf (Last accessed: 29.12.2023.) DOI: https://doi.org/10.14232/jtgf.2009.1.107-113

2 R. Hague and M. Harrop, *Comparative Government and Politics. An Introduction,* (Palgrave Macmillan, Basingstoke, 2004) 268.

3 Hague and Harrop, *Comparative Government and Politics.* 290; M. Weber, *The Theory of Social and Economic Organization,* (Free Press, New York, 1947) 329–341.

4 Körösényi A., Demokrácia és patronázs. Politikusok és köztisztviselők viszonya, (1996) 5 (4) *Politikatudományi Szemle,* 35–62.

DOI: 10.56749/annales.elteajk.2023.lxii.13.235

which is far more thoroughly regulated by law, can be controlled by public administrative bodies and courts, too.[5]

The theoretical framework that helps in making this decision and, as a result, setting the boundaries of judicial review, is called political question doctrine. It describes the connection between governmental acts and law and ascertains whether an act of government may be challenged before the court. This is a very important question, because courts are nowadays often pressed to make rulings on politically sensitive cases, such as regarding climate change[6] or the conditionality mechanism in the European Union.[7] Moreover, modern legal systems provide governmental bodies with broad deliberation, even discretionary powers, as the absence of detailed decision-making criteria and constraints laid down in legislation can enable administrations to respond quickly and effectively to continuously changing challenges.[8] On the other hand, to maintain effectiveness, governments also need constant feedback on the quality of their work, both in legal and political terms, and to be subject to external scrutiny in the system of democratic checks and balances. As a result, political question doctrine helps to resolve the conflict between broad political discretion and accountability (and, within this, legality).

In sum, governmental acts cannot be challenged in court since judges may only adjudicate legal but not political disputes. They cannot assume governmental responsibility because they have not been empowered by the people to govern. On the other hand, governmental actions may certainly not violate the principle of the rule of law and separation of powers.[9] From another point of view, the final decision on justiciability is always in the hand of the court: it can use political question doctrine as a tool to prevent itself from deciding on the merits of issues where it would be imprudent to do so.[10]

Political question doctrine has been elaborated in the jurisprudence of the United States Supreme Court, which laid down the criteria for political issues and thus

[5] Ereky I., *Közigazgatás és önkormányzat,* (Magyar Tudományos Akadémia, Budapest, 1939) 120–123, 180.

[6] K. Sulyok, The quality of law requirement as a climate litigation tool, (2022) 2 *ELTE Law Working Papers,* 1–7. DOI: https://doi.org/10.58360/20221129-Sulyok

[7] J. Fazekas, The European Court of Justice as political actor in intergovernmental coordination, (2024) 17 (1) *Journal of Comparative Politics,* 5–18. DOI: https://doi.org/10.21862/PoliticalActors.2023.35-37

[8] K. F. Warren, Administrative Discretion, in J. Rabin (ed.), *Encyclopedia of Public Administration and Public Policy,* (CRC Press, Boca Raton, 2003) 35–38.

[9] J. Fazekas, Local Governments and Political Question Doctrine in Hungary, (2019) 17 (3) *Lex Localis – Journal of Local Self-Government,* 811. DOI: https://doi.org/10.4335/17.3.809-819(2019)

[10] M. Tushnet, Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine, (2002) 80 *North Carolina Law Review,* 1204. DOI: https://doi.org/10.2139/ssrn.283464

non-justiciable governmental actions in the famous *Baker v. Carr* landmark decision,[11] in which the Court ruled on a case about the composition of legislative districts. In its decision, the Supreme Court set out the criteria for a case to be considered a political question, which cannot be decided by the court; for example, a "lack of judicially discoverable and manageable standards for resolving it" or the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion". Courts are often reluctant to take part in deciding other political questions, too, such as when the President and the Congress clash over the exercise of wartime authority.[12]

In European legal systems, political question doctrine cannot be found, neither in theory nor in judicial practice in the form in which it surfaced in the United States. Constitutional courts in Europe are generally not part of the ordinary court system and are much more likely to be regarded as political bodies than the US Supreme Court. In Europe, the separation between law and politics is less strict. Consequently, while the US Supreme Court only rules on the specific issue of law that it is presented with (see the case or controversy clause in the US Constitution), a European constitutional court examines the legal issue in a broader context, when, for example, it reviews a statutory law instrument abstractly in the light of the constitution.[13]

Nevertheless, political question doctrine has its own European antecedents and versions. The first theoretical doctrine to associate it with is the reason of state *(raison d'état),* with the pivotal thought that the interest of the state is more important than the legality of a state act.[14] In the German and Austrian jurisprudence, governmental acts *(Regierunksakt)* can be examined,[15] while in French jurisprudence the so called acte de gouvernements emerged in the practice *Conseil d´État*.[16] In the common law of the United Kingdom, we find another historical precedent, the concept of the royal prerogative.[17]

[11] *Baker v. Carr,* 369 U.S. 186 (1962).

[12] T. Porčnik, Detainee rights: the judicial vs. congressional check on the president in wartime, (2019) 12 (2) *Journal of Comparative Politics,* 72.

[13] Paczolay P., Alkotmánybíráskodás a politika és a jog határán, in Paczolay P. (ed.), *Alkotmánybíráskodás, alkotmányértelmezés,* (Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar, Budapest, 1995) 22.

[14] A. S. Miller, Reason of State and the Emergent Constitution of Control, (1980) 64 *Minnesota Law Review,* 587.

[15] E. Schmidt-Aßmann, Grundgesetz Art. 19 Abs. 4. in T. Maunz and G. Dürig (eds), *Grundgesetz. Kommentar,* (C. H. Beck, München, 2019) 81–83.

[16] Marosi and Csink, Political Questions in the United States and in France, 118–123; Barabás G., Kormányzati tevékenység: a "political question doctrine" a magyar közigazgatási perjogban, in Barabás G., Rozsnyai K. F. and Kovács A., *Kommentár a közigazgatási perrendtartáshoz,* (Wolters Kluwer Hungary, Budapest, 2018) 86.

[17] A. Bradley and K. Ewing, *Constitutional and Administrative Law,* (Pearson Longman, Harlow, 2011) 250–251.

Although the thesis does not delve deeply into the UK common law system, a special chapter is devoted to the court cases relating to the UK's exit from the European Union (Brexit). The reason for this is that Brexit has recently been (and to some extent still is) one of the most significant, news-generating, and emblematic political events on the international political stage, which fundamentally determines the fate of Europe and Hungary. This story has also given rise to some very exciting court cases. In them, the courts decided issues of real political significance and, accordingly, these judgments caused very serious political upheavals. Therefore, through these cases, the judicial review of government acts and the practical implementation of the political question doctrine can be observed at first hand, in today's context. The chapter, inter alia, analyses the *Miller/Cherry* case,[18] in which the UK Supreme Court had to rule on the constitutionality of the prorogation of the House of Commons. The court ruled the governmental decision on prorogation unconstitutional because it would have made parliamentary monitoring of government impossible during a very crucial period of Brexit.

The longest part of the thesis covers the functioning of political question doctrine in Hungary, namely in the jurisprudence of the Constitutional Court (hereinafter: CC) and the administrative courts (including the Supreme Court/Curia). The main controversy of the Hungarian situation is that, like European jurisprudences, Hungarian judicial practice has never explicitly mentioned political question doctrine; nevertheless, courts and the CC have regularly used political question doctrine-like justifications in their decisions. After the regime change (1989/1990). the CC played an important role in building the Hungarian constitutional system, for example, regarding the interpretation of the powers of the President of the Republic and therefore deciding on a conflict between the President and the Government,[19] so it had to rule on politically sensitive cases. On the other hand, such as in cases regarding the criminal justice system, the CC refrained from deciding on the merits of the problems, citing very much political question doctrine-like reasons.[20] Nevertheless, the new Code on the CC[21] has largely depoliticised constitutional adjudication by abolishing *actio popularis* and putting emphasis on constitutional complaints as a means of finding whether an action was unconstitutional. As a result, the CC has refrained from deciding politically sensitive cases after 2011, even when it had the opportunity to do so.[22] Furthermore, due to successive amendments to the Fundamental Law overruling

[18] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland,* ([2019] UKSC 41).
[19] CC decision 48/1991. (IX. 26.).
[20] Firstly in CC decision 1214/B/1990.
[21] Act CLI of 2011 on the Constitutional Court.
[22] Z. Pozsár-Szentmiklósy, The Hungarian Constitutional Court as a lawmaker, in M. Florczak-Wator (ed.), *Judicial Law-Making in European Constitutional Courts,* (Routledge, London and New York, 2020, 128–144) 144. DOI: https://doi.org/10.4324/9781003022442-7

certain decisions of the CC, it has had less and less power to interfere in the decision of cases that the legislature and the constitutional branches want to keep to themselves.[23]

In the field of judicial review of administrative acts by ordinary courts, the adoption of Act I of 2017 on the Code of Administrative Court Procedure (hereinafter: Kp.) can be considered as a significant milestone, because the concept of non-justiciable governmental actions appeared for the first time in Hungarian administrative statutory law in the Kp.[24] It has given political question doctrine a clear formulation in legislation. Prior to the Kp., the doctrine appeared indirectly, mostly in the practice of the Constitutional Court. Furthermore, since administrative adjudication before the adoption of the Kp. was primarily focused on decisions of administrative authorities, there was less chance of politically relevant cases being brought to administrative courts. The thesis therefore examines two politically heated cases under the regime of the Kp. that are relevant regarding political question doctrine: case Kvk. III.38.043/2019/2 (Curia) from 2019 was related to a municipal election campaign and case Kpkf. 40.129/2021/2 (Curia) from 2021 was about the maintenance of the University of Theatre and Film Arts (SZFE).

The man conclusions of the thesis are that political question doctrine is a vital challenge to the principle of rule of law because it excludes some decisions of the Executive from judicial review. Contrary to this, it is a democratic requirement to provide judicial remedy against decisions of the government and the court must be able to judge the legality of such decisions. The principle of separation of powers supports judicial review in all cases, even of a governmental action with political content, as it ensures that each branch operates lawfully in its own domain. In a democracy, no one can justify their own decisions if found contrary to the constitution and substantive law.[25] Consequently, courts should follow a prudential theory of political questions:[26] they must carefully consider whether a politically sensitive case is justiciable, must draw as narrowly as possible the boundaries of the political question doctrine and has to seek to ensure that as many acts of the Executive as possible are subject to judicial review. It is highly desirable, especially in view of the recent trends on limiting judicial power throughout Europe and the whole world, including Hungary (see the above-mentioned changes regarding the

[23] J. Fazekas, Administrative procedural and litigation aspects of the review of governmental actions, (2022) 2 (2) *Institutiones Administrationis – Journal of Administrative Sciences,* 17–20. DOI: https://doi.org/10.54201/iajas.v2i2.52; P. Sonnevend, The Responsibility of Courts in Maintaining the Rule of Law: Two Tales of Consequential Judicial Self-Restraiyernt, in A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski, and M. Schmidt (eds), *Defending Checks and Balances in EU Member States,* (Springer Verlag, Heidelberg, 2021) 175.

[24] Section 4(4) a).

[25] V. Beširević, Making Sense of the Political Question Doctrine: The Case of Kosovo, (2021) 46 (1) *Review of Central and East European Law,* 95–96. DOI: https://doi.org/10.1163/15730352-bja10041

[26] S. Birkey, Gordon v. Texas and the Prudential Approach to Political Questions, (1999) 87 (5) *California Law Review,* 1265–1281. DOI: https://doi.org/10.2307/3481043

Constitutional Court). In the United Kingdom, several government officials, including then-Prime Minister Boris Johnson said, regarding the *Miller/Cherry* case in connection with Brexit, that the courts became involved in politics, which is for ministers and Parliament, and the boundaries of judicial review should be reconsidered.[27] On the other hand, trends on limiting judicial review do not lack a theoretical basis. The concept of judicialization[28] analyses and often criticizes the process when judges take over the role of elected politicians when deciding on political matters.

As a sequel to my habilitation research, I have started a three-year (2022–2025) research project to examine the role of political question doctrine in the jurisprudence of the European Court of Justice (hereinafter ECJ). The research is in progress, so its final findings cannot be formulated yet. The starting point of the research is that ECJ is not a political actor; nonetheless, it can play a vital role in solving political debates, since it regularly makes rulings on political issues decided by EU bodies. Although ECJ has never elaborated a comprehensive political question doctrine, it has decided, case by case, whether a political problem is justiciable from the 1970's up to now (see. e. g. the Hungarian and Polish cases regarding the conditionality or rule of law mechanism). Despite the ECJ legally reviewing the operation of the Executive on an EU and national level, it usually refrains from cases of directly political substance because, as a court, it cannot take over the role of political actors. The aim of the research is to examine how it has tried to balance between these requirements. The main hypothesis of the research is that the political cohesion within the EU is going to become stronger, because it must take up challenges that need united action, for example, global issues like climate change or migration, or the Ukrainian-Russian war. For this reason, it is vital that ECJ, as the main body of the European judiciary, can rule on politically sensitive cases, since the judiciary can sometimes take the case out of the current political context, which means that the impact of the decision will go beyond the specific case. In this way, the ECJ can decide issues on which it is very difficult or impossible to reach political consensus, or even cool the heat of political conflict.[29] By doing so, the ECJ could help Europe to become a cohesive and organic political community.

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[27] BBC News, Judicial review: *Labour query independence of government probe,* 31 July 2020, https://www.bbc.com/news/uk-politics-53612232 (Last accessed: 29.12.2023.).

[28] R. Hirschl, The Judicialization of Politics, in E. R. Goodin (ed.), *The Oxford Handbook of Political Science*, (Oxford University Press, Oxford, 2013) 253–270; B. Pokol, *A jurisztokratikus állam* (Dialóg Campus Kiadó, Budapest, 2017).

[29] Sólyom L., Az alkotmány őrei, in Hitseker M. and Szilágyi Z. (eds), *Mindentudás Egyeteme: Hatodik kötet,* (Kossuth Kiadó, Budapest, 2006) 334.

Gárdos, Péter*

Questions relating to the transfer of contracts**

I. Introduction

At first sight, the transfer of a contract does not raise any questions. Suppose there is a contract between A and B, in which A, for whatever reason, no longer wishes to participate, but C is willing to take A's position, and B has no problem substituting A with C. From a practical point of view, there seem to be no reason not to recognise the possibility of this change.

Of course, if this arrangement affects a third party, the law must ensure that the situation of this third party should not become more burdensome without the consent of this party. Perhaps the most typical example is where the debtor's repayment obligation in a loan agreement is secured by a guarantee. If a new debtor replaces this debtor, it is necessary to ensure that the guarantor can be released from their obligation. The argument for this is straightforward. As the guarantee was given in respect of the original debtor, taking into account the financial situation of that person or the personal relationship between the guarantor and the debtor, the guarantor may not be forced to secure the debt of the new party.

Setting aside the problem of third parties, the transfer of contract concerns only the situation of A, B and C. Having regard to the principle of freedom of contract, there is no obstacle to such a transaction.

This is precisely what we found before Act V of 2013 on the Civil Code ("New Civil Code") entered into force in 2014. Act IV of 1959 on the Civil Code ("Old Civil Code") did not contain rules on the transfer of contracts. Nevertheless, the courts recognised that, by transferring all rights and assuming all obligations under the contract, the original parties and the new party might, in a trilateral agreement, transfer the contractual position of a party.[1] This was also in line with the fact that several sectoral laws expressly recognised the transferability of the contractual position.[2]

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1 See, e.g., the Supreme Court's decision BH 2006, 409. and the decision of the Szeged Court of Appeal BDT 2008, 1883.

2 See, e.g., Government Decree 214/1996. (XII. 23.) implementing the package travel directive that allowed the transfer of the package travel contract, or Section 161(1) of Act CXII of 1996 on credit institutions that allowed the transfer of loan portfolios.

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Moreover, the Old Civil Code itself included a rule that qualified as a transfer of contract. Among the provisions on lease agreements, the Old Civil Code provided that if the lessor sells the leased property, the lease agreement automatically transfers to the buyer.[3]

Under such an approach, the New Civil Code's task could only have been to codify the solution developed by the courts and thereby reduce the transaction costs of the parties by providing appropriate model rules for the transfer of contracts. The New Civil Code, indeed, introduced such rules.[4] Even though these rules were based on the solutions developed by the courts, several problems emerged after the New Civil Code entered into force.

II. Overview of the thesis

The thesis provides an overview of the law of the transfer of contracts from a comparative approach. It starts by summarising how the transfer of contracts is regulated in those few European jurisdictions where the civil code or the law of obligations introduced rules on the transfer of contracts.[5] This overview also extends to the UNIDROIT Principles and the Draft Common Frame of Reference. Apart from this high-level overview, the thesis also provides a detailed analysis of German law and a summary of English law.

The second part of the thesis explains how the transfer of contracts was regulated in Hungarian law before the New Civil Code and provides an introduction to the rules of the New Civil Code. It elaborates on how the amendment of the New Civil Code[6] and the amendment of the Act on the Transitional Provisions of the New Civil Code[7] caused significant uncertainties, how the situation was exacerbated by the decision of

[3] Section 432(1) of the Old Civil Code.
[4] Section 6:208–6:211 of the New Civil Code.
[5] The thesis provides an overview of the rules on the transfers on contracts in Italian, Portuguese, Estonian, Slovenian, Czech and the French civil codes or laws on obligations.
[6] See Act LXXVII of 2016 on the amendment of the New Civil Code.
[7] Act CLXXVII of 2013 on the Transitional Provisions of the New Civil Code includes the transitional provisions explaining whether, in a given situation, the rules of the Old Civil Code or the rules of the New Civil Code apply. After the act entered into force, the legislator, from time to time, also introduced substantive rules in this act. One of such amendments took place with the adoption of Act CCXX of 2015, which introduced rules on the transfer of contracts. This amendment not only inserted a transitional provision concerning certain transfers of contracts, but it also stated that, in these cases, the transfer of contract leads to the termination of the original contract and the creation of a new contract. For a detailed analysis, see Gárdos P., Gondolatok a szerződésátruházásról az Alkotmánybíróság határozata nyomán [Thoughts on the transfer of contract after the decision of the Constitutional Court], (2021) (7–8) *Magyar Jog [Hungarian Law],* 427–444.

the Constitutional Court,[8] and how the Curia's uniformity decision[9] helped in clarifying the situation.

The third part focuses on the question of what rights and obligations are transferred to the assignee in the case of an assignment. The paper argues that the New Civil Code's rule is inaccurate and the Hungarian legal literature also draws the scope of these rights and obligations too narrowly.

Building on the findings of this part, the last chapter addresses the question of how a transfer of contract may be described.

This paper summarises two findings of the thesis.

III. Advance consent to the transfer of contracts

The first finding that this paper's explanations relate to the question of advance consent. The New Civil Code provides that the transfer of contract is a tripartite agreement, but if the party remaining in the contract has given advance consent, the transfer shall take effect upon the party remaining in the contract being notified of the transfer.[10]

It seems obvious that the party remaining in the contract should have the right to notify the other party in advance that they consent to the substitution of their contractual partner. Such advance consent makes the transfer easier, and could therefore be valuable for the other party. The UNIDROIT Principles also contain a similar rule.[11] However, if we take a closer look, the concept of advance consent is slightly puzzling.

Consent, per definition, is a declaration from a third party, meaning someone who is not a party to the contract. Such a third party can be a parent company of one of the parties, the regulator of a regulated entity, or a guardian in private relationships. The UNIDROIT Principles regulate the transfer of contract as a bilateral agreement between the party leaving the contract and the new party entering the contract. This agreement, naturally, requires the consent of the party remaining in the contract.[12] The rule on advance consent easily fits in this structure. However, under Hungarian law, the transfer of contract is not regulated as a bilateral contract between the party leaving

[8] Decision 22/2018. (XI. 20.) of the Constitutional Court.
[9] Uniformity decision no. 7/2021 PJE on the enforcement of the rules governing transfers of contracts under Act No. V of 2013 on the Civil Code.
[10] Section 6:208(1) and Section 6:209(1) of the New Civil Code.
[11] Article 9.3.4 of the UNIDROIT Principles provides that the other party may give its consent in advance. If the other party has given its consent in advance, the assignment of the contract becomes effective when a notice of the assignment is given to the other party or when the other party acknowledges it.
[12] Article 9.3.3 of the UNIDROIT Principles.

and the party entering the contract, to which the party remaining in the contract can give their consent as a non-contracting party.

The Civil Code provides that the transfer of contract is a tripartite contract, to which the party remaining in the contract is also a party. Therefore, instead of consent, the Civil Code should have regulated how the party can express their declaration in advance. In principle, as this party is the first in the offer and acceptance scheme, this declaration should be an offer.[13] However, at this point in time, the party remaining in the contract does not know to whom this offer should be addressed, and, more importantly, does not know the material terms of the transfer.[14]

The law should therefore recognise the unique nature of this declaration. First, the declaration is addressed to the original party, but not addressed in relation to the new party. Second, taking into account the particularities of how the transfer takes place, this declaration should not be regarded as an offer.

IV. Characterisation of the transfer of contracts

The second finding of the thesis this paper will briefly address concerns regarding how the transfer of contract can be characterised.

The Civil Code, its amendments and the legislative developments that have taken place since the Civil Code entered into force make such a characterisation difficult, as these often contradict each other.

The thesis argues that there are five possible solutions to characterise the transfer of contracts from a doctrinal perspective: *(i)* a transfer in the legal sense, *(ii)* an amendment of the original contract, *(iii)* a novation of the original contract, *(iv)* an assignment of all receivables and rights and the assumption of obligations under the original contract to a third party, *(v)* if none of these solutions can describe the transfer of contracts appropriately, we can regard the transfer of a contract as a *sui generis* legal institution.

Handling the transfer of contracts as real transfers would be the closest to how business people treat such transfers. According to this approach, the transfer of contract is an actual transfer, the subject of which is the contractual position. This would be similar to the German law's position, where, at least according to the majority view, the transfer of contract is an actual transfer of the contractual position.[15] However, *de lege lata,* this

[13] Section 6:64 of the New Civil Code.

[14] An offeror is only bound by their offer if the offer includes the material terms of the agreement [Section 6:64(1) of the New Civil Code].

[15] K. W. Nörr, R. Scheyhing and W. Pöggeler, *Sukzessionen. Forderungszession, Vertragsübernahme, Schuldübernahme [Legal succession: Assignment, transfer of contracts and assumption of debt],* (Mohr, Tübingen, 1999) 187; K. Larenz, *Lehrbuch des Schuldrechts Allgemeiner Teil [Textbook on the law*

position is clearly untenable under Hungarian law, as only things, receivables and rights are capable of being transferred. We could, of course, restructure the system of contract law and property law so that a contractual position becomes property, but this is completely unnecessary to achieve our goal, the transferability of contractual positions.

The second possibility is to interpret the transfer of a contract as an amendment of the original contract.[16] However, it seems to be clear that the Civil Code does not regulate the transfer of contracts as an amendment. One can argue that the Civil Code could be amended so that the rules on amendment also cover the transfer of contract. However, it would seem problematic to recognise a transaction that cannot be carried out by the original contracting parties but which necessarily involves a third party as an amendment.

The third option would be to regulate the transfer of a contract as novation. Under this option, the original contracting parties terminate the contract, while the party remaining in the contract and the party entering into the contract create a new, identical contract simultaneously with the termination. The amendment of the Act on the Transitional Provisions of the New Civil Code and Decision 22/2018. (XI. 20.) of the Constitutional Court seems to support this interpretation. The thesis raises several concerns about this solution. The most important of these is that this solution clearly would not take into account the business intention of the parties. The parties do not want to terminate their contract. Instead, their intention is to achieve legal succession. The question of whether the transaction qualifies as a novation is not purely theoretical. If the transaction is a novation, and the contract together with the securities securing the performance of the obligations of the parties terminate, the parties need to conclude new contracts and register new securities. Although detailed legislation may help to ensure that the new securities maintain the ranking of the original ones, terminated as a result of the novation, the legislation will not help to eliminate the unnecessary costs that would arise as a consequence of the novation. The termination and recreation of the contract would create unnecessary costs, even for the transfer of one contract. However, such costs could make the transfer of complete portfolios of contracts commercially impossible.

The fourth option is to conceive the transfer of contract as the assignment of all rights and the assumption of all debts under a contract. This approach would follow the earlier jurisprudence of the Hungarian courts. Typically, two conceptual objections are raised against this approach. The first is a structural one. The argument is that the assignment and the assumption of debt result in legal succession concerning certain

of obligations general part], (Beck, München, 1987) 618; D. Klimke, *Die Vertragsübernahme [The transfer of contracts],* (Mohr, Tübingen, 2010) 72. DOI: https://doi.org/10.1628/978-3-16-151227-8

[16] László P. and Leszkoven L., Gondolatok a szerződés-engedményezés jogi természetéről [Thoughts on the legal nature of the transfer of contracts], (2004) (4) *Polgári Jogi Kodifikáció [Codification of Civil Law],* 17–24.

rights and certain obligations. However, this does not affect the underlying contract, which continues to exist between the original parties. If this is true, so goes the argument: how can the transfer of contract be achieved by this solution?[17] The second objection is that the contractual position includes rights that are not transferable. A typical example of such a right could be the right of rescission and the right of termination.[18]

The thesis argues that the transfer of contract is possible by the assignment of all rights and the assumption of all obligations under the contract. This argument was built on three pillars:

First, the New Civil Code's rule that provides that interest, surety and charge transfer automatically to the assignee in the case of an assignment[19] is wrong. This rule should be extended to other rights relating to the underlying claim, such as the right to liquidated damages or warranty claims. In addition, it should be recognised that not only rights but certain obligations also transfer automatically to the assignee. These obligations are primarily intended to help the debtor meet their obligations. The obligation to cooperate in the performance of the service is an ancillary obligation that cannot be dissociated from the position of the creditor.

Second, the thesis also suggested that the law should accept that the assignor and the assignee may agree that non-accessory rights, such as the right to termination or rescission, also transfer to the assignee. It goes without saying that the transfer of such rights should not be automatic, but there are no compelling reasons why the law should prohibit such transfers.

Whereas the first two arguments focused on the question of what rights and obligations can be transferred in the case of an assignment, the third argument focused solely on the transfer of contract scenario. The thesis argued that even if we accepted that certain rights are non-transferable in the case of the assignment of individual receivables, no argument supports why the transfer of these rights needs to be rejected in the case where the complete contractual position of a party is being transferred. The thesis used the analogy of the assumption of debt, where the legislator acknowledged that as the creditor needs to be involved in the assumption, any obligation could be transferred.[20] The legislator acknowledged that, in the case of an assumption of debt, the creditor could decide whether they mind if the original obligation, whatever that

[17] Menyhárd A., *Dologi jog [Property law],* (Osiris, Budapest, 2007) 167.

[18] Menyhárd A., Engedményezés, jogátruházás, tartozásátvállalás és szerződésátruházás [Assignment, transfer of rights, assumption of debt, transfer of contract], in Osztovits A. (ed.), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja [Large commentary to Act V of 2013 on the Civil Code and related legislation],* (Band III., Opten, Budapest, 2014, 468–493) 489.

[19] Section 6:193(3) of the New Civil Code.

[20] Eörsi Gy., *Kötelmi jog. Általános rész. [Law of obligations. General part],* (Nemzeti Tankönyvkiadó, Budapest, 1998) 226.

obligation is, will be performed by a new debtor. The same should be true in the case of a transfer of contract.

As regards the right of termination or the right of avoidance as a formative right linked to the underlying relationship, the legal literature puts forward two arguments against transferability, the protection of the assignor and the protection of the debtor. However, these arguments do not seem to make sense in the case of a tripartite transfer. The protection of the assignor does not arise in this context, since the assignor's aim is precisely to withdraw from the entire legal relationship. Nor is it relevant to invoke the protection of the debtor, since they are a party to the transfer, and the transaction cannot be carried out against the debtor's will. This provides the debtor with sufficient protection. If, on the other hand, the change of the party does not bother the debtor, it would seem unjustified to impose this protection on the debtor.

We find, therefore, that, in the case of a transfer of the entire contractual position, there are no claims, rights or obligations that should be considered non-transferable. As a result, the thesis argued that the transfer of a contract is not a *sui generis* transaction but an assignment of all receivables and rights and the assumption of debt.

V. Epilogue

As explained above, the thesis argued that the New Civil Code's rule that regulated the scope of rights that automatically transfers to the assignee in the case of an assignment is wrong and should be expanded. The thesis hoped that exploring the problem could lead to a lively discussion, which, if necessary, could result in the amendment of the New Civil Code. There was no need to rush, as the rule had existed in an unamended form since 1960 when the Old Civil Code entered into force.[21]

Suddenly, the legislator amended this rule.[22] The new provision, in force since 24 June 2023, extends the scope of rights that transfer to the assignee. Instead of providing a closed list of rights, the New Civil Code provides that all rights that facilitate the performance and enforcement of the assigned obligation transfer to the assignee.[23] The amendment also provides that if the maturity of the assigned claim depends on a declaration or other condition to be fulfilled by the assignee, the assignee may make such a declaration or fulfil such a condition as is necessary for the maturity to occur.[24] Whereas, surprisingly, the legislator had listened to the criticism, the legislator missed the opportunity to discuss and create a consensus on the new rule. It remains to be seen how the vaguely formulated terms will be interpreted by the parties and the courts.

[21] Section 329(1) of the Old Civil Code.
[22] Act XXXIX of 2023 on legislative amendments to increase the competitiveness of the economy.
[23] Section 193(3) of the New Civil Code.
[24] Section 193(4) of the New Civil Code.

Gosztonyi, Gergely*

Questions conceptuelles et formes de censure au 21e siècle**

1.

Il y a peu d'accusations plus faciles que la suivante: « *censure!* » Usitée dans des débats sensés, la plupart du temps inutilement. Cette pratique démontre ce que Derek Jones soutient dans son encyclopédie mondiale de la censure de près de 3 000 pages: la censure ne se limite pas à l'autorisation préalable des contenus, et le concept doit être interprété aussi largement que possible pour protéger pleinement la liberté d'expression.[1]

Une analyse historique peut nous aider à comprendre comment nous sommes passés d'un usage intense de la censure au cours des 17ème et 18ème siècles au 21ème siècle, où la censure politique en tant que concept devient presque insignifiante et où de nouveaux types de mécanismes de contrôle privés émergent. Comment et pourquoi les États ont "privatisé » la question de la gestion et la réglementation du contenu, et pourquoi nous voyons aujourd'hui de nouvelles problématiques émerger sur Internet. Comment cette forme de communication, qui a été essentiellement créée pour être libre, a été soumise – presque par définition – à une réglementation légale, annihilant de fait l'essence de cette liberté.[2]

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1 D. Jones (éd.), *Censorship. A world encyclopedia (Censure. Une encyclopédie mondiale),* (Routledge, London and New York, 2015), xi.

2 À ce sujet, le texte suivant a été publié en hongrois: Gosztonyi G., *Cenzúra Arisztotelésztől a Facebookig. A közösségi média tartalomszabályozási gyakorlatának komplexitása,* (Gondolat Kiadó, Budapest, 2022). DOI: https://doi.org/10.24362/cenzura.gosztonyi.2022. Une version anglaise considérablement élargie et mise à jour: G. Gosztonyi, *Censorship from Plato to Social Media. The Complexity of Social Media's Content Regulation and Moderation Practices (La censure de Plato aux médias sociaux: La complexité des pratiques de régulation et de modération du contenu des médias sociaux),* (Springer Nature International AG, Cham, 2023).

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2.

Il est généralement admis que la liberté d'expression est un droit humain fondamental. C'est la pierre angulaire de la démocratie, un élément clé de la protection de tous les droits de l'homme et l'une des conditions de base du développement de la démocratie et, comme l'a déclaré la Cour européenne des droits de l'homme dans plusieurs arrêts, de l'épanouissement de tous les êtres humains. Il faut cependant reconnaître que des siècles de lutte pour atteindre une liberté d'expression complète sont vains si la censure empêche la publication de certaines opinions. De plus, la censure est difficile à analyser empiriquement car elle voudrait passer inaperçue. Les définitions de la censure sont innombrables, mais il n'existe pas de définition unique et largement acceptée. Sophia Rosenfeld affirme que « *la censure n'est pas actuellement un sujet facilement négociable (...) Il semble qu'il n'y ait plus de consensus au niveau des théories sur ce qui peut être considéré comme de la censure.* »[3] Selon Eric Barendt, « *le terme de censure n'a pas de sens réel lorsqu'il est appliqué à des conventions sociales ou à des pratiques qui ne font que rendre la communication plus difficile pour certains individus.* »[4] Sur le même point, Matthew Bunn affirme que de nombreux historiens craignent une expansion voir une distortion excessive du terme, entraintant dans ce cas, la perte de son sens originel. Comme argument en faveur d'une interprétation plus large, il plaide pour l'introduction d'une "Nouvelle Théorie de la Censure » qui, après la définition libérale classique de la censure et les concepts marxistes qui l'ont contestée, reconnaît que, dans les années 2000, la censure était « *un phénomène diffus et omniprésent dans lequel un certain nombre d'acteurs (y compris des conditions structurelles impersonnelles) agissent en tant que censeurs efficaces.* »[5] Tout en admettant bien sûr qu'un cadre d'interprétation trop large peut nuire à l'efficacité de la réglementation juridique, mes recherches ont clairement démontré qu'une utilisation large de la censure peut conduire à une protection plus complète de la liberté d'expression.

[3] S. Rosenfeld, Writing the History of Censorship in the Age of Enlightenment (Écrire l'histoire de la censure au siècle des Lumières), in D. Gordon (éd.), *Postmodernism and the Enlightenment. New Perspectives in eighteenth-century French intellectual history (Postmodernisme et Lumières. Nouvelles perspectives dans l'histoire intellectuelle française du 18e siècle),* (Routledge, New York and London, 2001) 117. DOI: https://doi.org/10.4324/9781315023229-7

[4] E. Barendt, *Freedom of Speech (La liberté d'expression),* (Oxford University Press, Oxford, 2007) 151. DOI: https://doi.org/10.1093/acprof:oso/9780199225811.001.0001

[5] M. Bunn, Reimagining repression: New Censorship Theory and after (Réimaginer la répression: La nouvelle théorie de la censure et l'après), (2015) 54 (1) *History and Theory,* 27. DOI: https://doi.org/10.1111/hith.10739

3.

Dans le contexte de la censure, j'ai examiné la manière dont elle s'exprime sur Internet. Il est généralement admis qu'internet a impacté nos vies à plusieurs echelons. D'abord en fournissant un accès instantané à une quantité incroyable d'informations, mais aussi en transformant nos conceptions de l'État, de l'économie, l'éducation, ainsi que nos relations humaines et nos anxiétés relatives au monde d'aujourd'hui. Dans l'Affaire Cengiz et Autres c. Turquie, la Cour européenne des droits de l'homme a déclaré que « *Internet est aujourd'hui devenu l'un des principaux moyens d'exercice par les individus de leur droit à la liberté de recevoir ou de communiquer des informations ou des idées*. »[6] Cependant, il devient également de plus en plus évident que même les États démocratiques sont confrontés à de nouveaux défis liés à ce nouveau média. On peut dire qu'avec l'émergence et la diffusion d'Internet, outre la censure politique classique, un certain nombre de cas rendent difficile à déterminer les critères de la censure, de telle manière que la portée du discours et le contenu qui en résulte a changé significativement.

4.

D'après mes recherches, la doctrine fait référence à une variété de solutions sur le thème des restrictions de contenu dans le contexte de la gouvernance d'internet: ces solutions alternant entre restrictions légales et illégales.[7] Le cas le plus évident est celui où la restriction est motivée par des raisons de gestion du trafic ou de sécurité du réseau, ce qui est bien sûr – en principe – légal. On admet volontiers que la gestion du trafic est nécessaire pour gérer de manière optimale le volume croissant du trafic sur les réseaux Internet. Toutefois, certaines interventions sont moins acceptables. En general, les entreprises privées qui restreignent ou ralentissent l'accès à certains contenus sont dans l'illégalité, à moins de justifier d'un motif légitimes. Mes recherches révèlent, deux types de restriction de contenu d'origine étatique: d'une part, lorsque les fournisseurs d'accès Internet restreignent certains contenus selon les injonctions de l'État (par décision de justice ou par la loi), et d'autre part, lorsque les États restreignent ou rendent inaccessible l'accès à certains sites ou même proposent un éventail de services, sites ou applications complètement alternatifs afin de conserver sa mainmise, en exercant une censure systèmatique.[8]

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[6] *Cengiz et Autres c. Turquie,* App nos 48226/10 et 14027/11 (CEDH, 1er décembre 2015), [49.].

[7] Lendvai G. F., A Facebook „elitbírósága" kritikai megközelítésben: A Facebook Oversight Board nyolc kiemelt kérdése és lehetséges megoldásai (Un regard critique sur le « tribunal d'élite » de Facebook: huit questions clés et des solutions possibles du Conseil de surveillance de Facebook), (2023) 19 (3) *Iustum Aequum Salutare,* 227–243.

[8] Gosztonyi G., Az internet-hozzáférés korlátozásának gyakorlata az Emberi Jogok Európai Bírósága előtt (La pratique de la restriction de l'accès à Internet devant la Cour européenne des droits de l'homme), (2021) 10 (1) *In Medias Res,* 91–101.

D'après mes recherches, le défi juridique de la liberté d'expression face à la censure est multidimensionnel: il s'agit d'intégrer un outil médiatique de masse, aujourd'hui à la portée de milliards d'usagers sur cinq continents, dans un cadre juridique, exploité par des sociétés américaines avec une approche (fondamentalement) américaine, et de traiter des questions (juridiques) qui reflètent l'immense variété des cultures juridiques mondiales. En outre, Internet a développé au fil des ans son propre ensemble de normes, que les utilisateurs acceptent par défaut. Ainsi, les méthodes verticales, centralisées et étatiques de la réglementation traditionnelle sont complétées par des accords horizontaux coopératifs qui aboutissent à un « *environnement complexe de structures interdépendantes, avec un large éventail de mécanismes formels et informels opérant dans de nombreuses occasions*. »[9]

Entre 2010 et 2015, les acteurs politiques et les États qu'ils gouvernent, reconnaissant peu à peu les problèmes croissants, et ne pouvant plus fermer les yeux, admettent que la regulation interne par les entreprises de médias sociaux ne peut se poursuive. À ce titre, Jack M. Balkin indique que, « *Les États-nations, comprenant cela, ont développé de nouvelles techniques de réglementation de la liberté d'expression. En plus de cibler directement les utilisateurs, ils ciblent désormais les dirigeants d'entreprises privées, dans l'espoir de les contraindre ou de les coopter pour qu'ils régulent les discours au nom de l'État-nation*. »[10]

5.

Dans ma recherche, j'ai développé une triple analyse basé sur diverses solutions réglementaires.[11] Aux États-Unis d'Amérique, la réglementation d'Internet est incluse dans la Section 230(c)(1) du *Communications Decency Act* (CDA). Le gouvernement américain admet que la question de la protection de la liberté d'expression et les décisions de retrait des contenus illégaux ou préjudiciables demeurent à l'initiative des entreprises gérantes de réseaux sociaux. Cela correspond au "modèle d'immunité ».

[9] A. Hintz, Social media censorship, privatized regulation, and new restrictions to protest and dissent (Censure des médias sociaux, réglementation privatisée et nouvelles restrictions à la protestation et à la dissidence), in L. Dencik and O. Leistert (éds), *Critical Perspectives on Social Media and Protest: Between Control and Emancipation (Perspectives critiques sur les médias sociaux et la protestation: Entre contrôle et émancipation),* (Rowman & Littlefield, London, 2015), 111.

[10] J. M. Balkin, Free speech in the algorithmic society. The new school of big data, private regulation and the regulation of expression (La liberté d'expression dans la société algorithmique. La nouvelle école du big data, la régulation privée et la régulation de l'expression), (2018) 118 (7) *Columbia Law Review,* 1153. DOI: https://doi.org/10.2139/ssrn.3038939

[11] G. Gosztonyi, Early regulation of social media liability issues in the United States and the European Union (Réglementation précoce des questions de responsabilité liées aux médias sociaux aux États-Unis et dans l'Union européenne), (2021) (Special Issue) *Jogtörténeti Szemle,* 21–26.

L'originalité (relative) du système européen réside dans la procédure couramment utilisée de « notification et retrait », qui introduit un système de conditions et de procédures en plusieurs étapes: le fournisseur de services une fois informé d'un contenu manifestement illicite doit prendre des mesures pour le retirer dans un délai déterminé. L'Union européenne a donc opté pour le modèle dit du « *safe harbor* », qui prévoit l'application d'une exemption non automatique.

Aussi bien en Europe qu'aux États-Unis, les discussions sur un nouvel encadrement des pratiques sur Internet ont commencé au milieu des années 2000, en proposant initialement le cadre CDA230 ayant ensuite été remplacé par le cadre DSA-DMA constituant donc l'étape suivante.[12] Une troisième voie semble vouloir émerger, il s'agit du modèle chinois, qui repose sur une surveillance accrue et un contrôle total. La solution chinoise repose sur la souveraineté d'internet, c'est-à-dire le principe selon lequel tous les pays du monde ont le possibilité de choisir souverainement la manière dont ils développent et réglementent leur propre réseau internet. Les trois voies différentes sont ce qu'Anu Bradford appelle les voies axées sur le marché, les voies axées sur les droits et les voies axées sur l'État.[13]

6.

En 2023, ce qui demeure des idées fondatrices en déclin de la cybercriminalité soit la nature intrinsèquement libératrice de la technologie et d'internet, et la lutte permanente pour la décentralisation de la communication, où chacun (privilégié comme défavorisé) peut disposer de l'espace de communication qui lui revient. La régulation de la cybercriminalité sans être toujours mal orienté donne quand même lieu a des abus: ainsi le blocage du contenu d'internet à des fins politiques est encore courant dans de nombreux pays.

Mes recherches révèlent comment les opinions et les divers contenus qui sont ou ont été publiés ont été réglementés par l'État et l'Église au fil des siècles, parfois sous une forme religieuse, parfois sous une forme morale, parfois sous une forme politique. La technologie ayant permis à un nombre croissant de personnes d'accéder aux contenus, les outils juridiques et politiques se sont considérablement affinés au fil du temps. La lutte pour la liberté d'expression a semblé connaître un tournant avec l'avènement d'internet, considéré à ses débuts comme un moyen de communication offrant une li-

[12] O. Moravec et al., Digital Services Act Proposal (Social Media Regulation) (Proposition de loi sur les services numériques (réglementation des médias sociaux), (2021) 14 (2–3) *Studia Politica Slovaca,* 166–185. DOI: https://doi.org/10.31577/SPS.2021-3.5

[13] A. Bradford, *Digital Empires. The Global Battle to Regulate Technology (Empires numériques. La bataille mondiale pour réglementer la technologie),* (Oxford University Press, New York, 2023). DOI: https://doi.org/10.1093/oso/9780197649268.001.0001

berté totale. Cependant, le mythe d'un espace libre de droits a rapidement commencé à se dissiper, avec l'appartition des nouveaux dirigeants du monde numérique, la croissance des entreprises technologiques qui disposaient d'un pouvoir illimité sur l'expression et la publication de contenu. La réglementation est souvent fragmentée et caractérisée par un manque de transparence et d'applicabilité. La nature transfrontalière d'internet est mise au défi par des solutions isolées émanant d'États-nations de plus en plus fermés, sans réussir à fournir des solutions à long terme et juridiquement robustes. En outre, « *la promesse d'un accès ouvert à des sources d'information indépendantes et diversifiées n'est en fait une réalité que pour une minorité de personnes vivant dans des démocraties avancées*. »[14] Il serait difficile d'affirmer que, quelques décennies après l'avènement et l'adoption généralisée d'internet, le monde sait exactement où il va.

[14] P. Bennett and M. Naim, 21st-century censorship (La censure du 21e siècle), (2015) 14 (1) *Columbia Journalism Review*.

Szalai, Ákos*

The preventive effects of Hungarian tort law – A simple law and economics analysis**

Introduction

When analysing tort law, it is worth placing more emphasis on the preventive effect than is currently the case in the Hungarian legal literature.[1] It is indisputable that the reparation principle is reflected in many court decisions and a number of tort law rules cannot be understood without it, but if we focus on the reparation principle alone when analysing the aims of tort law, it really leads to the steady decline, and sooner or later disappearance, of civil law liability, to use László Sólyom's expression.[2] Indeed, in recent times, reparation has become increasingly easy to achieve using other techniques (for example with the help of insurance, or no-fault systems[3]).

This is when law and economics comes in, as its models can be used to predict the preventive effect. Here, the basic idea is that the probability of a harmful event (accident[4]) depends on the actions of the (potential) tortfeasor and the (potential) injured party respectively. However, why and how such an effect occurs and how tort law affects precaution is far from clear. (By precaution, we mean all those actions that reduce the likelihood of an accident occurring.)

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** This paper summarises the main statements and conclusions of my monograph "A deliktuális felelősség joggazdaságtana" submitted in my habilitation procedure. The statements are part of my habilitation theses.

1 Bárdos P., *Kárfelelősség a Polgári Törvénykönyv rendszerében,* (HVG-ORAC, Budapest, 2001) 13; Jobbágyi G. and Fazekas J., *Kötelmi jog*, (Szent István Társulat, Budapest, 2004) 144; Fuglinszky Á., Az európai kártérítési jog egyes jogfilozófiai és jogpolitikai alapkérdései, in Paksy M. (ed.), *Európai jog és jogfilozófia: Konferenciatanulmányok az európai integráció ötvenedik évfordulójának ünnepére,* (Szent István Társulat, Budapest, 2008) 203; Szalma J., Gondolatok a kontraktuális és a deliktuális felelősségről, különös tekintettel az új Ptk. vonatkozó szabályozására, (2014) (51) *ELTE Acta,* 217.

2 Sólyom L., *A polgári jogi felelősség hanyatlása,* (Akadémiai Kiadó, Budapest, 1977).

3 See e.g. K. Fiore, No-fault compensation systems, in F. Michael (ed.), *Tort Law and Economics,* (Edward Elgar, Cheltenham, UK and Northampton, MA, USA, 2009); I. R. McEwin, No-fault Compensation systems, in B. Bouckaert and G. De Geest (eds), *Encyclopedia of Law and Economics, Volume II.* (Civil Law and Economics, Edward Elgar, Cheltenham, 2000) 735–763.

4 Classical economic analyses of tort law also use the word „accident" to refer to the event. See e.g. G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis*, (Yale University Press, 1970); S. Shavell, *Economic Analysis of Accident Law,* (Harvard Univ. Press, Cambridge, MA, 1987).

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The model of prevention

There are many complex models of the preventive effect in the literature of law and economics, which I will group into two broad categories. One I call cost-based and the other expectation-based incentives.

The idea of a *cost-based incentive* is that the level of the cost associated with the loss and precaution has an impact on the precaution. This cost includes the damages payable on the side of the tortfeasor and the loss to be borne by the injured party in excess of the damages, and these two (also) depend on the legal decision, the jurisprudence. If the personal costs of the parties are (expected to be) higher in the event of the loss, they will do more to avoid the accident – and will take greater precautions. If the tortfeasor bears a larger share of the loss, they are likely to be more precautious. However, in this case, the injured party bears a smaller share of the loss – and therefore their incentive is reduced. This is the so-called compensation paradox: one party's incentives can only be strengthened by weakening the other's.

The *expectation-based incentive* occurs when the tortfeasor can avoid liability by complying with the legal standards. In this case, raising or lowering the standards or expectations has an impact on the level of precaution. Naturally, this system does not encourage precautionary measures that are known to be unprovable in court – and therefore cannot be formulated as a legal standard or expectation in practice.

Basic forms of liability for damages

The two incentive models appear in their pure form in the case of negligence-based liability with a predictable (and not very high) expectation and in the case of strict liability. The tortfeasor would face an expectation-based incentive in the former case and a cost-based incentive in the latter. (In both cases, the injured party would face a cost-based incentive; in the case of negligence, because the potential tortfeasor will almost certainly comply with the expectation and the injured party can be almost certain not to receive any damages or reparation and thus they would have to bear the full cost of the loss).

However, the liability regimes that currently exist in Hungarian law (or in other legal systems) rarely fall into these two clear categories. Considering the two basic forms in the Hungarian system,

1. the fault-based form can be described as comparative negligence, in which legal standards or expectations are not always predictable,

2. liability for hazardous operations is also a kind of comparative negligence system without any predictable expectation – but here the level of legal standards or expectations is very high.

That is why both of the incentive effects are always present. In the case of fault-based form, the precautionary level of the potential tortfeasor is essentially determined by the expectation-based incentive, but the cost-based incentive modifies this level slightly, and the injured party, who is the ultimate bearer of harm,[5] is subject to a cost-based incentive. The situation is reversed in the case of strict liability. The tortfeasor is the ultimate bearer, so the tortfeasor essentially faces cost-based incentives. (Expectation-based incentives are exceptional.) The injured party, on the other hand, primarily chooses their level of precaution in response to the expectation-based incentive, modified only to a lesser extent by the cost-based incentive.

However, before analysing the incentive effects of specific forms of liability in more detail, it is worth considering how precaution is affected by causation and by the assessment of damage; moreover, these issues arise in both forms of liability.

Common elements: the impact of causation on precaution

Causation essentially affects precaution depending on whether it works with a broad or narrow definition of causality. If the courts use a broader definition of causation, the cost-based incentive will be stronger, because it increases the range of consequences for which the tortfeasor is liable to pay damages. In such cases, an essential consideration is whether the case law is willing to apply other principles of causation in addition to the *conditio sine qua non* rule (or but-for test) such as probabilistic causation (or other principles such as testing for a substantial increase in probability), the foreseeability test, or proximate causation.

In expectation-based systems, causation becomes important when courts predictably base their decisions on negligence-based causation. This would mean that causation would only be assessed in relation to the actions of the tortfeasor for which they are otherwise at fault - the damage (or risk of damage) that would have been faced by the tortfeasor even if they had behaved as one would expect would not be considered as having been caused by them.

In the context of causation, the problem of joint causation must also be addressed, where the law makes several parties jointly and severally liable because of the uncertainty of causation (or the difficulty of proving it). Here the incentive effects depend strongly on

(i) the contributions; in other words, how the damages are shared among the joint tortfeasors, for example in a second lawsuit and

[5] C. Robert and U. Thomas, *Law and economics,* (Pearson, Boston, MA, 2011) 212.

(ii) the settlements – what the legal consequences of individual agreements between one of the tortfeasors and the plaintiff are.

Common elements: damages

The key to the concept of loss in law and economics literature is the *willingness to accept* that it is the amount of money that puts the victim on the same level of utility (benefit) (but not the same position!) as they would have been if the damage had not occurred. According to neoclassical normative economics, such a loss should and must only be compensated if it is also an externality;[6] in other words:

(i) if it has not been previously accepted by the injured party, at least implicitly, or

(ii) if there is no presumed offsetting positive effect on any other member of society or the economy.

The concept of loss in law bears some – perhaps unexpected – similarities with this claim of an efficiency-seeking normative economic analysis of law. Such is that the scope of damages to be recovered is narrower than the scope of the costs of disadvantages. At the same time, there are elements that differ sharply; for example, the exclusion of some forms of loss from the legal concept of damages (in particular preferential value).

Similarly, there is a divergence between contemporary Hungarian law on the one hand and law and economics on the other hand concerning the concept of non-pecuniary damage. In the legal literature, it is sometimes argued that the distinction between (pecuniary) damages and grievance award (non-pecuniary damages) is important because a breach of personal rights cannot be compensated as precisely as pecuniary loss, nor can it be measured in money.[7] Law and economics do not see such a difference.[8] For this reason, law and economic theory will not regard the grievance award for non-pecuniary loss as punitive damages (as known in American jurisprudence) as the legal literature sometimes has done.[9] The law and economic analysis stresses that the purpose of this form of damages is the same as the purpose of pecuniary damages – they attempt to compensate for a breach of rights.

[6] This statement is best described in the economic analyses of the Pure Economic Loss. See e.g. G. Dari-Mattiacci and H.-B. Schäfer, The core of pure economic loss, (2007) (27) *International Review of Law and Economics,* 8–28. DOI: https://doi.org/10.1016/j.irle.2007.04.002; J. De Mot, Pure economic loss, in F. Michael (ed.), *Tort Law and Economics,* (Edward Elgar, Cheltenham, UK and Northampton, MA, USA, 2009) 201–214.

[7] See decision of the Constitutional Court No. 34/1992 (VI. 1.) AB.

[8] See e.g. S. D. Lindenbergh and P. P. M. van Kippersluis, Non pecuniary losses, in F. Michael (ed.), *Tort Law and Economics* (Edward Elgar, Cheltenham, UK and Northampton, MA, 2009) 215–227.

[9] See e.g. Fuglinszky Á., *Kártérítési jog,* (HVG-ORAC, Budapest, 2015) 833–837; Faludi G., Gondolatok a kártérítési jogról egy új monográfia kapcsán, (2016) (6) *Jogtudományi Közlöny,* 340.

If we consider the economic and statistical techniques that can be used to estimate the magnitude of the damage, we must conclude that the Hungarian legal practice narrows the scope of the legal issues in an inefficient way and leaves too much room for experts. The exact amount of damages can be estimated by several professional (e.g. economic and statistical) methods. Case law must have a say in deciding whether to use methods that typically result in a higher amount of damages or use those that do the opposite. This is not a mere technical or professional issue – the preventive effects of tort law depend on it.

Types of liability 1: Fault-based liability

The analysis of fault-based liability in Hungarian jurisprudence is not straightforward, because – as stated above, what aspects the court takes into account when assessing the "conduct that can generally be expected in the given situation" is unclear (unlike, say, the Hand rule in the US system, which makes similar decisions more predictable). Partly because of this unpredictability, evidentiary process fundamentally influences the incentives, which has several Hungarian specificities.

First, the reverse burden of proof is the general rule in Hungarian tort law. On the face of it, this should encourage the tortfeasor to take more precautions, but this is only true if it is unlikely that the tortfeasor would be found negligent under the normal burden of proof. (If negligence is more likely to be established by the court under the normal rule then reversing the burden of proof may sometimes even reduce the precautionary incentives.)

Second, hindsight bias appears in many rulings. The courts often determine legal standards or expectations ex post, in the light of the actual loss suffered by the victim. The same act or conduct is more likely to be attributable to the tortfeasor if, of the potential losses, the greater one actually occurs, and the risk of this "bias" can, under certain conditions, increase the precautionary incentive.

Types of liability 2: liability for hazardous operations

In Hungary, it is up to the case law to define the range of activities that fall under the scope of "hazardous operations". The prevention-based approach of law and economics can help in that. Because, as we have seen, the two systems create different incentives, the question is when the different incentive-prevention effects should be applied?

Although the preventive effects of the two forms of liability differ, it does not follow that strict liability always encourages the tortfeasor to take greater precautions. It will only do so if the expectation in the event of negligence would be too low, for

example because of unobservable, unprovable actions. If the legal standards or expectations are high, the incentive effect will be reduced by a shift to strict liability – especially if the amount of damages (e.g. due to assessment problems) is lower than the actual loss.

It is well-known from the law and economics literature that, in the case of a shift to strict liability level of activity will decrease. (Using Richard Posner's example: "One way to avoid a highway accident is to drive more carefully, but another is to drive less."[10] The second is the activity level. Likewise, the level of activity is the amount of goods or services produced by a plant, the number of jobs undertaken by a trucking company or the amount of waste stored in a landfill – using a given safety technology etc. This raises the question of when should the decline of the activity be an aim? Efficiency-based normative economics models stress that this is related to whether there is an alternative activity towards which it is worth "diverting".)

The literature often stresses that the shift affects the appetite for litigation.[11] At first glance, it may seem that the shift induces more lawsuits because this change increases the chances for the plaintiffs to prevail. However, the eventuality of a settlement between the parties should be taken into account as well. As stricter liability makes the rulings more predictable, the difference between the expectations of the parties reduces, so the chances of a settlement will also be higher.

Types of liability 3: vicarious liability

There are several forms of vicarious liability in Hungarian tort law. In some cases, the direct and indirect tortfeasors are jointly and severally liable, while in other cases (e.g. if the loss is caused by an employee) only the indirect tortfeasor can be sued. Sometimes the indirect tortfeasor has strict liability, while in other cases their conduct is taken into account their negligence is assessed). There are cases when the indirect tortfeasor can ask the direct tortfeasor to pay the contribution; and there are cases when they cannot or can only partially do so. Of course, different forms also create different incentives for the direct tortfeasor, the indirect tortfeasor and the injured party.

Moreover, as many out-of-tort-law elements affect the incentives, it is even more difficult to assess the preventive effects. For example, the content of the contracts between the parties, or many non-legal elements of their relationship, influence whether and how the indirect tortfeasor can take action against the direct tortfeasor before or after the accident.

[10] See e.g. R. A. Posner, *Economic Analysis of Law,* (8th edition, Aspen Law and Business, New York, 2011) 226.

[11] S. Shavell, *Foundations of Economic Analysis of Law,* (Belknap Press, Cambridge, MA, 2004) 280–287. DOI: https://doi.org/10.4159/9780674043497

Types of liability 4: quasi-contractual liabilities

The Hungarian Civil Code distinguishes between tortious and contractual liability. It is more difficult to be exempted from contractual liability but there are cases where the rules of tortious liability must be applied and the parties cannot (even by common consent) derogate from them. They cannot exclude or limit liability. Such "grey zone" forms are product liability and the liability of healthcare providers to their patients.

The distinguishing feature of these quasi-contractual situations is that the price of the product or service may increase due to the non-excludable, non-restrictive liability. Because of these obstacles, the injured party cannot decide whether they are willing to accept more risk in exchange for a lower price.

According to normative economics, the main argument in favour of the application of such a mandatory liability rule is information asymmetry, or the problems of bounded rationality.[12] In the two main areas (product liability and malpractice cases), these arguments seem valid. However, it is questionable whether mandatory rules (as a form of hard paternalism) are necessary or soft methods (nudging, sticky default rules) would be enough. Under soft paternalism,[13] liability would remain within the contractual forms.

Conclusions

The law and economics models of prevention of help to identify the factors that determine the strength of the preventive effect of tort law. It is obvious that simply switching from one form of liability to another will not necessarily strengthen the incentive. Similarly, it is not true either that raising the amount of damages, establishing causality in a simpler way or making the burden of proof easier for the plaintiff would strengthen the initiatives of the potential tortfeasors in any case and would lower those of the potential injured parties. The models help to identify those factors under which

[12] See e.g. D. Kahneman and A. Tversky, On the Psychology of Prediction, (1973) (80) *Psychological Review,* 237–250. DOI: https://doi.org/10.1037/h0034747; A. Tversky and D. Kahneman, Judgment under Uncertainty: Heuristics and Biases: Biases in judgments reveal some heuristics of thinking under uncertainty, (1974) (185) *Science,* 1124–1131. DOI: https://doi.org/10.1126/science.185.4157.1124; C. Jolls, C. R. Sunstein and R. Thaler, A Behavioral Approach to Law and Economics, (1998) (50) *Stanford Law Review,* 1471–1550. DOI: https://doi.org/10.2307/1229304; C. Camerer, S. Isacharoff, G. Loewenstein, T. O'Donoghue and M. Rabinn, Regulation for Conservatives: Behavioral Economics and the Case for „Asymmetric Paternalism", (2003) (151) *University of Pennsylvania Law Review,* 1211–1254. DOI: https://doi.org/10.2307/3312889; A-S. Vandenberghe, Behavioral approach to contract law, in G. DeGeest (ed.), *Contract Law and Economics*, (Edward Elgar Publishing, Cheltenham, 2011) 401–423.

[13] C. R. Sunstein and R. Thaler, Libertarian Paternalism is not an Oxymoron, (2003) (70) *University of Chicago Law Review,* 1159–1202. DOI: https://doi.org/10.2307/1600573

a change tends to strengthen the incentive and the elements under which the same change tends to weaken the incentive.

The models of prevention presented above are based on the classical concept of rationality. For this reason, these models are subject to serious criticism from the theories of bounded rationality. However, even after reviewing these criticisms, these incentive models can still be maintained – empirical evidence can be provided for their existence.[14]

[14] See e.g. B. C. J. van Velthoven, Empirics of Tort, in M. Faure (ed.), *Tort Law and Economics,* (Edward Elgar, Cheltenham, UK and Northampton, MA, 2009).

BOOK REVIEW

Földi, András*

In honorem «magni Kaser» nostri temporis: Hochachtungsvolle Anmerkungen zum neuen Handbuch des römischen Privatrechts**

Das Erscheinen des *Handbuchs des römischen Privatrechts* (im Weiteren: HRP) im März 2023 stellt zweifelsohne ein hervorragendes und zugleich äußerst erfreuliches wissenschaftsgeschichtliches Ereignis dar, auf das die Römischrechtler der ganzen Welt seit mehreren Jahrzehnten warteten. Was Pugliese in der Besprechung des 1959 erschienenen II. Bandes des Kaser'schen Handbuchs schrieb, trifft auch dieses Mal zu: „il primo sentimento ... è ... ovviamente di ammirazione" sowie „di gratitudine".[1] Die drei imponierenden Bände des HRP überwältigen den Leser ja bereits kraft ihres Äußeren weitgehend.

Die Vorgeschichte des HRP ist den Romanisten gut bekannt, jedoch ist es an dieser Stelle vielleicht hilfreich, die wichtigsten Vorereignisse kurz zusammenzufassen. Die letzte Gesamtdarstellung des römischen Privatrechts in vergleichbarem Umfang war Max Kaser (1906–1997) zu danken, der sein berühmtes Handbuch – mit heroischer, ja wunderbarer Arbeit – in erster Auflage in drei Bänden zwischen 1955 und 1966 veröffentlichte.[2] Die drei Bände der zweiten Auflage des Kaser'schen Handbuchs sind dann zwischen 1971 und 1996 erschienen.[3]

Während die ersten zwei Bände der zweiten Auflage den entsprechenden Bänden der Erstauflage mit einem genauen Abstand von 16 Jahren folgten, vermochte Max

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** U. Babusiaux, C. Baldus, W. Ernst, F-S. Meissel, J. Platschek und T. Rüfner (hrsg.), *Handbuch des römischen Privatrechts, I–III* (Siebeck Mohr, Tübingen, 2023) XXXIII + 3673. DOI: https://doi.org/10.1628/978-3-16-160139-2

1 G. Pugliese, (1960) (11) *Iura,* 302.

2 M. Kaser, *Das römische Privatrecht* (im Weiteren: *RPR*), I–II, (Beck, München, 1955–1959); Ders., *Das römische Zivilpozeßrecht* (im Weiteren: *RZP*), (Beck, München, 1966). Meines Wissens gab es in der früheren Literatur keine Gesamtdarstellung, die den jeweiligen Forschungsstand im Bereich des antiken römischen Privatrechts (einschließlich des Zivilprozessrechts) mit einem ähnlichen Anspruch auf Vollständigkeit zusammengefasst hätte. Kasers außerordentliche Leistung ist in diesem Sinne mit dem *Lehrbuch des Pandektenrechts* von B. Windscheid, oder etwa mit der *Glossa ordinaria* von Accursius zu vergleichen.

3 Kaser, *RPR,* (2. Aufl. I–II, Beck, München, 1971–1975).

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Kaser den dem römischen Zivilprozessrecht gewidmeten dritten Band (RZP) weder im Jahr der „Fälligkeit" (1982) noch später zustande zu bringen. Er blieb zwar wissenschaftlich auch in den 1980er Jahren aktiv, die Aufgabe der Erstellung der zweiten Auflage des RZP musste er aber seinem treuen Schüler, Karl Hackl (1933–2018) anvertrauen. Dank seiner langen, unermüdlichen und engagierten Arbeit vermochte Hackl die zweite Auflage des RZP zum dreißigsten Jahreswechsel der ersten Auflage veröffentlichen, also im Jahre 1996, kurz vor dem Tode Max Kasers am 13. Januar 1997.[4]

Bedenkt man den von Kaser verwirklichten Abstand der zweiten Auflage der ersten zwei Bände seines Handbuchs, so hätte man damit rechnen können, dass die dritte Auflage der ersten zwei Bände 1987 bzw. 1991 erscheinen. Jedoch ist die dritte Auflage des Kaser'schen Handbuchs ein Desiderat geblieben.

Bis zu dem unlängst erfreulicherweise erfolgten Erscheinen des HRP musste der Mangel an einer dritten Auflage des Kaser'schen Handbuchs – einigermaßen – durch etliche andere Gesamtdarstellungen ausgeglichen werden, und zwar vorzugsweise durch die überarbeiteten und vermehrten Auflagen des Kurzlehrbuchs von Kaser, die seit 2003 von Rolf Knütel (1939–2019) und neuerdings von Sebastian Lohsse besorgt worden sind. Besonders wertvoll sind dabei die immer sorgfältig auserwählten Literaturnachträge.[5]

Einen ähnlichen allgemeinen bibliographischen Apparat haben unter den sonstigen Gesamtdarstellungen des römischen Privatrechts in jüngerer Zeit nur wenige Werke geboten, so etwa die von Honsell, Mayer-Maly, Selb und von Antonio Guarino.[6] Mit der Hilfe von Honsell, Mayer-Maly und Selb kann der Literatur bis 1987, mit der von Guarinos Handbuch bis 2001 gefolgt werden. Bezüglich der allgemeinen Bibliographien der römischrechtlichen Literatur sind auch die von italienischen Romanisten erstellten äußerst nützlichen Datenbanken zu erwähnen.[7] Alle diese Werke konnten aber die fehlende dritte Auflage des Kaser'schen Handbuchs nicht ersetzen.

[4] M. Kaser und K. Hackl, *RZP,* (2. Aufl., Beck, München, 1996).

[5] Siehe zuletzt M. Kaser, R. Knütel und S. Lohsse, *Römisches Privatrecht,* (22. Aufl., Beck, München, 2021). Die letzte (16.), noch von Kaser selber besorgte Auflage dieses bewährten Lehrbuchs erschien 1992. Die 2017 erschienene 21. Auflage wurde bereits gemeinsam von Knütel und Sebastian Lohsse vorbereitet. Nach Knütels Tode (2019) erstellte Lohsse die 22. Auflage allein. – Die erste Auflage des Kurzlehrbuchs von Kaser ist 1960 erschienen. Für eine Übersicht der Auflagen dieses Werkes bis zur 14. Auflage von 1986 siehe B. Dölemeyer in D. Willoweit (hrsg.), *Rechtswissenschaft und Rechtsliteratur im 20. Jahrhundert* (Beck, München, 2007) 1149, Fn. 16. Ergänzend sei hier bemerkt, dass die 7. Auflage 1972, die 9. Auflage 1976, die 12. Auflage 1981 und die 15. Auflage 1989 erschienen ist.

[6] H. Honsell, Th. Mayer-Maly und W. Selb, *Römisches Recht* [aufgrund des Werkes von P. Jörs, W. Kunkel und L. Wenger], (Springer, Berlin, Heidelberg und New York, 1987); A. Guarino, *Diritto privato romano,* (12ª ed., Jovene, Napoli, 2001).

[7] *Bibliotheca Iuris Antiqui* [CD-ROM], (cur. N. Palazzolo), (Torre, Catania, 2002); *Fiuris. Archivio elettronico per l'interpretazione delle fonti giuridiche romane* [CD-ROM], 2ª ed., (cur. P. Catalano / F. Sitzia), (CNR Edizioni, Roma, 2003).

Mit Blick auf die Vorgeschichte wäre das HRP bevorzugt dahingehend zu bewerten, inwieweit dieses Werk das Fehlen einer dritten Auflage des Kaser'schen Handbuchs wettmachen kann, oder aber ob das neue Handbuch das alte übertrifft? Auf diese Fragen könnte man natürlich selbst im Idealfall, also wenn man beide Handbücher mehr als gut kennt, nur nuanciert antworten. Aber selbst eine allgemeine Bewertung ist im Rahmen dieser Besprechung weder möglich noch intendiert. Dementsprechend kann ich höchstens gewisse Aspekte des HRP reflektieren.

Quantitativ kann man eindeutig feststellen, dass das HRP mit seinen 3673 Seiten erheblich umfangreicher ist als das Kaser'sche Handbuch mit seinen 832+680+712, insgesamt 2224 Seiten.[8]

Bei diesem quantitativen Vergleich muss man natürlich berücksichtigen, wie viele Autoren am HRP mitgearbeitet haben. Bereits die Anzahl der Herausgeber ist ungewöhnlich hoch: Wie bekannt, findet man auf dem Titelblatt sechs Namen: Babusiaux, Baldus, Ernst, Meissel, Platschek und Rüfner. Es ist anzumerken, dass keiner der Herausgeber als *primus inter pares* gekennzeichnet ist. Über die sechs Herausgeber hinaus wirkten als Autoren nicht weniger als achtundfünfzig weitere Romanisten mit.

Die Herausgeber sind deutscher bzw. österreichischer Herkunft, sie vertreten aber in gewissem Sinne vier Länder, mit Rücksicht auf die Professuren von Babusiaux und Ernst in Zürich bzw. in Oxford. Bunter ist der Kreis der Autoren. Ihre Mehrheit ist zwar ebenfalls deutscher oder österreichischer Herkunft, es gibt aber auch Autoren, die Italien, Spanien, Polen, Frankreich, Belgien, die Niederlanden, die Schweiz, das Vereinigte Königreich und Brasilien vertreten (wenn man nur die derzeitigen Universitätsaffiliationen berücksichtigt). Neben den Autoren deutscher bzw. österreichischer Herkunft ragt die Beteiligung der zwölf italienischen Romanisten heraus.[9]

Die Herausgeber vertreten hinsichtlich ihres Alters grundsätzlich die Mittelgeneration. Abgesehen von Wolfgang Ernst, der 1956 geboren ist, sind die Herausgeber zwischen 1966 und 1973 geboren. Das Alter der Autoren umfasst demgegenüber einen breiten zeitlichen Horizont, nämlich von den ältesten Kollegen, wie Detlef Liebs (geb. 1936), Hans-Peter Benöhr (1937–2017), Michel Humbert (geb. 1939), Peter E. Pieler

[8] Einfachheitshalber habe ich die Anzahl der mit römischen Ziffern numerierten Seiten außer Acht gelassen. Noch weniger ist hier darauf einzugehen, wie sich die durschschnittliche Anzahl der Buchstaben auf einer Seite in den vorliegenden Bänden verhält.

[9] Bedauerlicherweise ist Ungarn unter den Autoren nicht vertreten, diese Tatsache ist aber keineswegs den Herausgebern vorzuwerfen. Auch der Verfasser der vorliegenden Besprechung wurde von den Herausgebern freundlich eingeladen, für das HRP einen Paragraph zu schreiben. Leider musste ich auf die Erfüllung dieser schönen und ehrenvollen Aufgabe aus verschiedenen Gründen verzichten. Umso mehr schätze ich die heroische Arbeit der Autoren des HRP hoch.

(1941–2018)[10] und Georg Klingenberg (1942–2016) bis hin zu den Vertretern der jüngsten Generation, wie etwa Lisa Isola (geb. 1988).[11]

Bei einer hohen Anzahl von Autoren, die mehrere Länder und auch verschiedene Lebensalter vertreten, ist es natürlich nicht leicht, die formelle und inhaltliche Einheit eines Handbuchs zu sichern. Die Herausgeber haben offenbar eindeutige Richtlinien für die Autoren vorgegeben und im Laufe der Entstehung des großen Werkes alles in ihrer Macht stehende getan, um die Homogenität des Handbuchs zu sichern. Inwieweit diese Anstrengungen erfolgreich gewesen sind, ist nicht summarisch zu beurteilen.

Was das Verhältnis zum Handbuch von Kaser angeht, liegt die auffallendste Differenz zwischen den beiden Handbüchern vielleicht darin, dass das Kaser'sche Handbuch bekannterweise grundsätzlich diakronisch geteilt ist (altrömisches Recht, vorklassisches und klassisches Recht, nachklassische Entwicklungen),[12] der Aufbau des HRP demgegenüber dogmatisch geprägt ist. Aber auch die dogmatische Gliederung des HRP unterscheidet sich sowohl im Vergleich mit dem Handbuch von Kaser als auch im Vergleich mit sonstigen Gesamtdarstellungen des römischen Privatrechts sehr.

Während Kaser das römische Privatrecht innerhalb der einzelnen historischen Perioden aufgrund eines stark verbreiteten modernisierten Institutionensystems behandelte, scheint der Aufbau des HRP *prima facie* zum klassischen Institutionensystem zurückzukehren. Die bis Gaius zurückgehende Gliederung nach *personae, res, actiones* bildet – mindestens auf der Ebene der Abschnitte – das bevorzugte System des HRP. Die ersten zwei Abschnitte sind zwar den Grundlagen bzw. dem Zivilprozessrecht und den Handlungsformen des Privatrechts gewidmet, die darauffolgenden drei Abschnitte spiegeln aber die Trichotomie des gajanischen Institutionensytems wider.

Natürlich handelt es sich nicht um eine weitgehende Anpassung des HRP an das klassische Institutionensystem. Der dritte Abschnitt des HRP *(„personae")* enthält grundsätzlich das römische Personen- und Familienrecht, aber die Eheschließung wird als Handlungsform des Privatrechts im zweiten Abschnitt behandelt. Im Rahmen der *„res"* wird im HRP nicht das gesamte Vermögensrecht, sondern nur ein Teil des Sachenrechts und des Erbrechts dargestellt.

Unter *„actiones"* wird im HRP auf der Ebene der Systematik die „Rechtsdurchsetzung" verstanden. Dieser abschließende Abschnitt enthält den größten Teil des Schuldrechts, hier werden aber zuerst die sachenrechtlichen und erbrechtlichen Kla-

[10] Bedauerlicherweise erlebte auch die bekannte spanische Romanistin Amelia Castresana Herrero (1956–2022) das Erscheinen des HRP nicht mehr. Sie hat den § 67 (Teilungsklagen) geschrieben.

[11] Die angeführten biographischen Angaben finden sich in der Wikipedia.

[12] Eine ähnliche diakronische Struktur findet man auch in G. Pugliese, F. Sitzia und L. Vacca, *Istituzioni di diritto romano,* (3ª ed., Giappichelli, Torino, 1991). Siehe dazu skeptisch M. Talamanca, *Istituzioni di diritto romano,* (Giuffrè, Milano, 1990) 11.

gen behandelt, während am Ende dieses Abschnitts die Einreden und andere Verteidigungsmittel, also zivilprozessrechtliche Materien dargestellt werden.

Wie es teilweise auch dem oben Gesagten zu entnehmen ist, beschäftigt sich das HRP mit den traditionellen Hauptteilen des Privatrechts mindestens in zwei, aber manchmal in drei verschiedenen Abschnitten. Was das Sachenrecht angeht, findet man die *mancipatio* und die *in iure cessio* als Handlungsformen des Privatrechts im zweiten Abschnitt. Die meisten Fragen des Sachenrechts werden im vierten Abschnitt (im Rahmen der *„res"*) behandelt, während die dinglichen Klagen im fünften Abschnitt (im Rahmen der *„actiones"*) besprochen werden. Dasselbe gilt *mutatis mutandis* für das Erbrecht. Besser sind das Personen- und Familienrecht sowie das Schuldrecht konzentriert, sie werden nämlich außer der entsprechenden *sedes materiae* (*„personae"* bzw. *„actiones"*) im zweiten Abschnitt, im Rahmen der Handlungsformen des Privatrechts behandelt. Im zweiten Abschnitt, und zwar im Kapitel über die Stipulation werden wichtige Teile der Rechtsgeschäftslehre behandelt.[13]

Eine ähnliche Duplikation zeigt sich auch bei der Darstellung des Zivilprozessrechts. Wie es dem oben Gesagten zu entnehmen ist, identifizieren die Herausgeber des HRP den dritten Hauptteil des Institutionensystems *(actiones),* im Gegensatz zu der von Donellus gegründeten traditionellen Ansicht,[14] nicht mit dem Zivilprozessrecht.[15] Dementsprechend behandelt das HRP das römische Zivilprozessrecht größtenteils nicht im letzten Abschnitt über die *„actiones",* sondern im zweiten, als *sedes materiae* und zugleich als eine Art Prolegomenon geltenden Abschnitt, dementsprechend finden nur die übrig gebliebenen Teile des Prozessrechts ihren Platz am Ende des Werkes.

Trotz der Meinung etwa von Arangio-Ruiz[16] ist es m. E. gar nicht so leicht festzustellen, was Gaius und die späteren römischen Juristen über das wahre Wesen der Materie *de actionibus* dachten. Gaius stand der Auffassung der *actiones* als Zivilpro-

[13] Siehe insbesondere die Erörterungen von Th. Finkenauer in HRP, 594 ff., über die Unwirksamkeit, die Auslegung und die Wirkungen der Stipulationen.

[14] Siehe diesbezüglich P. Stein, *Roman law in European history,* (CUP, Cambridge, 1999) 81.

[15] Dieser traditionellen Lehre folgte im oben zitierten Kurzlehrbuch auch Kaser selber, dessen einschlägige Feststellung (nach der die *actiones* „Teile des Zivilprozessrechts" enthält) auch in der letzten, von Lohsse besorgten Auflage von 2021 beibehalten worden ist. Nuancierter, aber weniger klar ist Kaser, *RZP,* 10; Kaser und Hackl, *RZP,* 11 f. Siehe kategorischer H. Hausmaninger udn W. Selb, *Römisches Privatrecht,* (9. Aufl., Böhlau, Wien, Köln und Weimar, 2001) 40. Vgl. auch A. D. Manfredini, *Istituzioni di diritto romano,* (2ª ed., Giappichelli, Torino, 2001) 425, der seinerseits grundsätzlich das System *persone, cose, azioni* verwendet. Zu den *actiones* als Prozessrecht siehe in der ungarischen Literatur Molnár I., A Gaius-féle Institutio rendszer [= Das gajanische Institutionensystem], in *Degré Alajos Emlékkönyv,* (Unió, Budapest, 1995) 189.

[16] V. Arangio-Ruiz, *Istituzioni di diritto romano,* (14ª ed., Jovene, Napoli, 1960), 13, meint, dass „[q]uali siano gli argomenti trattati nelle parti *de personis* e *de actionibus*, è facile dire." Seiner Meinung nach „i due libri delle cose hanno potuto abbracciare senza troppo sforzo tutte le parti del diritto privato che non rientravano nelle categorie del *ius quod ad personas* e del *ius quod ad actiones pertinet*." Dieser Gedanke über den „Restcharakter" der *res* wiederholt sich auch bei Guarino, *Diritto privato romano,* 84.

zessrecht wohl nicht fern.[17] Zur Vorsicht mahnt aber die Tatsache, dass Theophilus die Obligationen *(hai enochai)* als „Mütter der Aktionen" *(méteres gar tón agógón)* betrachtete,[18] und auf diese Weise hat der berühmte byzantinische *antecessor* die Grundlage für die spätere Verbindung der *actiones* mit dem Schuldrecht geschaffen.[19] Bezüglich der antiken römischen Bedeutung des Hauptteils *actiones* handelt es sich um ein forschungs- oder mindestens um ein kommentierungsbedürftiges Problem. Durch die Identifizierung des Hauptteils *actiones* mit der „Rechtsdurchsetzung" im HRP wird die Erklärung dieses Problems kaum ersetzt.[20]

Der Mangel an Erklärung der klassischen Bedeutung (sowie der Begriffsgeschichte) des Hauptteils *actiones* stellt aber keine Spezialität des HRP dar. Die meisten Lehrbücher des römischen Privatrechts beschäftigen sich, wenn überhaupt, nur ganz kurz mit diesem Problem. Hinter dem Mangel an einem solchen Interesse liegt ein allgemeineres Interessendefizit der Lehrbücher bezüglich des Problems des römischen Institutionensystems. Dieses Interessendefizit zeigt sich in vielen Lehrbüchern darin, dass sie sowohl über die Ausgestaltung und die Entwicklung des römischen Institutio-

[17] Vgl. B. Kupisch in O. Behrends et al. (hrsg.), *Corpus Iuris Civilis. I. Institutionen. Text und Übersetzung,* (2. Aufl., Müller, Heidelberg, 1997) 294.

[18] „Nam qui de obligationibus disserit, tacite et de actionibus disserit; matres enim actionum sunt obligationes." Theoph. *paraphr. Inst.* 3.13 pr. (lat. Übers. von G. O. Reitz).

[19] Siehe zusammenfassend Kupisch 1997, ebd., siehe aber bereits F. X. Affolter, *Das römische Institutionensystem* (Puttkammer & Mühlbrecht, Berlin, 1897) 57, mit der Vermutung, dass das Konzept des Digestentitels 44.7 „De obligationibus et actionibus" dem Theophilus zuzuschreiben sei. Noch weiter ging der bekannte französische Jurist des 16. Jahrhunderts, Connanus, der meinte, dass „der Begriff *actio* alle Arten von Handlungen (Aktionen) von Personen umfaßte, die Anlaß zu einem Prozeß geben könnten", siehe P. G. Stein, *Römisches Recht und Europa. Die Geschichte einer Rechtskultur* [dt. Übers. von K. Luig], (Fischer, Frankfurt a. M., 1996) 151 f.

[20] Laut Humbert in HRP, 29 (Rn. 55), ist dem Gaius in seinen Institutionen gelungen, was Cicero vorgeschlagen hatte, *ius in artem redigere,* also „einen systematischen Bau des Privatrechts und des Prozessrechts zu schaffen". Dieser Gedanke scheint der oben erwähnten traditionellen Auffassung nah zu sein. Vgl. auch Fn. 26 unten. Hier ist zu bemerken, dass Gaius (1.8) seine Trichotomie wohl nicht nur für das Privatrecht, sondern für das gesamte Rechtssytem entwickelt hat: „Omne autem ius, quo utimur, vel ad personas pertinet vel ad res vel ad actiones.". Vgl. E. Rabel, Grundzüge des römischen Privatrechts, in Holtzendorff und Kohler (hrsg.), *Enzyklopädie der Rechtswissenschaft, I,* (Duncker & Humblot, Berlin, 1915, 405) mit der Bemerkung, dass „die Gajanische Teilung des objektiven Rechts" „[n]ur einen losen Anhaltspunkt für uns bietet". G. Aricò Anselmo, „'Ius publicum' – 'ius privatum' in Ulpiano, Gaio e Cicerone", (1983) (37) *Annali Palermo,* 450, 609, 725, meint demgegenüber, dass Gaius das Institutionensystem nur für das Privatrecht geschaffen hat. – Bezüglich Ciceros verlorenem Werk *De iure civili in artem redigendo* kann hier noch bemerkt werden, dass laut Ph. Thomas, A Barzunesque view of Cicero: From giant to dwarf and back, in P. du Plessis (ed.), *Cicero's law rethinking Roman law of the Late Republic* (EUP, Edinburgh, 2016) 11 ff., DOI: https://doi.org/10.1515/9781474408837-005, dieses Werk mit Ciceros *Topica* zu identifizieren sei.

nensystems,[21] als auch über ihr eigenes System,[22] geschweige denn über das System anderer Lehrbücher, wenn überhaupt nur wenige Auskünfte geben.[23]

Diese als typisch geltende Haltung ist wohl damit zu erklären, dass die Verwendung des Institutionensystems in den Lehrbüchern bis zum Anfang des 19. Jahrhunderts dermaßen selbstverständlich war, dass die alten Verfasser für überhaupt nicht nötig fanden, sich damit zu beschäftigen. Seit der Verbreitung des Pandektensystems auch im Kreise der Institutionenlehrbücher im 19. Jahrhundert[24] und seit der Ausgestaltung verschiedener modernisierter Varianten des klassischen Institutionensystems im 20. Jahrhundert[25] wäre aber die Erklärung mindestens des eigenen Systems im jeweiligen Lehrbuch bzw. Handbuch notwendig. Das Fortleben der alten Lehrbuchtraditionen ist wohl der Grund dafür, dass Reflexionen dieser Art nur schwer Eingang in die Lehrbücher, sogar in die Handbücher des römischen Privatrechts gefunden haben.[26] Vielmehr ist die axiomatische Behandlung des verwendeten Systems typisch ge-

[21] Auch Kaser, *RPR,* 188, hat nur kurz das gajanische Institutionensystem dargestellt. Ebenfalls knapp ist die entsprechende Zusammenfassung bei P. Jörs, W. Kunkel und L. Wenger, *Römisches Privatrecht,* (3. Aufl., Springer, Berlin, 1949) 27 f. Im Kurzlehrbuch von Kaser ist es von Vorteil, dass das Problem des Institutionensystems unter den Prämissen dieses Werkes erörtert wird. Wertvoll sind die diesbezüglichen Literaturnachträge bei Kaser, Knütel und Lohsse, *Römisches Privatrecht,* 35, wo etwa A. Guzmán Brito, La tripartición del 'omne ius' en 'personae res actiones' y la doctrina retórica de las 'circumstantiae', (2008) (11) *Revista General de Derecho Romano,* angeführt wird.

[22] Auch Kaser selbst beschäftigte sich kaum mit dem Problem des Aufbaus seines eigenen Handbuchs, siehe Kaser, *RPR,* 188. Weder die Besprechung von Biondi, noch die von Pugliese kommentierten den Aufbau des Kaser'schen Handbuchs, siehe B. Biondi, (1956) (7) *Iura,* 183 ff.; Pugliese 1960, 302 ff. Auch im internationalen Vergleich gibt es überraschend wenige Lehrbücher des römischen Privatrechts, die das eigene (Institutionen)system reflektieren, diesbezüglich sind etwa Talamanca, *Istituzioni di diritto romano,* 11, und D. D. Doždev, *Rimskoe častnoe pravo* (Infra M-Norma, Moskau, 1996) 8, zu erwähnen.

[23] Als ein bescheidener Beitrag darf ich auf meinen folgenden Aufsatz hinweisen: A. Földi, Die „institutiones" in der Geschichte des Rechtsunterrichtes, in *Festgabe für János Zlinszky,* (Bíbor, Miskolc, 1998) 533–556 (ung., mit dt. Zf.).

[24] Die deutschsprachigen Institutionenlehrbücher des römischen Privatrechts folgten ursprünglich, wie dies natürlich auch andernorts der Fall war, dem System der justinianischen Institutionen, seit dem 19. Jh. aber immer mehr dem Pandektensystem. Dem Pandektensystem folgten auch noch solche bewährten Lehr- bzw. Handbücher wie R. Sohm, L. Mitteis und L. Wenger, *Institutionen,* (17. Aufl., Duncker & Humblot, Berlin, 1923); Jörs, Kunkel und Wenger, *Römisches Privatrecht;* E. Weiß, *Institutionen des römischen Privatrechts,* (2. Aufl., Verlag für Recht und Gesellschaft, Basel, 1949).

[25] Auf dieses Problem kann ich hier nur kurz eingehen, ohne etwa die variable Position des allgemeinen Teils des Privatrechts in den verschiedenen Lehrbüchern des römischen Privatrechts zu berühren. Bereits Rabel, Grundzüge des römischen Privatrechts, kehrte zum (modernisierten) Institutionensystem zurück, soweit er das Familienrecht zusammen mit dem Personenrecht behandelte, immerhin befindet sich das Erbrecht auch bei Rabel am Ende. Auch F. Schwind, *Römisches Recht,* (Springer, Wien, 1950) verwendete ein ähnliches System. Die italienischen Institutionenlehrbücher weichen von diesem Modell dadurch ab, dass sie die Schenkungen zusammen mit dem Erbrecht behandeln, siehe z. B. Arangio-Ruiz, *Istituzioni di diritto romano,* siehe neuerdings ähnlich etwa A. Petrucci, *Manuale di diritto privato romano,* (2ª ed., Giappichelli, Torino, 2022).

[26] Hinsichtlich des gajanischen Institutionensystems stellt Humbert in *HRP,* 20 (Fn. 52), fest, dass das Werk von Gaius ein Beispiel der besten Systematisierungen des römischen Rechts darstellt, und dass es einer didaktischen Zielsetzung folgt. Humbert erwähnt in seinen einschlägigen Erörterungen (vgl

blieben. Diese Haltung ist noch typischer hinsichtlich der Darstellung der Geschichte des Pandektensystems.[27]

Ob die oben geschilderte, im HRP verwendete eigenartige Gliederung der Materie zweckmäßig ist, ist schwierig zu beurteilen. Der Versuch einer gewissen Rückkehr zum klassischen Institutionensystem ist auf alle Fälle zu begrüßen.

Es ist bedauerlich, dass die Herausgeber darauf verzichtet haben, das Werk mit einer ausführlicheren Einleitung zu versehen. Das knappe Vorwort der Herausgeber behebt keineswegs diesen Mangel. Eine ausführlichere Einleitung wäre dafür geeignet gewesen, sowohl das von den Herausgebern entwickelte, in vielerlei Hinsicht eigenartige System der Darstellung zu erklären, als auch die allgemeinen Zielsetzungen einschließlich der methodologischen Prämissen des HRP darzulegen. Dem Vorwort ist hinsichtlich des Zwecks bzw. des Inhalts des HRP dagegen nur soviel zu entnehmen, dass die Herausgeber „eine von Grund auf neu gearbeitete Darstellung des römischen Privatrechts anzubieten" versuchen. Bezüglich der allgemeinen Zielsetzungen des HRP findet man zusätzliche Auskunft im Klappentext:

> „Der Schwerpunkt liegt auf der Diskussion der spätrepublikanischen und kaiserzeitlichen römischen Jurisprudenz, wobei eine intensive Bezugnahme auf den Prozess erfolgt. Die juristische Papyrologie und Epigraphik sind ebenso berücksichtigt wie die provinziale Rechtspraxis."

In einem früheren Aufsatz hat Ulrike Babusiaux auf diese Prioritäten in folgender Weise hingewiesen:

> „Conceived by the editors to provide a 'modern view' of Roman private law, this aim was pursued by bringing together substantive and procedural law perspectives and extensively incorporating traditions that went beyond Justinian's codifications. It further aims to provide the reader with a good understanding of the chronological development of private law from archaic legal traditions to the era of Justinian."[28]

Diese Zusammenfassung der Zielsetzungen stimmt mit dem oben zitierten Klappentext nicht völlig überein. Babusiaux betont auch die Bedeutung der „archaic legal traditions", während laut dem Klappentext der Schwerpunkt auf der spätrepublikanischen und kaiserzeitlichen Jurisprudenz liegen soll.

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auch S. 29) nicht einmal die Gliederung *personae, res, actiones,* und für alle Details verweist er auf die Werke von Villey (1945) und Wieacker (1953), siehe Humbert in *HRP,* S. 20, Fn. 52. D. Liebs in *HRP,* 206 (Rn. 31) spricht ebenfalls nicht über das Institutionensystem, als er über Gaius schreibt, und dies gilt auch für die Darstellung der justinianischen Institutionen sowie deren Paraphrase von Theophilus bei P. E. Pieler in *HRP,* 101 f. (Rn. 20–22), 110 (Rn. 27).

[27] Diesbezüglich ist auch heute maßgeblich A. B. Schwarz, „Zur Entstehung des modernen Pandektensystems", (1921) (42) *SZ Rom. Abt.,* 578 ff., DOI: https://doi.org/10.7767/zrgra.1921.42.1.578

[28] U. Babusiaux, „The future of legal history: Roman law", (2016) 56 (1) *The American Journal of Legal History,* 9. DOI: https://doi.org/10.1093/ajlh/njv008

Problematischer finde ich die Zielsetzung „einer intensiven Bezugnahme auf den Prozess". Diese Zielsetzung wird auch nicht viel eindeutiger, wenn man aufgrund der Bemerkung von Babusiaux an einen engeren Zusammenhang zwischen dem materiellen Recht und dem Prozessrecht denkt. Steht im Titel des jeweiligen Kapitels anstatt des Namens der einzelnen Verträge bzw. der einzelnen Delikte der Name der entsprechenden Klagen, so wird dadurch das erwähnte Ziel kaum erreicht. Ansonsten ist es nicht überall gelungen, die prozessrechtliche Annäherung etwa auf der Ebene der Titel zur Geltung zu bringen. So heißt der Titel des die *actiones noxales* behandelnden Kapitels schlechthin „Noxalhaftung".[29] Dieser Terminus wurde von Fernand De Visscher für verfehlt gehalten.[30]

Es ist natürlich nicht zu leugnen, dass die aktionenrechtliche Denkweise der römischen Juristen eine wichtige Eigenart des römischen Privatrechts darstellt. Es ist ebenfalls nicht zu leugnen, dass die üblichen Lehrbücher diesen Aspekt nicht zufriedenstellend hervorheben. Offenbar gewährt das HRP der prozessrechtlichen Annäherung eine größere Bedeutung, die diesbezügliche Auswertung würde aber die Rahmen der vorliegenden Besprechung übertreten.

Das Verhältnis zum Kaser'schen Handbuch bzw. Kurzlehrbuch wird im HRP nur ausnahmsweise explizit reflektiert. Beispielsweise sei hier eine wichtige Vorbemerkung von Johannes Platschek zum § 12 („Formularprozess: Verhandlung *in iure*") zitiert:

> „Der folgende Überblick über die wichtigsten Phänomene der Verhandlung *in iure* unter dem Formularverfahren soll die ausführliche Darstellung von Kaser und Hackl nicht ersetzen, sondern in einem Bereich ausgewählter Aspekte vor allem um neuere Quellenfunde und Literatur ergänzen."[31]

Was die angeführte Literatur angeht, ist das HRP in dem Sinne autonom, dass es oft auch die ältere, bereits von Kaser referierte Literatur umfangreich anführt. In diesem Zusammenhang ist es den Herausgebern bzw. den Autoren keineswegs vorzuwerfen, dass sie, anstatt die ältere Literatur direkt zu zitieren, hie und da auf Kasers Handbuch,[32] insbesondere auf das „Kaser/Hackl"[33] hinweisen. Weniger ist es jedoch zu verstehen,

[29] Siehe den von M. Pennitz geschriebenen § 105 („Noxalhaftung") in *HRP,* 2845 ff.
[30] F. De Visscher, *Le régime romain de la noxalité,* (Éditions A. De Visscher, Bruxelles, 1947, 201); Ders., „Il sistema romano della nossalità", (1960) (11) *Iura,* 43.
[31] Platschek in *HRP,* 373 (Rn. 1).
[32] Siehe z. B. J. L. Alonso und U. Babusiaux in *HRP,* 264, Fn. 208; G. Pfeifer in *HRP,* 512, Fn. 11; 513, Fn. 13; 515, Fn. 3; 517, Fn. 19; Rüfner in *HRP,* 520, Fn. 6; V. Halbwachs in *HRP,* 557, Fn. 29; Finkenauer in *HRP,* 567, Fn. 18; 574, Fn. 100; 577, Fn. 123; 578, Fn. 135 usw.
[33] Siehe z. B. Babusiaux in *HRP,* 123, Fn. 49, 52; 151, Fn. 345; 152, Fn. 361 f.; 154, Fn. 369; 154, Fn. 372; 158, Fn. 407; Platschek in *HRP,* 342, Fn. 3; 343, Fn. 8; Fn. 344, Fn. 9; 345, Fn. 16; 347, Fn. 20; 376, Fn. 11 f., 17; 377, Fn. 22; 378, Fn. 24, 27; 380, Fn. 39; 381, Fn. 46 f.; 382, Fn. 56; 397, Fn. 111, 114 f. usw.; E. Metzger in *HRP,* 352, Fn. 6; G. Klingenberg in *HRP,* 415, Fn. 7; C. Willems in *HRP,* 479, Fn. 22; 480, Fn. 27 usw.; Finkenauer in *HRP,* 581, Fn. 168. Metzger in *HRP,* 354, Fn. 16, zitiert eine Fn.

warum einige im Kurzlehrbuch von Kaser befindlichen Literaturnachträge im HRP nicht eingearbeitet worden sind. Es ist ebenfalls nicht selbsterklärend, dass das HRP auf das „große Kaser" manchmal nicht nur als bibliographisches Referenzwerk hinweist, sondern auch hinsichtlich gewisser – heute weniger interessanter? – Einzelheiten des römischen Privatrechts, die im HRP nicht direkt behandelt werden. Noch merkwürdiger ist, dass im HRP manchmal auch das „kleine Kaser" als Referenzwerk angeführt wird.[34]

Dem oben Gesagten ist zu entnehmen, dass das HRP, obwohl erheblich umfangreicher, das behandelte Material des „großen Kasers" nur teilweise abdeckt. Ebenfalls haben viele ältere Werke im Licht des HRP ihre Aktualität nicht verloren. Diesbezüglich fällt auf, dass bei gewissen Phänomenen ausschließlich so alte Werke, wie etwa die von Bethmann-Hollweg zitiert werden.[35]

Das Verhältnis der historischen und der dogmatischen Perspektive ist in den Hand- und Lehrbüchern des römischen Privatrechts immer eine sensitive Frage. Trotz des grundsätzlich synchronischen Aufbaus des HRP kommt im Allgemeinen auch die historische Perspektive zur Geltung, dieses günstige Gleichgewicht ist aber nicht überall zu spüren.[36]

Im HRP findet man zwar keine methodologischen Prämissen, es gibt aber hie und da derartige Reflexionen, die die Forschern in vielerlei Hinsicht zur Vorsicht gemahnen. Humbert schreibt mit einer gewissen Reserviertheit über die traditionellen Einteilungen der Entwicklung in historische Perioden. Stolfi weist auf den umstrittenen Charakter des Begriffs des klassischen Rechts hin.[37] Willems kritisiert die Fachliteratur, einschließlich Kaser/Hackl, wegen der scharfen Differenzierung des klassischen Kognitionsverfahrens und des nachklassischen Verfahrens, und stellt fest, dass es sich tatsächlich um „eine schleichende Entwicklung" gehandelt haben dürfte.[38] Johannes Platschek hebt emphatisch

der ersten Aufl. des *RZP* von Kaser (48, Fn. 8), die im Kaser und Hackl weggelassen ist. Für ähnliche Rückgriffe zur 1. Aufl. des RZP siehe auch Platschek in *HRP,* 377, Fn. 21.

[34] Siehe z. B. Babusiaux in *HRP,* 163, Fn. 479; Klingenberg in *HRP,* 416, Fn. 25; 417, Fn. 45; 418, Fn. 53; 434, Fn. 257; 436, Fn. 271; 445, Fn. 400; 452, Fn. 482; 453, Fn. 490; 456, Fn. 534; 459, Fn. 568; Pfeifer in *HRP,* 515, Fn. 5; 516, Fn. 19; 517, Fn. 22, 24, 27; Finkenauer in *HRP,* 568, Fn. 26; 569, Fn. 37; 571, Fn. 72; 572, Fn. 81; 574, Fn. 94; 585, Fn. 209.

[35] Bezüglich der infamierenden Wirkung des prätorischen Vollstreckungsverfahrens weist Willems in *HRP,* 480, Fn. 34, allein auf das klassische Werk von Bethmann-Hollweg hin. Willems bemerkt ebd. 494, Fn. 10, dass das Werk von Bethmann-Hollweg auch „noch heute in weiten Teilen maßgeblich" ist.

[36] In den von Pfeifer geschriebenen §§ 16 („*In iure cessio* und Verwandtes") und 17 („Libralakte [...]") ist die historische Perspektive m. E. weniger präsent. Dasselbe gilt auch für die Erörterungen von Finkenauer über die Auslegung der Stipulationen (*HRP,* 605 ff.). Für eine vorteilhafte Präsenz der historischen Perspektive siehe etwa den von Rüfner geschriebenen § 18 („*Das testamentum per aes et libram* [...]").

[37] E. Stolfi in *HRP,* 57 (Rn. 5).

[38] Willems in *HRP,* 493 (Rn. 2).

> „die Gefahr, Entwicklungen auf große Zäsuren zu reduzieren, Kontinuitäten zu verkennen, Verschiebungen überzubewerten und voneinander unabhängige Phänomene aufeinander zu beziehen."[39]

hervor. Diesem Gedanken ist durchaus zuzustimmen. Hier ist auf die wichtige Anmerkung von Alfons Bürge hinzuweisen, nach der sich der Romanist spekulativen Theorien gegenüber vorsichtig verhalten soll.[40] Was die heutige Beurteilung der Interpolationenforschung angeht, ist die von Detlef Liebs gegebene Übersicht besonders aufschlussreich.[41]

Einige Verfasser berücksichtigten auch etliche mittelalterliche und neuzeitliche Entwicklungen. So weisen z.B. Stolfi auf Thomas von Aquin und Grotius,[42] Forgó-Feldner auf Bartolus,[43] Gröschler, Klinck und Schanbacher auf Cujaz,[44] Christian Baldus, Klinck, Pichonnaz und Winiger auf Donellus,[45] Pichonnaz auch auf Pothier hin.[46] Eine Berücksichtigung der Literatur des älteren *ius commune* wurde aber von den Herausgebern des HRP augenscheinlich nicht ins Auge gefasst. Dementsprechend wird im HRP etwa auf Azo, Accursius, Baldus, Zasius, Voet, Domat oder Stryk, soweit es aufgrund des Literaturverzeichnisses sowie der elektronischen Suche im Text zu beurteilen ist, nicht hingewiesen.

Am Ende der allgemeinen Bemerkungen lässt sich noch über die folgende Erfahrung berichten. Schlägt man das Kurzlehrbuch von Kaser auf, entweder die älteren oder die jüngeren, von Knütel und Lohsse besorgten Auflagen, so findet man eine anschauliche Liste der wichtigsten Quelleneditionen, der neueren Gesamtdarstellungen des römischen Privatrechts usw.[47] Auch im Kaser'schen Handbuch befindet sich eine derartig anschauliche Bibliographie.[48] Im dritten Band des HRP findet man zwar eine imponierende Bibliographie,[49] die aber nicht strukturiert, sondern einfach alphabetisch geordnet ist.

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[39] Platschek in *HRP,* 343 (Rn. 2).
[40] A. Bürge in *HRP,* 2844, Fn. 59.
[41] Liebs in *HRP,* 197 ff. (Rn. 7 ff.).
[42] Stolfi in *HRP,* 66 (Rn. 25).
[43] B. Forgó-Feldner in *HRP,* 2935, Fn. 23; 2954, Fn. 142.
[44] P. Gröschler in *HRP,* 2909, Fn. 165; F. Klinck in *HRP,* 1080, Fn. 113; 1087, Fn. 181; D. Schanbacher in *HRP,* 1204, Fn. 194.
[45] Ch. Baldus in *HRP,* 1777, Fn. 25; Klinck in *HRP,* 1075, Fn. 83; P. Pichonnaz in *HRP,* 2995, Fn. 3; 3032, Fn. 316; B. Winiger in *HRP,* 2572.
[46] Pichonnaz in *HRP,* 2995, Fn. 3.
[47] Siehe Kaser, Knütel und Lohsse, *Römisches Privatrecht,* 39 ff. Eine ebenfalls nützliche Bibliographie bietet auch W. Waldstein und J. M. Rainer, *Römische Rechtsgeschichte,* (10. Aufl. Beck, München, 2005) 5 ff. Eine reiche und gut strukturierte Bibliographie befindet sich in Guarino, *Diritto privato romano,* 1025–1062.
[48] Kaser, *RPR,* 12 ff.
[49] Für die „Abgekürzt zitierte Literatur" siehe *HRP,* III, 3455–3673. Ebenfalls befinden sich im III. Band die umfangreichen Register, nämlich das Sachregister (3053–3195) und das Quellenregister

Mit Rücksicht auf den riesigen Umfang des HRP ist es auf der Ebene des Besonderen nicht möglich, im Rahmen der vorliegenden Besprechung eine systematische Übersicht anzubieten, vielmehr kann ich nur kursorisch über manche, im Laufe des Lesens des HRP gewonnenen Eindrücke berichten.

Im ersten Kapitel (§ 1: „Faktoren der Rechtsbildung") gibt Michel Humbert eine höchstelegante Einführung in die Geschichte des römischen Privatrechts aber auch des römischen Rechts überhaupt. Die wissenschaftliche Vorsicht, auf welche ich oben zustimmend hingewiesen habe, zeigt sich in diesem Kapitel unter anderem darin, dass Humbert nicht über Suprematie des römischen Rechts gegenüber den sonstigen antiken Rechten spricht.[50] Humbert geht davon aus, dass das römische Recht „eine technische Schöpfung, das Werk einer Klasse der Spezialisten" war.[51] Hinsichtlich der Ausgestaltung der merkwürdigen Autonomie des Rechtssystems im antiken Rom hebt Humbert die Rolle der Volksbewegung zu Beginn des 5. Jahrhunderts hervor, die das Gesetz „als Triebkraft der Rechtsbegründung" in den Vordergrund stellte.[52]

Humbert stellt mit Hinweis auf eine „brillante Studie" von Mantovani[53] fest, dass die Spuren einer langen Reihe der alten römischen Gesetze „Opfer einer Politik der systematischen Beseitigung" derselben wurden, wobei die „gnadenlose Verstümmelungen der Kompilatoren" hervorgehoben werden.[54] Im Licht der Forschungen von Mantovani scheint die These von Rotondi und von Fritz Schulz, nach der „Das Volk des Rechts ist nicht das Volk der Gesetze", revisionsbedürftig zu sein.[55]

Humbert beschäftigt sich vertieft mit der Kritik der These von Savigny über die römischen Juristen als „fungible Persönlichkeiten".[56] Erwähnt Humbert die *legis actiones* als „auf Gesetz beruhende Verfahren"[57], so ist dies nicht ganz zutreffend, weil die einschlägige Erklärung von Gaius (*inst.* 4.11) als unhistorisch gilt: im Kontext der *legis*

(3197–3453). Das sorgfältig zusammengestellte Quellenregister bildet auch in diesem Fall einen der wichtigsten Edelsteine des Werkes. Es ist bedauerlich, dass sich der Teil B („Nichtjuristische literarische Quellen") mit den Angaben der Tacitus-Stellen auf der S. 3453 unerwartet unterbrochen wird, und deswegen die im HRP zitierten Terenz- oder Varro-Stellen nur im Besitz der elektronischen Version gesucht werden können.

[50] Kaser, *RPR,* 2, hat noch über die höhere Leistung des römischen Rechts gesprochen, die auch die Griechen übertroffen habe. Vgl. z. B. Talamanca 1990, 4; M. Marrone, *Manuale di diritto privato romano,* (2ª ed., Giappichelli, Torino, 2004) 3. Gegen die Suprematietheorie einiger früheren Romanisten siehe ganz polemisch H. J. Wolff, (1967) (18) *Iura,* 134.

[51] Humbert in *HRP,* 4 (Rn. 1).

[52] Ebd. 5 (Rn. 3).

[53] D. Mantovani, 'Legum multitudo' e diritto privato. Revisione critica della tesi di Giovanni Rotondi, in J.-L. Ferrary (cur.), *Leges publicae. La legge nell'esperienza giuridica romana,* (IUSS Press, Pavia, 2012) 707–767. Siehe neuerdings D. Mantovani, *Legum multitudo. Die Bedeutung der Gesetze im römischen Privatrecht,* (Duncker & Humblot, Berlin, 2018).

[54] Humbert in *HRP,* 6 f. (Rn. 8 ff.).

[55] Vgl. auch Buongiorno in *HRP,* 42, Rn. 28.

[56] Humbert in *HRP,* 13 ff.

[57] Humbert in *HRP,* 9 (Rn. 13).

actiones verstanden die Römer unter *leges* ursprünglich nicht die Gesetze, sondern die alten Spruchformeln.[58] Humbert stellt fest, dass dem Prätor, „[a]bgesehen von einer bekannten Ausnahme (Aquilius Gallus, Prätor 66 v. Chr.)", die „juristische Kompetenz" fehlte.[59] Emanuele Stolfi nimmt demgegenüber an, dass die Prätoren in der späten Republik meistens Juristen waren.[60]

Pierangelo Buongiorno spricht hinsichtlich der Begründung der römischen Republik im Jahre 509 v. Chr. über die „Einführung einer *res publica*".[61] Dieser im Text auch später erscheinende Terminus ist wenig glücklich, weil *res publica* bei den Römern nicht Republik bedeutete. Der Terminus *libera res publica*[62] ist dafür besser, er gilt aber wohl nicht als quellenmäßig.

Peter Pieler gibt ein lehrreiches Bild u. a. über die juristische Literatur im justinianischen Zeitalter. Dabei stellt Pieler fest, dass die justinianische Studienordnung wegen der Sparsamkeit der damaligen Generation „565 zusammen mit dem Kaiser zu Grabe getragen worden sein" dürfte.[63]

Im Einklang mit den allgemeinen Zielsetzungen des HRP ist der § 8 („Papyrologische und epigraphische Quellen") besonders aufschluss- und lehrreich. Die Verfasser, nämlich Alonso und Babusiaux, stellen fest, dass die Berücksichtigung der papyrologischen und epigraphischen Quellen unentbehrlich ist, um viele Erscheinungen des römischen Privatrechts vollständig zu verstehen.[64] Ebenda findet man eine ausführliche Übersicht auch über manche Einzelheiten der Wissenschaftsgeschichte dieses Fachgebiets. Dabei wird u. a. festgestellt, dass der Zweite Weltkrieg eine bedauerliche Zäsur in der Geschichte der juristischen Papyrologie bedeutete. Die Verfasser weisen anschaulich auf die Ursachen des damals beginnenden Niedergangs hin.[65] Es gibt aber auch gute Nachrichten. Auch in jüngerer Zeit tauchen hie und da neue Papyri sowie epigraphische Dokumente juristischer Relevanz auf. So wurden etwa 2018 neue Wachstäfelchen entdeckt, die Kaufverträge aus dem Jahre 334 n. Chr. dokumentieren.[66] Für den ungarischen Leser ist es besonders erfreulich zu lesen, dass die epigraphi-

[58] Siehe zusammenfassend Kaser und Hackl, *RZP,* 35; Varvaro in *HRP,* 323 (Rn. 10). Auch der Hinweis auf die Rekrutierung der Richter „aus dem Kreis der Senatoren" (so Humbert in *HRP,* 17 [Rn. 31]) lässt sich nuancieren, siehe diesbezüglich Klingenberg in *HRP,* 415 (Rn. 3) mit Literatur.
[59] Humbert in *HRP,* 17 (Rn. 31).
[60] Stolfi in *HRP,* 61 (Rn. 14).
[61] Buongiorno in *HRP,* 37 (Rn. 12).
[62] Ebd. 42 (Rn. 28).
[63] Pieler in *HRP,* 112 (Rn. 32).
[64] Siehe z. B. Alonso und Babusiaux in *HRP,* 299 (Rn. 177). Zur Bedeutung der epigraphischen Quellen für die Forschungen über *vadimonium* siehe Metzger in *HRP,* 369 (Rn. 27); vgl. für die Prozessformeln Platschek in *HRP,* 394 (Rn. 47 ff.); vgl. ferner z. B. Klingenberg in *HRP,* 418 ff. (Rn. 7 ff.).
[65] Alonso und Babusiaux in *HRP,* 227 f. (Rn. 11 f.).
[66] Ebd. 303 (Rn. 189). Siehe auch ebd. 306 (Rn. 195 f.).

schen Forschungen von Elemér Pólay[67] und Károly Visky[68] auch heute noch wissenschaftlichen Wert haben. Es ist erfreulich, dass Éva Jakab wohl verdient sowohl hier als auch andernorts als eine der am meisten zitierten Verfasser im ganzen HRP gilt.

Mario Varvaro beschäftigt sich eingehend mit dem Legisaktionenverfahren, welches er nicht mit dem einigermaßen anachronistischen Ausdruck *legis actiones*, sondern mit dem älteren *lege agere* bezeichnet. Seine Erörterungen gehen auch auf Einzelheiten ein, wie z. B. warum Gaius nicht *legis actio sacramento*, sondern *l. a. sacramenti* schrieb.[69]

In dem von Ernest Metzger geschriebenen Kapitel fällt auf, dass er sich auch für die hinter den Quellentexten liegenden, in der Literatur oft übersehenen Realitäten überdurchschnittlich interessiert. Hinsichtlich der mit der Ladung verbundenen Strafklage bemerkt Metzger, dass die Nützlichkeit dieser Klage nicht eindeutig ist,

> „denn sie setzt voraus, dass der Kläger erneut versucht, den Beklagten vorzuladen, vielleicht mit ebenso geringen Chancen wie beim ersten Mal."[70]

Platschek ragt u. a. mit seinen nuancierten und wohlfundierten Feststellungen heraus. Wie Metzger, beschäftigt sich Platschek auch mit den Realitäten, die hinter den Quellentexten liegen. Überzeugend ist seine auf einem „cost-benefit analysis" beruhende Kritik der auch im Kaser/Hackl vertretenen Ansicht, nach der der Kläger im Falle der Passivität des Beklagten „schlechter dastehe", weil sein Recht nicht durch Urteil festgestellt wurde.[71]

Sehr interessant ist Georg Klingenbergs Hinweis, dass die Sabinianer, „entgegen den am Formelwortlaut orientierten Prokulianern", die *absolutio* des den Kläger befriedigenden Beklagten auch bei den strengrechtlichen Klagen befürworteten.[72]

Constantin Willems stellt anschaulich fest, dass das römische Vollstreckungsverfahren aus heutiger Sicht als „ein scharfes Schwert" erscheint, er fügt aber hinzu:

> „Das römische Vollstreckungsverfahren zielte allerdings nicht darauf ab, den Schuldner zu ruinieren".[73]

Sehr lehrreich sind die Erörterungen von Thomas Finkenauer über die Ausgestaltung der Stipulation. Hierbei wird u. a. auf die mit der als herrschende Ansicht geltenden

[67] E. Pólay, Verträge auf Wachstafeln aus dem römischen Dakien, in *ANRW,* II.14, (Walter de Gruyter, Berlin und New York, 1982) 509–523, zitiert von Alonso und Babusiaux in *HRP,* 300 (Rn. 181), siehe ebd. Fn. 539, 541. Auf der Seite 301 werden auch weitere einschlägige Werke von Pólay angeführt.
[68] K. Visky, Diritto romano nelle iscrizioni di Savaria, (1958) (9) *Iura,* 81–100; Ders., Tracce del diritto ereditario romano nelle iscrizioni della Pannonia, (1962) (13) *Iura,* 60–132, beide zitiert von Alonso und Babusiaux in *HRP,* 309, Fn. 622.
[69] Varvaro in *HRP,* 324, Fn. 17.
[70] Metzger in *HRP,* 362 (Rn. 17).
[71] Platschek in *HRP,* 380 (Rn. 15).
[72] Klingenberg in *HRP,* 457 (Rn. 77).
[73] Willems in *HRP,* 477 (Rn. 1).

Eidestheorie zusammenhängenden Bedenken hingewiesen.[74] Finkenauer beschäftigt sich auch mit dem von vielen Forschern übersehenen Problem, dass der Sprachgebrauch der Quellen *(stipulari – spondere)* nahelegt,

> „Stipulation und Sponsion von vornherein als die beiden Teile, nämlich Frage und Antwort, desselben einheitlichen Rechtsgeschäfts zu begreifen".[75]

Es tut mir leid, dass ich diese kursorische Übersicht über den reichen Inhalt des HRP an diesem Punkt aus Umfangsgründen beenden muss. Es ist im Rahmen der vorliegenden Besprechung nicht einmal möglich, meine Lieblingsthemen zu behandeln, so z. B. die Frage, ob die *uxor in manu* ein Mitglied der *agnatio* war,[76] ob die *bona fides* des Ersitzungsbesitzers ein subjektives Kriterium darstellte,[77] ob im Falle der Abschließung eines *contractus bonae fidei* in Stipulationsform die Absorption des *contr. b. f.* erfolgte,[78] ob der Terminus *exercitor* ursprünglich den *magister navis* bedeutete[79] usw.

Wie am Anfang dieser Besprechung, so hat der Rezensent auch zum Schluss nur seine aufrichtige Hochachtung und nicht minder seinen aufrichtigen Dank den Herausgebern sowie allen Autoren des HRP für ihre höchstwertvolle und zugleich mühevolle, sogar aufopferungsvolle Arbeit auszudrücken. Die oben dargelegten kritischen Feststellungen beeinträchtigen keineswegs den eindeutig positiven Eindruck, sogar die Begeisterung, die das imponierende Handbuch auslöst. Das Erscheinen des HRP, das in vielerlei Hinsicht alle bisherigen Gesamtdarstellungen des römischen Privatrechts übertrifft, beweist überzeugend, dass das antike römische Recht auch im 21. Jahrhundert seine Bedeutung beibehalten hat. Das HRP stellt aber auch einen überzeugenden Beweis dafür dar, dass sich die wissenschaftliche Pflege des römischen Rechts auch in unserer Zeit auf einem solchen hohen Niveau fortsetzt, dass sie als Beispiel für viele andere Disziplinen dienen kann.

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[74] Finkenauer in *HRP,* 567 f. (Rn. 4 f.).

[75] Ebd. 569 (Rn. 5).

[76] Trotz der auch im *HRP* (V. Halbwachs, 554 [Rn. 1.]) vertretene *communis opinio* siehe verneinend R. Brósz, Ist die uxor in manu ein Agnat?, (1976) (18) *Annales Univ. Sc. Budapest. sect. iur.,* 3 ff. Róbert Brósz (1915–1994), weiland Professor des römischen Rechts an der Eötvös-Loránd-Universität Budapest, war mein hochverehrter Meister. Sein das *peculium* erörternde Aufsatz (aus dem J. 1970) wird von R. Gamauf in *HRP,* 2806, Fn. 103, zitiert.

[77] Siehe A. Földi, Osservazioni intorno al c. d. dualismo della 'bona fides', in *Studi in onore di Antonino Metro, II,* (Giuffrè, Milano, 2010) 483 ff. = A. Földi, *Selected studies on Roman law and comparative history of private law* (Ludovika and Aurum, Budapest, 2023) 43 ff. Diesbezüglich scheint mir nicht ganz klar der Standpunkt von Klinck in *HRP,* 1134 (Rn. 17), zu sein.

[78] Siehe verneinend (wohl mit Recht) Finkenauer in *HRP,* 579 (Rn. 21).

[79] Siehe A. Földi, Die Entwicklung der sich auf die Schiffer beziehenden Terminologie im römischen Recht, (1995) (63) *TR,* 1 ff. = Földi, *Selected studies on Roman law and comparative history of private law,* 273 ff.; Vgl. Platschek in *HRP,* 673, Fn. 59. DOI: https://doi.org/10.1163/157181995X00013

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„Handbuch des Verwaltungsrechts" Vol 1–4

I. Introduction

The *Handbuch des Verwaltungsrechts* is a handbook on administrative law that has been published in Germany from 2021 onwards and is planned to have a total of 12 volumes.[1] This scholarly undertaking of around one thousand five hundred pages per volume may fill those who research and teach administrative law outside of Germany with admiration, envy, and sometimes at the same time, even frustration – at least among Hungarians. The editors intend to use these volumes to make a mark for German administrative law abroad, which makes their presentation for a non-German audience all the more justified.

Even though it is a German-language work, the fact that nowhere in the world is the science of public law cultivated with the dogmatic thoroughness and depth as in Germany may also justify the presentation. I would dare to say that the language of (public) jurisprudence is still not exclusively English and, it must be admitted, English legal terminology is not capable of conveying the subtleties that can easily be expressed by German *terminus technici*. There are, of course, serious reasons for this, which are linked to the characteristics of German jurisprudence. German public law doctrine has already had and still has a fundamental influence on many areas, not only on the public law of many countries in Europe, but in fact throughout the world. One of the most – if not the most – obvious recent manifestations of this is the export of German constitutional court doctrine to the practice of many constitutional courts around the world.[2] Like many others, the Hungarian Constitutional Court also relied very heavily on the established practice of the *Bundesverfassungsgericht* in its first two decades, from 1990. If we dig deeper, it is evident that comparative public law existed from the very early beginnings

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1 W. Kahl and M. Ludwigs (eds), *Handbuch Des Verwaltungsrechts,* (vol. 1–4., 12 vols, C. F. Müller, München, 2021).

2 A. Voßkuhle, Constitutional Comparison by Constitutional Courts: Twelve Observations from Twelve Years of Constitutional Practice, (2023) (1) *ELTE Law Journal,* 7–22. DOI: https://doi.org/10.54148/ELTELJ.2023.1.7

DOI: 10.56749/annales.elteajk.2023.lxii.18.281

onwards,[3] and German public law always was an eminent source.[4] In the field of administrative justice, which is the subject of my more specific research, the German model has been the most widespread in Europe, not only in the organisation of the courts but also in the institutions of administrative procedural law, which have been adopted in many places.[5] Tellingly, the seminal monograph by Eberhardt Schmidt-Aßmann, the „doyen" of German administrative law on the system-building character of general administrative law, has been published in dozens of languages over the last two decades.[6] Such a wide reception of German dogmatics is, of course, greatly supported by the generous German cultural diplomacy and the numerous scholarship opportunities available.

Equally important is the not insignificant feature that German science funding, even in times of scarcity, is at a level which – to use German public law terms – guarantees the essential content of scientific freedom: university professors have the time and capacity to invest a great deal of energy in research. This is not only because their salaries allow them to avoid having to take on second jobs (something that their international colleagues from numerous countries cannot claim) and they do not have to teach fifteen to twenty hours a week or more, spending much of their time preparing for and giving classes. We should also mention the adequate (even high) level of library provision and, most certainly, the fact that there is always a background of students and postgraduate staff available to German professors, which makes both teaching and research work way more concentrated on core activities. Obviously, the competitive situation among German public law professors is very important as well: university professorship is only conferred by invitation from a university. This certainly enhances the quality of research. Whereas in Hungary there are some dozens of public law professors, the Association of German Public Law Professors, functioning for over a hundred years now, has more than 800 members, which creates immense possibilities

[3] K.-P. Sommermann, The Germanic Tradition of Comparative Administrative Law, in P. Cane et al. (eds), *The Oxford Handbook of Comparative Administrative Law,* (Oxford Handbooks, Oxford, OUP, 2020) 55. DOI: https://doi.org/10.1093/oxfordhb/9780198799986.013.3

[4] For Hungary, it suffices to read the coursebooks published from the 1870s on or scroll the literature on judicial review. Hungarian scholars always demonstrated a vivid interest in German public law. See some historical details in I. Stipta, *Die Herausbildung und die Wirkung der deutschen Verwaltungsgerichtsbarkeit auf den ungarischen Verwaltungsrechtsschutz,* (Rechtsgeschichtliche Vorträge 45.) (ELTE ÁJK Magyar Állam- és Jogtörténeti Tanszék, Budapest, 2006).

[5] K. F. Rozsnyai, Current Tendencies of Judicial Review as Reflected in the New Hungarian Code of Administrative Court Procedure, (2019) 17 (1) *Central European Public Administration Review (CEPAR),* 7–23. DOI: https://doi.org/10.17573/cepar.2019.1.01

[6] E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee,* 1. (Springer, Berlin, Heidelberg and New York, 1998) DOI: https://doi.org/10.1007/978-3-662-06446-7. This work (or rather its second edition from 2004) is thus the main "export product" of contemporary German administrative law, dealing with the foundations and tasks of administrative law systems theory, presenting the main topoi of German general administrative law.

for in-depth research. Furthermore, as in Germany there is no artificial separation between the fields of public law, professors of public law can, at the same time, deal with constitutional law, European public law, international law, administrative law and financial law, which also enriches their work in the field of administrative law.

So, if you want to know what is "state of the art" in the science of administrative law, this handbook will be a great help. In a nutshell (or rather in a "watermelon-shell"), it contains the achievements of German administrative law in the first quarter of the 21st century. Even colleagues who do not speak German can get some insight since, at the end of each chapter, there is an English abstract summarising the main theses of the chapter. The handbook not only presents the main achievements of administrative law but also organises this knowledge in a systematic way, which of course brings further synergies and new research topics to the surface. In doing so, it also points the way forward for those involved in the study of administrative law among less fortunate foreign colleagues, in which fields and how research can and should be pursued. It is not my place to analyse the state of Hungarian administrative legal scholarly literature, but it is safe to say that the regular use of the handbook could result in a significant broadening of perspectives and the elimination of many harmful traditions.

II. The dizzying parameters of the handbook

The publication aims to involve a significant part of the German public law community in the enterprise. Some 250, mainly German, public law professors are expected to contribute to the 12 volumes.[7] The two editors, Wolfgang Kahl, professor of public law at the University of Heidelberg, and Markus Ludwigs, professor of public law at the University of Würzburg, are doing a tremendous editorial job. The academic advisory board of the handbook includes eight eminent public law professors, most of whom are or have been members of the highest courts: former President of the Constitutional Court Andreas Voßkuhle (Freiburg i. Br.), former constitutional judges Peter M. Huber (Munich) and Paul Kirchhof, (Heidelberg), as well as Astrid Wallrabenstein (Frankfurt), constitutional judge, and Thomas von Danwitz, judge at the ECJ. Other members are Indra Spiecker genannt Döhmann (Frankfurt) and Sabine Schlacke (Greifswald). It is therefore a mixed committee in terms of both gender and age.

[7] In the volumes published so far, the editors have written a total of 5 chapters each; apart from them, only three authors have two chapters, two of them members of the scientific board of the publication (I. Spiecker gen. Döhmann and S. Schlacke). The gender distribution is also better than in "reality", with about 25% of female authors despite the lower percentage of female professors.

The first four volumes published until the end of 2022 contain a total of 122 chapters,[8] with an average of 30 chapters (§) per volume, divided into 5 and 6 parts respectively.[9] Each of these conceptual parts contains 3 to 10 chapters. The structure of the chapters in each volume is, of course, uniform. It is divided into subchapters, alphabetically numbered, and these are divided into sections, numbered in Roman numerals. Typically, this is the final subdivision within the subchapters, but sometimes they are further divided into titles, which use Arabic numbering.[10]

The workmanship is the usual great quality of German manuals: on Bible paper, in relatively small type and densely spaced, but legible and not only with marginal numbers but also marginal headings for each paragraph. Following the table of contents, there is first a list of abbreviations, then a bibliographical summary of the books, which are cited in abbreviated form in all 12 volumes. This list, 25 pages long and divided into six chapters, lists the most important literature on German administrative law: in Chapter I those textbooks, manuals and monographs in German in the field of European and international law as well as comparative law, which are regularly cited in the volumes appear, and then such commentaries. Chapter II lists the textbooks, manuals and monographs in the field of constitutional law (in Germany rather called *Staatsrecht*), subdivided into subchapters, followed by the commentaries. Chapter III of the bibliography first lists the textbooks, manuals and monographs in the fields of general administrative law, public administration doctrine and administrative liability law. This fills just over 3 pages, followed by one page of commentaries. Subchapter 2 of this chapter brings together the textbooks, manuals and monographs in the field of administrative procedural law, followed by commentaries totalling 2 pages. Chapter IV then takes the reader through the literature in the field of special administrative law: first come the comprehensive volumes, followed by the most important sectoral reference works in the fields of construction law, data protection law, finance and tax law, municipal law, public service law, public economic law and regulatory law, police and law enforcement law, social law and finally environmental law. Chapter V briefly summarises similar works on the history of public administration, administrative law and constitutional law, while Chapter VI contains, among other things, governance theories, legal methodology and theory, and a commentary on the German Civil Code. The list of abbreviations contains 38 pages of international, EU and German legal sources, organisations, journal titles and, of course, the established abbreviations mainly used in footnotes.

[8] Volume V is, at the time of the writing this review, already in press and the authors and editors are currently working on Volume VI.

[9] The fourth volume has only 3 parts, but there are 5 chapters each, so it is the same size as the other volumes.

[10] Of course, there are some sections where the structure is even more differentiated, in which case there are also small Latin subtitles, double lowercase bullet points and, where appropriate (in Arabic numerals), subheadings.

III. The concept of the content of the publication and its integration into the developmental arc of German administrative law

The editors have carefully planned the contents of all 12 volumes whose titles are already indicated. The first two volumes are in fact, as their titles suggest, summary volumes containing the basic principles, with 7 and 3 in detail volumes respectively. Thus, to the first summary volume (I, Basic Structures of German Administrative Law) can be linked the volumes Public Administration and Constitutional Law, Status of the Individual and Procedures, Scales and Forms of Activity, Administrative Law and Private Law, Tasks, Organisation and Public Service, Control and Enforcement, and State Liability. The second summary volume (II) is entitled Basic Structures of European and international administrative law, the doctrines of which are set out in detail in three volumes, grouped into the topics of European "Administrative Union" Law, Administrative Law of the EU and International Administrative Law.

The editors – and with them the authors – want to convey a particular vision, one that sees administrative law as an organic whole, but also as a whole with its interdependencies and interactions. In other words, it does not (only) present administrative law in its static state, but wishes to give an idea of the incredible dynamics that characterises this field. Administrative law does not exist in itself. On the one hand, it is closely linked to international and EU administrative law: a considerable part of national administrative law is determined by these, not only through binding EU legal sources and international treaties. This is particularly true of sectoral administrative law, where public international economic law as well as the policies and public law of the European Union sometimes fully determine national law. Sectoral administrative law inevitably feeds back into general administrative law, but obviously there are mechanisms in the other direction too, just think of the flow of information or procedural law. These interdependencies and interactions are analysed in great detail by the authors of the 122 chapters in the 4 volumes published until the end of 2022. In the same way, the interdependencies between procedural law and substantive law are not overlooked, nor is the interdisciplinarity of the methodology.

This publication is an integral part of the development of German administrative law. It is worth recalling this journey over the last two centuries, with reference to the chapters discussed. The opus itself – maybe surprisingly? – does not begin with an introduction to administrative law, but to its subject, public administration; in the first part entitled "Historie", in six chapters, which cover the "long 19th century", the Weimar Republic and the National Socialist period, from the early modern "Policey" to the after-war occupation and the reunification of Germany. Of course, there is also a great deal of discussion of administrative law in these chapters, with important features of each era being covered in detail – and also discussed from the perspective of our

current concepts. These historical chapters nicely illustrate how closely organisation, staff, tasks and (legal) instruments of public administration are interrelated, and how difficult it is to decide, for example, in which order a textbook should present these inseparable elements. In these chapters, too, a picture of contemporary administrative law is drawn alternately from the point of view of the constitutional system, the administrative organisation, the tasks it performs and the civil servants. Administrative law itself is of course also discussed, although, since it is the subject of all the chapters in the 12 volumes in one sense or another, these historical chapters rightly concentrate on the administration itself.[11] Thus, what has been said about "Policey-law" makes it even clearer why the translation of Policey as "policing" is much more appropriate than "police", and why we cannot speak at that moment of administrative law in the modern sense. Indeed, at that time, police law was essentially only a set of rules aimed at influencing the behaviour of the addressees *(Steuerungsnormen),* the addressees at that time being subjects who were either obliged to behave in a certain way or to refrain from doing so.[12] The addressees are not yet citizens, but subordinated subjects, who have no rights. Although at times they may appear to have rights by reflex, not in a legal relationship with the organs of the state, as those do not yet have obligations towards them. It is very interesting to read how this "law of order" has developed within private law, mainly out of a need for a systematic presentation of the rules of private law, which were essential for the study of "Kameralistik" and "Policeywissenschaft".[13] This is partly clarified by citing the works of Otto Mayer and Lorenz von Stein, which are already associated with the next period.[14] The authors present the administration of the next two periods, the long 19th century and the Weimar Republic, rather through the prism of important stages in German history, primarily through the gradual differentiation of the administrative organisation, which resulted partly from the development of the state organisation and partly from the proliferation of state tasks. In these periods, starting primarily in the second half of the 19th century, and then summarised in a dazzling system by Otto Mayer,[15] the methodology that still prevails has been fundamentally developed, and is the subject of a separate chapter.[16] After the dark age of National Socialism, Ulrich Stelkens summarises the milestones of German public administration that still determine German public administration today in two historical chapters, from the post-World War II period to the recent past, with the reunification as the caesura between the two. The first of them – and still the most

[11] The relationship between the concepts of public administration and administrative law will be discussed in § 11.
[12] Simon, § 1: Administration in the early modern polity, 3–39. [58].
[13] Simon, § 1: Administration in the early modern polity, [55].
[14] Simon, § 1: Administration in the early modern polity, [58].
[15] Most eminently O. Mayer, *Deutsches Verwaltungsrecht,* (München, 1924[3]).
[16] So on the legal method, see Kaiser, § 24 Juristische Methode, Dogmatik und System, 941–977.

important – is the process of constitutionalisation that followed the adoption of the Basic Law.[17] The *Grundgesetz* of course built on administrative law, but the Basic Law completely reshaped the whole of it, partly due to the effective involvement of the Federal Constitutional Court. From this moment on, the basic principle certainly applies: *Verwaltungsrecht ist konkretisiertes Verfassungsrecht*.[18] The chapter outlines the various directions of the implications of the requirement of (effective) legal protection against the administration in the German Basic Law, *Grundgesetz* 19(4), and then highlights the unifying work of the five federal courts and the significance of access to court that has developed into a five-tier system. It also analyses the three most important further influences on administrative law before reunification, namely the codification and consolidation of general administrative law, the development of environmental law, and the rise of proceedings relating to conscientious objection and to immigration. The final historical chapter, which leads from reunification to the present, continues the macro-perspective of the arc that the chapters of the four volumes analysed here – and of each subsequent volume – will (then) examine in detail, broken down by notions and by legal institutions.[19] Of course, these aspects of the development of administrative law can be observed throughout Europe, with the exception, however, of the part dealing with the technical aspects of reunification, in other words the extension of the scope of the West German legal system to the former East German territories and the phasing out of the East German legal system.[20]

The "product" of this period, the very important reform process that began in the first half of the 1990s and has since become dominant under the name *Neue Verwaltungsrechtswissenschaft,*[21] which seeks to go beyond the Otto Mayer concept in its concept and methods, is presented in a separate methodological chapter.[22] This reform process has drawn on a number of sources, and we must mention on the one hand the series "Schriften zur Reform des Verwaltungsrechts", started by Wolfgang

[17] Here the interactions are presented. The elements of the Basic Law that determine administrative law, and the details of the implications, are most concentrated in Volume III, entitled "Verfassung und Verwaltungsrecht", see below.

[18] "Administrative law is constitutional law substantiated in concrete terms."

[19] Stelkens, § 5 Verwaltung von der Besatzungszeit bis zur Wiedervereinigung, 155–193. Actually, three volumes deal with this, and chapters in further volumes will deal specifically with what appears here in a nutshell, i.e. how European integration has had a significant impact on public administration and administrative law. To quote the very apt subtitle, administrative law is affected by *Ungleichzeitige und gegenläufige Entwicklungen* (conflicting processes in a time-shift), the main buzzwords being accelerating procedures, cutting red tape, privatisation, PPPs, public procurement, digitalisation, "information governance", New Public Management and multitasking.

[20] Stelkens, § 6 Administration in a reunified Germany, [6]–[12].

[21] More on this trend: A. Voßkuhle, 1 § Neue Verwaltungsrechtswissenschaft, in A. Voßkuhle, M. Eifert and C. Möllers (eds), *Grundlagen des Verwaltungsrechts,* (3rd ed., vol. 1, 2 vols, C. H. Beck, München, 2022), 3–70, and in the handbook discussed here, Kersten, § 25 Konzeption und Methoden der „Neuen Verwaltungsrechtswissenschaft", [13].

[22] Kersten, § 25 Konzeption und Methoden der „Neuen Verwaltungsrechtswissenschaft", 979–1022.

Hoffman-Riem,[23] and on the other hand two very important works by Eberhardt Schmidt-Aßmann[24] and Gunnar Folke Schuppert[25] respectively. In fact, the conceptual approach to administrative law of these works has been synthesised and taken forward in the three-volume publication "Grundlagen des Verwaltungsrechts",[26] which is probably well known to many and is also referred to by many as the "bible of administrative law". It was edited in the 1st and 2nd editions by Professors Eberhardt Schmidt-Aßmann from Heidelberg, Wolfgang Hoffmann-Riem from Hamburg, who were joined by Professor Andreas Voßkuhle from Freiburg, by then the ever-youngest president of the German Federal Constitutional Court – all of them congenial legal scholars. The third edition of this three-volume handbook, which is a huge work of reference having laid the foundations for this genre, was published in 2022 in 2 volumes, and edited in addition to Andreas Voßkuhle by Professors Christoph Möllers and Martin Eifert from Berlin, who replaced the other founding editors. The handbook discussed follows a somewhat different logic, explicitly emphasising that it does not seek to represent a particular paradigmatic trend, but to present German administrative law and jurisprudence in all its diversity. At the same time, it is clearly linked to the *Grundlagen,* but this is inevitable, since the subject of this work is the same: administrative law. The 12 volumes are in fact a more detailed, more diversified treatment of the same subjects, with the first two volumes, like the Grundlagen, covering the basic principles and the ten volumes that follow them covering aspects of administrative law in greater detail. Of course, the more detailed presentation and the even greater importance of inter- and intradisciplinarity and the deeper embeddedness into the international and European legal system also require a different arrangement.

[23] 10 edited volumes have been published in this series over ten years, starting with W. Hoffmann-Riem (ed.), *Reform Des Allgemeinen Verwaltungsrechts. Grundfragen,* (Nomos, 1993) from the third volume onwards with Eberhard Schmidt-Aßman as co-editor, tackling the most important aspects of reforms.

[24] Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee*.

[25] G. Folke Schuppert, *Verwaltungswissenschaft. Verwaltung, Verwaltungsrecht, Verwaltungslehre,* (Nomos, Baden-Baden, 2000). This is a very interesting, mosaic-structured publication (i.e. quoting long passages from the works of other authors) of more than a thousand pages, described in its subtitle as a textbook, which provides a nice cross-section of the achievements of German public administration research up to the early 2000s through the prism of governance theory.

[26] E. Schmidt-Aßmann, W. Hoffmann-Riem and A. Voßkuhle (eds), *Grundlagen des Verwaltungsrechts,* (vol. II, C. H. Beck, München, 2012).

IV. Some insights to the first four volumes

1. Volume 1: Basic structures of administrative law

The historical chapters are followed in the second part by the legal system as another essential coordinate system for defining the place of administrative law, namely what are the layers and sources of law, all of which have an impact on public administration. In the chapter on the sources of administrative law, we will, of course, not only find that the formal sources of administrative law are depicted, but also, before that, the basic legal theory and concepts, the functions and principles of sources of law, and the trends in legislative development, including the declining role of parliaments in lawmaking, the role of judge-made law and the increasing prevalence of norm-collision. Unwritten legal rules and "non-legislation" (technical rules and other rules created by non-state actors) are also discussed. The concept of the multilayered legal system is treated in chapters on the Europeanisation and the internationalisation of administrative law as well as the interaction between constitutional and administrative law.

Having thus presented the external determinants of administrative law, it is possible to move on to administrative law itself. The first part on this topic, "Concepts and References",[27] seeks to define administrative law through chapters presenting several dialectical conceptual pairs. First, the duo of public administration and administrative law is examined in more detail, containing some interesting reflections on the conceptual problems of public administration, as well as of administrative law, and on the reasons for the separation of the two concepts from each other, as well as on approaches that have tried to treat the two concepts as a unit (illustrated with another historical overview of the different trends from police science to *Neue Verwaltungsrechtwissenschaft*).[28] This is followed by the pair of general and special administrative law, and then, with a focus on intradisciplinarity, the specific relationship between administrative law and administrative science, which relationship has been constantly changing over time, mainly being concerned with questions of demarcation. The next pair of terms is perhaps somewhat surprising, since they are related in a different way from the usual pairs that will follow it: private law-administrative law and then criminal law-administrative law. It is no coincidence that Jan Ziekow immediately expands the pair of administrative law and administrative court procedural law[29] into a trio, wedging administrative procedural law in between, in order to focus attention on the procedural aspects of administration (and administrative

[27] Begriffe und Bezüge.
[28] Waldhoff, § 11 Verwaltung und Verwaltungsrecht.
[29] Ziekow, § 14 Verwaltungsrecht und Verwaltungsprozessrecht.

law) and then to analyse the relationship between public administration and administrative justice and the laws that govern them.[30]

Of particular interest to foreign readers may be the concluding chapter of this section, which compares German administrative law with foreign administrative laws in a summary.[31] This is in fact a comparative chapter on administrative law, since it first presents the methodological foundations and challenges of comparison in administrative law, which all flow from the different national characters of the subject matter, being administrative law – which is of course sometimes the case in other fields of law as well. It then presents, on the one hand, the common lines of development in administrative law and, on the other, the distinctive differences and national characteristics of the German-French-English triad traditionally researched in Germany. Gernot Sydow then compares the main characteristics of the structure of administrative law systems from the perspective of governance- and systems theory, which is a very interesting aspect. These characteristics are the place of administrative activity in the system of checks and balances, the way in which administrative law is systematised and in which the impulses of Europeanisation are handled, the foundations of organisational law as well as the system of judicial protection and the other control mechanisms over public administration. All of this leads to a number of conclusions on the functional interdependence of systemic decisions on the one hand, and the convergent nature of decisions about administrative law in a democratic administrative state under the rule of law on the other.

The next, fourth major part is dedicated to the *Handlungsformen,* the core of all textbooks, a genuinely German systematisation.[32] Its chapters describe the typical forms of action in public administration, which are defined in terms of the functions and tasks of public administration. The first is interventionist public administration *(Eingriffsverwaltung),* followed by public service administration, which is now much more and, as a result of constitutionalisation, very different from Forsthoff's concept of *Daseinsvorsorge,* as it is also known in many other countries.[33] Then there are planning administration, infrastructure administration, guarantory and regulatory administration, and finally information administration. Hungarian professionals will also find these chapters of great benefit, especially if they wish to convey a systematised administrative law and not only teach a snippet of it. The chapters on the forms of activities present, in a most systematic way, the range of instruments with which public administrations attempt to deal with their various tasks.

[30] More on this infra in the discussion of the fourth volume.
[31] Sydow, § 17 Deutsches Verwaltungsrecht und ausländisches Verwaltungsrecht.
[32] Unfortunately, there is still no adequate term for this in the Hungarian literature...
[33] See Nagy M., A közszolgáltatás-szervezés intézmény- és elmélettörténete, in Fazekas M. (ed.), *Közigazgatási jog. Általános rész II.: A közszolgáltatások szervezése,* (ELTE Eötvös Kiadó, Budapest, 2017) 39–53.

2. Volume 2: The basic structures of European and international administrative law

Volume II may come as a surprise to some foreign readers but, as it has already been pointed out, in Germany the organic unity of public law is not artificially separated. At the same time, it is even a great step for German literature that not only EU law is dealt with here, but that the pan-European and even global level is treated in the other basic volume.[34] There are chapters that go far beyond this, such as those on European administrative judicial cooperation or the one on the European administrative area. The question of national identity is also raised here and is not left to the detailed volumes.

The logical structure of the second volume is similar to the first volume, as far as possible given the differences in its substance. The historical section starts immediately with the Europeanisation of German public administration, followed by a historical review, the separation division of powers and the exercise of powers. The conceptual pair here is EU administrative law and the Union's own administrative law on the one hand, and German administrative law and EU administrative law on the other, complemented by chapters on European administrative judicial cooperation and the European Administrative Union. The sources and layers of law are then analysed in this volume, followed by the principles and methods of European and international administrative law. The latter can also be of great benefit to those who are not dealing with EU administrative law.

Karl-Peter Sommermann's chapter on the importance of legal comparison as a method[35] deserves special mention. This chapter analyses the historical development of comparison in the field of administrative law and shows how important it has been since the birth of administrative law, although those who argued for the need for this method were often in the minority, since, unlike constitutional law, many considered administrative law to be the main area of the emergence of true national character. Even back then, many were inspired by the study of other nations' solutions and, of course, by the need to justify their reform efforts. This is also confirmed by Hungarian literature, which, for example, refers to the contemporary literature on the creation of administrative justice and the "transnational reception process" that took place at the level of various drafts,[36] which shows many similarities with the German, Italian and French processes described above.[37] The next part of the chapter deals with the role of comparative law in

[34] Given the different volumes of the body of law, EU law dominates of course.
[35] Sommermann, § 52 Bedeutung der Rechtsvergleichung im europäischen Verwaltungsrecht.
[36] I. Stipta, Die Geschichte der Verwaltungsgerichtsbarkeit in Ungarn und die internationalen Modelle, (2014) (5) *Journal on European History of Law,* 73–79.
[37] Stipta, Die Geschichte der Verwaltungsgerichtsbarkeit in Ungarn und die internationalen Modelle, 865–869.

European integration processes, followed by a separate section on the administrative law foundations of European convention law (transnational international law), in which the ECHR, the recommendations of the Committee of Ministers within the Council of Europe and other international treaties play a key role, creating a form of pan-European standards. The development of the science of international comparative administrative law, the development of which is linked to comparative law, and its main fora and impact on legal training are discussed. The second volume also concludes with an outlook on the challenges of supranational administrative action, in which, in addition to the general European and international outlook, a special chapter is devoted to the EU's (own) codification efforts in administrative law, as interpreted by a key German scholar of the ReNEUAL initiative, which has gained momentum in the last decade but has been somewhat sidelined since.[38]

3. Volume 3: Public administration and constitutional law

This volume also applies the already mentioned holistic perspective. First of all, the constitution as a framework for administrative action is presented, of course, starting from the point of view of the concept of multi-level constitutionalism. The concept and practical implementation of the "European Legal Community" is the subject of the chapter by the former President of the Constitutional Court, Andreas Voßkuhle, who is still devoted to constitutional dialogue.[39] The following two parts deal first with the organisational and then with the fundamental rights aspects. In the chapter on democratic legitimacy and self-government, the various aspects of organisational arrangements are discussed from a number of angles, ranging from independent agencies to the different public bodies. A very interesting concept is followed in the fourteenth part, entitled "Constitutional constraints, in particular fundamental rights". It discusses the role of the rule of law in European administrative law and then the extensive system of obligations stemming from fundamental rights: the definition of fundamental rights in EU and German public administration law, but also obligations that arise for public administrations when using private law instruments or in connection with digitalisation. Particularly fascinating is the chapter outlining the fundamental rights aspects of what used to be called *besonderes Gewaltverhältnis,* which in fact deals with the fundamental rights of natural persons in a supremative relationship based on (inner-)organisational power, a subject on which, in contemporary Hungarian literature, one can perhaps only read about in a subset of areas: it primarily comprises the relationships between persons holding public office and persons in a

[38] Schneider, § 56 Kodifikation des europäischen Verwaltungsrechts.
[39] Voßkuhle, § 59 Europäische Rechtsgemeinschaft – Konzept und praktische Umsetzung.

permanent legal relationship with a public institution (and in fact even users of prisons).[40]

In addition to the adhesion to fundamental rights, the most important related constitutional principles are also presented in the consecutive chapters, such as the primacy of law and the importance of statutory empowerment, equality, proportionality and, together with legal certainty, the protection of legitimate expectations, which is a quite neglected subject in Hungary.[41]

The issue of federalism, which affects German administrative law in a thousand ways, is the next constitutional determinant, which is discussed in a separate chapter, followed by the examination of the role of public administration in the state, primarily in terms of the various state objectives and the constitutional constraints that determine the functioning of the state.[42] Finally, the volume concludes with the challenges of civil service, which is itself a major challenge for both constitutional law and administrative law for the future as, unlike many European countries, in Germany it is anchored in the constitution.

4. Volume 4: The status of the individual and procedures

The fourth volume basically focuses on the individual (or more precisely, the external subject). A very specific German perspective prevails here, since what else could form the basis of this topic than the specific German conception of the subjective public law right. Several chapters of the first part deal with the development, evolution and types of this entitlement, the impact of EU law on the conception and its role in EU law in general, as well as a comparative legal analysis of this entitlement, so that the reader can understand the essence of this particular German approach and gain an idea of the processes for its rearrangement taking place, actually at European level. Of course, legitimate interests and conflict resolution methods are also discussed. A related but less prominent issue is that of the administrative legal relationship, which is analysed in three chapters, one on general issues, one on procedural rights and one on internal organisational relationships. The next part sets these concepts in motion and examines their enforceability through procedural law and judicial review. It starts with my personal favourite, the so called competitor's action.[43] This constellation is still

[40] Kielmansegg, § 70 Grundrechte im Eingliederungsverhältnis („Sonderstatusverhältnis").

[41] Of course this is not only a Hungarian reluctance. Cf. E. Chevalier, The Case of Legal Certainty, an Uncertain Transplant Process in France, (2021) 14 (1) *Review of European Administrative Law,* 95–119. DOI: https://doi.org/10.7590/187479821X16190058548745

[42] These are the "social state", the "environmental state", the economic and financial union, the "constitution of regulated industries", the "financial constitution" and the "constitution of public finances".

[43] Fehling, § 100 Konkurrentenklage, 331–377.

underdeveloped in Hungarian law, even though, in view of the EU harmonisation, economic administrative law in Hungary is familiar with a number of such situations, where competitors try to compete, or to oust or "regain" their position by various legal means. In addition to market entry, this is also the case with concessions, state aid, public procurement and other market regulation constellations, of which Michael Fehling from Hamburg gives a good overview. In addition to economic administration, this is also an issue in civil service and in higher education, something that is still completely lacking in Hungary. In view of this, a study of the basic doctrinal issues could be very important, especially for legal practitioners and researchers working in the field of litigation and dispute resolution, as well as for the synergies between civil procedural law and administrative court procedural law. It is also a good illustration of how the legal classification of a legal instrument has a significant impact on the depth to which such an area is examined in the scholarship. I am convinced that the difficulties of litigation relating to concession and subsidy contracts are mainly due to the classification of these contracts as civil law contracts, and this is currently one of the main obstacles to the proper development of this field in our country.[44] In the field of public space use, it is already visible that there are positive legal and scientific benefits to be gained from bringing a legal relationship into the public law domain.[45] Conversely, the under-representation of general competition law issues in German public law literature is due to the fact that, in Germany, competition law infringements are almost exclusively subject to civil litigation.

The other chapters in this section are not only of interest to German lawyers, since they deal with the enforcement of claims that are not based on subjective legal protection, primarily in the areas that are also pioneering in our country – due to the influence of EU and international law: in environmental protection on the one hand, in consumer protection and in social law on the other. The linking of the latter two areas is based in part on the very similar considerations: we can learn more about the privileged position of NGOs representing disabled people as plaintiffs. This chapter also illustrates the different developments which the transposition of EU directives can have as an effect. In Hungary, for example, unlike in Germany, instead of limiting the scope to social law, this collective redress is regulated in relation to violations of the

[44] See on the many problems of the lack of defining some contracts as administrative contracts Nagy M., Szerződés a közigazgatási jogban, (2022) (4) *Jogtudományi Közlöny,* 137–146.

[45] Horváth M. T., Áttetsző Viszonyok. Közszerződés és Magánjog, (2022) (2) *Közjogi Szemle,* (1–8) 6–8; or K. F. Rozsnyai, Challenges for Hungarian Local Self-Governments Connected to the Use of Public Space: To Be Governed by Public or by Private Law?, in *Urbanisation and Local Government(s),* (Lex-Localis Press, Maribor, 2021) 95–105. DOI: https://doi.org/10.4335/2021.7.8. The use of public space could also be one of the veterinary horses of the theme of the competition action, since some of the problems in this area are presented in a much simpler framework than in regulated markets.

requirement of equal treatment, which has led to a significant reduction in the scope: NGOs can only bring civil and labour law claims, but no administrative actions.[46]

Following these basic issues of enforcement, the previous two parts are placed in the coordinate system of general administrative law – sectoral or special administrative law, and the situation of the individual is presented in the most important "reference areas": construction law, economic administration, environmental protection, public service, social law and tax law. Then the "dice" are turned again, and the next part is a more detailed examination of the various types of procedure for the enforcement of the rights and interests of the subjects; as described above, divided into two sub-parts. The first sub-part puts the whole issue in context: inevitably, of course, this requires reflection on the functions of procedures. The eternal *topos,* the serving role of procedures and their *per se* value, serves as an opening of this sub-part, to be followed by the fundamental questions of participation in procedures. After the right to a reasoned decision, the specific administrative issues of major investments (like power plants and highways, etc.) follow, to arrive then to the main challenges of the moment. Digitalisation, timeliness and the impact of EU law are discussed in the following chapters. After setting the context, the second sub-part takes an in-depth look at each type of procedure. Informal and formal procedures are first contrasted in chapters 117 and 118. This distinction may seem alien to the Hungarian reader and is also linked to the fact that, in Germany, procedural law in general was regulated much later and in a different way than in Hungary. The essence of the difference can perhaps be summarised in the fact that both procedures are based on the principle of formality, but the formal procedure in Hungary is more formal: the procedure, the content of the decision and the legal effects are regulated in greater detail, so it is closer to the court procedure in its regulation. This was Imre Valló's objective as early as the 1930s, and this is why the procedure was designed in this way in Hungary from the outset. Nevertheless, at the same time, informality is also an important principle in our country, and the way in which the procedure is conducted is essentially at the procedural discretion of the administrative body through the principle of free evidence. This is, of course, being interpreted increasingly narrowly, both in Germany and here, in the wake of the "constitutionalisation" described in Volumes 1 and 3.

The following chapter looks at the one-stop shop procedure, which has appeared in member states' administrative law as a result of the impact of EU law, to then focus on planning and plan approval procedures. A similarly pioneer topic form allocation procedures, which would also be very much needed in Hungarian legislature and scholarly literature, as there are many cases where rights over finite assets or a finite

[46] See § 20 of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (Act on Equal Treatmentand the Promotion of Equal Opportunities). On some further consequences cf. B. Dombrovszky and I. Hoffman, When Social Policy Walks into the Justice System..., (2023) *Central European Journal of Public Policy,* DOI: https://doi.org/doi:10.2478/cejpp-2023-0013

number of entitlements are allocated. Instead of a detailed description of the individual areas, this section focuses on the general features: the object of the allocation itself (which is an entitlement) and the decision leading to finality, as well as the allocation decision itself and its implementation, which is not a procedural stage merged with the allocation decision resulting in a two-stage procedure.

As usual, this volume also concludes with the challenges; this time in a single chapter and not in a separate part: the challenges of authorisation procedures, an evergreen subject of administrative procedural law. Ivo Appel paints a huge tableau of problem areas and the need for renewal. At a very high level of abstraction, this chapter actually presents the challenges related to the topics discussed in this volume (and in the previous volumes), such as expertise, primarily in terms of the need for external experts, as well as the relationship between formal and substantive law. Standardisation, the depth of judicial control and Europeanisation are presented as factors that would require reforms. Then, in a more positive tone, the development potentials of the current situation are discussed, always with reference to their limits, such as the broadening and improvement of the possibilities of participation, deregulation, procedural privatisation, digitalisation and artificial intelligence, the increasing role of procedures and the associated rules of preclusion. The call for sustainability is not missing, nor is the issue of stabilising decisions.

V. Perspectives

I hope that this presentation, which can only move on the surface, given the limitations of space, encourages many readers to study this work. Even this brief introduction is already full of suggestions for future doctoral theses and habilitation papers. The opus may also provide impulses for the further development of national administrative law itself and the way it is taught. It demonstrates far too well the many positive outcomes of a multi-authored scientific thinking that wishes to encompass the entire public administration science of a country,[47] and can give good guidance to designing conference series providing a great organisational framework for the administrative law scholarly community to think together.

Last but not least, I cannot refrain from reiterating the importance of the German language for public lawyers outside of Germany: this book review also provided evidence that it is a legitimate expectation that my doctoral students should

[47] Slowly, this has also taken root in Hungary with its first fruit, the publication of the handbook prepared in cooperation with all administrative law departments of the country now in the second edition including the most important sectoral fields of Hungarian administrative law in one volume: Lapsánszky A. (ed.), *Közigazgatási jog: Szakigazgatásaink elmélete és működése 2.,* (Wolters Kluwer, Budapest, 2020).

know German, since only those who can read in this language can truly see the wonders of administrative law. Perhaps I can console the readers not understanding German by saying that, fortunately, German public law scholars have in recent years increasingly recognised the need to participate in English professional discourse, so that more and more of the topics covered in the volumes are available in English, which does not, of course, alter the fact that it is worth learning German and suggesting that the libraries acquire the opus presented.

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