CODIFICATION OF CIVIL LAW IN HUNGARY: THE CIVIL CODE AS A PART OF THE SYSTEM OF LAW

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ABSTRACT

The law is a heterogenous body of legal norms wherein regulation is contrasted to law. Law is an autonomous order of society where norms are created via judicial adjudication by deciding individual cases. Written law, like a civil code, does not distinguish in terms of interpretation of rules, concretisation of general clauses on a case-by-case basis, and prioritisation among competing rights. The courts actually construe the law instead of applying it. Private law is built on a bottom-up-approach even in codified legal systems. Private law transmits social values that are to be assessed as described in Walter Wilburg's Bewegliches System. *Thus, courts do not apply but actually create law; the same is the case in the system of private law based on a written law. The civil code, where it exists, determines methodology and structure of argumentation, provides legal framework for social and economic phenomena, establishes basic evaluation, may implement direct policy, and may confirm, reflect, or overrule trends in court practice.*

Keywords: *civil code, courts, evaluation, law and regulation, methodology, lawyers, law making,* ad hoc *legislation.*

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1. THE NATURE OF LAW

In the upper layer of law, norms, organised in a hierarchy of sources of law, traced to, and legitimated by legislative or judicial authority, are created by members of society, that is, people for people. Law is not supposed to originate from an authority above society but is to be derived as a social product. It organises individual actions into collective action, coordinating the behaviour of the members of society to achieve specific goals. The key to this is the ability to think in the abstract and to create myths and beliefs divorced from physical reality. Only this kind of thinking can create a social consensus, without the need for justification by material reality, on phenomena that are the building blocks of law (the concept of state, property, legal person, contract, family, to name but a few). It is on these foundations that the abstract system of law is built, in its entirety, independent of physical reality.

Law is a product of society, but in the social division of labour, the production of law is the task of a small part of the community, the professional community of lawyers. This monopoly of lawyers is also based on social consensus. Lawyers are tasked with shaping social values into rules of conduct, to which the community holds its members accountable to the state.[1] Here, we do not even attempt to define the concepts of state and law. Whatever concept one adopts in this connection, it is safe to say that the content of law is determined by jurists. The source of law, then, is the professional community of lawyers in the social reality. Of course, this assertion does not change the fact that in the system of legal thought, individual elements of the legal system of norms are considered the source of law. The statement implies that the content of this system of norms is determined by the community of jurists. This community is said to perform its task well if it is able to translate social values into rules of conduct enforced by the state, that is, if the rules of conduct are followed in accordance with social values.

It is therefore worthwhile to approach law from the perspective of the social function of the community of lawyers. In fact, one could

1 Habermas, 1998, p. 255.

say that law emerged in society with lawyers; law does not exist independently of lawyers but is created by them. The closed professional community of lawyers and, within it, primarily the judges shape the law. If we want to focus on law as a social phenomenon, we do not need to pay attention to the legal texts or theory, only to the position and place of lawyers in society.

One example of this role of lawyers can be illustrated in referring to the period of social and legal development in Hungary after World War II. The market economy and democracy were dismantled, means of production were taken over by the state, and economic turnover was centrally controlled in accordance with centrally prescribed plans. Private property was limited to personal property, and society and the economy were controlled by the party. Although the economic mechanism of 1968 marked an opening up to market-based thinking, the system of central redistribution remained unchanged. However, the research directions of jurisprudence were still able to address the fundamental issues of the institutions that served as the pillars of the market economy. The so-called *red corners* remained well separated in the individual works, and the results of the science were distinctly up to date. This is true not only of jurisprudence but also, with certain limitations, of legislation and jurisprudence. The 1959 Civil Code was never a socialist code. It was, in fact, a direct follow-up of the development from the 1900 draft of the Hungarian General Civil Code through the 1928 'Private Law Bill' to the 1959 Civil Code. The direction of development has been to raise the level of abstraction and, at the same time, to simplify the rules. The 1959 Civil Code fitted in well with this codification process. It was created as a code that was extremely, and in some cases excessively, streamlined and abstract leaving those rules out that were not deemed useful in practice or could be derived from the logic of existing legislation (and were therefore considered superfluous). It was not a socialist code, as mentioned earlier, buy it was essentially adapted to the socialist system only insofar as the rules relating to social values and property were modelled on the socialist social and economic foundations. After the change of regime, these provisions were removed from the law, and the terms were replaced by terminology reflecting the values of civil society and the market economy. The result was a code of law that was applied

in practice in the context of civil society and the market economy without major problems. Considering that by 1959 the lessons, mistakes, and weaknesses of European codifications could be identified from the judicial practice of European countries and that the Hungarian legislator could bear them in mind, and that the 1977 amendment to the Civil Code, which was intended to reflect the new economic mechanism in private law promulgated in 1968, also reflected the latest developments in European law, Hungary's civil code for decades had been the most modern code in Europe. The lack of foundations due to the socioeconomic system could be addressed by broadening the horizon, which was primarily represented by the scientific method of legal comparison.

The explanation for this phenomenon is that the Hungarian community of lawyers, even within the socialist social order that built communism, carried on the values of private law that were not only in line with civil society and the market economy, but also the knowledge related to it. It was also able to pass on this knowledge to future generations. Thanks to this, Hungarian legal culture was able to return to traditional private law after the change of regime, in the socioeconomic order of civil society and the market economy, as if it had simply picked up a thread that had been dropped. This knowledge, which was not supported by the socioeconomic order and which, according to the social order of the time, might even have been considered superfluous, lived and developed as a subsurface flow. This result is not the consequence of some self-evident law, but of human convictions. It is the work and social responsibility of the members of a community that form the basis for teaching the same responsibility to future generations.

Something similar has been observed by Thomas C Grey as well, who argued as follows:

> *Someday the point may go without saying, but now it remains important to keep repeating that under the robes, federal judges are ordinary members of the comfortable classes – not so different from those on the Senate Judiciary Committee or your state public utilities commission. It does not overcorrect much to think of the Justices of the United States Supreme Court, in the exercise of their majestic power of judicial review, as members of a nine-member committee reviewing the decisions of a dispute-resolution*

bureaucracy, deciding many minor political issues and a few important ones, guided in those decisions by what their committee has said and done before, by their sense of the professional and the popular culture, and, in a relatively few cases, by the words of the Constitution.[2]

2. LAWYERS AS INSTITUTIONALISED COMMUNITY: COURTS AND SOCIAL VALUES

The role of lawyers in modern society is highly institutionalised. Judges and courts have the most important role in determining the content of the law. The interpretation of written legal norms is the task of the courts. Interpretation is in fact the determination of the content of the norm. Legal texts, like religious texts, require interpretative authority. In context of legal texts, courts are vested with this authority, just as in the case of religious texts, the authority is with the priests of the relevant church. If the result of the interpretation of the written norm in the given case is not compatible with the values of the good society, the court may override the general legislative command by applying general clauses. Considering the role of the judge, what could that role be but to enforce the values of the right society by formulating the law applicable to the case?[3] The content of the written norm created by the legislator can be determined by interpretation, but in determining the content, the creation and application of the law are not separated. In fact, the court does not determine the content of the law but constructs it. In private law, the distinction between legislation and the application of law is relative; a judgement delivered by a court does not in fact constitute the law. The court, by defining the content of the law, does. It does this not only by applying abstract norms (concepts) to concrete cases, but also by giving concrete form to norms with an open content (general clauses).

The court's task is to secure the subjective right of the subjects of the law based on what is considered socially correct, and the written law is

2 Grey, 1984, pp. 1–25.

3 Menyhárd, 2019, pp. 69–73.

only partly the source of this right to enforce justice; more precisely, what we today call substantive law – substantive private law – is not the source of the subjective right, but only a means in the hands of the court to enforce justice, that is, the values prevailing in society, by deciding the dispute in question. In the traditional model of thinking, the legislator creates the law, and the court applies it. This thinking presupposes a hierarchy in which the court, as the law enforcer, carries out the legislator's orders. However, this is not true or, at least, is only partially true, with strong limitations. Judicial decisions necessarily imply prioritisation of values. The fundamental values accepted in society (or, more precisely, those considered to be accepted in a proper society) play a different role in different factual situations. The prioritisation of values is based on a balancing of the interests carried by the facts of the case, where the main decision-making principle is that identical cases should be assessed the same way and different ones differently. The written norm only establishes the basic assessment formulated by the legislator, but this can be overridden by the court: either by interpretation of the law or by the application of general clauses (such as the requirements of good faith and fair dealing, prohibition of immoral contracts).

The subjective right of one subject vis-à-vis another cannot be other than that which he or she is entitled to according to the correct social values. This also follows from the fact that the function of the law is to represent social values and priorities among social values as norms of conduct. If it is for the court to determine the existence or otherwise of a subjective right, it follows directly from this that it is for the court to determine the rule of conduct (norm). The difference between the legislator's authority and that of the judiciary is primarily a difference in the degree of legitimacy. The social consensus on the role of the judge plays a central role in this, just as the legitimacy of judicial decisions must be underpinned by a social consensus. This role is directly related to whether the law is seen as a manifestation of power as well as a framework for social functioning that transmits and implements the values of a just society.

If there is a written law (like a civil code), the court is required to anchor its decisions into the legal norm postulated by the will of the legislature in order to ensure the legitimacy of the decision. The judgement

shall also fit into the conceptual and logical framework of legal doctrine, primarily in order to check the consistency of the decision, that is, that the court judges similar cases in the same way and different cases in different ways. This is also the basis for understanding the content of the rule and for the predictability of substantive law. This is why the model of decision-making can be distinguished from the model of supporting the decision. This dichotomy, however, is not a problem, but a natural consequence of the way social evaluation is expressed as a rule of conduct and, thus, the way values are translated into law.

3. THE ROLE OF COURTS AND JUDGES IN PRIVATE LAW

This contribution addresses a methodological issue: what difference a civil code can make in the private law of a legal system. Traditionally, codified legal systems and jurisdictions based on case laws or judge-made laws (either as precedents or not) are contrasted and a line is drawn distinguishing between these two systems. It is argued here that this distinction is much less significant than is usually considered in legal scholarship.

In 1897, Oliver Wendell Holmes, in 'The Path of the Law', mentions the main feature of the legal system as follows:

> *in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.*[4]

4 Holmes, 1897, pp. 457–458.

> *The role of the courts as described by* Holmes *is just the same in legal systems, regardless of it having a written law, either as a civil code or as a largely comprehensive act. This comes from the institutional function of the courts. Courts are institutions for providing justice to the community, and the model for this is rather obvious: the citizen, seeking justice turns to the sovereign, and the sovereign vested with the power of the community provides that justice. Although the sovereign, by its legislative power, can give orders to the courts on how to give that justice, courts have the monopoly of interpreting the text provided by the legislator. This way, the courts establish the content of the legal norm. Arguments are used to find the hypothetical will of the legislator to give the judgement legitimacy. Thus, the main difference between codified and non-codified legal systems is legitimacy: in a system of common law, legitimacy is allocated to the courts, and in written law, it is allocated to the legislative power.*

In describing the system of common law, Benjamin Cardozo in 1921 said the following:

> *What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew.*[5]

The question is whether the existence of a civil code does make a difference or not. In the model of judicial decision-making in private law,

5 Cardozo, 2005, p. 6.

it is task of the court to establish rights and obligations. The source of rights and obligations is the law. While establishing the content of private law, the source of the law must be identified. In this contribution, it is argued that private law cannot be identical to written rules. It is more to be understood as normative materialisation of the values prevailing in the society. It is the task of the court to enforce social values through establishing the content of the law. Thus, the task of the court is the very same as the task of the legislator. In other words, enforcing social values between the parties by providing a social evaluation of the case. Consequently, the relationship between the courts and the legislator cannot be described as a hierarchy based on the subordination of the courts to the supremacy of the legislator. In short, as far as establishing the content of legal norms is concerned, no difference exists between legislative and judicial power. The relationship linking legislation and the judiciary is more a division of the tasks of social engineering based on aspects of efficiency and legitimacy rather than of hierarchy.

4. THE FLEXIBLE SYSTEM OF PRIVATE LAW

The working of private law is best described as the judgement of the court as a process of evaluation. In such a system, the court decides the case based on a limited number of relevant values by counter-weighing them in context of the facts of the case. Finding whether a party has the right against the other party is the result of such evaluation. According to this model, propounded by the Austrian scholar Walter Wilburg, private law shall be seen as a flexible system.[6]

In this flexible system, for example, the binding force of contract depends on counter-weighing four fundamental values: private autonomy, protection of reliance on the other party's conduct and statement, objective evaluation of the intended exchange, and self-reliance.[7] The strength of the value of private autonomy depends on how informed the parties were in the course of contracting, and whether their decision on

6 Wilburg, 1950; Wilburg, 1964, p. 364.

7 Bydlinski, 1999, pp. 9–20.

contracting was voluntary. Private autonomy is one of the fundamental values of a market economy and civil society. Mistake, misrepresentation, and duress, however, are market failures. If the consent was not an informed one or contractual will was not free, the transaction is not a market-based one. In other words, it shall not be enforceable. Further, the manner in which the required information and the required level of voluntariness is to be determined depends on moral base-lines as well.[8] Protection of reliance on statements and conduct of the other party is equal for the parties in cases of equal bargaining power. The parties are, from this point of view, in equal positions in contracting. The basic evaluation is that each party has to take care of his own interest. If, due to a change of circumstances or a change of position of parties the performance becomes so burdensome that it is not reasonable to enforce it anymore, or the changes make the performance burdensome, while the risk of such changes shall not be implied in the contract (hardship), the court may amend the contract or establish that it shall not be enforceable (owing to frustration of purpose, impossibility of performance). Objective evaluation of the intended exchange is less relevant if contracting was informed and voluntary. On the contrary, less voluntary or less informed contracting indicates a lower probability of enforcement of the bargain if an objective imbalance exists between the value of the performances. This is the ground for judicial and legislative control of contracting with standard contract terms too. Responsibility and self-reliance indicate that as a moral value, promises are to be kept.[9] The written law provides for this only the conceptual framework: duress, mistake, hardship, impossibility, usury, immoral contracts, or public policy but normally does it in such a flexible way that it leaves an extremely wide playing field for the courts to weigh the relevant social values and enforce policy for social engineering.

In context of tort law, the general rule of liability is designed on similar lines in different jurisdictions: the tortfeasor shall have the obligation to pay damages if loss was caused unlawfully, and fault implies establishing the burden of the wrongdoer. Thus, the prerequisites of

8 Trebilcock, 1997, 78 et seq.

9 Koch, 2002, pp. 545–548; Bydlinski, 1999, 9 et seq.

liability are damage, unlawful conduct, and a causal link between them and fault. Compensable damage, relevant cause, fault, and unlawfulness are, as abstract legal norms, open to a wide range of judicial interpretations. If the certain loss was compensable, moral evaluations are considered as well: lost profit shall not be compensated if it was illicit, and often fierce debates arise over the issue of whether childbirth can be a basis for claiming damages. The concept of non-pecuniary loss has emerged in court practice, and its limits are to be drawn by courts. Fault is a concept expressing the required standard of conduct. Standards, by the nature, are always meant to be established and assessed by courts on a case-by-case basis. To establish causal link and the relevant cause (legal cause) on the basis of the chain of natural causation (condition sine qua non or a but-for test) is a task left to the courts by nature and by all legal systems as well. In other words, in addressing liability, the task of the legislator shall be restricted to providing specific rules where necessary and some basic evaluation (e.g., that fault is needed in order to establish liability) but no more.

The limits of liability are inherent to tort law, and cases of pure economic loss are a good example of this. The main conceptual feature of pure economic loss is that it is a loss without antecedent harm to the plaintiff's person or property, which is not a consequential loss in the same patrimony in which property has been damaged and which is not the loss of the plaintiff, who as person has been injured.[10] Pure economic loss is 'harm not causally consequent upon an injury to the person (life, body, health, freedom, or other rights to personality) or to property (tangible or intangible assets)'.[11] Compensating pure economic loss is a challenge for all jurisdiction owing to its unclear contours. Normally, courts do not award compensation for such loss in order to keep the floodgates shut against claims that could be unpredictable in terms of the amounts or the number of potential plaintiffs. Helmut Koziol, in considering the compensability of pure economic loss and searching for elements of risk allocation in the flexible system of tort law, identifies the following factors of evaluation: number of potential

10 Bussani, Palmer, 2003, p. 5.

11 Koziol, 2004, 141 et seq.

plaintiffs, existence or absence of additional duty of care, proximity and special relations, dangerousness, dependence, obviousness and actual knowledge, clear contours, negligence and intent, the importance of violated financial interests, and the importance of the defendant's financial interests.[12] In general, judgements of the court in tort cases are the result of counter-weighing these elements and balancing the interests of the tortfeasor and victim in line with the weight of the factors relevant under the given facts of the case. The risk allocation in the judgement is provided accordingly. Thus, the judgement is the outcome of balancing of the interests. The preconditions of liability are called for only in order to anchor the judgement in the civil code and maintain the conceptual framework for liability. However, interpretation of written law does not arise in this context.

The same holds for enforcing inherent rights of persons in the context of private law, where fundamental rights are to be prioritised by the courts. The Lüth-judgement delivered by the German Constitutional Court is a good example of this.[13] The Bundesgerichtshof and the Bundesverfassungsgericht agreed upon the relevant values, that is, human dignity on the one hand and freedom of speech on the other but disagreed upon which one to prioritise. Thus, the mechanism was the very same. The legislator did not play a role at all in establishing the rights and obligations of the parties.

In this evaluation-based flexible model, the content of the norm referred to by the court in the judgement is not provided as a result of interpreting the written legal text but by establishing a social evaluation of the case. The social evaluation is actually provided by the court with the judgement. This mechanism is very similar to the one based on which constitutional courts come to conclusions providing the '*interpretation*'[14] of the constitution after counter-weighing constitutional values and balancing interests.

12 Ibid., pp. 141–161.

13 Judgment of 15 January 1958, 1 BvR 400/51.

14 For more details in Hungarian scholarship, see, e.g., Tóth, 2009.

5. LEGISLATION VS JUDICIAL ADJUDICATION

Of course, the written rule provided by the legislator is not irrelevant in this model either. Its role, however, cannot be described as an order that comes from a higher hierarchical level. The function of written rules provided by the legislator is complex.

Written rules provide the basic evaluation and the set of values that can be relevant in the course of deciding cases. Such an evaluation is provided along with freedom of contract (private autonomy), rules addressing unequal bargaining (gross disparity, unfair standard contract terms, hardship), specific rules in tort law for liability in cases of extra-hazardous activity (consequences of dangerousness and avoiding externalities), opportunity to reduce damages on equitable grounds (considering the relevance of financial situation of the tortfeasor and of the victim), or exclusion clauses that limit the liability for death, personal injury, and health damage unenforceable (ranking the protected interests). The court has to overrule the basic evaluation provided by the legislator only if – and insofar as – another relevant risk allocation element (value) is strong enough to establish such an overruling. On the level of legislation, such an opportunity for overruling written rules is provided with general clauses.

An important difference between legislative and judicial law-making is the level of legitimacy. In democracies, the source of legitimacy of legislative power is the election (which provides a strong legitimacy in a proper election system), while the legitimacy of the courts is the system of choosing and appointing the judges. The legitimacy of judicial power primarily seems to be a question of state organisation. The legitimacy of legislative power comes to the foreground in cases where social evaluation is uncertain or lack of consent is seen among the community of lawyers on the understanding and evaluation of a case. Such an issue

emerged in Hungarian court practice in the context of the concept of exclusive state property[15] or damages claims for childbirth.

One specific group of cases in medical malpractice relates to where a child was born with a genetic or teratological deficiency (e.g., Down syndrome) owing to the failure of the doctor who was negligent in revealing and disclosing the obvious risk to the pregnant mother during pregnancy, thus depriving the parents of the opportunity to decide on abortion otherwise permitted by law in such a situation. In such cases, the parents may have a claim for damages as a compensation of giving life to child with a mental or physical handicap (*'wrongful birth'* claims). It is also a question whether the child could have such a claim in her own name (*'wrongful life'* claims). While wrongful birth claims are normally accepted, considerable arguments follow against allowing wrongful life claims. In Hungary, the Supreme Court established[16] that the child shall not be entitled to claim either pecuniary or non-pecuniary damages from the medical service provider for being born with genetic or teratological deficiencies on the grounds that, during the pregnancy, her mother could not have decided on an abortion because of the incorrect information given to her by her medical service provider if an abortion would have been otherwise permitted in such a case. The scope of the unificatory resolution is to be restricted to wrongful life cases, that is, to cases where the genetic or teratological deficiency is of a natural origin and has developed independently of the activity of the medical service provider or its employees. Thus, claims for damages as compensation for prenatal injuries (compensation for injury suffered as a

15 Legfelsőbb Bíróság [Supreme Court of the Hungarian Republic] judgement no. Pfv. I. 21.446/2008. (BH 2009.175.). The question was whether exclusive state property would mean that objects (real estates or tangible things) belonging to this category do not exist in the eye of private law (French model) or that such ownership is limited in its public functionality (German model). Courts were divided on this issue. Finally, the Supreme Court followed the French model, but legitimacy provided was too weak, and the legislator set forth specific rules by means of Act CXCVI of 2011 on national property.

16 *No Damages for Wrongful Life*, Legfelsőbb Bíróság [Supreme Court of the Hungarian Republic], Jogegységi Határozat [Unificatory Resolution] no. 1/2008, 12 March 2008, Magyar Közlöny [Official Journal of the Hungarian Republic] no. 2008/50 (26 March 2008).

result of intervention of doctors during the pregnancy) are not covered by the resolution. However, the resolution does not affect the claims of parents.

The necessity to pass such a resolution concerning damages for wrongful life arose because, although the Supreme Court followed a settled practice of accepting such claims,[17] this interpretation did not correspond to the practice of some of the high courts in Hungary, which also declared and published their interpretation rejecting such claims brought by the child.[18] Not only the tension created by the diverging practice of high courts but also the obvious deviation from the trends presented by European legal systems[19] led the Supreme Court to revise its practice in such cases. As a result, obviously influenced by court practice of other European jurisdictions and with the clear intention of harmonising Hungarian court practice with the trend of rejecting such claims in most European jurisdictions, the Supreme Court decided to revise its former decisions and adopt a uniform practice of rejecting claims for damages for wrongful life.

The result of passing such a resolution in Hungarian law meant laying down the law covered by the resolution with the effect of an authoritative interpretation that might – perhaps should – have been given by the legislator too. The necessity of passing such a resolution in Hungarian law supports the argument that such sensitive issues may and should be addressed by the legislator even if this does seem incompatible with the flexible system of tort law. The process of making a law, in a democratic society, designed for channelling and harmonising different social values and interests – in such sensitive areas – seems to be a more appropriate way of fixing such principles than using court decisions.

The question of whether giving life to a child regardless of the child being healthy or not could be the basis for damages claims may impose a

17 Legfelsőbb Bíróság [Supreme Court of the Hungarian Republic] judgement no. Pfv. III. 22.193/2004. (EBH 2005.1206) reported by Menyhárd, 2006, pp. 9–11.

18 Opinion of the Civil Law College to the Regional Court of Pécs no. 1/2006. (VI. 2.), Opinion of the Csongrád County Court, referred to in the explanatory notes to the Unificatory Resolution of the Supreme Court.

19 Explicitly referred to in the explanatory notes to the Unificatory Resolution of the Supreme Court. See also Koch, p. 608.

heavy moral burden on judges. It may not be appropriate to impose such a burden on judges, or courts may not have a strong enough legitimacy for deciding such issues. In France, the court practice was reversed by legislative acts[20] on the same issue; in Hungary, the same revision was performed by the courts. It made no difference whether the step was taken using legislative or judicial measures.

In Hungary, as it happened in other Middle-East European countries, a majority of the citizens had become overburdened due to bank loans denominated in Swiss Francs. These consumer loans became a huge social problem threatening mass insolvency of households. Many claims were brought to the courts arguing that shifting the risk of changes in currency rates to the debtor consumer was unfair and unenforceable. In order to avoid the flood of claims, the legislator enacted a law that declares such clauses explicitly unenforceable.[21] The courts could have come to the same conclusion with the same result by applying the rules providing unenforceability of unfair standard terms in the Civil Code.[22] However, it seemed more efficient to provide a legislative solution instead of deciding thousands of claims in court procedure. The only difference between the legislative step and the solution provided with judicial adjudication was the efficiency.

Underlying these examples can be observed the fact that the difference between judiciary and legislative measures cannot be found in hierarchy but in legitimacy and efficiency. In other words, there is no difference between judicial and legislative power.

20 Loi no. 2002/303 du 4 mars 2002 ('Loi Perruche').

21 2014. évi LXXVII. törvény az egyes fogyasztói kölcsönszerződések devizanemének módosulásával és a kamatszabályokkal kapcsolatos kérdések rendezéséről [Act LXXVII of 2014 for the amendment of certain consumer loan contracts relating to their currency and interest].

22 2013. évi V. törvény a Polgári Törvénykönyvről [Act V of 2013 on the Hungarian Civil Code] § 6:103.

6. LAW VS REGULATION: THE LEGAL NATURE OF A CIVIL CODE

The law is not a heterogenous system. The origins of content of norms are also different. Originally, civil codes like the BGB or the Code Civil had multiple functions, and this was reflected by the heterogeneity of the norms that emerged too. Primarily, norms were created in order to make the norms established by the judgements of courts transparent. Further, norms were also meant to make diverging court practice into unified law: diverging law is incompatible with the idea of sovereignty. Furthermore, beyond such attempts, rules were incorporated for transmitting direct policy (e.g., the *lésion* in Code Civil).

In order to assess the nature of written law, one needs to distinguish between law and regulation. Although both are mostly termed as 'law' in common legal parlance, addressing law as regulation is misleading. Law is a system of norms transmitting social values and implementing social evaluation. Law is a self-coordinating, autonomous order of the society that emerged in a bottom-up-approach and is created and established by courts through addressing social conflicts by judgements. Courts establish policy. Constitutional law and civil law are '*law*' in this sense. Regulation, on the contrary, is a direct order of the legislator prescribing clear-cut rules for social coordination. Regulation does not necessarily reflect values. It implements direct policy of the regulatory power and assumes that law is the order of the sovereign instead of taking it as an autonomous order of the society. Regulation follows an up-to-bottom approach and is based on the prediction of the legislator.

While, in the context of regulation, the written norm is a tool of the legislator for communicating the direct order to the members of the society, in the context of law, the written norm is an abstract formulation of the pillars of the autonomous order derived from judgements of courts.

This distinction also determines the role of the court: in the context of regulation, the court simply applies the order of the sovereign while in context of law, the court is the part of the system of creating law.

In the realm of law, the court and the legislator create law together. Whether and how far evaluation of cases is left to the courts (i.e., the playing field provided for them) may depend on factors like legitimacy or efficiency. Whether the legislator or the court has stronger legitimacy in the society depends on the legal and social culture and on the system of selection and appointment of judges. Efficiency depends on the number of potential cases: the more individual the potential number of cases, the less efficient is the legislative solution.

7. IMPORTANCE OF STRUCTURE AND COHERENCE AND THE ROLE OF POLICY IN PRIVATE LAW

In addressing a legal problem in private law, we assume that the judgement is the outcome of closed lines of arguments. These arguments point to one and only one correct conclusion. Thus, the outcome of the case is not arbitrable but is determined by principles. Sometimes, the solution is a policy judgement. Such judgements are to be handed down when there are no answers derived from the existing legal provisions or when there is an answer, but the result is unacceptable from the point of view of social evaluation. Policy judgements are also expected to be consistent as they are to comply with the requirement; in other words, similar cases are to be decided in similar ways, while different cases are to be decided differently. Explanation of policy issues and the conclusions on such grounds, however, are also expected to fit into the logical structure of private law. This would imply that the judgement is to be seen as the only logical consequence of premises that are relevant in the given case.

This internal logic resembles the system of mathematics. There is a consent about axioms (premises) that we never doubt. They make the conceptual basis of private law. The basic structural concepts like person, ownership, contract, liability, etc. provide the domain for the validity of the conclusions. Arguments, presenting the line of conclusions, are to be drawn by the logic on the basis of the concepts (axioms) as they are related to the social relationship, that is, the facts of the case. If we change the concepts, then arguments and conclusions based on them

are not valid anymore. Syllogisms, on the basis of axioms and premises, establish a conclusion that is inevitable. This is the scientific element in the art of law, because the correctness or failure of syllogisms can verify or falsify the consequences, which is the basic criterion of science. The methodology, used in order to obtain conclusions in individual cases with the application of the law, is based on consent of the interpretive community of lawyers in the society.[23]

The underlying difference between the way of thinking of mathematics and law is that, in legal adjudication, the logical consequences can and shall be assessed, and if necessary, overruled in the light of social values relevant in the given case. Such overruling, however, should also fit into the logical structure. General clauses open the line of arguments for social evaluation. Concepts, premises, and syllogisms create a system that forms the basis of the common understanding of lawyers, that is, the interpretive community of society entrusted with the task of social engineering. Judgements or legislative measures that do not comply with this system, undermine the common understanding and are to be deemed detrimental.

As mentioned earlier, private law can be considered a flexible system,[24] where judgements are the result of balancing relevant values and interests. This is how law actually works as a mechanism of transmitting and implementing social values.[25] As such valuations of cases cannot be structured to build a system on: arguments anchored in legal provisions, as well as standards and doctrines, are required to do that. In the absence of such a structure, professional discourse and common understanding of the arguments would be impossible. If there is no such common understanding, one can neither establish the scope of conclusions nor predict the consequences to other cases.

In private law, the content of norms is to be established by the judges via interpretation and application of standards, doctrines, and general clauses. These are the tools of opening the line of arguments for social evaluation. Insofar as enforcing policy is part of the methodology, the

23 Popper, 2002, pp. 17, 27.
24 Wilburg, 1950; Wilburg, 1964, p. 364.
25 Habermas, 1998, p. 255.

system remains coherent. The consequence of the role of courts is that the content of private law actually consists of statements predicting the outcome of hypothetical cases.[26] The logical structure steered by considering policy issues and social evaluation results in a specific method that brings law close to the nature of *art*.[27]

8. AD HOC LEGISLATION AND THE STRUCTURE OF PRIVATE LAW

One of the consequences of *ad hoc* legislation is that the system of written norms of private law becomes a mixture of broadly defined rules, formulated on a high level of abstraction (law) and norms defined in a concrete and specific way and of a regulatory nature. Both legislation and judicial adjudication may be seen as an intervention of state in the relationships of individuals. Especially, in context of contract law, this intervention limits the freedom of contract, mostly in order to protect public interest or correct market failures. From the model of private law follows the fact that regulation, as a legislative intervention, is necessary if and insofar as judicial adjudication is not a proper tool for the intervention of the state in private law relationships. *Ad hoc* legislation is mostly regulation rather than law in the sense described above.

It is a historical experience in the development of private law that the more detailed and specific the applicable norms are, the less compatible the result of the application is with the social evaluation of the specific case. This is the consequence of narrowing the room of judicial adjudication. The structural impact of *ad hoc* statutory intervention can be positive if it can increase legal certainty or make social evaluation clearer. Its impact on this level depends on how coherent it is with the structure of the existing law, including court practice. A regulatory approach is, generally, not the standard methodology of private law. In order to distinguish cases and to provide justice for parties in individual cases, enough room must be allowed for judicial adjudication.

26 Menyhárd, 2019, pp. 69–82.

27 See the reference to *ars* in the maxim 'ius est ars boni et aequi' by Ulpian.

One of the problems with *ad hoc* legislation is that, in most of the cases, it narrows the playing field. The other is that mostly the consequence of such legislation increases the uncertainty in the flexible system of private law, because it does not clarify whether cases that do not fall under the scope of the specific regulation but are similar to that are to be distinguished and decided differently or are to be decided the same way.

Consumer protection is a good example of how specific legislation can make the contours of the structure of private law uncertain. The goal and the underlying policy of consumer protection are clear. The division of private law on the basis of subjective qualification, however, raises the question of whether contracts of small- and middle-sized enterprises, individual entrepreneurs in particular, with big companies are to be assessed the same way as consumer contracts or are to be assessed differently. On some points, in order to avoid inconsistency, the rules that are relevant in consumer protection legislation could be shifted to the general level. This was the solution followed by the Hungarian legislation when implementing the general concept of unfair contract terms in standard form contracts, making such contract terms unenforceable not only in consumer contracts but in contracts in general. It is, however, unclear, to what extent unfairness (non-compliance with the requirement of good faith and fair dealing) is to be assessed differently based on the bargaining power of the parties. In other words, it is not possible to predict if a contract term declared unenforceable in a consumer contract would be – and if yes, under what circumstances – unenforceable in a *'B to B'* contract as well if the parties had vastly different bargaining powers. In such cases, the policy arguments underlying consumer protection may suggest the same outcome while policy arguments underlying commercial law may suggest a different conclusion.

9. CONCLUSION

A distinction is to be made between law and regulation. Private law is more law than regulation and shall be assessed accordingly. The main difference between codified and non-codified legal systems is

legitimacy: in a system of common law, legitimacy is allocated to the courts; in written law, it is allocated to the legislative power. Whether the legislator or the court has stronger legitimacy in society depends on the legal and social culture and on the system of selection and appointment of judges. Efficiency depends on the number of potential cases: the more individual the potential number of cases are, the less efficient is the legislative solution. The Civil Code has different functions. Such functions, however, are not about providing the content of law, because the content of private law emerges in a bottom-up-way, even in a codified system. This is the consequence of how civil codes are designed, never independent of court practice. Further, the role of lawyers as an interpretive community shall be considered while assessing the content of law. The Civil Code (1959) in the history of codification of private law is a good example of this. The law transmits social values. In the flexible system of private law, the civil code provides the basic evaluation, which can be overruled by the courts via interpretation of written norms, deciding *'hard cases'*, application (concretisation) of general clauses, or establishing priorities amongst competing values. The main functions of a civil code are to determine methodology and structure of argumentation, provide a legal framework for social and economic phenomena through basic evaluation (e.g., invalidity on the grounds of excessive benefit) of implementing direct policy (e.g., rules on consumer protection, or limiting liability to foreseeable losses); the civil code may also confirm and reflect trends in court practice (e.g., strict liability for breach of contract, protection of inherent rights of persons) and may also overrule such trends (like revising non-pecuniary damages during codification).

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