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Kinga Pétervári

REGULATORY RISK MANAGEMENT VERSUS STATE INTERVENTION

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INTRODUCTION

> *"It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reason for making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society."*
>
> Sir William Blackstone[1]

Risk is everywhere. The history of risk management may be matched to the history of law. Risk management, on the other hand, may trigger further risks somewhere else where risk was either endurable, or where there was no problem before. For example, ameliorating the fertility of the soil destroys the ecosystem of the surrounding environment which neccessitates further risks management, taking a pill against inflammation may cause kidney problems which again further necessitates risks management, building safer homes exhausts natural resources available only limitedly, etc. Risk management therefore is a *risk trade off*.[2]

---

1 BLACKSTONE, W. *Commentaries on the Laws of England in Four Books*. Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes. (Philadelphia: J.B. Lippincott Co., 1893). Vol. 1 - Books I & II. Chapter: Chapter I.: Of Property, In General.

2 See SUNSTEIN, C. Foreword. p.vii. In: GRAHAM, J. D. & WIENER, J. B. eds. *Risk versus Risk. Tradeoffs in Protecting Health and the Environment*. Harvard University Press. 1995.

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The following analysis of the laws tackles with this sort of trade-offs in certain areas of the law. Risk management has complex objectives nowadays, it does not aim at cancelling risk whatsoever, it strives to lower risks by either reducing the probability or the seriousness of a possible risk meanwhile calculating also the possible drawbacks of an invasive deed. Modern risk managament, or even the optimization of risk managament, however, presumes state intervention. But what kind of, or what degree of state intervention may be worthwile?[3]

The government in liberal democracy is accountable for its promises but is the state liable too?[4] What does accountability mean in a party-state system[5] who and how is responsible – or liable – for the promises?[6] These promises may be regarded as the bargaining of the political process no matter what these promises are about: housing for eveyone, universal health care, free education or the first generation basic rights – freedom of religion, free speech, free assembly and voting. But is there a ranking in these promises? If yes, on what grounds are these rankings justifiable: economic, moral or legal[7] or even ideological?[8] Illiberal democracies would value highly the paternalistic providences if at least formal elections are inevitable[9] as *opposed to* the first generation basic rights. Liberal democracies on the other hand *may* value

[3] Chapter 3.1.
[4] Chapter 3.2.
[5] Surely, two distinct notions may be used in the academic discourse to describe cc. the time period of cc. 1949–1989: *socialism* or *communism* – not only in Hungary but in Central-East-Europe (CEE). While both are contradictory in their applications, I choose to refer to this era as socialism rather than communism. For if I wrote communism, then those related ideas would be discarded which were already available in the 18.th century, such as the concept of communa, etc. If however I talk about socialism, then I would disregard the differences between the contemporary – European and Latin-American – socialism and the socialism back then in CEE. Yet, none of the level of development of communism was ever achieved – since there was not enough goods to make it possible – after World War II in CEE, so a description of that period as communism would be misleading. Plausibly, the notion of party-state (*pártállam*) would be the best suited word, so I use socialism and party-state interchangeably.
[6] Chapter 1.1. and 1.2.
[7] Chapter 2.1.
[8] Chapter 1.2.
[9] Chapter 2.1. and 3.1.

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welfare state *beside* freedom of conscience, free speech, freedom of assembly and voting rights. These discussions naturally involve the reasoning of fairness and equity. But how to negotiate, who can take part in it, who bears the risks of the ultimate decisions – beneficiaries or taxpayers.[10]

Modern constitutional democracies focus their regulatory power in optimizing these risks. Good laws are, which allocate liability on those who can defend from the occurrence of the risk the most efficiently. Efficient risk allocations may mean, among others, the lessening of the transaction costs for market participants, at the expense of taxpayers, or deterring participants from doing something, at the expense of the consumers.[11] But what kind of risks should be managed by regulations, what kind of infrastructure should be upheld by public monies?[12]

While answers to these risk management questions concern politicians and academics alike, the Internet sweeps in stealthily and create global incompetence.[13] The Internet creates two parallel but intertwined worlds: the on-line and the off-line world. And by enabling ones to connect and use others' databases and softwares, the internet generates global incompetence. Yet, the emphasis here is on the data or information of others. For how to trace back the bad signals, the misinformation or misunderstanding or even hacking, in the interconnections of the various databases and softwares used throughout the internet causing defect in the services. Certainly, these softwares and databases have in-build protecting protocols but so far, we live with the recognition that there is no bug free software. Can disclaimer be applied in case a map becomes unduly un-updated, or a traffic code sign becomes obsolete? And could this be the case in the internet and especially in the case of driverless cars, for example? These sort of incompetence

[10] Chapter 2.1., 2.2., 3.1. and 3.2.
[11] Chapter 4.1.
[12] Chapter 3.2.
[13] Chapter 4.2.

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requires special liabilities. Thus by blurring the boarderlines between businesses and private actions, thanks to the internet, the legal formula of the objective (strict) liability presumably extends to more areas of transactions too.[14] The data provider or perhaps a database owner need not be an expert as the US case of the mushroom picking laymen shows (Winter v. G.P. Putnam's Sons, 1991). In this court case the plaintiffs wanted to pick and eat wild mushrooms, so they had bought a mushroom encyclopedia. But after having the meal they got so sick that they needed a liver transplantation. The reasoning included the problem of liability of publishing houses for reprinting others' books. The argument of the court may be rational and acceptable, even if it is hard to digest that an encyclopedia need not be correct. But what sort of data become obsolete? And when? And finally, what is more important: to have more information or to have checked information? Checked by whom?[15]

This book deals with this regulatory risk management from both a sociological and a law and economics analytical point of view in certain areas of laws. Risks are discerned in an abstract way, such as negotiations within the legislations, drafting laws by certain elite groups, dealing with non-efficient laws, applying different categories of liability due to the technological challenges, or even the withering away of the copyright law as should be now in academic circles. The book is structured around the following topics and problems:

PART 1. *discusses risks management from a historical point of view. With the benefit of hindsight, it reveals the problems of the unmanaged risks regarding property questions in the time of party-state system (or socialism) in Hungary.*

[14] Chapter 4.3.
[15] Chapter 4.2.

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Chapter 1.1. explores whether without actual property titles there can be no, or only limited market relations, as stated in the neo-libertarian theory. The model of the New Economic Mechanism of '68 in the socialist Hungary is a case study for a law and economics analysis as to whether and how the guidance of the price due to the lack of the free market, may be simulated without clear ownership rights. According to the findings it is important to emphasise, that even without these prerequisites certain very limited room for maneouvers and risks could be allocated rationally but they definitely remain inefficient, wasteful and highly bureaucratic. However, the investigations were definitely a taboo. If there was no property right, but there was a market, even a quasi-market, then capital and its yield were not conceivable, or interpretable concepts. The corporate assets value was necessarily fictitious without the classic property right. If, however, the value of the property right was not real, then it was not possible to calculate how much the return on capital was, that is, the market only existed as a commodity market and not as a capital market or a market for means of production. As a result, the indefinability of property rights in direct steering economies (or command economics) makes it impossible to examine efficiency. How could the performance and value of a factory be measured if there was no market for its products. How to check whether production was efficient for a given company if there were no real data about the company.

Under such a regime risks are not calculable, not rationally manageable, so as interests cannot be defined, the costs may not be limited and must be born by those who cannot avoid it.

Chapter 1.2. analyses the arguments that were used in the parliamentary plenary session debates in Hungary in 1987 when introducing the personal income tax. The point of this analysis is that even in a non-pluralist parliament there can be rational debates, provided that there exists a well devel-

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oped intellectual environment surrounding it. As an example this chapter interprets the reasoning in the national assembly towards the end of the socialist regime in Hungary. The analysis of this special parliamentary debate back then is legitimate, because the less influential a national assembly is, the more informative its debate may be. So, owe to its fairly irrelevant, non-influential, therefore, more informative dispute, the reasonings may be studied. As a consequence of that, it could be drawn both that i) a multiparty system in itself does not guarantee a meaningful debate on public issues if a dominant party squeezes out the chances of such a structured discussions, so that no rational comments may be added, and ii) vice versa, even in a one-party regime a parliament could have deliberation — also because it is weightless. Under these circumstances limited risk management may be possible, however, it cannot be calculated rationally or foreseeably. The costs and the burden of risk is allocated again on those who cannot avoid it and not at all on the beneficiaries.

PART 2. *studies risks of* ***quasi legal*** *bargaining. These bargainings are carried out with the legislation therefore its real nature is also political.*

Chapter 2.1. is about a unique, out-drawn, henceforth unsolved legal bargaining between small churches and the parliament in Hungary. Is the majority principle based on firm enough grounds, so that to differentiate among religions? Why should the ruling majority be required to take into consideration religious groups that are marginal, or that they dislike, on an equality basis while distributing public funds? This analysis suggests that the conceptual critique of the new deliberately differentiating, illiberal Church law of 2011 is, that it allows unhinged exclusive and arbitrary decision-making for the legislation. Although majority principle should be the essence of democracy, its unconstrained version creates such anomalies in

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the democratic institutions which could well be survived but would alter the system into a non-democratic regime. First generation fundamental rights are therefore to be protected, not by the democratic institutions, even in a democracy, but by the rule of law (liberalism). This chapter tackles with the arguments justified by ideological reasonings as opposed to legal ones, yet the burden of costs of the risks are difficult to assess. At first glance it seems the prevailing of the majority principle is merituous and the costs are born by those who were not valued by the majority. Nonetheless, the denial of protection of freedom of conscience based on ideological arguments may represent an oppression rather than question of conscientiousness from a historical point of view.

Chapter 2.2. addresses the question of legislation. Even though legal experts do not create legislation, it is appropriate to question the role that the different legal professionals—attorneys (advocate lawyers), judges, prosecutors, law professors, law clerks in the government administration, etc.—play in drafting law. Assuming that creating the law requires real power, one should be able to discern which group of professionals has the most influence on this process. Depending on the cultural values of a community, the expectation that people play by the rules is more or less strong, with the effect, that an individual who has intentionally violated the rules may or may not feel compelled to justify, or apologize for their behavior. It is also well established that playing by the rules is best accomplished if one has the power to create and modify these rules, perhaps even retroactively. Laws and regulations are no different from this, with one exception: their binding nature—which, of course, implies enforcement—means that creating laws requires genuine power. It is more likely than not, that academics are the best equipped legal professional group, because they have the opportunity to disguise their own group interests by pretending that

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their sociological identity is a representative of objectivity, using scientific methodology, and legal rationality. Here the risks lie in the not easily calculable, non-transparent influence of the interests of the legal elite.

***PART 3**. examines the risks of law in conscientiousness. First, the laymen concepts of failed long-term loan agreements are scrutinized, whether laymen perceive foreseeability as the laws do and whether they calculate risks accordingly. Whether the laymen concept of the careing society reflects the reality of the "welfare state" as it exists in the 21st century in Hungary. Secondly, the promise of the state is under scrutiny, i.e. how risky it is to rely on a promise made by the state.*

Chapter 3.1. is a follow up of a survey among students analysing their attitude toward non-performance of longterm loan agreements. The new survey, using the same old questionnaire to be answered by the same statistically homogeneous student group at the university, provides a possible interpretation of the changes of the financial-legal culture — if any — in Hungary. The first study was conducted between 2013–2016 while its follow-up in 2024. Interestingly enough, the overall changes in the attitude in 2024 show a deeper general solidarity towards those in need. Yet, at a closer look, when it comes to the actual point of helping, this solidarity seems to be more or less at the same level as it was 8 years ago. However, one thing that really seems to be different, is an even stronger distrust in the state (the laws, the system) and more possible reliance on family and friends.

As for a conclusion of the surveys, one could say that the respondents act very logically and calculate very rationally. They do so, even if they mostly have no basic knowledge of the issues above but a hunch. The problem is that acting irresponsibly is rational because it often pays off better than

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acting by the rules. To be able to embrace the disadvantages of the market economy and the distrust in the state one needs to be able to understand the institutions. This survey, as it stands now also in 2024, still demonstrates exactly the lack of such an insight. What is left nowadays is the capitalistic objectives (an avidity to be wealthy) without the capitalistic virtues (the autonomous, financially independent, deliberating citizen).

Chapter 3.2. enquires the legal nature of the budget law, wether the state can be held liable for its promises, if it does that through the state budget. As to the legal conception of the state promise, as argued below, there are two types of public promise: i) the public law promise and ii) the private law promise. Again, there are two types of private promise: ii/a) the public promise based on a contract and ii/b) the public promise based on a specific budgetary law. Budgetary law *strictu sensu* provides for an accountibility of the government mainly politically. So the government shall be answerable for its public law promises (elections, programs) only politically. The answer is, therefore, that a state promise can only be chargeable via the liability provisions of the Civil Code if it is made by the state as a civil law entity.

These provisions cannot be applied to other state promises, even if they are clearly promises and commitments, and even if there is coverage for it in the budget, which in the given case is not a condition for a civil law obligation, according to the Hungarian Civil Code, for example. So, oddly enough, if the state committed itself in a private law contract, it has to perform even if there is not budget allocated for that. Political processes are, *preater iuram*, least restricted by law.

This shows the risk in the legislative process and the importance of bargaining power. And not only the bargaining power but the power to allocate the costs of managing these risks.

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PART 4. *deals with the changes in risk management or risk allocations due to the new "disruptive" technologies.*

Chapter 4.1. is a provocative essay against copyright in scientific investigations and for freedom of research, and free access made possible by the Internet. The Internet — at least web2.0 — has created an opportunity for freedom of expression that essentially questions the current version of copyright. Anyone can publish anything, orally, such as via Youtube, or in writing, in a blog, except for researchers who, being condemned to mandatory publication, can only officially access the public through academic journals, or book (publishers). Academic publishers in this regard play the role of gatekeepers in that they bring some kind of control, an extra professional aspect to the discourse in exchange for remuneration. The following analysis discusses the role of copyright holders, publishers and authors, focusing exclusively on the world of scientific works, in an era in which research is almost entirely financed by public funds, and in which freedom of research means not only the researcher's subjective right to publish his work creating thereby monopoly over his work, but also that the researcher has access to the work of others. The final conclusion of this investigation is that, the emphasis is once again shifting from the author to the work in the scientific world, just like in the old pre-Guttenbergian days. That means that only the moral rights pertinent to the copyright would remain in contrast to the monopolistic property rights of the author. So a researcher, as a private individual, can continue to be as an important player in the free market and a disseminator of 'popular' science.

Chapter 4.2. discusses the expansion of incompetence owe to the Internet. Internet has a special new feature. Internet connects. Internet creates two parallel but intertwined worlds: the on-line and the off-line world. And by

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enabling ones to connect and use others' databases and softwares, the internet generates global incompetence. If softwares are defect on the internet, it has physical consequences in the real world. With its connecting nature, internet inserts a third assisting party into all on-line transactions. The role of the traditional actors is undistinguishable and extra risks triggered by the internet are to be dealt with. The question of competence and liability faces challenges. One uses others' softwares or databases via the internet not necessarily knowing its defects, so defects may grow into others' softwares, like bugs via deep learning.

Chapter 4.3. looks into the regulatory and applicatory challenges related to new technologies. Inspite of the radical changes brought about by the new disruptive technologies, the law, as it is today, still operates with analogies and fictions. And as long as there are analogies, and precedents, or fictions available, the regulatory and applicatory challenges can be overcome. Since there are no homologous lawsuits, legislators and judges need to interpret previous cases. Beside interpretation courts and legislators employ analogies too.

In the following various legal tools are to be investigated which may be relevant in the time of AI, robotics, self-driving cars and machine-learning. These possible legal institutions are: i) legal personality, ii) vicarious liability and iii) culpability as opposed to strict – objective – liability. As all these legal techniques were familiar in the course of the legal history, none of these are new. Yet, the conceptions or the construction of these legal tools may change. But even the most radical recommendation of awarding a computer a legal personality, or constitutional fundamental rights, can found its roots in the past, like legal personality, and criminal liability to organs created by the law, such as the companies, or the standing for the trees, which provides now legal protection to the environment.

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And last but not least here applies the universal *caveat* too, that inspite of all these counselling all faults and mistakes are mine.

Budapest, 1. September, 2024.

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PART 1.

UNMANAGED RISKS IN LEGISLATION

A HISTORICAL APPROACH — THE PROBLEMS OF PROPERTY

When political objectives are set in laws they may generate proper risks in search of adequate place in the legal regime and/or when applied. The often too vague re-interpretations but too strict use of old legal institutions and so the ineffective allocation of the resources may be countervailing risks triggered by the ideological struggle for equality in wealth in the party-state system. Part 1. analysis the question how socialism tackles with these risks tradeoffs in Hungary between 1949–1987.

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Chapter 1.1.

Risks of unclear titles — in search of ownership rights in the indirect steering of the economy

Without proper property titles there can be no or only limited market relations, so goes the neo-libertarian theory. The model of the New Economic Mechanism of '68 in the socialist Hungary is a case study for a law and economics analysis as to whether and how the guidance of the price due to the lack of the free market, may be simulated without clear ownership rights. According to the findings it is important to emphasise that even without these prerequisites certain very limited room for maneouvers and risks could be allocated rationally but they definitely remain inefficient, wasteful and highly bureaucratic. However, the investigations were definitely a taboo. If there was no property right, but there was a market, even a quasi-market, then capital and its yield were not conceivable or interpretable concepts. The corporate assets value was necessarily fictitious without the classic property right. If, however, the value of the property right was not real, then it was not possible to calculate how much the return on capital was, that is, the market only existed as a commodity market and not as a capital market or a market for means of production. As a result, the indefinability of property rights in direct steering economies (or command economics) makes it impossible to examine efficiency. How could the performance and value of a factory be measured if there was no market for its products. How to check whether production was efficient for a given company if there were no real data about the company.

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1.1.1. Nature of Interventionalism

The New Economic Mechanism (*"új gazdasági mechanizmus"*)[16] entered into force in 1968 in Hungary.[17] The contemporary discussion of this new economic mechanism and its models, which differed from country to country, took place through several channels and in significantly different discourses.

After Khrushchev's de-Stalinization and the failure of the Kosygin reforms[18] the communist Party in the Soviet Union ordered the "political economy of advanced socialism", in order to facilitate the transition from advanced socialism to communism in the Soviet Union by 1968. Although this initiation has clearly aborted, as it was established at a conference in 1974,[19] still it served as a prototype for the Hungarian reform of '68.

After the introduction of the New Economic Mechanism, a couple of years later, in 1974, the Central Committee of the Hungarian Socialist La-

[16] "In the new economic mechanism, the state does not generally impose binding planning indicators on companies. Companies develop their plans themselves on the basis of information from central authorities and their knowledge of the market. The state, as the owner, regulates the operation of enterprises, but the way and form of regulation changes. The state does not generally ensure the achievement of plan objectives through direct instructions, but through economic and macroeconomic instruments, appropriate credit policies, regulation of the use of net corporate income and other means." see the Congressional Report of the Central Committee of the Hungarian Socialist Labour Party (*MSZMP KB*) of 1966. In: *Az MSZMP IX. kongresszusának anyaga*. Budapest, Kossuth Könyvkiadó. 1966. pp.41–42.

[17] This new economic model — broadly speaking, from an economic-poltitical point of view — tried to ease the scarcity problems of the socialist economy which was due to the lack of market (real costs and prices), and so to the rigid, minisculous nature of the obligatory planning regime. Its consequence, the indirect steering of the economy (as opposed to the direct steering of the economy) meant that the operative decisions of the Socialist Labour Party leaders about how to guide the socialist economy ceased to be used directly instructing the leaders of the state owned entreprises. Instead of those ad hoc commands there were regulations. So contrary to the previous direct hand-gear the bureaucracy drafted special decrees, which were still very interventionist but at least were pre-written, therefore rationally calculable, even if not at all reliable.

[18] SURI, J. The Promise and Failure of 'Developed Socialism': The Soviet 'Thaw' and the Cruciable of the Prague Spring, 1964–1972. *Contemporary European History,* Vol. 15, No. 2. May, 2006. pp.133–158. p.139.

[19] See, the journal of the Soviet Academy of Sciences: IVANCSENKO, V.: Statements ("*Közlemények*"), *Közgazdasági sorozat,* 1973/5. (cited by: SERÉNY, P.: A gazdasági mechanizmus kérdései a Szovjetunióban. In: *Társadalmi Szemle*. pp.56–63. p.58.).

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bour Party (*MSZMP KB*) stood already patently against these reforms in favor of political intervention by stating that "politics - sometimes — if there are disturbances — even have to enter into ‘purely’ economic processes to intervene".[20]

The question became the nature of the intervention.

And so took place the discussion grappling with the emancipation of the law in certain academic circles too in Hungary in the socialist regime. Tamás Sárközy’s book about the indirect steering of the economy[21] was about one of the starting points and most important issue in the socialist law and economic literature of the late 1960’s, 1970’s and the 1980’s until the fall of the Soviet Union. Sárközy’s concept was that there has been no general concept of property rights. In this way, he actually legitimized the planned steering reforms of '68 that seemed to be at a standstill then[22]. Owe to this theory one could argue that the different economic steering models need not — and/or should not — conform to each other, so specifically the strict, rigorous Soviet model of planned economy of the 1930s or the Hungarian regulations of the 1950s do not — or should not — comply with

[20] "Not everyone understands the elementary Marxist truth that economics and politics are in a complex interaction with each other, and that in this relationship politics has priority.... The priority of politics today means that our political goals, the interests of strengthening workers’ power, and the development of our socialist values determine our economic activity. There are those who believe that our economic plans already fully include these aspects, and by referring to economic necessity and judging the problems from a ‚pure’ economic perspective, they would in fact want to make the economy independent of politics. This is incorrect." (BISZKU, B. Pártunk politikájának időszerű kérdéseiről. In: *Társadalmi Szemle*. 1974/3. pp.3–12.

[21] See SÁRKÖZY, T. *Indirekt gazdaságirányítás-vállalati árutermelés és a tulajdonjog.* Akadémiai Kiadó, Budapest. 1973.

[22] According to the resolution of March 1974 of the Central Committee of the Hungarian Socialist Labour Party (*MSZMP KB*) "In economic policy, the party continues the planned, proportionate development of the national economy ... strengthens and further improves the proven method of managing economic life". The professional journals are full of implied criticism against this statement: see BEREND, T. I. *A magyar gazdasági reform útja (1953–1988).* Közgazdasági és Jogi Könyvkiadó, Budapest. 1974. 29–41.p, MUTH, M. et al, Az operatív vezetés csődje. In: *Valóság*. 1973/9. pp.95–99. Az 1968-as reformok utáni szabály dömpingekről, utasításokról, rendeletekről, szabályokról About the dumping of the regulations, instructions and decrees after the 1968 reforms see in particular: SZABÓ, B. 1974./11 Gazdaságirányítás, szabályozás, érdekek. In: *Valóság*. pp.1–9. or VÉKÁS, L. A gazdaságirányítás és a jog. In: *Társadalmi Szemle*. 1974/7. p.21.

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the new Hungarian indirectly steered economic model of the 1960s. *"... the development of socialist forms of property rights (thus the state property right functioning as the basic form of property rights) is basically determined by the planned steering mechanism"*[23] he writes. His main goal was to develop a coherent hypothesis of the order of socialist property rights (social ownership)[24] in Hungary after the reforms of '68, through the specific examination of the types of socialist planned economies reformed and compared to that of the Hungarian model.[25]

The general view was that Tamás Sárközy represented the economic approach in law. However, in reality the opposite was true. He tried to emancipate the law from its predetermination of the economic necessities.[26] There was a vivid debate on the connection between the economy and the law that time and many excellent civil lawyers were involved.[27] So Sárközy has just legalised the economy when he wrote: *"In the planned market instructions ... there is every possibility that ... all constitutional forms of legal sources of economic steering will turn into a real legal regulation, a general rule of conduct*", or the "*indirect and direct economic regulators in steering the economy are not enforced automatically, but through legal measures"*.[28] However, in contrast to other civilists, such as Világhy and Eörsi, he did not envisage state ownership control within civil law, but in an external organizational control, in a state economic control now governed by law.
In this way, Sárközy actually anticipated the concerns expressed by reform economists many times later,[29] according to which economic reform would

[23] SÁRKÖZY, T. *Indirekt gazdaságirányítás – vállalati árutermelés és a tulajdonjog*. Akadémiai Kiadó, Budapest. 1973. p.143.
[24] i.e. "*Társadalmi tulajdon*".
[25] A good example of this is the title of the chapter "The Alternatives of Ownership Rights in the Development of Socialist Planned Economies" SÁRKÖZY, T. *Indirekt ...* p.235.
[26] From the – naive, voluntary – application of the Marxist theory which conceptualises the notion and function of the law as predetermined by the economic necessities.
[27] e.g. Eörsi, Világhy, Nizsalovszky, Sárándi.
[28] SÁRKÖZY, T. Indirekt ,p.235.
[29] See in particular, BEREND, T. I. *A magyar gazdasági reform útja (1953–1988*). Közgazdasá-

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necessarily remain insufficient without political reforms. And indeed, the pluralization of property followed from the market processes, from the pluralization of property the pluralization of ownership rights, and from that the pluralization of law, so ultimately the political pluralism.

1.1.2. Why ownership and state owned entreprise

Ownership is the primary right to property (thing – *res* in Roman Law), from which other rights arise.[30] This primacy means on the one hand, that all further legal relations related to the thing presuppose this right of ownership, and on the other hand that this right of ownership is a basic structural element of legal regulation, a point of reference.[31]

The socialist concept of social property, which was based on the social ownership of the means of production, was most generally realised through corporate production. In parallel, of course, the group property of cooperatives, the personal property and, to a small extent, the private property of small industrialists also existed as constitutionally accepted forms of property. But the most characteristic was the state enterprise model. In contrast to the original socialist or war-communist conception of (property) law, which mostly reflected the property rights problems of a huge factory, and later perhaps of a one single factory in one country, it was increasingly a fact of experience that commodity and money relations were not short transitory phenomena. One of the most interesting experience of the era, was to see the trickling-down of the classical property right view into socialist law.[32]

"The development of the active role of market relations, which the

gi és Jogi Könyvkiadó, Budapest, 1988. and BAUER, T. The Hungarian Alternative to Soviet Type Planning. *Journal of Comparative Economics*. Vol. 7. 1983. No. 3. pp. 304–316.

30 ÉÖRSI, Gy. Állami tulajdon – állami vállalat. *ELTE Acta, Különlenyomat*. 1970.

31 SAJÓ, A. Az állami szocialista tulajdon és az állami vállalat. Budapest, ELTE ÁJK Polgári Jogi Tanszék, Polgári jogi tanulmányok I. 1970. pp. 303– 403.

32 SÁRKÖZY, T. *Indirekt gazdaságirányítás - vállalati árutermelés és a tulajdonjog*. Akadémiai Kiadó, Budapest. 1973. p.90.

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new economic policy strives for, therefore necessitates the separation of the principles of the state, the state bureaucracy and the state property rights, as well as the distinction between the state bureaucracy measures and the ownership rights tools of economic policy."[33] However, for this to be achieved, it was necessary to prove in the social sciences the extent to which the difference between the two "market" relationships could be demonstrated: the "market" created by the new economic mechanism and the market of the existing capitalism.

Thus, in the contemporary "reform" discourse, the legal professional debate revolved around the reconciliation of political-ideological intervention with quasi-market conditions.[34]

The importance of property rights was shown by the fact that the first property rights debate in Soviet jurisprudence had emerged in the 1920s, almost parallel to the introduction of the then-new economic mechanism (*NEP*) instituted by Lenin. The *NEP*, even if to a limited extent, meant the return of the market to the Soviet-Russian economy, and the original socialist concept of property was also forced to face this. It was then that Venediktov's theory[35] of unified and indivisible state property rights gained ground in the socialist legal literature: "Own interest, own power". The unified and indivisible basic principle of Venediktov's concept of property, which had been refined in the meantime,[36] logically followed from the rejection of the civil law theory of property rights. If the *triad of property rights* (possession-use-disposal) was rejected, then it was not a problem in

[33] VILÁGHY, M. *Gazdasági reform és polgári jog*. Különlenyomat. 1968. p.47.

[34] See EÖRSI, Gy. Állami tulajdon – állami vállalat. *ELTE Acta, Különlenyomat.* 1970., or: NIZSALOVSZKY, E. Az állami vállalatok forgalmi viszonyainak új alakulásához. Különlenyomat. Állam- és Jogtudomány. 1968/4. pp.517–543. or VILÁGHY, M. *Gazdasági reform és polgári jog*. Különlenyomat. 1968.

[35] KIRALFY, A. K. R. Review of Attempts to Formulate a Legal Theory of Public Ownership in the USSR (Two Recent Approaches), by VENEDIKTOV, A. V. and KARASS, A. V. *Soviet Studies* 8, no. 3. 1957. pp.236–53. p.237. http://www.jstor.org/stable/148641

[36] i.e. the theory of the double collective, or the issue of the legal subjects.

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the first place if the owner — society or the state — did not possess and only indirectly had the right to dispose. But not only was the concept of property rights "simplified" into a sheer tool, but the law itself also became a "simple" communicator of the will.

There was no doubt that in the concept of civil law ownership, as applied in market conditions, the possession does not, cannot, have any special significance, albeit it accepts the notion of the triad of property rights. Moreover, this was precisely what gave the essence of the capitalist market economy, that the use associated with the right of ownership practically multiplies and that even disposal was not the exclusive possibility of the owner (while the owner's responsibility is even limited).[37] The classic example of this is the shareholders of joint-stock companies, who, at least from an economic point of view, in the end are not sure whether they are owners at all, or rather creditors. This relativization, emptying, multiplication or unbearable lightness[38] of property rights is increasingly challenging the classical interpretation of property rights and the traditional functioning of capitalism.

The sociology of law actually showed a kind of division in the quality of property rights, or a kind of enforcement rather, in socialist legal regimes. In socialism, quasi-disposition could practically go to extremes, but this right of disposition did not include the possibility of actual legal disposition, i.e. alienation. The company could not be sold in this way, for

[37] This is what Sárközy calls the relativization of property, see SÁRKÖZY, T. *Indirekt...* 1973. p.41.

[38] One glaring relative new example in the early 2000s was the trading of a branch of Enron's energy trading business, specifically the trading of rights to future energy supplies, the value of which varied according to future energy demand. In other words, the value of the company depended on people's perception of whether or not it would rain the next day. These large companies often crossed the boundary between the instantaneous value of a company estimated with unfounded optimism and the instantaneous value of a company estimated with deliberate overvaluation or undue persuasion. And apart from the fact that the latter is a crime while the former is not, this also raises the conceptual issue of property. see: HUDSON, A. The unbearable lightness of property. In: HUDSON et al eds. *New Perspectives on Property Law – Obligation and Restitution*. 2003.

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example, since that would have been the change of regime itself. To use one example, the employee of the company could without further ado bring certain advantages to others for personal interest, that is, he could "put aside" newer, better quality, nicer products for his doctor, who in return provided him with more favourable care.

Other discarded elements of the civil (market) concept of property rights were also reborn. Thus, for example, the concept of the *legal entity*[39], which had lost its significance, started reappearing. Legal personality (juridicial person or legal entity) was originally a legal institution suitable for the legal representation of *separate* assets and thus *separate* interests with the dissolution of community property. It appeared when in civil law (i.e. in the market) legal relationships (i.e. trades) require autonomous persons with legal capacity and capacity to act equally recognizable before the law of court. There could be no separate interest in socialism. The state represented all the workers in the strict planned direct steering economic regime, and therefore there was no separation, no group or individual interest, we could not speak of separate legal entity. But this was not a problem, since if one company existed in one country, then there was no need to have another legal entity in this sense, which should also have had vested rights of the legal person or the legal capacity under civil law. There was no (goods to) trade.

But how can one *motivate* in planned, directly steered economy, what does profit mean and who is entitled to the profit? Who decides on alienating/selling/buying, who controls it, and how? In order to define the economic tools specifically available in an indirectly steered economy, it was inevitable to examine the (legal) relationship of the state, state-owned enterprises and other state owned economic organizations. The fundamental question was, therefore, whether the state owned the state enterprise,

[39] See e.g.: SÁRKÖZY, T. Die »juristische Person« in Den Sozialistischen Ländern. *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht* 47, no. 1. 1983. pp.1–21. http://www.jstor.org/stable/27876739.

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whether the state enterprise was a state body, or whether the state enterprise itself was also the owner, as well as whether the citizens or the workers (managers and employees) were the owners.

The jurisprudential investigation took place in two directions: towards a complex ownership investigation and towards a state bureaucracy investigation.[40]

The necessarily different answers to the ownership analysis can be grouped based on the following criteria. First, the writings before and after 1974 differ *chronologically*. Models that did not deny the existence of corporate independence and separate corporate interests were emerging more and more. Secondly, a kind of generational difference could also be discovered between the authors, i.e. the new generation[41] strived for a more characteristic separation of the private life and the state sphere, thereby enhancing the view of property rights. Thus, for example, since the state company could not be an owner in the sense of civil law, because it did not comply with the legal dogma of civil law, it could not therefore be under civil law, but only under the regulatory area of state law. Thirdly, as a result of this, a highly professional dispute was developing on the distinctions of the various branches of the law. Fourthly, the widely varying methodological approaches also created different views.[42]

However, the investigations were definitely a taboo. If there was no property right, but there was a market, even a quasi-market, then capital and its yield were not conceivable or interpretable concepts. The corporate assets value was necessarily fictitious without the classic property right. If,

[40] Besides the above already mentioned scholars, examples of the latter in particular are FICZERE, L. A vállalat és az államigazgatási szervek viszonya. In: *Állam- és Jogtudomány*, 1968/4. p.603., and BERÉNYI, S. Az államigazgatási tevékenység néhány elméleti kérdése a gazdaságirányítás új rendszerében. In: *Állam és Igazgatás*, 1969/8. p.681.

[41] In addition to Sárközy, for example, Sajó.

[42] e.g. deductive approach– Eörsi, Sárándi; legal specification distinctions – Világhy, Nizsalovszky; sociology of law approach – Sajó; pragmatic approach – Sárközy, etc.

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however, the value of the property right was not real, then it was not possible to calculate how much the return on capital was, that is, the market only exists as a commodity market and not as a capital market or a market for means of production. As a result, the indefinability of property rights in (in)direct steering economies makes it impossible to examine efficiency. How could the performance and value of a factory be measured if there was no market for its products. How to check whether production was efficient for a given company if there were no real data about the company.

There were many witty or less witty, or more complicated or bureaucratic attempts to create the possibility of legal transactions despite the legal ambiguity and lack of regulation of property law.[43] But this did not solve the above dilemma of what happens if there was no specific owner in the legal and economic sense. Of course, the scholars of civil law unanimously recognized that property is a broader concept than ownership. Still, in the absence of clear legal titles – in addition to the already over-regulated system – the narrower interpretation of property rights prevails in socialist law as opposed to a broader concept of economic or sociological property in a market regime.

Instead of looking for the owner himself, therefore, the search for the "how to dispose" of the property should provide an answer to the ambiguous property rights problems.

1.1.3. The essence of ownership is not who owns, but how

Thus property cannot be analyzed only from the point of view of acquisition, because that would only capture the static moment that characterizes the already acquired power,[44] and thus it would be a tautology. In other

[43] e.g. Sárközy›s distinction between material property and legal property which recognized the dynamic economic approach as opposed to the static view of property rights, which in a way maybe eased the problems of legal transactions.

[44] SAJÓ, A. Az állami szocialista tulajdon és az állami vállalat. Budapest, *ELTE ÁJK Polgári Jogi Tanszék, Polgári jogi tanulmányok I.* 1970. pp.303–403. p.310.

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words, it is not important who is the owner, i.e. who possesses the thing, but how they possess it.

In the new economic mechanism, in the absence of specific plan indicators, in the much freer contractual relations of state companies — in the quasi-market —, the fiction necessarily appeared. The fiction appeared to recognise the company as owner. *"A third party cannot regard the state company as an owner, because it really is an owner in his view, but because he knows that the real owner's intention is to behave towards him as an owner."*[45]

The planned indirect market regulation model seemingly necessarily revitalised the denial of the theory of an *a priori* property rights, the freedom of legal transactions. It revived especially the question of liability, which had already been present in contemporary capitalist criticisms (Marx, Lassalle, Tönnies) too. As a result of this, the way in which property rights were disposed of could become an object under possible scrutiny.

[45] NIZSALOVSZKY, E. Az állami vállalatok forgalmi viszonyainak új alakulásához. Különlenyomat. *Állam- és Jogtudomány*. 1968/4. pp.517–543. p.523.

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Chapter 1.2.
The Risks of Delayed Legislation

This chapter analyses the arguments that were used in the parliamentary plenary session debates in Hungary in 1987 when introducing the personal income tax. The point of this analysis is that even in a non-pluralist parliament there can be rational debates, provided that there exists a well developed intellectual environment surrounding it. As an example this chapter interprets the reasoning in the national assembly towards the end of the socialist regime in Hungary. The analysis of this special parliamentary debate back then is legitimate, because the less influential a national assembly is the more informative its debate may be. So, owe to its fairly irrelevant, non-influential therefore, more informative dispute, the reasonings may be studied. As a consequence of that it could be drawn both that i) a multiparty system in itself does not guarantee a meaningful debate on public issues if a dominant party squeezes out the chances of such a structured discussions, so that no rational comments may be added, and ii) vice versa, even in a one-party regime a parliament could have deliberation — also because it is weightless.

1.2.1. Introduction

2019 in Davos a young Dutch Historian, Rutger Bregman, talked vehemently about taxation as the core element of problems of today's world[46]. He challenged the rich, the important and the influencing elite and urged the legislations of the developed countries to think about raising taxes. He also claimed that earlier in the 1950's taxes were much higher than now, after Reagen and Thatcher. Most recently Donald Trump and Liz Truss introduced huge tax cuts for the rich, to enhance the operation of "trickle

[46] Rutger BREGMAN tells Davos to talk about tax: ‚This is not rocket science' online Guardian News on YouTube. 30 January, 2019. Available at: https://www.youtube.com/watch?v=P8ijiLqfXP0 [Accessed 10 July 2024].

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down economy" as they put it, but instead, it only created enormous gaps in the public budget.[47]

Yet, this seems to be one side of the coin. On the other side there are some statistics to consider about the personal income tax (US data, 2020): "The average income tax rate in 2020 was 13.6 percent. The top 1 percent of taxpayers paid a 25.99 percent average rate, more than eight times higher than the 3.1 percent average rate paid by the bottom half of taxpayers. The top 1 percent's income share rose from 20.1 percent in 2019 to 22.2 percent in 2020 and its share of federal income taxes paid rose from 38.8 percent to 42.3 percent".[48]

So the question arises: what arguments can there be in favour of personal income tax if at one end of the argument we can start from the premise that taxation is at best theft or appropriation and at the other end we bump into the postulate of distributive justice. Skipping over the historical beginnings and the legal philosophical-theoretical issues of tax, here and now the historical moment of the Hungarian socialism will be discussed when the personal income tax was introduced into the economy in 1987, a few years before the change of regime. The arguments are based exclusively on what was said in the plenary session.

Surely, the reasonings of the representatives in the Hungarian parliament could be questioned for Hungary was a socialist country back then. How-

[47] For the USA, see, e.g.: CORDEN, M. and GARNAUT, R. The Economic Consequences of Mr Trump. *Australian Economic Review,* 51. pp.411–417. 2018. https://doi.org/10.1111/1467-8462.12295, for the UK, see, e.g.: DORLING, D. The "mini-budget" will make the UK the most unequal country in Europe. *BMJ*;378:o2318 . 2022., or YUXUAN, Y. L. Britain's economic crisis in Mini-budget perspective *Academic Journal of Management and Social Sciences.* Vol. 2, No. 1. 2023.

[48] The U.S. Already Soaks the Rich. In 2021 the richest 1% paid 45.8% of income taxes, up from 33.2% in 2001. online. *Wall Street Journal*, March 29, 2024 at 5:50 pm ET, Available at: https://www.wsj.com/articles/u-s-income-taxes-top-1-percent-irs-tax-foundation-joe-biden-fair-share-3394355b [Accessed 10 July 2024]. citing the Summary of the Latest Federal Income Tax Data, 2023 Update. online. Available at: https://taxfoundation.org/data/all/federal/summary-latest-federal-income-tax-data-2023-update/ [Accessed 10 July 2024]. *Tax Foundation* (by Erica York), January 26, 2023.

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ever the proposition is, that the argumentation in the national assembly could be analysed as a real parliamentary debate and may be justified as such, because as the general pragmatic result shows: the less influential a national assembly is the more informative its debates may be. Meaning that the Hungarian Parliament back then did not have much impact on the decisions made *therefore* could carry out a decent debate.

1.2.2. The Hungarian economic and legal situation in the 1980s

Pursuant to the then existing socialist vision, the Constitution of 1949, as amended in 1972, mirrored the wish list of the sole party in the People's Republic of Hungary and so, on paper, Hungary used to be — as the other satellite countries in Central and Eastern Europe — a state equipped with one of the best constitutions guaranteeing all sorts of rights for all even providing for regular elections. Yet, the constitution was not self-executing, i.e. it could not be cited in court claims and the regular elections proved futile in a one-party system. The Central Committe and the Political Committe of the Hungarian Socialist Workers Party (*Magyar Szocialista Munkáspárt, MSZMP*) in particular, had the power over the Parliament which seldom had sessions anyway.

However, after the revolution of 1956, the Party's General Secretary, János Kádár, in order to obtain the support for compromise, committed the system to a relatively better standard of living. The economic policy objective of prioritising household consumption gave state owned enterprises a looser though constrained room for manoeuvre as opposed to the bureacracy[49] and the party leaders. This inevitably paved the way to a less strictly directly steered socialist economy. The *new economic mechanism* of 1968 provided for a so called *indirect steered economy* which was based

[49] BERÉNYI, S. Az államigazgatási tevékenység néhány elméleti kérdése a gazdaságirányítás új rendszerében. *Állam és Igazgatás*. 8, 1969, p. 681. or FICZERE, L., A vállalat és az államigazgatási szervek viszonya. *Állam- és Jogtudomány*. Vol. 11, No. 4, 1968 pp.592–613.

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on regulatory means[50] rather than direct involvement from the part of the Party leaders[51]. After all, if the state-owned companies did not operate directly according to the instructions of the party as reflected in The Five Year Plan[52] any more, then in their decisions they develope separate interests.[53] These interests were represented by the newly theoreticized concept of legal personality[54] and the question of ownership[55] in a vastly nationalized economic model. Civil liability for breaching of contracts began to take on particular importance, as opposed to administrative or criminal liability for not fulfilling the regulations of the Plan.[56] The operative management of the state owned companies needed to heed on the (world)market information (too) since risks like prices and quality expected by "consumers", had to be calculated.

The political elite's feud on the possible room for manouvre ended in less stricter or more stricter regulatory phases all over the 1970's-80's, depending on the actual constellations of the fractions within the bureacracy and the Party.[57]

Truly, the economy became more and more involved in international

[50] VÉKÁS, L. A gazdaságirányítás és a jog. *Társadalmi Szemle*. 7, 1974. p.21. or SZABÓ, B. Gazdaságirányítás, szabályozás, érdekek. *Valóság*. 11, 1974, pp.1–9.

[51] A KB kongresszusi beszámolója. In: *Az MSZMP IX. kongresszusának anyaga*. Budapest: Kossuth Könyvkiadó. 1966.

[52] VILÁGHY, M. *Gazdasági reform és polgári jog*. Budapest: Tankönyvkiadó, Különlenyomat, 1968. pp.45–69. or BAUER, T. The Hungarian Alternative to Soviet Type Planning. *Journal of Comparative Economics.* Vol. 7, No. 3, 1983. pp.304–316.

[53] NIZSALOVSZKY, E. Az állami vállalatok forgalmi viszonyainak új alakulásához. *Különlenyomat. Állam- és Jogtudomány.* 4, 1968. pp.517–543. or SÁRKÖZY, T. *Indirekt gazdaságirányítás-vállalati árutermelés és a tulajdonjog*. Budapest: Akadémiai Kiadó. 1973.

[54] SAJÓ, A. Az állami szocialista tulajdon és az állami vállalat. (*Polgári jogi tanulmányok I*) Budapest: ELTE ÁJK Polgári Jogi Tanszék, 1973. p. 303–403 or EÖRSI, Gy. Állami tulajdon – állami vállalat. *ELTE Acta*. XII, pp.39–67. Különlenyomat. 1970.

[55] VÉKÁS, L. A társadalmi tulajdon és tulajdonjog új elméleti megközelítése. *Jogtudományi Közlöny*. 8, 1974. p.457

[56] MUTH, M. – NYESTE, A. – PALATITZ, A. –VANICSEK, Z. Az operatív vezetés csődje. *Valóság*. 9, 1973. pp.95–99.

[57] e.g.: 1968–1972: liberalization, 1975–1979: restructuralization, 1984: new laws on state owned enterprises with operative management (1984. évi 22. tvr.).

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trade[58] also to satisfy the needs of the households via (western) imports due to the scarcity of the domestic economy mostly because the structurally rigid state owned enterprises could not adjust to the inflationary outer environment caused by the oil crises of the 1970s. Public debts soared in Hungary. By the 1980s, in the absence of a real owner, or real ownership, the productivity and export capacity of Hungarian companies had fallen far short of what was desirable, while the conditions of wasteful household consumption increased (western) imports. And so, in this ever-reformed socialist economic system, the same problem arose as in the West, namely that "taxation, spending and borrowing [were] necessary to balance the sometimes conflicting goals of economic growth, equity and stability, especially in times of economic crisis, and [thus] reformed [the] fiscal systems".[59]

Paradoxically enough, if Hungary wanted to maintain its socialist regime, to be eligible for more trade (GATT) and loans it had to adapt more to the modern Western economic model, especially after having joined to the Bretton Woods system (IMF and WorldBank) in 1982. It needed transparency in pricing, comparability in accounting, taxation and property titles. In the socialist economy, for example, the population did not pay any tax since all contributions were borne by the producers. The clear goal of creating higher productivity, required by the the new economic mechanism since 1968, had been doomed to fail, partly because of the ambiguous socialist ownership system and because of the lack of financial and capital markets.[60] The discussions whether the economic reform could be successful and effective without the creation of a capital market, the creation of an interest in wealth or in a long-term profit led to several reports urging at least experiments of fake stimulations in the soviet type centralized only state

[58] Hungary joined GATT in 1973, after Poland and Romania in 1967 and 1971, respectively.

[59] HUERLIMANN, G. - BROWNLIE, W.E. - IDE, E. eds. *Worlds of Taxation. The Political Economy of Taxing, Spending, and Redistribution Since 1945*, Palgrave McMillan. 2018. p.3.

[60] VÉRTESY, L. Magyar Banktörténet a reformkortól az államosításig. *Jogtörténeti Szemle*. 4. 2007. pp.58–68. p.68.

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bank.[61] Albeit certain ease was achieved in the financial transactions of the state owned enterprises, the reforms basically left the soviet type centralized bank sector intact.[62] In the late 1980's the consumption of the households was inevitably to be constrained, for the stranded Hungarian economy required finally unsustainable subsidies, and so the state budget became heavily indebted towards Western private banks (e.g. CIB, Creditanstalt) beside the IMF and WorldBank loans. These were the economic reasons why the ruling elite — rather the administration of the Ministry of Finance and the Planning Bureau than the Party leaders, of course — grappled with the idea of introducing the personal income tax along with the value added tax. The tax reform depended most likely also upon the firm recommendation of these international institutions.[63] So instead of a necessarily overall mandatory restrain on consumption, the objective was to let people face with the consequences of their spending.

1.2.3. The debate

The uniqueness of this debate in a reformed socialist economic regime is first, that it was conducted in the Parliament.[64] So it was open, public. It took 4 long days. So there really was a deliberation. Between Wednesday and Saturday, on the 16 –19th of September, 1987 allegedly all those MPs talked who wanted to. Secondly, this was to be a reaction — if not ex-

[61] The two-tier banking regime was introduced in 1987 only, see: Decision No 3062/1986 of the Council of Ministers on the further development of the banking system. This decision contained the tasks related to the establishment of a two-tier banking system. The central bank and commercial banking areas of the Hungarian National Bank were functionally separated in preparation for the banking reform. see also: URSPRUNG, J., A kétszintű bankrendszer fejlődése Magyarországon 1987–1995. *Manuscript*. online. 1996. p.193. Available at: http://ursprungjanos.hu/bankrendszer.pdf [Accessed 10 July 2024].

[62] KORNAI, J. *Indulatos Röpirat*. HVG Rt. 1989. p.136.

[63] BOD, P. Á. Bankrendszerünk fejlődésének kritikus szakaszai és a rendszerváltozási folyamat (A visszatekintés relevanciája). *Gazdaság és Pénzügy* 3. 2017. pp.228–242. p.233.

[64] The whole debate can be read in the Minutes of the National Assembly, therefore the following citations are all from the *Országgyűlési napló* 1985. II. kötet: 1987. szeptember 16. – 1988. november 26. Ülésnapok 1985-17-29 pp.1207–2888.

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pressly a discussion — to the Ministers' Council's (as the Government was called) action plan based on the position paper of the Central Committee of the Hungarian Socialist Workers Party. The opening speech was delivered by Károly Grósz, President of the Ministers' Council, then János Kádár, the Party General Secretary, was given the floor way before the exposé of the Minister of Finances, Péter Medgyessy (on the following day). Thirdly, the brand new introduction of the personal income tax was accompanied with the brand new introduction of the value added tax too. In fact, for decades these taxes have been framed as a disadvantage of capitalism compared to socialism. However, the parallel introduction of the two taxes was essential if the objective of curbing consumption and increasing productivity was to be achieved, i.e. to impose on the population the consequences of their consumption choices and to ease the tax burden borne by companies. The debate was therefore part of a major tax reform in socialism.

1.2.4. The categories of arguments

The most striking revelation of the debate was that the arguments were nowhere new. Yet what was new was the economic-legal environment, the socialist economic model, where these arguments were uttered. In fact, even the classic idea that "there is no tax without representation" has emerged and enjoyed strong support. Interestingly enough, during the debates the stealthily developed diversity of the social sratification took an obvious shape. Owe to the reforms in the indirect steering economy, the social strata became more like in the West; instead of the doctrinaire Leninist model of *peasant, working and intellectual classes*, there were (in their pre-natal form) economic elites consisting of the operating management of large state owned companies and enterprises, the leaders of co-operatives, the skilled workers, the reborn self-made-men, the entrepreneurs and the representatives of the administrative interests (local and central), etc. The principle

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of no taxation without representation was very vivid among the reform socialists (later turned out to be the ancestors of the liberals, e.g. János Fekete, Rezső Nyers) as opposed to the advocacy of the social problems of the families by many representatives (later turned out to be the ancestors of the Christian Democrats or the Small Holders).

The arguments may be put in two major sets: a) the procedural arguments and b) the material ones.

As far as *procedural arguments* were concerned, there were three important issues: (i) first, the *delay*, which marked the notorious inconsistency — the ceaseless infighting — of the political elite in implementing reforms that the party had sometimes approved and sometimes rejected decades earlier, and thus provoked a continuous hectic reaction; (ii) secondly, the question of the *accountability* of the few, mainly Grósz and Kádár; and (iii) thirdly, the old claim of *no taxation without representation*, i.e. the right to have a say, which characterised quite a few speeches to varying degrees (claiming an independent central bank, central bank answerable to parliament, say in budgetary planning, etc.).

The *material arguments* included social inequality, social injustice, cohesion within the system, principles of redistribution (e.g. expansion of the burden of taxes v. expansion of the tax base), differences among the generations (tax exemptions, tax credits, tax allowances, taxation of pensions), effectiveness of the tax itself, its progressivity and its characteristic of withholding productivity.

All in all, however, what made the debate yet another day of a very socialist regime was the *almost* total lack of critical voices or the lack of concern of a possible failing of enforcement and a complete lack of summoning of the political elite for its responsibility (with the only exception of Zoltán Király) due to the political cultural environment.

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1.2.5. The procedural arguments

Delay and effectivity

The *delay* — in the sense of hesitation — was mentioned in almost all of the speeches. No wonder, since the specialty of the Hungarian "opposition" was that all debates over the regime failures were covered by an economic discourse. The amelioration of the general living standard had always been a legitimate goal of the political elite, the Party, after 1956. As a result, the contractual rights of the state owned companies as a starting point and then their — questionable but needed — property rights along with the autonomous decision-making power of their management became hot topics[65] not only in the professional and academic discussions but certainly within a bigger environment around the socialist managers and the intelligentia, at best.

The turning of the direct steering regime into an indirect one had a snowball effect. If the Party gives less and less strict direct instructions about the desired end productions and the Planning Bureau must act via regulations (even strict regulations are more general and can be and must be calculated) then it automatically gives the management of the state owned companies power — not necessarily right — to bargain for better (or worse) results. This power needed proper framework, thus the legal institution of contractual relationship pure evolved dragging along civil liability for breaching the contract; instead of the criminal one for breaking the laws.[66]

Yet, this kind of evolution certainly triggered the concerns that the socialist *political* regime was to be untouchable and this fear was sometimes almost palpable in the debates just as much as the exact opposite, the fears

[65] PÉTERVÁRI, K. A tulajdonjog fogalmának problémái az indirekt gazdaságirányításban. *Magyar Tudomány*. 9. 2017. pp.1078–1083.

[66] The Party "guidelines" eventually were protected as if they were laws, and the 5-year-plans were enacted too.

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from the mixture of two things: the sneaking in of capitalism with the withering away of the socialist security.

These tensions and power games led to the enormous state budget deficit as Prime Minister Károly Grósz explained in his speech in the Parliament:

> *"It is now clear that neither an unwarranted acceleration of growth nor a restrictive policy without structural renewal of the economy can lead to results, but only to a new aggravation of the imbalances. We know that in 1985–1986 the economy's incomes fell, while domestic consumption expanded contrary to our intentions, with imports again exceeding exports. The import surplus did not serve technical development and competitiveness adequately, and the outdated production structure was preserved. The key economic policy objective of extending intensive development to all elements of the production process has not been achieved. The efficiency of the economy has hardly improved. Productivity has increased only slightly, product quality has not changed significantly and specific material and energy consumption remains high. Corporate autonomy has not really developed and central steering has not improved as much as it should. This means that, over the last two years combined, national income has fallen by 1 per cent, while domestic consumption has increased by the same amount. Our gross debt in convertible currency has increased to $16 billion. Net debt reached $9.3 billion, double our one-year total exports in USD currency terms. Net interest expense in 1986 exceeded $800 million. As a result of the broad measures taken in the meantime, the adverse trends slowed down somewhat in*

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> *1987, but the improvement is less than necessary. However, in a worsening situation, household incomes and purchases rose faster than planned. Corporate incomes also exceeded expectations, while the government budget deficit increased. All this points to contradictions in economic trends."*
> (Károly Grósz, PM, p. 1209.) (16th of September, 1987. 17th session of the Parliament)[67]

Stunningly sincere phrases. Were they so because the PM was not accountable or because the PM had thought it would work? The stimulation of production — by introducing the VAT — and the taxation of consumption was needed instead of the original taxation of the production and stimulation of consumption. The state owned corporations had difficulty to invest their gains (profits) because the employment costs were to be covered by the taxed net income of the state owned companies and were not considered as costs as in capitalist accounting.[68] Import exceeded export and the import "surplus did not serve technical development and competitiveness adequately, and the outdated production structure was preserved" (Grósz's speech). In order to stop the high budget deficit the government had to control not only the public spending but the individual consumption too which had been clearly heavily subsidized.

However, there were only a few criticism about the effectivity of the bill:

> *During the debates, I got the feeling that the people in the financial administration think that the budget deficit resulting from the loss of the abolished taxes can only be made up from the personal income tax. I know that the government*

[67] The whole debate in: *Országgyűlési napló*, 1985. II. kötet: 1987. szeptember 16. – 1988. november 26. Ülésnapok 1985-17-29 pp.1207–2888.
[68] ÉKES, I. Adózás 1988–1996. *Statisztikai elemzések*. 1. 1997. pp.45–57.

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> *also intends to cut other public expenditure. But the revenue generated seems to be intended to be used elsewhere. It is precisely because of the controversy surrounding this tax reform that it has changed the most over the past several months of negotiation and preparation. Even on the day before the parliament, it underwent profound changes. In addition to housing subsidy benefits, it introduced the possibility of a deduction of HUF 12,000 per family with three or more children per year from the tax base. I consider both of these benefits to be important and I agree with them. The frequent changes, however, confirm my conviction that all the implications and consequences of personal income tax are not sufficiently thought through because of the short time available.* (Dr. Miklós Horváth Fejér County, p.1502.)

Accountability

The *accountability* issue in the arguments was very rare. This was discussed by Károly Grósz, then Prime Minister, János Kádár, then Party General Secratary and by Zoltán Király, then actually elected representative of the so called opposition allowed to be elected due to the Gorbatchow era.[69]

This part of the discussion makes the whole debate very socialist again. What kind of "political" accountability could there be in a *pro forma* elections where the who-abouts of the to be representatives were decided by the Party — according to a kind of representative statistical pattern — but

[69] Gorbatchev declared a new doctrine in January, 1987 at the plenum of the Party Congress in Moscow. In contrast to Brezhnev's politics Gorbatchev "justified his policy of 'perestroika' (restructuring) and 'glasnost' (openness) as the only solution to the Soviet Union". See e.g.: GIDADHUBLI, R. G. Perestroika and Glasnost. *Economic and Political Weekly* 22, no. 18 (1987): 784–87. http://www.jstor.org/stable/4376986. In his view there was emphasis on direct democracy, allowing the satellite countries (i.e. the Central-East-European countries) more room for maneouvre.

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selected carefully from among the loyalists Party members (miners, clerks, housewives, artists, etc). So no wonder that the ‘actual decision makers’ — the Party General Secretary and the Head of the Ministers’ Council — dared to refer to this question alone. What is more, Kádár proved to be self-critic even. As he put it:

> *"If only nationalisation had not been over achieved.... ...responsibility — it’s not the real question, but what we’ve learned from it..."* (János Kádár General Secretary of the Workers Party, p. 1234.) (16th of September, 1987. 17th session of the Parliament)

There was a general consensus among the representatives in the debate that Hungary had been stranded and something needed to be done. And this was certainly approved by the Party and the Ministers’ Council. Kádár made the following argument:

> *"So I just want to say a few words. The main function of VAT is to stimulate production, not consumption. According to human observation, I think that neither a community, a collective, nor an individual, if they have money, should be encouraged to consume, because they do not need huge incentives for consumption, but they do need incentives for production. And the purpose of this tax system is also to encourage production.*
>
> *Given some of the debate, it has to be said that these taxes are not very well liked in general and the personal income tax in particular has not been very well liked by the people, although I have never in the history of mankind seen anyone anywhere say hurrah for the personal income tax, whatever the social system.*

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> *But I would like to say — and there is nothing strange about this — that if these two tax proposals were not on the agenda of Parliament now, in this session, from the beginning of January next year at the latest, public and private consumption would definitely have to be limited without any new tax system."* (16th of September, 1987. 17th session of the Parliament)

The question of resigning did not occur at all. Only Zoltán Király made a point on this but also immediately acknowledging its actual impossibility (p.1401.). He criticized the lack of information as well. Not much less enthusiastically argued among others Rezső Nyers (p.1294.) and Iván Boldizsár (p.1452) too, that more information and further discussions of the estimates of the state budget would be necessary in the future. Nyers also advocated for the parliamentary controll over the central bank (which was in fact just about to be "*the* central bank" after having introduced the two-tier banking system p.1294.).

The question of accountability of the MPs was an even a less often occuring topic:

> *"Increased responsibility. [....] I read, and I start to get stressed, because I'm under pressure. And to be angry! Have we not had legislative responsibility before? Has someone or something exempted me from this? Certainly not our electorate. How could we have made a wrong decision? Not in the public interest? That may be. Because we can make decisions on the basis of information that we have or that we are given and not the information we need. So we make a wrong decision, as in the case of the VIIth five-year plan law, for example, we now know, that it was based on incorrect,*

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insufficiently credible, sometimes even untrue information." (Gusztáv Lékai, Hajdú-Bihar County, p. 1484.)

No taxation without representation

The debate over the personal income tax proved later on well how dangerous it could become for the Party if they expand the involvement of MPs into politics.

The National Assembly should be involved here in the negotiation of a major foreign commitment. And in the preliminary decision in case of serious financial implications. The government should publish the country's balance of payments and debt annually. Also the amount of debt service so that we can measure this ratio. Not to satisfy curiosity. I believe that the development of our democracy, even in its current state, allows and enables this.

This should be considered by the government. But it is now almost commonplace, in parliamentary committee discussions, in academic meetings, in party meetings, that alternatives are needed, and it is also commonplace that you cannot expect the same organisation to come up with another alternative (see the Planning Bureau).

I propose that the National Assembly should increase the role and weight of the Hungarian National Bank in the National Assembly, and in the government in economic governance. And the National Assembly should involve the Bank more in the scrutiny of governance. In my opinion, the legislation on the bank and commercial banks should be reviewed from this point of view. (Rezső Nyers, p. 1294.)

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Obviously, there was a consensus on a possible extension of the parliamentary controll over the budget — phrased in socialist rhetorics though. As József Kasó from Baranya County expressed:

> *"But I feel that, in the interests of the electorate, I must ask for something in return for this trust. And that is a stronger implementation of the role of scrutiny of the work of representatives compared to the previous period. Comrade Károly Grósz, Comrade Antal Apró and my fellow Member András Pásztohy have also spoken about this. That is why I do not wish to say any more about this; I agree with their points."* (József Kasó, Baranya County p.1308.)

Yet, a more modern, western-type, paraphrase of this idea was demonstrated too by the President of the Hungarian Academy of Sciences, János Szentágothai:

> *"At the beginning of my speech I spoke of the sacred duty of taxation, but there is another right and duty: the right of taxpayers, and of the people as a whole, to oblige the government to present its estimates and accounts of how it intends to steer, and has steered, the public funds and public property it has collected, for discussion by its elected representatives. I am not thinking primarily of the budget and the debate on its implementation. This is formal anyway, as it is — to a considerable extent — on an economic forced track that no archangels could change. But I would think of a commitment of tens of billions of forints that the public only learns about years later, when it can no longer be changed. Not to mention that the public would never have voted for*

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> *it. The fact that at a certain point an ongoing investment becomes a real necessity, which in the specific case in question I am not now discussing, does not make it right! So this does not justify the original concept. Here I would ask for a little more openness, or, to use a foreign word,* glasnost*. This is something that should be discussed in the House of Representatives, not in the possession of ready-made plans, but at the stage of the more serious early development of the idea."* (János Szentágothai, national list, p.1519.)

1.2.6. The material arguments

The material arguments included social inequality, social injustice, political fears, principles of redistribution (or the expansion of the burden of taxes), differences among generations (tax exemption, tax credit, tax allowance, e.g. families with children, pensioners, youngsters, etc), cohesion within the system, but most of all the effectiveness of the tax itself (e.g. its progressivity, its characteristic of withholding productivity, etc).

Social inequality, social injustice, stability, cohesion within the system

Oddly enough in this debate, in a socialist regime, the personal income tax was often associated by the MPs with the magic wand of creating a more equal society. By the 1980s one of the major social issues became that, in contrast to the rhetorics, there had been a growing discrepancy in wages and niveau of life within the society.[70] The alleviating of the direct steer-

[70] "Private trade also started to grow: ‚In 1975 there were just over 9,000 private retailers and just under 900 private restaurants in the country. By 1985, by contrast, the number of private shops was close to 20,000 and the number of private catering establishments was well over 5,000. The total number of private traders had therefore jumped from 10,000 to more than 25,000." (Berend [1988] p. 430.) The pace of growth did not stop here either. In 1989, the year of the political transition ‚the number of private shops (shops) had increased to 29,000 and the number of catering establishments to more than 10,000 (Hungarian Statistical Pocket Book, Magyar Statisztikai Zsebkönyv [1990] p. 159)". LAKI, M. *Kisvállalkozás a szocializmus után*.

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ing economy empowered the management of the state owned companies to negotiate and thereby to acquire minimum but still tacitly approved and thereby usable "gains". Also a kind of a private market emerged by the separate profitable economic activities which were carried out in basic partnership forms (economic working communities — *gazdasági munkaközösség, gmk,* and the economic working communities in the company — *vállalati gmk* i.e. *vgmk)*[71] providing for extra earnings to those in the group[72]. These possibilities contained the most variable professions, e.g. engineers, factory workers or even university professors. Similarly, the small farming as extra activity was tolerated in/beside the cooperatives too (*háztáji)*. These semi-legal, rather grey zone market activities somehow compromised the regime without having it publicly discussed or justified by the Party elite.[73] This had the immediate consequences of differentiation among the earnings of the new entrepreneurs, workers, clerks creating massive grumbling

Újabb reform a nyolcvanas években. online 1989. Available at: http://www.kszemle.hu/kiadvany/Laki_-_Kisvallalkozas_a_socializmus_utan/ch03s08.html [Accessed 10 July 2024].

[71] A new development in the reform of the 1980s was the introduction of mixed forms in large state-owned industries. The number of company economic working communities (*vgmk*-s) and economic working coomunities (*gmk*-s) grew rapidly. A [*vgmk*] was set up by workers in a sub-unit (brigade, workshop, etc.) of the enterprise organisation. After working hours, they mostly produced the same products on the same machines and equipment and performed the same services as employees during their main working hours. However, they contracted with the company not as wage workers but as a community of entrepreneurs. They did not have a work contract but a business (rental) contract. The profit of their enterprise was the difference between the production, the income from the service and the rent. Their number grew very rapidly: in 1981, there were barely a few dozen such organisations in industry; in 1986, the peak year, there were already more than 14,000 [*vgmk*-s], with 184,000 industrial workers producing a gross output value of HUF 11.8 billion (Statistical Yearbook [1987] p. 109). Despite the rapid growth, the role of the [*vgmk-s*] is marginal: 1.4 per cent of those employed in state industry in 1986 accounted for 0.9 per cent of state industry output. The construction industry also saw the emergence of a significant number of [*vgmk*-s]. In 1986, 2 682 such organisations employed 29.6 thousand people and produced 1.8 billion forints of gross output, about 2 per cent of annual construction output. LAKI, M. *Kisvállalkozás a szocializmus után*. *Újabb reform a nyolcvanas években.* online 1989. Available at: http://www.kszemle.hu/kiadvany/Laki_-_Kisvallalkozas_a_socializmus_utan/ch03s08.html [Accessed 10 July 2024].

[72] As for the reintroduction of the law on business associations in Hungary, see: Act No. VI of 1988 (the law on business associations).

[73] These formations of private businesses were discriminated though both in taxation and legal protection, see: KOLLEGA TARSOLY, I. ed. *Magyarország a XX. században 1996–2000.* (II. kötet) Babits Kiadó, Szekszárd.

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across the country. Black market is certainly thriving in an economy of scarcity — as socialist economy is famous for it[74] — however, its extension became tacitly tolerated therefore the exception started to be the rule. On the other hand this grey zone somewhat relieved the gravity of scarcity of goods.[75]

Yet, there were only a few critics related to the invisible income in the bill:

> *"I found few examples of making invisible income visible in the otherwise meticulously precise bill."* (Iván Boldizsár, national list, p. 1452.)

> *"According to the bill, the more accurate tracking of income will allow invisible income to be identified and included in the taxable income. Well, in my opinion, as long as no one is forced to ask for an invoice because they are not interested, and as long as invoicing is not an obligation, invisible income will remain invisible and untaxable. It is still better to take a washing machine to the botch who asks for 1,500 forints to have it repaired than to the small tradesman who asks for 3,000 forints and gives an invoice.*
>
> *I would respectfully ask the administration to prepare a system of taxation where invisible income can be properly identified and taxed. Certainly, we should not believe that*

[74] see: KORNAI, J. *A hiány*. Közgazdasági és Jogi Könyvkiadó. 1982.

[75] "Many believe that while the *vgmk*-s have stimulated added value, giving its members experience in organising and managing private enterprise in a protected environment, they have done much to damage the morale of entrepreneurs at a critical time before the advent of mass enterprise. The other group of small businesses made very good use of the relaxation of state control and excelled particularly in the import of high-tech goods, importing embargoed goods from abroad and distributing them domestically, thus making huge extra profits up to the time of the politica, transition" : KOLLEGA TARSOLY, I. ed. *Magyarország a XX. században 1996–2000.* (II. kötet) Babits Kiadó, Szekszárd.

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> *these people will be taxed, but we have to make sure that they are obliged to pay taxes."* (Gyula Fetter, Pest county, p.1522.)

Many of those who could not participate — neither as producer, nor as beneficiary — in the grey zone of the evolving, in fact less and less socialist, economy, felt frustrated, disappointed and disillusioned. For those the newly applied personal income tax could have offered a possible ideology and chance to let *others' "gains"* share with the public.

> *"They are willing, if they can see that it makes sense to do so in order to lay the foundations for the future, and that is no small thing, to expect honesty, full openness, fair solutions and consistency from government. Full closure of loopholes, the prevention of institutionalised profiteering, and the disclosure and control not only of invisible revenues but also of invisible losses. Citizens expect the party and the government to lead them."* (Szabó Imre, Hajdú-Bihar county, representing the local councils, p.1270.)

This however required proper enforcement. And this was promised by the Minister of Finances.

> *"Perhaps most of the questions raised in the debate on the bill concerned the disclosure and proposed taxation of so-called invisible income. The National Council of Trade Unions also made demands in this regard. In the implementing regulation, we have specified that all income, such as*

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> *tips and gratuities, is taxable. It is true that it is estimated that income in the order of HUF 70 billion is causing growing discontent, but it is important to know that there are many conditions for this to be visible income. Improving care, closing the gap, the bill's provision on asset declarations, increasing control are all such things. We are also working on a scheme to create an incentive to declare invisible income, so that the income declared can be used as the basis for social security benefits. I am convinced that people are fundamentally honest, like to sleep soundly and that the compulsory completion of the tax declaration also creates a widespread moral compulsion to declare such income. I should also add that, in addition to economic measures, we must rely more on the power of social perception. The government is determined to tax such income. We do not wish to resign ourselves to the current situation and we are working on further effective methods."* (Péter Medgyessy, Minister of Finances, p.1425.)

Beside the postulate of a fairer tax system the potential failure of the measures was nevertheless a real likelihood, which however was not so much used as a criticism against the drafters — the Party or the government — but rather as a description attributed to the situation of the taxpayers.

> *Among the expected tensions is the problem of invisible incomes. The calculations suggest a huge sum, as comrade Medgyessy has said. If the tax system were able to capture some of this, it would generate substantial budget revenue and move closer to the original goal of fairer public taxation.*

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> *Today, the planned instruments to tax invisible income and to estimate and then tax the assets are not yet sufficiently convincing. We will not win the public's trust if we are uncertain on this issue. We should also expect that people will see the deterioration in living standards as a direct consequence of the tax reform, all the more so because, although this is not its original purpose, if the economy's performance does not improve for a few years, the tax system will also contribute to the forced reduction in living standards.* (dr. Ferenc Dobi, Pest County, representing the Trade Union, p.1449.)

Oddly enough, the first introductory speech of the Head of the Ministers' Council literally mentioned the enhancement of the environment for a more operational market relations as a goal.

> *"And finally, our intention is to further develop the methods of government management planning in such a way that, even in the new circumstances, it will be able to influence processes more effectively in the overall social interest, in accordance with economic policy objectives, which is no less a task than the enforcement of market conditions."* (Károly Grósz, Prime Minister, p.1209.)

And further oddly enough, the (at least rhetoric) aim of the government was to broaden the autonomy of the state owned entreprises. And these goals have all been elabourated and approved previously by the Party so that to constrain the recent inflation in Hungary triggered by the ever higher demand and lower supply in the economy of scarcity.[76]

[76] See: KOLLEGA TARSOLY, I. ed. *Magyarország a XX. században 1996–2000.* (II. kötet) Babits Kiadó, Szekszárd.

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The principles of redistribution, progressivity and its characteristic of withholding productivity

There was no debate at all among the representatives on the progressive nature of the personal income tax to be introduced in 1987. Notwithstanding, there emerged a rather heated discussion on the rate of progression and even more on tax credits, exemptions and allowances. Since the dire strait of the state budget and the method of how to overcome that — i.e. to create an ever freer market (socialist?) economy — was a well acknowledged fact by then, the debate could basically boil down to the numbers only and not the principles. That meant vivid arguments on whether the personal income tax itself was to fill the budget gap alone, and who exactly to bear the burden by what sort of exemptions.

There was nothing secret about the intent of the government related to the tax reform. Yet, taxation is not a proper tool where the property titles are unclear. So there was quite a confusion, even if the Head of the Ministers' Council did mention this in his speech:

> *"The large and controversial social repercussions of the preparation of the tax reform indicate that this is not simply a tax technique, but a new system of social redistribution and public taxation, i.e. an important social policy issue. Public interest is understandably focused on personal income tax, but I would also like to stress here that, from an economic point of view, including that of the population, the importance of general sales tax is no less significant, and the two are closely interlinked.*
>
> *[...] In the context of the work programme, I would like to point out that the new tax system is seen as a tool for economic governance, which can be used to influence corporate and, in many respects, citizen behaviour. In this system, we*

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should be able to track more accurately the value-generating activities of the company. If we want to increase people's entrepreneurial spirit and unleash their creative potential, we must also accept high and exorbitant incomes commensurate with performance. But we also need to reform the tax system to ensure that a significant proportion of this income is channelled back into technical and technological development. Many people ask: why should low and middle income earners be taxed? The answer to this is that in future the state will put the money that it has so far taken from the company, i.e. from the workers, into their envelopes. It does this to make it clear that public spending is not covered by the state, which is above society, but by the citizens, and that if it is channelled through them, they will be more careful about how it is used, and those who manage public money will be more responsible in their use of public spending, of taxpayers' money.

We are facing a year when we cannot even distribute what we have produced, what we have worked for. Even temporarily and modestly, we need to reduce public consumption. A larger increase in consumer prices than in previous years is now inevitable. The government is firmly committed to reducing inflationary pressures by all available means. Following the 14-15 % increase in consumer prices planned for 1988, the rate of increase will be reduced as early as 1989. In addition, we will ensure that the retail sector provides consumers with a sufficient range of goods of the right quality and variety.

The government's work programme is also responsibly

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> *addressing the tasks of living standards and social welfare in the current situation. Specific measures are planned to alleviate the tensions associated with the restructuring.*
> *Despite the expected difficulties in finding employment, the government will guarantee social security. We plan to reform social policy to achieve more balanced social conditions. This will focus central and local resources on young people, families with children, the elderly and the disadvantaged. It is in this spirit that we will submit an amendment to the pension scheme to Parliament in 1988.* (Grósz Károly, p.1209. onward)

So there was consensus on the progressivity of the personal income tax, no doubt. Many MPs expressed their concerns that the tax reform is only one thing and could not be successful without a consequential economic policy. This consensus even included the debate on proper application of the economic nudges, instruments as opposed to the direct instructions, or the possibility of the state owned companies to go bankrupt, let alone the acceptance of the "gains" (profits) in the corporate budgets. Truly interesting concepts in a socialist economy, where property titles were still obscure and (therefore) the contractual rights and obligations depended more on sociological-political bargaining power than on the law.

The proposed progressivity of the income tax put the regime into one of the highest box in an international comparison which was challenged by many, mostly by trying to extend the categories of exemption. As a result, including the 0-rate brackets, there were 11 brackets, and in the highest bracket — which started at 16.7 times the upper limit of the lowest bracket — the tax rate reached 60%. In the income structure of the time, this was a well ‘spread’ tax scale.

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Rate of tax according to Act No. VI. of 1987 (Art. 18 (1))

Art.18 (1) The rate of tax, if the tax is based on		
0-	48 000 Ft	0%
48 001-	70 000 Ft	
	the part exceeding HUF 48 000	20%
70 001-	90 000 Ft	
	4400 Ft and the part exceeding HUF 70 000 Ft	25%
90 001-	120 000 Ft	
	9400 Ft and the part exceeding 90 000 Ft	30%
120 001-	150 000 Ft	
	18 400 Ft and the part exceeding 120 000 Ft	35%
150 001-	180 000 Ft	
	28 900 Ft and the part exceeding 150 000 Ft	39%
180 001-	240 000 Ft	
	40 600 Ft and the part exceeding 180 000 Ft	44%
240 001-	360 000 Ft	
	67 000 Ft and the part exceeding 240 000 Ft	48%
360 001-	600 000 Ft	
	124 600 Ft and the part exceeding 360 000 Ft	52%
600 001-	800 000 Ft	
	249 400 Ft and the part exceeding 600 000 Ft	56%
800 001-	361 400 Ft and the part exceeding 800 000 Ft	60%

Table

The extent of progression however has always been a matter of lively debate and so it was constantly, yearly changed, i.e. Act No. VI. of 1987 was amended by Act No. XIX. of 1988, then Act No. XLV. of 1989, then Act No. LVIII. of 1991, then Act No. XC. of 1991, then Acts No. XLIV. and LV. of 1992, then Act No. LXXXII. of 1994.

The new law: still in effect with many modifications is the Act No. CXVII. of 1995, modified significantly in 2011 when flat rate was intro-

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duced. This pracitically let Hungary be the last Central-East-European country having flat rate tax instead of progressive income tax.

1.2.7. Conclusion

The arguments in the Hungarian parliament in 1987 could be analysed as a real parliamentary debate and may be justified by the actual finding, that the less influential a national assembly is the more informative its debate may be. The Hungarian Parliament back then did not have much impact on the decisions made. So much so, that one may have the impression that the entire debate was allowed rather to extend the accountability of the ruling party elite to the representatives for the new tax regime. This allegation may be buttressed also by the fact that the MPs had hardly more information on the subject than the everyday newspaper reader that time, so no risk was really threatening.[77]

So owe to its fairly irrelevant, non-influential therefore more informative debate in the socialist parliamentary regime, the reasonings were quite free. And familiar. This may well be the consequences of the actual balances of the political forces in Europe after WWII. On the one side there reigned the social democrats and every other parties — liberals, christian democrats, small holders, conservatives of any kind — on the other side (even if sometimes in coalition). These weberian, non-revolutionary social democrats are ubiquitous in most developed capitalist regime but for the USA.[78]

Yet another crucial issue in the Hungarian debate was the reliance on data. Under the socialist disguise in the discussions only a few MPs raised this point. Although the Party, the ministries and the authorities (e.g. Statis-

[77] Yet, it had proved to be a wrong political calculation since the political transition was due a couple of years later, though truly for not really this reason.

[78] The US model is blurred from this aspect because of its federalist nature so one could only assert that the democrats want to spend more on federal level claiming more tax and that the republicans don't, but this all have neither roots nor repercussion in the state politics.

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tical Office, Planning Bureau) disseminated statistics and other information in better quality — and quantity — than usual in this almost uniquely public debate, it is clear from the records that the MPs had no power, despite their probable right, to access necessary information. For undoubtedly, the decision on progressivity of the income tax requires reliable adequate data. In fact the objective of the progressive personal income tax cannot be achieved without authentic, genuine, well reliable data and an overall trust in the system. This trust was everything but obvious during the debate. Most of the speeches refer to the delay, the political hesitation as a source of distrust and the lack of taking the ruling party elite accountable is attributable to the politico-cultural environment rather than to any kind of approval.

According to Gisela Huerlimann, W. Elliot Brownlee and Eisaku Ide[79] there is a recognizable pattern as to what kind of discussion, when by whom and with what results may occur in the debates for the advocation of personal income tax in the developed countries after 1945. In their book they distinguish between two main kind of political attitudes: i) *the consensual policy-making* , i.e. the "European nations with social compacts that produced universalistic welfare states funded primarily by relatively broad-based taxes, but only moderately progressive tax systems"[80] and ii) in contrast the *crisis mobilization model* "in countries with fewer political institutions for consensual policymaking and with intense class conflict. Significant revenue reforms are delayed until crises (usually wars) demand new fiscal instruments; in these instances, business and the right largely oppose social and fiscal policy expansions. This leads to contentious tax

[79] HUERLIMANN, G. – BROWNLIE, W.E. – IDE, E. eds. *Worlds of Taxation. The Political Economy of Taxing, Spending, and Redistribution Since 1945*, Palgrave McMillan. 2018. p.6.
[80] id. p.6.

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politics that aim to 'soak the rich' through progressive levies".[81] The ideotypes of the previous one are the Scandinavian, Western European welfare states, the latter one are the common law countries mostly.

Pursuant to the Hungarian debate, the political culture seems to be closer to the crisis mobilization type. Also the stark progressivity of the personal income tax puts Hungary into the ad-hoc non-consensus based solution bracket and may show the openly admitted intent: "to soak the rich". On the basis of the typology developed by Huerlimann, Brownlee and Ide, this chapter shows through the parliamentary debate, that Hungary even in the socialism, proves to be rather closer to a non-consensual society than not, which provides for tax regimes ad-hoc, reacting to the crisis at hand.

However, the above mentioned models for taxation could be interpreted a little bit differently too. Clearly, the *consensual policy-making model* generates more redistribution and stabilizes the society, whereas the *crisis mobilization model* creates social tensions and permanent struggles among the tax payers. But the previous model does not stabilizes the society because it is a social democratic one but because the redistribution depends on the functioning of the system as opposed to the latter model in which the workers, the income tax payers have all rights — liberal rights — to express their demands. So basically these two models define the less individual Western-Northern European states in contrast to the less cooperating ones.

And from this aspect it is interesting to construct the Hungarian debate in the parliament, where the arguments of the traditional social democrats were used so as to create a competitive eonomy (not society). Thus the reasonings are closer to the consensual policy-making model, but the aim is to deal with a crisis mobilization model: *if you want to achieve something you have to do it on your own*. This notion reflects the most in the arguments used for exemptions.

[81] id. p.6.

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PART 2.

RISKS OF QUASI LEGAL BARGAINING

In an illiberal democracy the negotiations with the legislation is rather political than legal. The arguments are therefore only quasi legal arguments. And as said in the previous chapter: a multiparty system in itself does not guarantee a meaningful debate on public issues if a dominant party squeezes out the chances of such a structured discussions, so that no rational comments may be added. Part 2. examines the risks tradeoffs through legislations from the point of view of i) how to apply the many times discriminatorily changing laws in illiberal democracy and ii) the legal elites, throughout the history, who have the power to influence the legislation.

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Chapter 2.1.

Risks of Bargaining with the Legislation[82]

The following analysis is about a unique, out-drawn, henceforth unsolved legal bargaining between small churches and the parliament in Hungary. Is the majority principle based on firm enough grounds so that to differentiate among religions? Why should the ruling majority be required to take into consideration religious groups that are marginal, or that they dislike, on an equality basis while distributing public funds?

This study suggests that the conceptual critique of the new deliberately differentiating, illiberal Church law of 2011 is that it allows unhinged exclusive and arbitrary decision-making for the legislation. Although majority principle should be the essence of democracy, its unconstrained version creates such anomalies in the democratic institutions which could well be survived but would alter the system into a non-democratic regime. First generation fundamental rights are therefore to be protected not by the democratic institutions even in a democracy but by the rule of law (liberalism).

2.1.1. Introduction

The following analysis was inspired, among others, by the newest Church law[83] amendment coming into force on 15 April 2019 in Hungary. This amendment (Church Law 13)[84] is the outcome of an out-drawn, still unsolved legal bargaining triggered by the then new Church law in 2011

[82] For an earlier version of it see: PÉTERVÁRI, K. Az indokolás jelentősége az egyházak közpénzekből finanszírozásában, avagy a Magyarországi Evangéliumi Testvérközösség esete a jogalkotóval (2011–2019). *Opuscula Theologica Et Scientifica*, *1*(1), 2024. pp. 29–47. https://doi.org/10.59531/ots.2023.1.1.29-47 (Original work published 2023. május 8.)

[83] The Church law is the Act No CCVI of 2011 on the *freedom of conscience and religion beside the legal status of the churches, denominations and religious communities* (Egyházi törvény "Eht" or Church law amendment No 2).

[84] Amendment No 13, the Act No CXXXII of 2018.

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having replaced the old Church law from 1990.[85] The Church law in force in 2011 listed only 14 of the previously almost 150 churches as church, religious denomination and religious community recognized by the Parliament. Only the institutions on the list included in the appendix could thenceforth be called churches automatically, *ex lege*, denying the status of a church to the other institutions right away. On that day started the legal debate on the legal status of small churches such as the Evangelian Brotherhood of Hungary too (*MET — Magyarországi Evangéliumi Testvérközösség)*. In fact, it all started long before, with the passing of the first new Church law in 2011 that was however nullified within half a year.[86]

In contrast to the initial list of churches, the new Church law (Amendment 13), entering into force on 15 April 2019, has a longer though still random list of 27 churches in the Appendix and rewrites the disputed legislative places altogether by introducing a four-stage church founding system (Article 9/A-9/G). It also terminates all applications for registrations, cases, suits in progress and court orders (Article 37 para 1). Thus, again it automatically, *ex lege,* relocates the once-but-no-longer-churches to the register of associations and civil organisations through the courts. So, the parliament clearly overrules the courts in religious freedom cases. Hence majority principle overrides rule of law notion. The question is whether this is the end of the debate.

This is a story of a case worth studying to better understand the threats to the first-generation fundamental rights. In the heatwave of fear on the earth because of the migration[87] this article shows an even

[85] Act No IV of 1990 *on freedom of conscience and religion* ("lelkiismereti és vallásszabadság törvény", Lvt).

[86] This Church law, as a starter, is already the 2nd version of the original Act No. C of 2011 but repealed by the parliament within 6 months after its entering into effect.

[87] NUSSBAUM, M.C. *The New Religious Intolerance Overcoming the Politics of Fear in an Anxious Age*, Cambridge MA, The Belknap Press of Harvard University Press, 2012. p.285., also reviewed by: LARSEN, L. The New Religious Intolerance. Overcoming the Politics

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bigger in-doors threat: the story of the actual dismantling of a rule of law system with the implementation of the majority principle.[88]

In the following I will recapitulate the major points of this debate so that I could add some comments to the legal reasonings applied therein.

2.1.2. The legal debate of MET directly with the courts and more directly than indirectly with the legislator, of course, briefly between 2011–2019:[89]

From ***13.7. 1990***

The court of Szabolcs-Szatmár-Bereg county registers the MET as church adhering to the new Act No IV of 1990 on freedom of conscience and religion (in Hungarian abbreviation: Lvt) right at the beginning of the political transition.

11.7. 2011

The new Church law takes effect, (Church law 1), which strips the MET from its church status by — among others — not including it on the list in the appendix. Later with the effect of 20 December 2011, the Constitutional Court nullifies the Church law 1 on the grounds of public law invalidity.

From ***1.01. 2012***

The new Church law (Church law 2) is effective which states in Article 34 para (2) that the applications based on the nullified Church law 1 already submitted to the minister will be decided upon in the Parliament until 20 February 2012. There is no possibility for appeals.

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of Fear in an Anxious Age, *Nordic Journal of Human Rights*, 2014. 32:4 pp.406–408, DOI: 10.1080/18918131.2015.957474.

[88] See also: UITZ, R. 'Hogy ki egyház és ki nem'. Látlelet a magyar állam és az egyházak viszonyáról. Fundamentum, 2011/3. szám.pp.29. and SCHWEITZER, G. Az egyházakra vonatkozó szabályozás alakulása. MTA LAW WORKING PAPERS, 1(44).

[89] Sources: the Constitutional Court decisions (ABH) and the files of the MET.

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29. 2. 2012

The Parliament rejects the appeal of MET (and the other almost 100 churches on the list) in the 8/2012. (II. 29.) parliamentary resolution.

3.09. 2012

After the rejection the Tribunal of Nyíregyháza orders that the MET be taken into the court register as an association with its main objective of religious activity (11.Pk.60.077/1990/118. sz. végzés). Meanwhile it orders that all previous data of the church be deleted from the register. The MET appeals.

11 .12.2012

The Regional Court of Appeal in Debrecen rejects both the appeal and the application (Pkf.II.20.774/2012/2. sz. végzés).

1 .03. 2013

The MET regains its church status with retroactive effect of 1 March 2012 because on 1 March 2013 the Constitutional Court declares the Art 34. para 2 and 4 of the Church law 2 effective from 1 January 2012 to 31 August 2012 to be unconstitutional and thus inapplicable from the moment they took effect (6/2013. ABH). The reason is that no legal effect can be disclosed to the Church law 2 Art 34. para 4 because the parliamentary resolution was passed with unconstitutional instructions therefore the churches named in the parliamentary resolution did not lose their church status thus their ex lege transformation into religious associations cannot be enforced (6/2013 ABH Reasoning [215]). The Constitutional Court (CC) further confirms that despite of their not being deprived of their church status, because of the retroactive effect of the CC decision, these churches still must submit their data to the minister and the minister must

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register them as it is written in the Church law 2. Articles 17-18 (6/2013. ABH, [215]).

4 .03. 2013

The MET submits its application to the minister in which it requests its registration in the church register.

1. 04. 2013

The 4th amendment of the Hungarian Constitution (Basic Law) takes effect (25 March 2013). Its Article VII para 2 introduces the notion of the "organizations doing religious activity": it states: "The Parliament can recognize in a cardinal law certain organizations doing religious activity with which the government will work together for the sake of community goals". The paragraph also allows for constitutional complaint against the provisions of the cardinal law that recognizes the religious communities. The new para 4 of Article VII however delegates power to the legislation so that to create further conditions for recognition. It stipulates that a prolonged operation and public support may be prescribed as condition for recognition of any religious organization. This rids the Constitutional Court's decision of March of cause and subject, because the new constitutional amendment establishes a new procedural system in the Constitution. Before, the law only knew one organizational status and it was the "church", in relation to the freedom of religion, now it allows for differentiating between religious communities.

17. 04. 2013

The minister notifies the MET in a letter that it cannot be registered as church (17480-4/2013/EKEF. sz. levél)

30 . 04. 2013

The MET submits a complaint to the Metropolitan Administrative and

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Labour Court to render this letter — as administrative decision — ineffective.

12 . 07.2013

Meanwhile the appeal of 3 September 2012 in relation with the Tribunal of Nyíregyháza ordered the MET to register as an organization doing religious activity and delete its previous data was rendered ineffective by the Regional Court of Appeal in Debrecen and stopped the registration procedure (Pkf.II.20.405/2013/2. sz. végzés).

One could say that until this point there was no constitutive change in the church status of the MET.

1.08. 2013

The Act No CXXXIII of 2013 (Church law 7) takes effect and modifies the Church Law 2 with the effect of 1 August and 1 September and introduces the notion of the established church under special regulation which has a different legal status than before. Art 6 para 1: "A religious community is an organization doing religious activity that is recognized by the Parliament. A church recognized by the parliament is an established church". The official reasoning states the objective of the law as being "in accordance with the ruling of the Constitutional Court and with regards to the 4th amendment of the Constitution, it defines the subjective and objective framework of religious activity, redefines the recognition procedure and settles the legal status of the religious communities affected by the ruling of the Constitutional Court." The Church Law 7 establishes new transitional provisions in the Articles 34-37 to sort out the legal status of the organizations affected by the Constitutional Court decision.

The definition in Church law 7 Art 34 para 1 stating that the associations doing religious activity are now defined as organizations doing religious activity does not affect the MET because the Constitutional Court

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decision of 6/2013 ABH ruled that it doesn't apply to it. The minister publishes on the ministry's online website a list of churches that were registered by the old Church law of 1990 and can apply to be recognized as an established church [Church law 7 Art. 37 para 1 and Art. 33 para 1 and 2]. The Minister will decide on the existence of certain conditions for recognition under the law, which are subject to judicial review [Church law 7 Art. 14/B. para 1-2 and Art. 14/D para 1].

1. 10.2013

The 5th amendment of the Constitution takes effect (26 September 2013) which, just like Church law 7, introduces the general notion of "religious community" and defines "established church" as a subtype of that. (The other named type in the Church law 7 — the organization doing religious activity — does not appear in the Constitution).

With the exception of its para 1, the entirety of Article VII of the Constitution was renewed and it abolishes the appeal by constitutional complaint of the negative decision of the Parliament and the constitutional review of the decision. Moreover, it elevates to constitutional level the provision of the Church law 7 stating that by the positive decision of the parliament the state can give particular entitlements (for helping to achieve social/public goals) thus the state can differentiate.

Still the Church law 7 and the referenced rules of the Act on Constitutional Court aren't in accordance with the new constitutional status established with the 5th amendment to the Constitution (Basic Law) (Constitutional Court decision [73]).

7. 02. 2014

The Tribunal of Nyíregyháza issues an extract of the effective data of the MET which lists it — as per the old Church law of 1990 as a registered — church.

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10. 02. 2014

The MET starts the procedure to be recognized as it stated in the Church law 7 and the minister finds that the MET meets with the conditions stated in the Church law Art. 14 a)-f) and forwards his decision to the Parliament's Committee on religious affairs for the next step in the recognition procedure (719-11/2014/EKF. sz határozat).

Meanwhile the Metropolitan Administrative and Labour Court repeals the no. 17480-4/2013/EKEF resolution of the Minister (which said that the MET cannot be registered) and a new procedure must be started in its 2.K.31.968/2013/7. ruling on 19 February 2014. It is about the letter of the Minister which counts as a resolution and which is not in accordance with the Constitutional Court's ruling, stating that "the registration of organizations as churches others than the ones on the appendix list is not excluded". The question is whether the changed legal environment (because of the Church law modifications) is to be kept in regard in this new procedure.

7. 05. 2014

The Curia of Hungary (Kúria) analyses the status of the MET in its ruling Kfv.II.37.124/2014/6 and states, that "the plaintiff was right to refer to the Constitutional Court decision (ABH 6/2013, 215, 217) which marked that the churches in the parliamentary resolution (where the plaintiff was on the 41st place) did not lose their church status and thus they cannot be forced to be converted into associations" (reasoning [41]).

29. 05. 2014

In its ruling, 23.Pk.60.077/1991/167. resolution, the Tribunal of Nyíregyháza refuses to issue the registration extract to the MET because they find either that the MET is not an established church as per the Church law as amended or because the MET withdrew its application to be registered as

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such. (To be noted: later this Tribunal says the same on 13 February 2015, 23.Pk.60.077/1991/169. resolution).

11. 07. 2014

The Committee of Judiciary Affairs of the Parliament discusses the T/794. bill as per the Church law 7 which contains among others the registration of the MET on the list of established churches of the Parliament. The debate is to determine whether the MET complies with the Art. 14 g)-i) of the Church law 7 and whether the Parliament wishes to collaborate with the organization doing religious activity to achieve public goals and whether the organization doing religious activity is capable of collaborating to achieve public goals as stated in para 4 of Article VII in the Constitution. The Committee declared that "the requirements of collaboration are not met". The Parliament however did not decide on the acceptance of the bill or the resolution proposal.

9. 09. 2014

The European Court of Human Rights in Strasbourg (ECHR) decides that because of the complete abrupt termination of the applicants' church status and the establishment of a politically dependent procedure (of which existence is questionable in the first place) and because of the differentiation of the applicants from the established churches not only in the collaboration but also in the privileges regarding religious activities, the authorities ignored the neutrality standards owed toward the applicants. The ECHR also criticized the lack of a compelling societal need behind the challenged legislation. [ECHR 115.]

On these grounds Article 11 was violated since it needs to be read together with Article 9.[90]

[90] For a recent excellent analysis of the interpretative problems of the margin of appreciation when it comes to religion-state-relations, see HENRARD, K. The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds? *Nordic Journal of Human Rights*, 34:3. 2016. pp.157–177, DOI: 10.1080/18918131.2016.1225656

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13 , 05. 2015

In its 23.Pk.60.077/1991/169. resolution the Tribunal of Nyíregyháza repeats its standpoint.

29. 12. 2017

The Constitutional Court determines unconstitutionality in omission regarding the Parliament's fault at not delivering the necessary procedure for Church law 7 Article 14/C on time. The Constitutional Court therefore sets a new deadline to the Parliament until 31 March 2018 (36/2017. ABH).

31. 03. 2018

The Constitutional Court sets a new deadline to the Parliament until 31 December 2018 (3310/2018. ABH).

1. 01. 2019

Meanwhile the 7th amendment of the Constitution takes effect on 1 January 2019 (Article 28) which, when interpreting the law, elevates to constitutional level the consideration of the law's preamble and official reasonings.

15. 04. 2019

The new Church law 13 rewrites the disputed legislative provisions altogether by introducing a four-steps church founding system (Articles 9/A-9/G) and terminates all applications for registrations, cases, suits in progress and court orders (Article 37 para 1). Thus, again it automatically, *ex lege*, relocates the once-but-no-longer-churches to the register of associations and civil organisations through the courts.

According to Article 37 para 1: "As this amendment takes effect the following will cease to exist:

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- Ongoing procedures to recognize organizations doing religious activity as churches that are in the Parliament,
- Ongoing procedures to register organizations doing religious activity in court,
- Ongoing administrative procedures started by Article 14/B para 2 of 1 august 2013,
- Ongoing procedures to register as church as ruled by the Constitutional Court in 6/2013. (III. 1.) AB decision
- The termination procedures of religious communities as stated in Art 33 para 3 of Church law 13, 14 April 2019 and Art 33 para 5 of Church law 7, 1 September 2013."

Justice István Stumpf of the Constitutional Court, in his writing for the (marginal) majority at the end of 2018, declares that the legal status of the MET is mixed in the judicial system: in a sense its church status is recognized in multiple cases, but they just cannot be fit into the system implemented by the Church law (3310/2018 ABH). In the meantime, the Constitutional Court is also divided, since a small minority would even deny the standing of the MET in these lawsuits, like Egon Dienes-Oehm, who expressly confirms, that the fathers of the Basic Law (the Constitution) wanted to keep the right to decide on church recognition within the framework of the political – legislative – branch of the powers. Although this notion was adapted in the 5th amendment of the Basic Law, it was nevertheless contrary to what the legislators had previously had in the texts related to these churches following the 4th amendment to the Constitution (Church law 1, and Constitutional Court law). [91]

Clearly, the Basic Law changed conceptually twice in Article VII due to the 4th and the 5th amendments in April and September of 2013 respectively. But the Church law itself was also redrafted 13 times. In addition, it had to be harmonized by the legislation with 11 decisions of the

[91] See the Constitutional Court cases 36/2017 ABH and 3110/2018 ABH, [75].

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Constitutional Court, which are in fact only this many because the motions were consolidated.

In this further analysis I would structure my reflexions around 3 topics: i) the problem of definitions and the reasoning of the law, ii) the fundamental right and the state, or the secularization and the concept of a neutral state, and finally iii) the financing of churches from public funds.

2.1.3. The importance of reasoning

The problem of definition and the reasoning of the law

Eventually, the Church law is not fundamentally about the freedom of conscience and religion. In the official justification[92] the main reason for the drafting of a new Church law is that in the old one of 1990 the generous conditions of the founding of a church gives grounds to the abuse of this basic right. And this literally means the misuse of budgetary money and state aid. Thus, the official justification confirms that the goal of the new Church law is the restriction of church founding, and the motivation is the termination of the "unlawful" draining of state aid money.

The legislator filters and abolishes the majority of churches. Instead of utilizing criminal law and letting the Penal Code take action against the perpetrator, the legislator, in a preventive fashion, abolishes the non-recognized and non-historical churches in general. These so-called small churches, that are completely arbitrarily put on that list, can be ancient beliefs (shamanism, witches), neo-protestants, Jewish, Muslims, religions of the Far East or modern esoteric religions. This differentiation

[92] Official justification of the Act No CCVI of 2011: "The Act No IV of 1990 on freedom of religion and conscious passed by the parliament still in the era of the one-party regime, broadly secured the religious freedom and the establishment of the churches. Later however, it became clear that these generous conditions of the founding of the churches provide for a possibility of abuse with the fundamental right and the illicit – non faith based – use of public funds dedicated for churches".

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is of course grounded in history which favours mostly the most popular church, the catholic church.[93]

Already the first, quickly nullified Church law 1 wasn't about the freedom of conscience and religion but about the church-founding and about the specifics of state aids. Indeed, the introductory sections and provisions repeated the words of the Basic Law not giving any new or extra to the scope of these fundamental rights but introducing a definition of the religious activity. That would be the legal definition of religion which was missing in the old Church law of 1990. In this regard the Church law 2 didn't change anything, the same definition was therein as in Church law 1.[94]

It's not customary to give a legal definition of religion in the statutes themselves. It is normally the realm of the scholarly debates, the legal literature or judicial practice, because it is either going to be naturally exclusive (unitary definition) or overbroad, encompassing everything and thus becoming completely meaningless (pluralist definition). On one end of the scale, not all religions centre around the supernatural (see deism or Hinduism) and on the other end, even the existence of the belief is questionable (see the problem of atheism: Is atheism a religion?). Thus, we could say that a legal definition is to be avoided because it is going to

[93] FAZEKAS, Cs. Egyházak, egyházpolitika és politikai eszmék az Osztrák-Magyar Monarchiában. (Churches, church politics and political thinking in the Austria-Hungary Monarchy). in: *Working Papers 4.* Miskolci Egyetem Politikatudományi Intézet. 2008.

[94] Art. 6 para 1: "Religious activity is an activity connected to such world view, which relates to transcendency, is equipped with orderly set of dogmas, the doctrines of which relate to the entirety of the reality and embraces the totality of the human personality with such special standards of behaviour which do not hurt the morality and human dignity" ("A vallási tevékenység olyan világnézethez kapcsolódó tevékenység, amely természetfelettire irányul, rendszerbe foglalt hitelvekkel rendelkezik, tanai a valóság egészére irányulnak, valamint az erkölcsöt és az emberi méltóságot nem sértő sajátos magatartáskövetelményekkel az emberi személyiség egészét átfogja"). The critics of which has already been exercised in the first Constitutional Court decision (6/2013 ABH, see the opinion of Elemér Balogh). The definition has changed later on (Act No 133 of 2013) and the term "which do not hurt the morality and human dignity" is deleted from among the conditions of the standards of behaviour. The definition is shifted to the Art 7/A para 2 in the newest, 14th version (including the Church Law 1 too).

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be either too strict or uninterpretable. So, it gives grounds to either a too strict or a too lenient interpretation.[95]

Notwithstanding, the real problem isn't the legal definition in the new Church law or its general justifications but its so-called *admissibility of the content examination and the examination of the seriousness of conviction*. Because the justification states that the old Church law of 1990 was too generous, too liberal with "the registration of not in fact religious organizations as churches". Without questioning the problem of importance and effectivity of the actions against fraud, the content of and strength of the belief or the seriousness of conviction cannot be examined without other factual elements. That would indeed violate this most classic political freedom, because it would allow to differentiate between citizens based on the quality of their faith. Of course, there are such political systems that allow this, but these systems are not democratic or liberal.[96] Also, in this regard there is a unified practice in the liberal democracies, in all cases of the member states of the EU and of the USA. But also, the case law of the ECHR is in line with these ideas.

However, fraud can be discerned from the behaviour and circumstances of the particular actor, and it does need to be established. But there is a *caveat* here too: "Men can believe in anything that they cannot prove" (*US v. Ballard*, 1944, J Jackson).[97] Moreover, what is especially lifelike,

[95] Classic example of the overbroad definition is the conscientious objector in the military services (*US v. Seeger*, 1*965*). However this case would not fit into this definition of the recent Hungarian Church Law, since Seeger did not believe in any transcendental being but in good and virtuous, in moral values in themselves. Certainly, this raises the question of clear and distinct borderlines (see also STONE, G.R, SEIDMAN, L.M., SUNSTEIN, C.R., Mark V. TUSHNET, M.V. *Constitutional Law.* Little, Brown and Company. 1994. p.1465.).

[96] e.g. the United Arab Emirates is fairly tolerant towards religion but discriminates on the grounds of citizenship.

[97] Justices Stone, Roberts and Frankfurter dissented: if it were shown that a defendant had asserted that he had physically shaken hands with St. Germain in San Francisco on a day named, or that by the exertion of his spiritual power he had in fact cured hundreds of persons, it would be open to the government to submit to the jury proof that he had never been in San Francisco and that no such cures had ever been effected.) Justice Jackson agrees that church leaders may be prosecuted for frauds, however… (cited in STONE et al. p.1467.).

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experiential conviction for some, can be utterly incomprehensible and messy for others. And so, the problem of delimitation arises: How much scepticism and doubt can belief encompass? And who can judge it? Can it be checked if a self-proclaimed healer sustains his actions with real data (time, place, name of the sick person)? (Yes). Can it be checked by the police? (The minority thinks yes).[98]

But what does "false" teaching even mean? The Swedish church of Kopimism[99] exists, existed, to make an action of copyright pirating and servant copying unquestionable. Also, they created one of the most coherent belief-system of the essence of the universe: the copying. However, the *Flying Spaghetti Monster* did not get permission in the USA to found a church, because the judge thought it to be more similar to a parody than an actual belief.[100]

Hence, it is no wonder that while analysing the contested sections of the Church law in its ruling, the ECHR awarded the decision to the plaintiff applying the stricter test of necessity and proportionality.[101]

It would seem clear that the creation of the legal definition of religion is impossible. Because what would be the definitive elements? The thinking about fate or destiny, the perception of beyond time or the consequences

[98] STONE et al p.1467.

[99] Even the registration of this church was achieved by copying, since the Swedish court first had rejected the application, but then upon the advice of their lawyer the applicants copied the exact words of the law, thereby obtaining their license to exist.

[100] Stephen Cavanaugh, Plaintiff, v. Randy Bartelt, et al., Defendants. United States District Court, D. Nebraska. 178 F.Supp.3d 819 (2016).

[101] Decision of the ECHR on 9th September 2014 [115.]: "The Court concludes that, in removing the applicants' Church status altogether rather than applying less stringent measures, in establishing a politically tainted re-registration procedure whose justification as such is open to doubt and, finally, in treating the applicants differently from the incorporated Churches not only with regard to the possibilities for cooperation but also with regard to entitlement to benefits for the purposes of faith-related activities, the authorities disregarded their duty of neutrality vis-à-vis the applicant communities. These elements, taken in isolation and together, are sufficient for the Court to find that the impugned measure cannot be said to correspond to a "pressing social need". There has therefore been a violation of Article 11 of the Convention read in the light of Article 9.

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of out-of-time, the tech reality of the afterlife, the meditation, the requirements of moral ideas? At the same time, if there is no such definition, on what bases can the rules of exceptions be judged *non-arbitrarily*? To what standards or measures could the tax benefits, the school financing or the property support be compared and justified?

And the Hungarian legislation is visibly battling these problems throughout the entirety of the debate. If there is not — cannot be — a definition in the statute, the revulsion of the state towards peripheral religions and its endeavour to eliminate them legitimately, becomes impossible. This way the delicate balance of sharing the burden of proof between believers and non-believers capsizes. That is, the delicate balance[102] between the secular goals and the rights of the believers falls over. Because in a liberal rule of law state, (liberal) Rechtsstaat, any legislation affecting religious freedom must have legitimate secular goals and cannot elevate one from among the others.

The fundamental right and the state, or the secularization and the concept of a neutral state

Why shouldn't the legislator be allowed to support certain churches and not others? In other words, why couldn't the Church law become a *political* question as suggested by the narrow minority of the Constitutional Court, and let the Parliament decide in the matter? (see the argument of Judge Dienes-Oehm above (36/2017 ABH and 3110/2018 ABH [83]).

Why would it be necessary for the liberal (rule of law) arguments to be more binding, more conclusive than the democratic arguments. Undoubtedly, the basis of the critique against the new Church law is not that it oppresses other religions. Moreover, in this regard not even the limited

[102] FREEMAN, The Misguided search for the constitutional definitions of religion. 71 *Geo L J* . 1983. p.1519. (cited in STONE p.1466).

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religion definition causes any problem, because at its core, in a legal system based on the free market, it's the private property that ensures the freedom of religion, as long as it is everyone's internal affair. And as per the analysis of the Constitutional Court of article M of the Basic law, Hungary is a country of free market (1769/2013 ABH).

Why would it be a necessary consequence of this that the freedom of conscience and religion incorporate the *freedom of religious practices*? Why couldn't the democratic majority say that they themselves could decide on these matters simply because this is what the majority principle is about. Speaking about a matter of principle here, I would refrain from citing the obvious counterargument that such a decision can be quite whimsical and would thus create legal uncertainty: what is popular today may not qualify as such tomorrow. Since only majority-based decisions have such *differentia specifica* as consequence, to change law even overnight in the parliament regardless to certain deliberations. The (liberal) notion of legal certainty was specifically created to prevent this kind of arbitrariness. And so, this circle ends. It's not a coincidence that the exclusivity of the majority principle or to put it pejoratively, the tyranny of the majority is what motivated the establishment of the rule of law (liberal) institutions, the checks and balances.

The new original Church law of 2011 ordered every church that existed after the socialism, since the political transition in 1989, to change their form into an association, except for 14 which had nothing in common except for their being one of the 14 churches on the list. The other, more than 100, churches that were left out, had to re-register as association in a really short – though undetermined – period of time in order to be legally able to request their registration as church again to be decided upon, in less than 60 days by the Parliament. Those who didn't comply, ceased to exist for lack of legal successor. Undoubtedly, the legal debates resulted

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in many modifications to the Church law. Some were to make the transformation easier in a sense, that it allowed for the "new associations" to use the word "church" and even customized a special association form for churches (Art. 7) but none of the above amendments changed the fact that the small churches were deprived of their rights abruptly. Nor was this the intention of the legislator. Given that they admittedly operate by the majority principle and think their original decision to be legitimate and working in a legalistic fashion, they only cared for that the law be correct to the letter. That's why there were multiple casual amendments to the Constitution itself in a manner that the legislator simply copied the challenged provisions that were declared unconstitutional by the Constitutional Court and inserted them into the Constitution.

But no version of these legislative clauses could fix the problem that the Church law deprived **a)** arbitrarily differentiating, **b)** existing churches of their legal status and ordered them to go through a re-registration process of questionable outcome by the power of the law, automatically. Hence, except for the 14 churches recognized by the parliament, which were automatically registered, as per Art 7 para 4 of Church law 1-2, all the other churches ceased to be churches. The justification of the law states specifically that from that point forward the parliament was entitled to recognize churches.

Accordingly, could it be argued, that this sort of measures cannot be trusted to and decided by the majority principle because the requirements of the principle of secularization stand on firmer theoretical grounds? And so, should the existence of a so-called neutral state be protected, that stands equally apart from every religion and church, and moreover that ensures the freedom of non-religiousness too? And even more so, if the

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greatest critique of the secularized state is that it is not in fact neutral but supports the atheists, the non-believers.[103]

Moreover, only a few European countries and EU members have a specifically secularized system. Countries having an officially recognized church are the UK, and the Scandinavian states (Denmark, Finland, Island, Sweden the latter of those separated the church and the state legally only in 2000) and we cannot speak of democratic deficit in these instances. Greece is in the process of separating the orthodox church from the state. There are hybrid, not-unified systems in place in Germany, Switzerland, Belgium and the Netherlands. In Germany there is no official religion, and in its so-called coordination model it provides for the right of assembly and every recognized church is a public body as set already in the Weimar Constitution.[104] For the most part the Central-European countries such as the Czech Republic and now Hungary, belong in this intermediate model.

The critique of the secularized state that it is not neutral but equally prejudiced towards every religion thus supportive towards the non-believers is obviously convincing and that is therefore not what I argue against.[105] The stance for a liberal and neutral state is based on practical historical arguments. Historically where there is tolerance (of religion) there are fewer wars (of religion). Tolerance is of course not without cost,

[103] Normally, it is the French secularization to be quoted here mirroring Voltaire or his personality and his animosity towards religion (laicité, or the freedom of state from the religion) even though this interpretation had been challenged even then, since most of the advocates of the bill were religious themselves. On the other hand the American secularization is fairly different from this already in its famous terms of standard, like "Congress shall make no law…", providing for a more restrictive state (the freedom of religion from the state). Whereas the French version allows nothing, the American draws up a non-transparent wall between the state and the religion: the faith-blindness (see Everson v. Board of Education (1947), Justice Hugo Black).

[104] Notwithstanding, this is not at all entirely neutral, for the small churches or the non-hierarchically organized religious communities are forced to join umbrella organisations.

[105] BEINER, R. Taylor, Rawls, and Secularism. This essay was written for "Charles Taylor at 80," a conference held in Montreal on March 29th-31st. 2012. Available at: hhtp://www.academia.edu/12526434/Taylor_Rawls_and_Secularism.

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it is no *panaceum*, but it works. The law can either aid it or harm it but fundamentally it is the cultural, historic traditions that are determinative.[106]

In the western liberal constitutional democracies, the theoretical starting point is the complete secularization even though the two historical model (the American and the French) exist in this moment in countless *variations.* Moreover, the model of established churches can be acceptable on the other end of the spectrum. These models in themselves do not confirm nor guarantee the existence or non-existence of the modern constitutional democracy. It is possible in every model for the state and the church (religion) to stand equally apart from each other, equally tolerating each other. In all systems of established churches, recognized churches, separated churches or in the mixed systems. Thus, the litmus test is the so-called *twin-tolerance* the ensuring of the mutual room of manoeuvre. That's how the Turkish system of Kemal based on the French system allows for a serious influence of the state meanwhile the UK with a model of an established (not secularized) church is especially tolerant.[107]

It could be said that it is not the law but the political-moral-philosophical-cultural conception that really counts. In other words, the problem is not whether the parliament decides on these matters but that the majority principle is not, exclusively and in itself, capable of treating individuals who wish to exercise their freedom of conscience and religion on an equal footing. Because, among others, the parliament doesn't see individuals but voters.

The original Church law 1 was found unconstitutional for its failure of having been passed in due course by the representatives. The judges of the Constitutional Court objected especially to the exclusion and impos-

[106] STEPAN, A. The Multiple Secularisms of Modern Democratic and Non-Democratic Regimes. APSA. 2010. Annual Meeting Paper. Available at SSRN: https://ssrn.com/abstract=1643701.
[107] See STEPAN, A. The Multiple... 2010.

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sibility of intelligent debate over common affairs. The deliberation is the duty of the parliament, as an institution, so every representative, no matter whether they belong to the majority or the minority, has equal rights in this debate and all of them are supposed to act in the interest of the community (Justice Bragyova 6/2013. ABH). Since this notion really is utopian, it is essential that in a state where the classical – first-generation – freedoms are important, like in a rule of law system, the majority principle cannot work exclusively. Therefore, a liberal state is not *per definicionem* secularized, but it respects the twin-tolerance in a cultural or legal way.

After all of this the question occurs whether illiberal democracy is even possible or could it be called simply a non-pluralist democracy. As a matter of fact, where there is fundamental political freedom pluralism follows as a necessity. So, it is dubious whether a non-pluralist democracy is fathomable at all, because if the first-generation fundamental rights of all are not respected, it results in the inequality of individuals in this regard. And this begs the next question, whether there even is democracy conceivable where the individuals are not equal in regard of these fundamental political freedoms. To highlight, these fundamental rights are the freedom of conscience and religion, the right of assembly and association, the freedom of expression and the right to vote. Moreover, the freedom of conscience and religion is not only a first-generation fundamental freedom but the ground on which the whole constitutional system is built.[108]

Therefore, by definition, a democracy must be liberal and pluralist. And a liberal state is necessarily secularized and cannot support exclusively or dominantly a single ideal/theory/concept in the name of the public good.

Naturally this concept of neutrality is debated and can, without a doubt, lead to the expansion of individualism. A typically Rawlsian political lib-

[108] ANNICHINO, P. A Transatlantic Partnership for International Religious Freedom? The United States, Europe, and the Challenge of Religious Persecution. *Oxford Journal of Law and Religion*, 5, 2016. p.280–297. doi: 10.1093/ojlr/rww005: footnote6.

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eral answer to this liberal paradox is that neutrality is rather a goal in itself. The liberal state cannot support any overall dominant concept of good, be it moral, philosophical or religious not even one that expressly fits the values of a liberal state. Since, if the pluralism of – rational – theories stands, then the governmental support of any value-system will upset this balance on which the democratic system is based. In contrast with non-democratic, non-liberal regimes, in liberal states there exists a common, independent concept of truth that is capable of mediating between the state coercion and the religious ideas. In other words, the possibility of telling the truth as competing items helps to maintain consensus.[109]

Consequently, therefore the conceptual critique of the new Church law of 2011 is that it allows *exclusive and arbitrary* decision-making for the legislation. Although seemingly this should be the essence of democracy, nevertheless it creates such anomalies in the democratic institutions that it could well survive but would alter the system into a non-democratic regime.

Hence these considerations render the official reasoning of the Church law of 2011 unacceptable, for it both justifies the examination of the content and the examination of the seriousness of one's conviction and repeals acquired rights without due regard to the circumstances. In addition, the new 7th amendment to the Basic Law in 2019 elevates the legal weight of the official reasoning of a statute in case of interpretations or ranking the interpretations.

The financing of churches from public funds

In spite of all this, why should the ruling majority take into consideration religious groups that they don't like (but whose existence aren't unconstitutional) or that are marginal on an equality basis while distributing

[109] AUDARD, C. Rawls and Habermas on the Place of Religion in the Political Domain. In: FINLAYSON, G. – FREYENHAGEN, F. eds *Habermas and Rawls Disputing the Political* London, Routledge, 2011. pp.224–246.

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public funds? Why can't the majority decide on a political basis which is a church, and which is not? In other words, is there a problem with the new Church law of 2011 from this public financing perspective? For it isn't about the freedom of conscience and religion but especially about the founding and funding of churches.

As a matter of fact, the point in the critiques is not the public funding (of course in the long run it is) but rather the arbitrariness. That is why the MET has always sued for the deprivation of its *acquired rights*.

"Acquired rights" is, of course, a quite broad concept. On one end it can incorporate private property and on the other end it includes the rights granted because of political incentive like the baby bond. Nowadays we would call it the protection of legitimate expectation (Vertrauensschutz) or legitimate expectation depending on the strength of the bond between the future entitlements and the entitled (candidate). So, one could speak of bought or acquired rights or "simply" of entitlements.

In a modern constitutional democracy from a constitutional or a public law standpoint, the notion of acquired rights means merely that the entitlements ensured by the state (or local authorities) are to be modified – into a negative direction – only through a meaningful hearing[110] of the affected and can only be implemented in the future. Negative modification entails either the narrowing of the scope of the entitled ones or the decreasing value of these entitlements as well as the changing of the whole system. Also, the meaningful hearing sets a high bar, requiring that it is not enough to prove that the entitled had had knowledge of the modification and could have reacted to it. The meaningful attributive means that the arguments of the interested parties who have been heard, are going to be taken into consideration. Furthermore, the authorities have to prove

[110] See e.g. Article 41 – Right to good administration in the Charter of Fundamental Rights of the EU (2010/C 83/02).

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that they have taken these arguments into consideration. If the arguments are convincing than the concept of the change of the entitlements should be modified as such, in case that they are not convincing it must be communicated and a justification has to be attached. This justification must be rational, in other words not arbitrary. There needs to be found a compelling state interest which cannot be fulfilled in any other way – less restrictive way for the affected ones (see the strict scrutiny test of necessity and proportionality as applied by the ECHR in its case of 2014 above too).

Since the acquired rights in question can directly be drawn from the freedom of conscience and religion there is a need of strict scrutiny rule of law guarantee here as well: the reasoning and the ban of retroactive effect. Surely, the subject matter of the legal debate with the MET is not that the state should be forever bound to fund and provide aid for the churches or any church. The budgetary rules can, of course, be modified, they are not forever. Few would argue this.

The state commits to general promises which apply to everyone. These promises embody in the bulk of laws but effectuated only via the budgetary statute. Therefore, the budgetary law is the realization of the promise of the state. Since the budget is based on the actual program of the government (and that is often based on their promises during the elections) it is clear that this general promise of the state which applies to everyone is a political question. This state promise is of a public law nature, which is closely related to the political processes. From a strictly positive legal point of view, the legislator is entirely free to modify the legislation. This is inherent to governing. Therefore, the question whether there is a legal remedy for a public institution that isn't getting the appropriate funding for the performing of the activities prescribed by the law, is not interpretable. Because the general legal guaranty is only executable through the budgetary law. And the budgetary law by its legal nature is a permission

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for the government to realise its program. Therefore, there is no legal remedy here for the institutions that are left out of the budget, the public aid or support.

Yet in the case of the problem with acquired right and retroactive effect there is a remedy.

As per the Church law 1, the churches left out of the list had had no chance to be heard neither even to be told that in a short notice – less than 60 days – they must transform into associations so that to be able to request the so lost legal status of a church to be decided by the parliament. With some differences in the various amendments, especially in the conditions of church-founding, this model has changed. In certain instances, the model has been eased (Church law 7) in other instances it has been tightened (now it is the strictest), but in no way does it meet with the reuirements of the general rule of law or of the neutral state principles (see ii) above).

It is however to be emphasized that this failure to be in compliance with these principles are primarily not because of the legal environment but because of the legal practice. Because **a)** it nullifies acquired rights, **b)** arbitrarily, **c)** with retroactive effect, while **d)** it justifies the examination of the seriousness of the conviction and the content of the belief, and finally because **e)** it pushes some used-to-be-churches which performed state tasks (schoolings, shelters) into actual breach of contract, thereby causing even actual damage.

Otherwise, the introduction of this state-church model would surely have passed through the constitutional filter, given that mutual tolerance practices would have prevailed. This was in fact the case of the Concodat of 1997 but ratified only 2 years after due to heavy criticism.[111] But

[111] Act No LXX of 1999 on the Concordat between the Holy See and the Republic of Hungary regarding the financing of the religious and public activity of the Catholic Church in Hungary.

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none of the versions of the presented Church law would have met the requirements of the then still good doctrine of the American *Lemon test*. Despite of its criticism,[112] in connection with the freedom of operation of churches, the American case law is dependent on the Lemon test *(Lemon v. Kurtzman, 1971*), according to which any law affecting church activity must comply with the following requirements: i) the law must have a secularized goal, ii) its basic and primary influence cannot and should not support or obstruct any church, and iii) it should not result in any state interference with any religion / church. The practical application of this was not easy and the US courts were fairly divided on these issues, still, one should say that a modification of the Hungarian Church law that would not have terminated the status of the churches in certain circles with immediate effect, but for example would have waited for their extinction, even if it let new churches be established according to new conditions, would not be *prima facie* unconstitutional. It remains to be considerable despite the fact that the Lemon test was overturned in 2022 in *Kennedy v. Bremerton School District (2022)* because the argument of MET was based on acquired rights.[113]

2.1.4. Conclusion

This analysis demonstrates the conflict between liberal and illiberal democracy and argues that the majority principle cannot be the standard tool in cases of protecting the first-generation fundamental rights, especially the freedom of religion.

The problem with the illiberal democracy is not that it promotes certain

See also the report of the Committee on the scrutiny of the results and effects of the Concordat: 2006-8. http://www.okm.gov.hu/letolt/egyhaz/vatikanijelentes06nov11.pdf

[112] lately see: *The American Legion v. American Humanist Association,* 2019.

[113] BARCLAY, S. H. The Religion Clauses After Kennedy v. Bremerton School District I*owa Law Review* Vol. 108. 2023. pp.2097–2113.

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religious groups more than others, at the expense of others, but because of the lack of the neutrality principle, such a government may become unleashed. Truly, the mere existence of a free market can guarantee the freedom of religion, as long as it is everyone's internal affair and private property is secured. The out-door practice or the funding of a religion is however another question.

Clearly, a government has quite a broad room for manoeuvre in managing the public expenditures reflecting its own political deliberations. Yet, if public funds are to be decided and spent on majority principle so, financially at least, it could differentiate among religions. If, however, these differentiations are allowed among religions, so that the individuals are not treated equally in this sense, compelling state interests should be used as reasoning. The mere fear, or in certain cases even the fact, of abuse of public funds should not suffice as justification, since it may punish those, who would not deserve that. The Penal Code is to be applied in its stead.

That is why, majority principle is constrained by the rule of law requirements.[114]

This analysis suggests that the conceptual critique of the new deliberately differentiating, illiberal, Church law of 2011/2019 is that it allows unhinged exclusive and arbitrary decision-making for the legislation. Although majority principle should be the essence of democracy, its unconstrained version creates such anomalies in the democratic institutions which could well be survived but would alter the system into a non-democratic regime. First generation fundamental rights are therefore to be

[114] See espacially: KELSEN, H. *Vom Wesen und Wert der Demokratie*. Mohr, Tübingen. 1920. esp. p.36.

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protected not by the democratic institutions even in a democracy but by the rule of law (liberalism).[115]

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The bargaining between the methodist church and the legislation did not end well for the church. The challenged distinction among the churches remain in force in 2024. MET is still not recognized as established church in 2024[116], so they were finally successfully forced to register as a civil organisation at the Municipal Court of Budapest under the law of civil organisations and not that of the churches.[117] Yet the MET is on the list of the so called registered churches in the registry of the Office of the Prime Minister. [118]

As said above: in an illiberal democracy the negotiations with the legislation is rather political than legal. The arguments are therefore only quasi legal arguments. And as said in the previous chapter: a multiparty system in itself does not guarantee a meaningful debate on public issues if a dominant party squeezes out the chances of such a structured discussions, so that no rational comments may be added.

[115] See also: SAJÓ, A. *Ruling by Cheating*. Cambridge University Press, Cambridge. 2021.
[116] The MET church is not enlisted in the court registry as established church. see: https://egyhaz.me.gov.hu, last visited: 22. December, 2024.
[117] See: case No. 0100/Pk.60156/2024 according to the Act No. CLXXXI. of 2011. https://birosag.hu/ugyfeleknek/civil-szervezetek/civil-szervezetek-nevjegyzeke. downloaded: 1. September, 2024.
[118] See: https://cdn.kormany.hu//uploads/sheets//d/dc/dc4/dc4a6848ccca0a4a95bb2857a3a2ec8.pdf. downloaded: 1. September, 2024.

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Chapter 2.2.

Risks of Legal Elites in Legislative Drafting[119]

This chapter addresses the question of legislation. Even though legal experts do not create legislation, it is appropriate to question the role that the different legal professionals—attorneys (advocate lawyers), judges, prosecutors, law professors, law clerks in the government administration, etc.—play in drafting law. Assuming that creating the law requires real power, one should be able to discern which group of professionals exerts the most influence on this process. Depending on the cultural values of a community, the expectation that people play by the rules is more or less strong, with the effect that an individual who has intentionally violated the rules may or may not feel compelled to justify or apologize for their behavior. It is also well established that playing by the rules is best accomplished if one has the power to create and modify these rules, perhaps even retroactively. Laws and regulations are no different from this, with one exception: their binding nature—which, of course, implies enforcement—means that creating laws requires genuine power. It is more likely than not that academics are the best equipped legal professional group, because they have the opportunity to disguise their own group interests by pretending their sociological identity as representatives of objectivity, using scientific methodology, and legal rationality.

2.2.1. Introduction

Even though legal experts do not create legislation, it is appropriate to question the role that the different legal professionals—attorneys (advocate lawyers), judges, prosecutors, law professors, law clerks in the government

[119] For an earlier version of it see: PÉTERVÁRI, K. *Social Risks of Current Regulations* L'Harmattan, Paris, 2021. p.104.

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administration, etc.—play in drafting law.[120] Assuming that creating the law requires real power, one should be able to discern which group of professionals exerts the most influence on this process.

Depending on the cultural values of a community, the expectation that people play by the rules is more or less strong, with the effect that an individual who has intentionally violated the rules may or may not feel compelled to justify or apologize for their behavior. It is also well established that playing by the rules is best accomplished if one has the power to create and modify these rules, perhaps even retroactively. Laws and regulations are no different from this, with one exception: their binding nature—which, of course, implies enforcement—means that creating laws requires genuine power.

The traditional view in Hungary is that Hungarian law, like German law, is a so-called *Professorenrecht*—that is, academics draft the laws of both states.[121] Thus, professors at various universities and research institutes are usually recognized as the most influential legal elite within the broad definition of the legal profession. However, I argue that the struggle for leverage in the process has become more subtle and complex over time. Clearly, the power of drafting laws among different groups of legal professionals depends not only on legal networks or on the structure of the legal

[120] CSERNE, P., GAJDUSCHEK, G. Jogalkotási javaslatok megfogalmazása a jogtudományban. In *A jog tudománya*, JAKAB, A. & MENYHÁRD A. pp.79–100. pp.80–83. Budapest *HVG-Orac*, 2015.

[121] See SÁRKÖZY, T. A jog szerepe. *Magyar Tudomány*, no. 5. pp.535–40. 2011. *Professorenrecht* has various meanings. Currently it is often used in a pejorative sense, referring to a "dogmatic style" that is hard to understand and "full of concepts and abstractions." In other words, it means that content is not accessible for nonspecialists. For example, see HESSELINK, M.W. *The New European Private Law: Essays on the Future of Private Law in Europe.* The Hague: Kluewer Law International, pp.95, p.154. 2002. It may also be used as a possible tool for harmonization in EU private law. See SCHEPEL, H. Professorenrecht? The Field of European Private Law." In: SCHEPEL, H. & JETTINGHOFF, A. eds. *In Lawyers' Circles: Lawyers and European Legal Integration,* pp.115–24. The Hague: Elsevier Reed, 2004. But *Professorenrecht* may have another abstract meaning too, namely that certain interpretations, perhaps new legal institutions may be codified in writing later, similar to the influence that law practice has on codification. See MENYHÁRD, A. A polgári jog tudománya Magyarországon, In: MENYHÁRD, A. & JAKAB, A. eds. *A jog tudománya,* Budapest: HVG-ORAC, 2015. pp.226–45.

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systems, but also on the historical, cultural, economic, and sociological environment in which they operate. These circumstances have dramatically changed since the Second World War both in (post-)socialist regimes and in constitutional democracies, especially due to the internationalization of laws in an increasingly globalized world.[122] In order to account for this transformation and reorientation of the legal systems, my analysis uses the broad expression of "creating the law," which is not *a terminus technicus, per se.*[123] Further, because of the complicated problem of who wields agenda-setting power in politics, the various legal systems and the legal branches within these systems react differently.[124] Undoubtedly, one distinguishes the common law tradition and the continental European approach to law creation. Even though the concept of a positivist written law, which entailed the participation of a professorial elite in the legislative process, became widespread in the past several decades, the necessary interpretation of these rules still provides certain leverage to other professional groups, especially judges. Further, the theoretical problem of how much creativity is implied in the application of law is not new.

Having said that, it is more likely than not that academics are the best equipped legal professional group, because they have the opportunity to disguise their own group interests by citing their sociological identity as representatives of objectivity, scientific methodology, and legal rationality.[125] Consequently, this analyzes of the legal elite in the legislative process has two parts. Part one focuses on the notion of *Professorenrecht* in the sphere of private/civil law, and specifically in the context of the legislative process that produced the new Hungarian Civil Code of 2013. The lengthy drafting process during this codification process is a good case study that

[122] IP, E. C. Globalization and the Future of the Law of the Sovereign State. *International Journal of Constitutional Law* 8, no. 3 2010. pp.636–55.
[123] This is important especially if one believes that the law cannot be made, but only modified.
[124] See, for example, MENYHÁRD, A polgári jog tudománya.... pp.247–50.
[125] SAJÓ, A. *Kritikai értekezés a jogtudományról.* Budapest: Akadémiai Kiadó, 1983. p.190.

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shows the internal rivalries among the various legal professional groups such as bureaucrats, traditional legal professionals (judges and practicing lawyers), and academics. It also clarifies the specific Hungarian legislative process in the post–Second World War period, but reflects on earlier times thereby providing a necessary point of comparison. Part two tells the story of the birth of Hungary's 2012 Basic Law. In this case the participation of law professors in the drafting procedure was almost negligible. As such, it became representative of a new, definitively non-traditional way of creating law.

2.2.2. Private law

The notion of Professorenrecht

Historically, the particular feudal political and legal system of the German-Roman Empire eventually required a path to the harmonization of local case law with universal legal standards or principles. This task was then completed by professors in various universities where different and often competing legal theories had been elaborated on with great zeal (e.g., the exegists, the pandektists, the legal historians, etc.). In Hungary, this kind of standardization requirement took place much later and under very different political circumstances. Historically, so-called judges always represented customs, local customary laws, or particularized privileges. Their professional education began as late as the second half of the seventeenth century, when some form of legal studies were introduced in Hungarian higher education.[126]

At that time, proper legal professionals (mostly non-Catholics) still studied abroad, and they became attorneys and professors having been barred

[126] MEZEY, B. A jogászképzés változásai. *Jogtörténeti Szemle.* Special issue 1–3. 2005. p.40; SZUROMI, A középkori egyetemek létrejöttének és az egyetemi oktatás megszületésének sajátosságai. *Jogtörténeti Szemle*. Special Issue 3–7. 2005. and MEZEY, B. Jogalkotás a 16–19. századi Magyarországon *Rubicon*, nos. 1–2. 76–8.1 1–2. 2012.

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access to the political administration and justice system.[127] These professionals represented modern legal thinking, especially the necessity of a written legal code. Oddly enough, this intent also mirrored the political agenda of the Habsburg emperors. Thus, the struggle between the modernization or integration of the country into a broader economic area (a trading zone) on the one hand, and that of the stabilization of Hungarian leadership in the region and by extension the imposition of old customs on the other, created a delicate situation. This discrepancy of goals generated fairly clear dividing lines between legal professionals on the basis of their social origins.[128] Moreover, this environment was difficult to manage because of another conflict between the rigidly Catholic Habsburgs and the traditionally Protestant and/or re-Catholicized Hungarian nobility, whose desire for autonomy drove it to use anything one could as a bargaining chip in negotiations at court.

The role of professors, as the creators of law, was obviously not an ancient custom in Hungary, but rather originated as a consequence of the Hungarian resistance to the Habsburg modernization. This German orientation was due to the fact that various (often subtle) forms of opposition or resistance to Habsburg influence could be expressed through the law, especially after 1867. These persistent opposites, however obscured, still exist—i.e., modernization versus customs; non-institutionalized freelancers versus political administration; the enlightened administration versus institutionalized academics. Thus, the roles of legal actors were interchangeable depending on the political, historical, and economic environment.

Nevertheless, the rare exceptions to the general rule were periods of major political rupture when the enlightened administration historically

[127] HORVÁTH, P. Tudós elmék és eredmények a hazai modern jogi tudományosság kifejlődésében. *Jogtörténeti Szemle*. Special Issue 2005. pp.21–26.; and HAMZA, G. Vécsey Tamás és a jogi szemináriumok. *Jogtörténeti Szemle*. Special issue 2005. pp.12–21.

[128] ASZTALOS, L. A magyar burzsoá magánjog rövid története. In: *Polgári jogi tanulmányok* pp.5–302. Budapest: ELTE ÁJK Polgári jogi tanszék, 1970.

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played the main role in making law: the foundation of the Dual Monarchy, Austria-Hungary, in 1867; and Hungary's accession to the European Union. Broadly speaking, in these kinds of struggles, judges historically may be characterized as agents of the administration, but definitely acted as the protectors of the status quo, whereas attorneys served as representatives of academic circles, which were open to modernization.

The biased development of private law in the era of feudalism (and beyond)

As discussed above, legal sources in Hungary were rooted in rules and systems of donation, customs, and written customary laws and privileges until as late as the mid-nineteenth century. These customs and written customary laws, such as the Golden Bull of 1222 or the Tripartitum of 1514, guaranteed the lengthy survival of the Hungarian-style (or Central European) feudal regime.[129] They extended the rights of the grand seigneurs (peerage; *főnemesség*) to all those with noble titles, thereby deflecting the classical feudal hierarchical contractual relationship among the king, peers, and servants, and creating a broad sociological strata of largely impoverished nobles (*középnemesség*), who lacked wealth but wielded political power. This proved handy for the Habsburg emperors (kings of Hungary after 1526) in their struggle for more leverage against the peerage and serfs (*jobbágy*), respectively. In exchange the nobility had no other interest but to maintain this feudal system as the status quo for as long as possible.

Due to global economic developments in the eighteenth and nineteenth centuries, written commercial law invaded some parts of the established customary legal system in the entirety of Europe, including Hungary.

[129] The Golden Bull was meant for constitutional terms mostly (the rights of the nobilities against the king, e.g. the right of resistance), and the *Tripartitum* for private matters mostly (inheritance, contracts, system of donations, entail, etc.). See SZŰCS, J. *Nemzet és történelem*. Budapest: Gondolat Kiadó, 1984.

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These laws, mostly initiated by the Habsburgs, mainly reflected the needs of the emerging early capitalist market, such as new acts on the trading partnerships (*közkereseti társaság*), the bill of exchange (*váltó*), liquidation (*csőd*), etc.[130] The transformation of commercial law, however, left the private sphere of the noble classes intact until the revolution of 1848. Moreover, certain dimensions, mostly concerning property and related issues, such as the entail (*hitbizomány*), the donation system (*adományrendszer*), and noble classes' inheritance and family law, remained in force during the Horthy regime and even as late as 1949, mostly as customs applied by county courts (*táblabíróság*).[131]

Therefore, it is clear that the influence of written law had not touched the field of private law *strictu sensu*, but only commercial law. Commercial law was traditionally outside of the scope of the Tripartitum, since the noble classes had never been interested in trade. The nobles' judges and other legal clerks in the county administration could fortify their own power through the customs and privileges applied by the courts. This is the reason the codification process of the Hungarian Civil Code took more than one hundred years after the 1848 revolution.

Written laws could only regulate credit, loans, and liens, for example, if they left the basic characteristics of the land system (entail, donation, inheritance) intact.[132] Notwithstanding, it should be noted that after the revolution of 1848, during the neo-absolutistic era, the land registry (*telekkönyv*) system was incorporated into the Hungarian legal system according to the Austrian Civil Code.[133] Despite the legal nullification of the bonded servant system (serfdom) in 1848, the family law and the contracts of the noble

[130] See Act No. 1840: XVIII. tc. a közkereseti társaságról [on partnership]; Act No. 1840: XV.tc. a váltóról [on bills of exchange]; and Act No. 1840: XXII. tc. a csődületről [on insolvency].
[131] See Act No. 1949. No. VII. tv. a hitbizományok megszüntetéséről [on the abolition of entail].
[132] Once a land belonged to a noble, it could not be bought or inherited by a non-noble. Towns, especially agricultural towns (*mezőváros*), could not own "noble" lands until the 1840s. See Act No. 1844:IV.tc.
[133] See ASZTALOS, L. *A magyar burzsoá*... p.58.

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classes remain essentially the same governed by the customary laws of the Tripartitum. The application of the written laws of valorization related to property transactions (sales, inheritance, mortgages, etc.) during the economic crisis after the First World War and the laws created during the great depression in Hungary still had to wrestle with customary laws as applied by county courts with regard to older precedents.[134]

When can we start talking about **Professorenrecht***?*

Undoubtedly, one should only discuss Professorenrecht if there are "professors" worth mentioning. The academic sphere was not really a decisive part of the legal development of the Hungarian private law until the nineteenth century.

Illés Georch wrote the first legal book on private law in Hungarian in 1804, during a time when most scholars still communicated in Latin.[135] Notwithstanding the language, the legal literature of that time was simply a presentation of the country's customs and laws with added commentary.[136] Universities were not the most important places for legal education and training. Rather, students obtained their knowledge through practice or internships (*patvaria*) at local law firms or in the local administration. Since most judges and the law clerks came from the noble classes, their instruction depended on traditional, customary (written) law.

There was a strong discrepancy in the legal thinking between these lawyers and those who represented the interests of the towns and traders later on in the nineteenth century. The latter group attended proper legal courses at foreign universities and practiced mostly as attorneys or journalists. Their controversies might be described with an analogical reference to the debate

[134] See, for example, BILÉT, M. A redintegrációról. *Jogtudományi Közlöny*, March 1924. pp.37–38.
[135] GEORCH, I. *Honnyi törvény* Vols. 1–2. Posony: Belnay György Aloys. 1804–1806.
[136] See ASZTALOS, L. *A magyar burzsoá.* p.29.

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between Thibaut and Savigny, though with a decisive distinction.[137] Under the influence of the French revolutionary ideas of 1789 and their embodiment in the Civil Code, both Thibaut and Savigny recognized the need for legal reform in the divided German states. However, whereas Thibaut advocated for a new codification, Savigny insisted on incremental reforms to the evolutionary, historical, organic development of German law. The controversy caused by these lawyers' rival notions never really exploded in Hungary where there was no actual debate until 1861.[138] Even then, there was no consensus on the form that necessary reforms should take.[139]

After the defeat of the revolution of 1848, it is intriguing to observe how lawyers used the legal system to struggle for independence from the Habsburg Empire. This was the exact period when German law (especially Prussian), as opposed to the Austrian example, emerged as a major reference point for Hungarian lawmakers. After having repealed the 1848–1849 revolutionary legislation, the emperor ordered the Austrian Civil Code to be implemented in Hungarian territories, which outraged the majority of practicing lawyers who opted for the old (unreformed) customary law.[140]

The rivalry among legal elites in the legislative process for private law after 1848

Having realised that the traditional customary laws had been restored, which hindered the economic integration of the country and halted its de-

[137] See the debate in PESCHKA, V. Thibaut és Savigny vitája". *Állam- és Jogtudomány*, no. 3. 1974. pp. 353–81.

[138] See ASZTALOS, *A magyar burzsoá....* p.30. The two radical positions in this debate are exemplified by Ignác Frank (1788–1850), who taught at the Pázmány Péter University, and László Szalay (1813–1864), who was a journalist and a delegate of the Centrum Party at the Frankfurt General Meeting.

[139] RÁTH, Gy. *Az Országbírói Értekezlet a törvénykezés tárgyában.* Pest: Landerer és Heckenast, 1861.

[140] See e.g.: DEÁK, F. Beszéd az Országbírói Értekezleten a polgári törvénykezés tárgyában. Pest, 1861. február 25. In: *Deák Ferenc válogatott politikai írások és beszédek*. II. kötet 1850–1873. VIII. fejezet: Az első kísérlet a magyar alkotmányosság helyreállítására 1860 –1861.

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velopment, the emperor commanded the chief judge to summon a General Meeting (*Országbírói Értekezlet*) of upper judges (*táblabíró*), peers, and lawyers. The objective was to reconcile Hungarian customs with the Austrian Civil Code. In 1861, the General Meeting was organized by the chief judge (*judex curiae regiae*). According to the documents there were sixteen lawyers, fourteen members of the clergy and the nobility, five upper judges, and five representatives of the commoners, chambers, and traders. These numbers demonstrate that while peers and judges were overrepresented, academics were nowhere to be found among those who attended the meeting.[141] The primary representatives belonged to the established estates (the clergy and the noble classes), while only a few commoners were present. However, this meeting marked a turning point, namely the beginning of Hungary's coerced modernization process.[142]

The outcome of this meeting was a genuine compromise. Instead of drafting new laws, the compromise entailed the very limited acceptance of the Austrian Civil Code (basically only the land registry and the mining provisions) and very limited reforms to written customary laws (especially in the field of commercial law, e.g., the bill of exchange). The peerage consented to the land registry system, which provided them with greater and safer access to credit, and the nobility were able to exempt their territories from commerce. The real nature of this compromise might well be illustrated by the contradictory results in family law.[143]

While serfdom (*jobbágyság*) legally ceased to exist after 1848 and (formal) equality before the law was recognized, due to the reinforcement of customary law, family law, and especially inheritance laws, the distinction

[141] Ibid.
[142] See e.g.: KÉPESSY, I. *Az Országbírói Értekezlet története és öröksége.* Jogtörténeti Értekezések. 61. Gondolat. 2023. p.290. p.95.
[143] See e.g.: HOMOKI-NAGY, M. Az öröklési jog szabályai az Mtj. tükrében. *Jogtudományi Közlöny.* 2009. pp.18–23.

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among different noble classes and serfs was maintained[144]. Interestingly enough, more radical young lawyers who later became important legal clerks in the administration and even influential politicians represented the commoners' lawyers.[145] All the rules agreed upon at the General Meeting were collected under the title of "Temporary Applicable Rules" (*Ideiglenes Törvénykezési Szabályok*) and remained in effect for the next century, until 1959.[146]

After having passed the law on the conciliation of Austria and Hungary in 1867,[147] the struggle for an independent legal system continued as before and often at the expense of national economic interests. Traditional judges (local and county) legitimized this struggle, since there were no new written laws, and—when such laws existed—they were simply considered to be anomalies in the system of case law, ready to be applied (possibly with deference) to customary laws. Loopholes were supposed to be filled in with scholarly legal works authored by the professoriate. "Multipositioning" was very common among different legal elites in developed cities, especially Budapest.[148] Attorneys or judges often received honorary titles from the university (*címzetes magántanár*), and they often published scholarly studies. This situation remained fundamentally intact until the Second World War. Therefore, one might assert that Hungary's *Professorenrecht* did not share the same attributes as its German counterpart. There was no *Professorenrecht strictu sensu*, because academics did not occupy similar positions as those in Germany at the time. The selection of law professors was not an autonomous right of the faculty; they had to be approved

144 See paternal or maternal inheritance.
145 For example Boldizsár Horváth, who later served as Minister of Justice, and Ferenc Deák, who was the mastermind and the chief negotiator of the Austro-Hungarian Compromise of 1867.
146 Overruled by the new Civil Code. Act No. IV of 1959.
147 See Act No. 1867:XII.tc.
148 Károly Csemegi may serve as a good example. He was basically everything during his career (lawyer, law clerk, high official administrator, and judge), but when he was asked to draft the Penal Code, he was given a high office in the Ministry of Justice.

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by the Ministry of Justice, and negotiations between the two camps were seldom smooth.[149] The staff of universities was often recruited from among the traditional higher judges (*táblabíró*) who gave preference to customary law.[150] It should also be noted that during the Austro-Hungarian Monarchy, the enlightened governments seem to have been in constant conflict with academic appointees. The state administration (Ministry of Justice) and (freelance) urban lawyers specifically advocated for the complex codification and reform of the private law.[151] Clashes concerning nominations in the law faculties and colleges often developed between the faculty and the administration.

These generally resulted in a compromise or in the abrupt creation of new departments.[152] This antagonism, which was characteristic of professional legal elites in Hungary, extended well into the twentieth century.

The Civil Code that was never codified (1867–1945)

The codification of Hungary's complex civil code took more than thirty years to draft, and although several versions reached the plenary sessions of Parliament, they were never passed. This mirrors the ambiguous public approach to the modernization agenda in the country. Around the end of the nineteenth century, traditional (still feudal) ruling nobilities lost ground against commoners representing the industrial and commercial elite of Hungary, and this group became increasingly stubborn in its resistance to

[149] The Pázmány Péter Faculty of Law was a state owned, yet autonomous institution (on paper). MEZEY, B. Wlassics Gyula a büntetőjog és a bűnvádi perjog professzora. In: KAPILLER, I. ed. *Wlassics Gyula és kora 1852–1937*. pp.60–78. Zalaegerszeg: Millecentenáriumi Közalapítvány, 2002.

[150] See, for example, Gusztáv Wenzel (1812–1891), a follower of Ignác Frank. Wenzel was a professor.

[151] For example, István Telesky (1836–1899), a State Secretary at the Ministry of Justice, or Rezső Dell'Adami (1850–1888), a lawyer and honorary professor. His habilitation was suspended by Wenzel who claimed his research, which demonstrated customary laws were influenced by different legal systems such as Roman and German law, was antinational.

[152] See the history of the criminal law department and the case of Wlassics Gyula, in MEZEY, Wlassics Gyula...

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the legal revision of its customs. Business and commerce were once again regarded as "non-Hungarian," and consequently, new laws regarding merchant activity were to remain separate from the traditional legal system.

Documents show that there were six academics, two lawyers, one prosecutor, two judges, and six bureaucrats and clerks working on the drafting.[153] This demonstrates that the influence of two groups in this stage of the legal codification process, bureaucrats, and academics, remained balanced. It is telling that even though the Ministry of Justice had often been the real engine of legal reform, revisions to private law were rarely adopted because of the resistance of traditionalist county law clerks who were overrepresented in Parliament.[154]

Oddly enough, the draft was in operation as a recommendation or a set of guidelines for courts to follow. Similar to the legal basis of the Tripartitum, the Private Law Draft (*Magánjogi Törvénykönyv, MTK, javaslat*) also acted like written customary law, was cited by judges, and affected case law in Hungary. On a practical level, this meant that the former dual (coexistent) regime of private law continued to prevail. The written, ad-hoc commercial law statutes performed the role of subsidiary laws for cases in which customary laws could provide no resolution to the problems in question (e.g., the obligations, contracts, liability, etc.). Thus, fundamental laws of liberal capitalism related to the protection of private property, freedom of contract, and equality before the law, could only be partially instrumentalized. The crisis of capitalism and the problems of "monopolistic capitalism" (imperialism) later on often served as a pretext for the revival of old customary law, including anti-competition laws, usury, debtors' protection, and inequality before the law.

[153] Source: ELTE, Department of Hungarian Legal History.
[154] FLECK, Z. *Szociológia jogászoknak*. Budapest. Napvilág kiadó. 2004.

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The rivalry of legal elites after the Second World War

As is well known, the overall conditions of political and professional decision-making changed radically within the Soviet system after 1945. Paradoxically enough, this led to the finalization of the draft and passage of the new and very first Hungarian Civil Code. The final version applied certain tenets of the former Private Law Draft (*MTK javaslat)* along with former case law, although it placed both in an undoubtedly socialist context.[155] But a written, codified Civil Code, as in Act No. IV of 1959, was not at all self-evident, even in the positivist legal environment of normative socialism. The code entered into effect on January 1, 1960. Crucial changes in the legal system had already been made by then, and the code had to transform customary law into written private law within a new legal environment.

The legislative committees had eight academic members and thirteen bureaucrats and clerks. The academics were totally outnumbered by bureaucrats in the administration and by party experts.[156] It should be noted that the former possibility of "multipositioning" across different groups of legal elites ceased to exist, and lawyers—especially attorneys—became a suspicious cluster (category/box X: outsiders in the tripartite party-state of workers, peasants, and "progressive intellectuals"). Academics, however, were very welcome in the drafting and interpreting of law, for want of legitimacy within the regime.

After the Second World War, the legal system underwent obvious changes. The role of judges became much less important since they were no longer needed to interpret law or customs. Similarly, the role of the academics grew because written law required arguments. The new drafting process

[155] See the opinion of SZABÓ, I. on the Civil Code in a debate at the Institute for Legal Studies, in : A Ptk. Tervezetének vitája az Állam- és Jogtudományi Intézetben. *Jogtudományi Közlöny* 13. nos. 3–4. 1958. pp.129–32.

[156] 1080/1957. (X. 13.) Government decree on the government committees for codification.

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needed both analysis and interpretation of the current situation in Hungary, and a vision of the desired future. Academics were the best suited and equipped for this job. Thus, paradoxically, *Professorenrecht* may have become more a feature of the legal system in Hungary after the Second World War than before. From this period on, academics involved in law creation included members of newly founded research institutions. Researchers had no effect on the training of further generations of legal scholars, and their scholarship had only a limited impact on prevailing legal thinking.[157]

The new legal system had various sources in addition to customary law (as opposed to written law) and existing trade regulations. The new regime brought about a new culture of lawmaking. The open exercise of highly concentrated state power as formulated by the Constitution of 1949 justified the intervention of party officials in the legislative process. The radical alteration of the entire regime in Hungary required swift and effective (state) administration. The sole function of public and professional debates was the legitimization of political decisions. Since the regime was to be built on a new elite that would, in theory, be comprised by those coming from the "lower classes." Where they existed, legal debates and discourses were orchestrated in newspapers rather than in professional journals or in monographs.[158] Later, the rivalry among various groups of legal elites became a new constellation. It was no longer connected to antagonisms among classical professional groups (judges, law clerks, attorneys), but to the position different specialists occupied in the power network of the

[157] It is striking to see the difference in how conservative law professors managed to establish own schools in universities (ELTE), while their liberal counterparts did not. Examples are the Sólyom School, Mádl School, or the Harmathy School. In comparison, there is no Sárközy School or Sajó School *strictu sensu*.

[158] See, for example, VEREBICS, J. A többi–néma csend. A száz éve született Világhy Miklós pályaképe. In: Emlékülés Világhy Miklós születésének 100. évfordulója alkalmából. Budapest: *Magyar Jogászegyleti Értekezések*, 2017.

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party-state, which gave them more or less influence.[159] A formal role in the legislative process became a criterion of membership in the new legal elite. These employment opportunities provided special information as the source of special privileges, which was unknown to outsiders.

Thus, the traditional legal professionals were only involved in the legislative process through their representative bodies and not through their professional activities. Deprived of the ability to make law, judges simply became clerks and judicial administrators. Judges and courts represented a culturally hierarchical, traditional institution. They were generally not interested in the principles of law or in new legal thinking. Their careers depended on the statistics of their remanded cases. Therefore, it is very unlikely that a judge would decide or even argue against a decision by a superior court. The new laws and new ideas only made their lives uncomfortable.

As economic and financial crises endangered the regime and forced the country to open up to market requirements, "multipositioning" among the legal elites became commonplace once again. Toward the end of the socialist period but prior to the 1989 transition, bureaucrats enlisted experts, academics, and counselors from the private (business) sector in drafting new laws.[160]

The rivalry of the legal elites in the post-socialist transition (1989–2017)

Historically, lawyers, especially those with foreign training (following the political transition), tend to be more innovative in their legal application.

[159] It is intriguing how Tamás Sárközy explained the success of certain reforms towards the end of the socialist regime in the 1980s. For example, the Károly Grósz government was supported by János Kádár and other hardline socialist politicians. Therefore he could support new, "less socialist, more capitalist" institutions much easier than the reform economists in the party like Rezső Nyers. See SÁRKÖZY, T. *A szocializmus, a rendszerváltás és az új kapitalizmus gazdasági civiljoga 1945–2005*. Budapest, HVG-Orac, 2007.

[160] This was the business as usual when Tamás Sárközy served as Deputy Minister of Justice. See also LENGYEL, L. ed. *Fordulat és reform*. Budapest: Pénzügykutató, 1986.

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These modernizing tendencies of lawyers are still apparent nowadays; academics often have private practices and lawyers have academic careers. These "multipositional" professors (and attorneys) are overrepresented in committees charged with drafting new laws.

The drafting of a new Civil Code took more than two decades, although the decision to create it was made fairly early in the 1990s.[161] A Codification Committee had already been established before the actual transition and was operating in the Ministry of Justice in 1989. It was specifically organized to modernize the Civil Code of 1959.[162] The market legislation procedure, which was in full swing by that time, easily accommodated this objective. Led by academics, this committee remained in charge of the drafting process throughout the 1990s, though its activity slowed.[163] The next stage of the process began in 1998, when a new committee was organized by the incoming administration's Ministry of Justice.[164] There were eight academics, two lawyers, one prosecutor, two judges, and four bureaucrats and clerks in the drafting committee. Taken together, academics and private sector lawyers were overrepresented in the new board of experts.[165] It seems that this drafting procedure finally reflected the tenets of Professorenrecht within the framework of the late-socialist regime.

Yet the drafting process was too slow. Although deliberations were indispensable for drawing up the new Civil Code, the rapid political transition, radical reconstruction of economic markets, new property relations, etc., required a swifter reaction. Consequently, dozens of amendments were

[161] See SÁRKÖZY, T. *A szocializmus,* p.214.
[162] Established by Tamás Sárközy. See SÁRKÖZY, T. *A szocializmus*, p.216.
[163] Ibid. This was during the co-presidency of Attila Harmathy and Lajos Vékás. Both are professors at ELTE and members of the Hungarian Academy of Sciences.
[164] See 1050/1998. (IV. 24.) Government Decree, and 1061/1999. (V. 28.) Government Decree on the Civil Code. The leaders remained Attila Harmathy and Lajos Vékás. Pál Vastagh is a professor.
[165] Sources: 1050/1998. (IV. 24.) Government Decree, and 1061/1999. (V. 28.) Government Decree on the Civil Code.

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made to the Civil Code of 1959 before the introduction of the new Civil Code. The drafters disagreed on fundamental issues: how broad should the scope of the Civil Code be?; should private law also cover corporate law?; should family law be included in the code?

Legal professionals supported different options (the Hungarian legal system's traditional solutions versus novel approaches based on either German or Anglo-Saxon traditions), but the main issues remained the same: whoever drafted the code would ultimately decide how legal studies would be taught in universities.

The basic conception of the new code was accessible to both the public and legal professionals on the website of the Ministry of Justice for a lengthy period of time (2000–2007). The entire process was based on an extensive professional debate, which has been accessible on-line[166].

In 2008, when everyone thought that the final draft of the code was finished, the new administration unexpectedly called for new initiatives to be incorporated into it.[167] On a practical level, this meant that the code had to be redrafted by the then-secretary of the Ministry of Justice.[168] Not surprisingly, this bill could not be fully reconciled with the 2007 drafting committee's proposals.[169] Major divergences concerned individual rights, especially those of disabled persons, and the recognition of same sex couples (family law).

Parliament began debating the bill and passed it in November 2009.[170]

[166] See the website www.ptk2013.hu.

[167] 1042/2008. (VI. 30.) Government decree repealing the government decree No. 1050/1998, and see the government decree No. 1049/2008. (VII. 18.) on the tasks related to the new Civil Code.

[168] Gábor Gadó was State Secretary at the Ministry of Justice and a lawyer and author of several professional articles. In an interview, he said he would not revise the bill again. His motivation was that the drafting committee was not ready to push through certain issues that were self-evident in other "developed" countries, such as the individual rights of disabled people, their representation in private life, or the rights of same-sex couples.

[169] See the Vékás committee, which expressed its discontent with the revised code.

[170] Act No. 2009. of CXX.

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From that point on, the act became the subject of political games. By then, the overwhelming success of the conservative-nationalist opposition party (FIDESZ) in the upcoming parliamentary elections seemed highly likely. Thus, conservative, religious, and other lobbies played for time so that the new bill would not come into force. The president of the republic, a law professor himself who was long recognized for his opposition to the governing socialist party, vetoed the bill in November 2009, citing conceptual disagreements and procedural irregularities.[171]

Notwithstanding the veto, the parliament passed an amended version of the bill in December 2009. FIDESZ declared that if they won the election, the new Civil Code would not be put into effect, largely because of its discontent with the definition of marriage and same sex partnerships. In the meantime, the parliament passed a supplementary bill that called for the gradual implementation of the new code to ensure it would be effective and manageable. In early 2010, FIDESZ claimed the supplementary bill was unconstitutional and therefore null and void. The party referred the matter to the Constitutional Court, which upheld the position of the plaintiffs.[172]

After ascending to power, the new FIDESZ government established a new drafting committee, as promised.[173] The (partly) new draft of the Civil Code included entirely new sections as compared to the 2007 version.[174] This meant that the 2010 draft represented a fundamentally new conceptualization of legislative technique and—more importantly—philosophy of corporate law.[175] Although discussions had been ongoing since the post-

[171] László Sólyom is a professor at ELTE University. He wrote an unexpectedly long letter of arguments touching upon professional rather than political issues.

[172] The paradoxical outcome of which was that, due to legal prescriptions, there was a period of time in 2010 when two Civil Codes were in effect.

[173] Under the presidency of Professor Lajos Vékás from ELTE University.

[174] See the Vékás committee of 2007.

[175] The main issue in this dispute was an old controversy, namely whether the Civil Code should also cover basic commercial law—i.e., the company law—or not. Professor Sárközy argued against, while Professor Vékás supported the inclusion.

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socialist transition (and even before), these sudden changes reflected the shifting power relations among academics, in addition to those among political parties.

In 2013, the new Civil Code Act was passed, and it entered into effect on March 15, 2014.[176] However, in December 2014, the Minister of Justice established a new drafting committee, charged with amending the new Civil Code of 2013, to be based in the ministry.[177] Bureaucrats significantly outnumbered academics in this committee, and those professors who were included held lower ranks—i.e., there were fewer members of the Academy of Sciences on the committee.[178] The final draft of this committee modification of the 2013 Civil Code was passed by Parliament on June 13, 2016.[179]

Contextual detour for possible comparisons

Undoubtedly, this case study of the civil code's drafting procedures requires a broader perspective. The following paragraphs provide some comparisons that clarify the procedural conditions of the drafting process of the post-transition Penal Code and Procedural Code.

The drafting of the Penal Code (2001–2012)[180] shows a shift towards the growing influence of the state administration, especially after 2010–2012. Thus, in 2001 there were twenty-two bureaucrats/clerks, twenty-four academics, twelve prosecutors, twelve judges, and fourteen lawyers, whereas in 2012 there were twenty-six bureaucrats/clerks, twenty academics, sixteen prosecutors, sixteen judges, and ten lawyers.

[176] Act of 2013. No. V. on the Civil Code.
[177] László Tócsányi, a former judge, is Minister of Justice, lawyer, and university professor.
[178] These professors represent a younger generation that belonged to different (and some new) universities: Kinga Pázmándi is affiliated with the Budapest University of Technology and Economics; Zoltán Csehi is affiliated with Pázmány Péter Catholic University; Péter Miskolczi-Bodnár is affiliated with Károli Gáspár University of Reformed Churches in Hungary, and Attila Menyhárd is affiliated with ELTE.
[179] See Act No. LXXVII of 2016, on the modification of the Civil Code of 2013.
[180] *Büntetőjogi kodifikáció* 2001/1.

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In the drafting of the Private Procedure Act (2010–2015),[181] bureaucratic leverage grew over time, marginalizing the academic fields. The drafting committees comprised of five bureaucrats/clerks, four academics, one prosecutor, four judges, and three lawyers.

Conclusion one:* Professorenrecht *revised in private law

Clearly, the German variety of *Professorenrecht* did not prevail in Hungary. Yet, academics still appear to have been one of the most influential elite groups among legal professionals involved in the process. Due to the expectation of objectivity by practitioners of legal sciences, academics—as opposed to other legal professionals— are the most capable of concealing their own interests in proposals or recommendations, couching them in terms of efficiency or other socially recognized benefits. Nevertheless, there are other dimensions that alter the picture. The subject matter of regulations or laws makes a difference. In the case of the Civil Code, academics have been much more influential, whereas in the drafting of the Penal Code, this was not the case after 2010. Since the bureaucracy and MPs traditionally have been less interested and willing to fully appreciate the complexity of economic issues, the context of competition, and market regulations, the leading role of academics and practicing lawyers is necessary, whereas in the case of the Penal Code, the Administrative Procedure Act, and other procedural codes, this is not as important. However, during the most recent parliamentary session, there were converging tendencies in this respect. The bureaucracy tends to impose its views in the realm of privacy and competition, which is clearly demonstrated in the case of the current Civil Code.

Especially after the Second World War, academics' influence has in-

[181] Government decree no. 1267/2013 (V. 17.).

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creased despite the fact that the bureaucracy has gained more leverage in the legislative process, and notwithstanding the growth of a specific profession charged with drafting legislation.[182] In Hungary there are no special courses for this activity and there is not much social and/or material prestige attached to it. Consequently, generally only newly-minted lawyers are recruited to be legal drafters. This is a recipe for very low administrative standards, which leaves a large amount of space for political and academic machinations.

The influence of academics remains relatively important despite the intervention of special interest groups, especially lobbyists, who act on behalf of pro-market forces and the welfare state. These groups are a reaction to administrative over-regulation and provide specific self-regulatory activity and soft laws.[183] The self-regulatory activities of practicing lawyers and their soft laws often have extended cross-border effects, since a company's investment decisions affect various regional stakeholders. Thus, academic leverage in the legislative process has gone global too, for example, in the various model laws of the Organization for Economic Cooperation and Development, the European Union (the Lando Commission, Hugh Beale), and the World Trade Organization. The leaders or the dominant elites in these working groups are almost exclusively professors. In short, *Professorenrecht* in Hungary may not hold the same meaning as in Germany, and it may not exert the same influence, but it does exist and plays a role in global legal harmonization.

[182] This influence became less relevant in the second and third FIDESZ governments. See VARGA, Cs. *A kodifikáció mint társadalmi-történelmi jelenség.* Budapest: Akadémiai Kiadó, 1979. p.379.

[183] ZUMBANSEN, P. C. What Lies Before, Behind, and Beneath a Case? Five Minutes on Transnational Lawyering and the Consequences for Legal Education. Research paper no. 62/2013, *Osgoode Hall Law School of York University, Comparative Research in Law and Political Economy* p.4.

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2.2.3. Constitutional law

Professorenrecht *in constitutional law*

The role or the notion of *Professorenrecht* appears to be very different in the development of constitutional law. If there was a working notion of *Professorenrecht*, it would most likely be in this field. Constitutional law is ideally based on pure categories in the Platonic sense, and on universal theories. It presumes, requires, and recognizes natural law or some sort of law related to basic human rights. If one defines constitutional law as the set of principles concerning the relationship between the state and the individual, then tenets of natural law must be accepted and there must be an acknowledgement that there are certain fundamental rights that protect the liberty of the individual from the government.

Nevertheless, without constitutional law there would still be a coherent legal system and a system of valid rules. Constitutional law simply contributes to the legitimacy and general acceptability of laws. Therefore, if the constitution provides for the safeguard of private property, then seizures must be regulated (at least on the procedural level), and if equality before the law is guaranteed, then distinctions among different groups of people need to be specifically justified.

Constitutional law is a matter of more abstract thinking, the ideal terrain for academics. One might even say that it did not exist before the Enlightenment. Paradoxically enough, however, the articles and the entire operation of the Encyclopédistes might well be considered the first public and rather political discourse about the elements of a future constitution. For the same reason, in Hungary the political debates of the so-called reform parliaments between 1825 and 1848 called for a public negotiation about the interpretation of the rights of persons as articulated in natural law and the constitutional principles of the country. When some of these concepts

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were integrated into the Laws of April 1848, political considerations far outweighed the legal ones proposed by academics.[184]
However, traditional constitutional thinking appears to be different in Hungary. Although the constitution is not a matter of evolution, it is also not a purely theoretical construction. The Hungarian historical constitution is a kind of ancient pledge, an agreement of the nation and, in a certain sense, it still has a binding effect, having been revitalized in the new Basic Law of 2011.[185]

With this in mind, one might have the impression that the contradictions evident in the practical influence of *Professorenrecht* in the sphere of private law are equally traceable in constitutional law. The two worlds, the traditional and the modernizing, clearly coexist within the same sociological setting.

Continuous statehood, discontinuous constitutions

Act Number One of 2000 celebrated a millennium of Hungarian statehood. This emblematic piece of legislation—promoted especially by the traditionalist Hungarian Democratic Forum Party (MDF)—was drafted by the administration and submitted by the Minister of Justice (Ibolya Dávid, MDF). It demonstrated the deeply rooted fiction of the unbroken historical continuity of the country's constitutional traditions. Emblematic as it was, this statute also ordered that the crown (*Szent Korona* or the Holy Crown of St. István) and other royal coronation jewelry be placed in the House of the Parliament instead of the National Museum. This transfer was meant to reinvigorate the interpretation of the crown as the symbolic embodiment of the nation.

[184] These so-called "*Laws of April*" might be considered an attempt to produce a written constitution, see Deák....
[185] The meaning of the nation is not clear.

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The preamble of the Basic Law of Hungary of 2011 affirms this position in its final sentences: "We are proud that our king St. Stephen founded our state on a solid foundation one thousand years ago and made our country a part of Christian Europe. […] We honor the attainment of our historic Constitution and the Holy Crown, which embodies the continuous constitutional existence of the state of Hungary and the unity of the nation".[186] Yet, within the same *credo*, this alleged continuous existence is denied to certain eras of Hungarian history: "We do not acknowledge the communist constitution of 1949 because it was based on despotic power. Therefore, we declare it to be null and void".[187] By linking itself only to the 1919 revolution, the Constitution of 1949 declared itself to be a break in this "continuous historical constitutionalism".[188]

The birth of the first written constitution of 1949

The first written constitution of Hungary was conceptualized by the Hungarian Workers' Party (*Magyar Dolgozók Pártja, MDP*) as "the basic law of the peoples' democracy" in 1948. In the declaration of its program, it stated that "the Party considers it necessary to create a basic law of the peoples' democracy in order to canonize the rights and duties of the citizens; the fundamental changes in public order, economy, and society; and the populist character of the republic" in the constitution.[189]

Since the allied party of the Hungarian Independent Peoples' Front, chaired by the communist leader Mátyás Rákosi, overwhelmingly won the elections of early May 1949, the drafting of this constitution faced no obstacles. Immediately after the inauguration, a drafting committee was established

[186] See the credo of the Basic Law of Hungary as amended.
[187] Ibid.
[188] See the Act No. XX. of 1949 on the Constitution of the People's Republic of Hungary. See also the preamble of the Act No. XX. of 1949 on the Constitution of the People's Republic of Hungary.
[189] BEÉR, J. ed. *Magyar alkotmányjog*. Budapest: Tankönykiadó. 1951. p.111.

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on May 27, 1949, and was presided over by Rákosi himself, who was vice president of the Council of Ministers at the time.[190] The draft was approved by the government on August 5, 1949, and published for debate in popular gatherings organized in villages and factories across Hungary. The draft proposal was submitted to Parliament on August 10, and it was debated in committee on August 12. After negligible changes were made, the bill was passed on August 18, 1949, and published two days later.

It went into effect on the very same day, which was publicly celebrated as the "Constitution Day".[191] While neither the hastily generated constitutional text, nor the party's rhetoric or later commentary on the constitution denied that the ruling party's leaders were responsible for the draft, the regime was keen on demonstrating the widespread consent of the people.[192] Since academics were on the committee, the document could be said to bear the influence of *Professorenrecht*, though surely not in its original sense. The question is whether it is the ideological leverage of academics or that of politicians that defines the constitution. Certainly, the 1949 Constitution was a legal document, even if it was—admittedly—a translation of the 1936 Stalinist Soviet Constitution with the exception of the preamble and certain clauses.[193]

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[190] The May 27, 1949, decision of the Council of Ministers. The members of this drafting committee also included Imre Szabó, a professor of law at ELTE, member of the Hungarian Academy of Sciences, and later the head of the Research Institute of the Academy, and Andor Berei, a professor of economics, president of the Planning Bureau in the 1950s, and a researcher at the Academy of Sciences.

[191] See BEÉR, J. *Magyar alkotmányjog*... p.112.

[192] What is more, they were proud of it. See BEÉR, J. *Magyar alkotmányjog*... ibid.

[193] For example, Article 63 (2) declared that "the enemies of the working people and the mentally ill people are deprived of voting rights." Article 41 (1) stated that "the Courts of the Hungarian Peoples' Republic shall punish the enemies of the working peoples" Article 4 (2) provided that "working people shall gradually squeeze out the capitalists and shall build the socialist order of the economy."

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The birth of the constitution of the post-socialist transition in 1989

The drafting process of the 1989 Constitution had the exact opposite history as the Constitution of 1949. In addition to various domestic and international political and social factors, by the end of the 1980s, the desire to give genuine representative power back to Parliament served as the foundation of the Opposition Round Table (*Ellenzéki Kerekasztal, EKA*) on March 22, 1989, formed by the existing opponents of the regime and administered by the Independent Lawyers' Forum.

The EKA later created the so-called NEKA, the National Round Table (*Nemzeti Ellenzéki Kerekasztal, NEKA*). The NEKA established a constitutional road map including how to modify and eventually redraft the existing Constitution of 1949.[194] The NEKA proceeded from the idea that new rules of governance and the rights and duties of the citizens would be drafted during the negotiations and then approved by the single-party Parliament, which would adopt the results of the political negotiations.

Thus, in 1989 the process took the opposite form of the 1949 process. Negotiations proceeded throughout the summer of 1989, and the public could follow them in the daily press or through other news channels. However, the news did not contain full transcripts of negotiations but provided only concise reports on the substance of the talks.[195]

The members of the NEKA were mostly academics and overwhelmingly lawyers or attorneys, especially those who represented the Independent

[194] On June 10, 1989, the NEKA began negotiations with the ruling Socialist Party (MSZMP). The opposition contained the Bajcsy-Zsilinszky Society and the representatives of the parties that would later to become the MDF, FKGP, MSZDP, SZDSZ, MSZP, FIDESZ, and the trade unions.

[195] Participation in the NEKA: six non-law professors, twenty-five lawyers, five representatives of the Communist Party, and eleven other professionals.

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Lawyers' Forum.[196] Conspicuously, actual law professors were less representative among the negotiators.

Nevertheless, the entire founding procedure of the NEKA, and the essential discussions over the methods of the political negotiation process were held in the Criminal Law Department of ELTE's Faculty of Law. Not all of the representatives were democratically selected to carry out these negotiations, and no matter how favorable the environment was for constitutional reform later on in October 1989, the constitution that emerged from the NEKA negotiations was understood as a place holder.[197] The preliminary nature of this constitutional change was declared in its short preamble, and from a legal-administrative standpoint, the 1989 Constitution was merely an amendment to the Constitution of 1949. Later, as the "changes" decreased in popularity, these factors led to a continuous process of constitutional revision.

The birth of the Basic Law of 2011

The Basic Law of 2011 was drafted on the private iPad of a member of FIDESZ.[198] This hastily written document was based on the previous constitution; some parts of it are an exact "copy and paste." Nevertheless, there has never been a written constitution around which the debate was

[196] There were four law professors and nineteen practicing lawyers in the NEKA. These numbers are based on BOZÓKI, "*Szemérmes alkotmányozás*," 216. The participants of the first meeting were Károly Vigh, László Kövér, Viktor Orbán, Pál György Bártfay, Imre Kónya, György Sándorfi, Imre Boross, András Gergely, György Szabad, Csaba Varga, Bálint Magyar, László Bruszt, László Vitézy, and T. Mihály Révész. However, many others joined the negotiations, including László Sólyom, János Kis, Péter Tölgyessy, Béla Pokol, etc. The majority of these negotiators were lawyers and academics. Different meetings included different participants.

[197] KÖRÖSÉNYI, A., TÓTH Cs., and TÖRÖK, G. *A magyar politikai rendszer.* Budapest: Osiris Kiadó, 2003; and especially JAKAB, A. A magyar alkotmányjog-tudomány története és jelenlegi helyzete. In: MENYHÁRD, A. & JAKAB, A. eds. *A jog tudománya,...* . See Act No. XXXI. of 1989 on the Amendment of the Constitution (of Act No. XX. of 1949) regarding the temporary status of the constitution.

[198] See: iPaden írja az alkotmányt Szájer József. *HVG*. 2011. március. 02. This member of the FIDESZ Party, József Szájer, was also member of the European Parliament, and was on an academic track at the beginning of his career.

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so heated in academic circles as this one. There were already many drafts of a new constitution circulating in the 1990s, because the 1989 Constitution's legitimacy had always been questioned.[199] It is, therefore, interesting that after so many debates and so much preparation, the Basic Law did not actually reflect any of the concerns, fears, or proposals raised during the previous two decades.[200]

Having said that, the question of *Professorenrecht* is disguised, but present. Although the Orbán regime might be described as a legalistic or legalizing regime, this identity is mirrored neither in the strengthening of *Professorenrecht*, nor in the legislation proposed by the administration or FIDESZ's legislation proposals. The influence of political will is comparable to that which accompanied the drafting of the 1949 Constitution.

Conclusion two: **Professorenrecht** *revised in constitutional law*

One might have the impression that the notion of Professorenrecht was still valid in the field of constitutional law in a confusing and limited way. Perhaps not surprisingly, political leverage remains more influential in these cases than in the creation of civil or private law. In principle, a constitution drafted by academics rather than politicians, and thus in a less transparent and more undemocratic manner similar to the Weimar Constitution, is not inherently problematic. This method is far better than a written constitution drafted by a victorious general like the Japanese constitution, despite its ef-

[199] See, for example, HALMAI, G. *Egy új alkotmánymodell felé*. Budapest: Társadalomtudományi Társaság, 1991; BRAGYOVA, A. *Az új alkotmány egy koncepciója.* Budapest: Közgazdasági és Jogi Könyvkiadó—MTA Állam- és Jogtudományi Intézet, 1995.; ÁDÁM, A., KILÉNYI, G., SAJÓ, A. SCHMIDT, P., PERECZ, L. & SÓS, V. Mire való az alkotmányozás?. Világosság 35, no. 12 (1994) pp.5–27.; SOMOGYVÁRI, I. Magyar alkotmányozás 1988–2008 *Politikai évkönyv.hu,* 1995. http://www.politikaievkonyv. hu/online/mp20/1-02_somogyvari.html., BOZÓKI, A. Szemérmes alkotmányozás. Rendszerváltás és jogállami forradalom 1989-ben. In: JAKAB, A. & KÖRÖSÉNYI, A. eds. *Alkotmányozás Magyarországon és máshol* Budapest: MTA TK PTI—Új Mandátum, 2012. pp.202–39.; DEZSŐ, M., FŰRÉSZ, K., KUKORELLI, I., PAPP, I., SÁRI, J., SOMODY, B., SZEGVÁRI, P., TAKÁCS, I. *Alkotmánytan*. Vol. 1. Budapest: Osiris Kiadó, 2007.

[200] For a brief summary, see JAKAB, A. A magyar alkotmányjog-tudomány... pp.186–88.

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fectiveness and durability. Yet, it is important to consider that even if many constitutional drafting processes are characterized by a lack of democratic control or legitimacy, the people involved do not universally try to convince the citizenry that the opposite is true. One could say that the litmus test of a constitutional democratic regime is whether the ruling elite feels it is necessary to demonstrate the consent of an overwhelming majority of people in favor of a newly drafted constitution or whether this same elite can handle the fact that the constitution is merely a legal-theoretical piece of work.

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PART 3.

RISKS OF LAW IN CONSCIENTIOUSNESS

The government in liberal democracy is accountable for its promises but is the state liable too? What does accountability mean in an illiberal democracy, who and how is responsible – or liable – for the promises? These promises may be regarded as the bargaining of the political process no matter what these promises are about: housing for eveyone, universal health care, free education or the first generation basic rights – freedom of religion, free speech, free assembly and voting. But is there a ranking in these promises? If yes, on what grounds are these rankings justifiable: economic, moral or legal or even ideological? Illiberal democracies would value highly the paternalistic providences if at least formal elections are inevitable as opposed to the first generation basic rights. Liberal democracies on the other hand may value welfare state beside freedom of conscience, free speech, freedom of assembly and voting rights. These discussions naturally involve the reasoning of fairness and equity. Part 3. discuses the risks of the laymen perception of equity, or how to negotiate, who can take part in it, who bears the risks of the ultimate decisions – beneficiaries or taxpayers?

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Chapter 3.1.

Possible Risk Allocations for Taiming (Un)Foreseeability in Longterm Loan Agreements

This chapter is a follow up of a survey[201] *among students analysing their attitude toward non-performance of long-term loan agreements. The new survey, using the same old questionnaire to be answered by the same statistically homogeneous student group at the university, provides a possible interpretation of the changes of the financial-legal culture —if any— in Hungary. The first study was conducted between 2013–2016 while its follow up in 2024. Interestingly enough, the overall changes in the attitude in 2024 shows a deeper general solidarity towards those in need. Yet, at a closer look, when it comes to the actual point of helping, this solidarity seems to be more or less at the same level as it was 8 years ago. However, one thing that really seems to be different is an even stronger distrust in the state (the laws, the system) and more possible reliance in family and friends.*

As for a really brief conclusion of the surveys, one could say that the respondents act very logically and calculate very rationally. They do so, even if they mostly have no basic knowledge of the issues above but a hunch. The problem is that acting irresponsibly is rational because it often pays off better than acting by the rules. To be able to embrace the disadvantages of the market economy and the distrust in the state one needs to be able to understand the institutions. This survey, as it stands now also in 2024, still demonstrates exactly the lack of such an insight. What is left nowadays is the capitalistic objectives (an avidity to be wealthy) without the capitalistic virtues (the autonomous, financially independent, deliberating citizen).

[201] The results of the previous survey were published in 2018, see: How to Keep a Promise: Laymen Answers to the Financial Crisis. *Periodica Polytechnica Social and Management Sciences.* 26(1) 2018. pp.49–66.

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3.1.1. Introduction

The question whether there is such a thing like ethical economy[202] has perhaps never been discussed so intensively and challenged so globally[203] as it is nowadays. The motivation such as "greed is good" has perhaps never been to be hidden behind such a dense drapery or the criticism of the neo-libertarian economy has never been louder especially in the literature of social economy.[204] Besides, however, the series of questions of accountability or responsibility (liability) emerge ceaselessly together with analysis, should they be legal,[205] political, ethical or cultural[206] in Hungary too.

There is, certainly, nothing new in the problem of keeping a promise in adverse (economic) conditions. Hungary has also survived many wars, inflations, revolutions, and turmoils.[207] The idea of *pacta sunt servanda* has long been a legal rule of civil law in Hungary too. So, it is accepted, that the parties must perform unless the newly emerged (unforeseeable) circumstances make it impossible for a party to fulfill the earlier promise, *clausula rebus sic stantibus*.

Obviously, the existence of such rules, such legal rules, require developed ideas about how individual and/or social risks are to be calculated and

[202] GRIFFITHS, M. R., LUCAS, J. R. *Ethical Economics*. Palgrave-MacMillan. 1996.
[203] PICKETTY, T. *Economy of Inequality*. Harvard University Press 2015.
[204] GENSCHEL, P. & HEMERIJCK, A. Solidarity in Europe. European University Institute. Policy Brief. *School of Transnational Governance.* May 2018. DOI: 10.2870/106143 or DUFLO, E. & BANERJEE, A.V. *Good Economics for Hard Times: Better Answers to Our Biggest Problems.* Penguin Random House, 2019. or KRLEV, G., PASI, G., WRUK, D & BERNHARD, M. Reconceptualizing the Social Economy. *Stanford Social Innovation Review*. 2021. https://doi.org/10.48558/98VT-G859., or perhaps most recently: RAJAN, R. Monetary Policy and Its Unintended Consequences. *Karl Brunner Distinguished Lecture Series.* MIT Press. 2023.
[205] PÁZMÁNDI, K. A nyelvvel való visszaélés rétegei a pénzpiacokkal kapcsolatos kereskedelmi és politikai kommunikációban. In: SZABÓ, M. ed. *A jog nyelvi dimenziója.* Bíbor Kiadó, Miskolc. 2015. pp.257–266.
[206] FLECK, Z., GAJDUSCHEK, Gy. Empirikus kutatás a jogban. In: JAKAB, A., MENYHÁRD, A. eds. *A jog tudománya: Tudománytörténeti és tudományelméleti írások, gyakorlati tanácsokkal.* HVG-ORAC Lap- és Könyvkiadó Kft. 2015. pp.101–131.
[207] See e.g. the Hungarian Legal Journal (*Jogtudományi Közlöny*) between 1921–1923 for illustrating the problems of performance of long-term contracts under and after WW I.

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allocated.[208] And further the existence of such rules does not necessarily mean that they are efficiently enforced or applied. The more such rules are part of a legal culture, the clearer it can be the kinds of events which may be unforeseeable (therefore excusable), really unexpected, and which are not.[209] Lately, the widespread use of long-term private credits (the consumer loans, or the consumer loan agreements) offer good chances to illustrate what people in Hungary think about long term obligations, responsibility, calculations, financial risks, liabilities, performances, and excuses. The relevant question in law is, how likely and how foreseeable the various possible new scenarios (e.g. a global economic financial crisis) or the (non-) expected —but foreseeable—human reactions – both biologically (e.g. serious illness, pandemic) and sociologically (e.g. a divorce, or unemployment among – lower – middle class people) – could be.

Some of these considerations are inevitable, for the parties entering into a contract, to calculate the risks (in both sides) and thereby allocating the liabilities properly, in other words, to use resources efficiently. If special unexpected changes in the performance or in the circumstances are not foreseeable or not arranged in the agreement properly, then instead of the prior risk minimization rules, the liability for damages must be applied so that to offer efficient remedies.[210]

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[208] HATZIS, A. N. Moral Externalities: An Economic Approach to the Legal Enforcement of Morality. In: Hatzis, A. N., Mercuro, N. eds. *Law and Economics: Philosophical Issues and Fundamental Questions* Routledge, London/New York. . 2015. pp.226–244. Available at: http://ssrn.com/abstract=2821292 [Accessed: 3. Dec. 2024] or see the theory of efficient breach: EISENBERG, M. A. The Theory of Efficient Breach. *Foundational Principles of Contract Law* New York, 2018. https://doi.org/10.1093/oso/9780199731404.003.0006 or see: LANGVARDT, A., BARNES, A., PENKERT, J., McCRORY, M., and PERRY, J. *Business Law: The Ethical, Global, and E-Commerce of Environment*. 17th ed. McGraw Hill. 2019. p.1470.

[209] GRAHAM, J.D. & WIENER, J.B. eds. *Risk versus Risk Tradeoffs in Protecting Health and the Environment.* Harvard UP. 2015.

[210] It should be emphasized, that the word "responsibility" here is being used in a much more broader sense than it is suggested by András Földi in his book reviewing (also) the historical conception of responsibility; This, perhaps a little bit overbroad, understanding of responsibility is naturally due to the goal of the questionnaire which is to interrogate the laymen so the respondents are non-law students, therefore their interpretation of responsibility or liability or

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The following questions were examined in the analysis of the follow up surveys too in 2024: (i) whether the obligations of a loan agreement have to be fulfilled no matter what new circumstances may occur, (ii) whether the original objective of the debtor in a loan agreement makes any difference in case of failure, (iii) what kind of events should be construed as an excuse for non-performance, (iv) whether there should be measures designed to protect the debtors more, (v) if yes, at whose expense —the creditors (rather preventive measures) or the taxpayers (rather restitutive measures) —, (vi) if no, how to allocate ideally the risks and liabilities, and finally (vii) whether profit-making is an evil *per se,* that needs to be managed.

3.1.2. The methodology

The first survey was conducted through several years (between January 2013 and September 2016) among the same, from a statistical point of view, homogeneous groups. The questionnaires were to be answered in every semester by the students of the business law course at the very beginning, in the first class. The students were therefore generally among 20-24 years of age and have presumptively different sociological and geographical backgrounds, of course. What made them comparable though, was their age, their lack of interest to be a lawyer, but their aim to be engineers or economists, their being at the threshold of their professional life and basically their common educational culture at school. This generation was born after the Transition.[211]

accountability may not be so distinctive. Also that is why my construction of responsibility here purports to include "cultural responsibility" such as solidarity as well and horribile dictu risk and responsibility might well be used interchangeably, since they are – in certain sense – just the other side of the same relations. FÖLDI, A. *A másért való felelősség a római jogban, jogelméleti és össze-hasonlító polgári jogi kitekintéssel.* Rejtjel, Budapest. 2004.

[211] "Transition" here is meant to describe the democratisation and marketisation process of the post-socialist (communist) societies after the collapse of the Soviet regime in East-Central Europe in the 1990s.

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The follow up survey was conducted in 2024 among students of the same courses but not at the same university.[212] Also, these 8 years, having lapsed in between the two surveys, resulted in a change of generation too, so not only were these respondents born after the Transition, i.e. not in the socialist Hungary, but in contrast to the earlier students before 2016, they are already the representatives of the Gen Z.[213]

Naturally, the questionnaires were anonymous and non-obligatory. The total number of answers so received was close to 400 until 2016 and 170 in 2024. The survey sought to have answers on these students' attitudes towards private expectations, private debts, private bankruptcies, small business failures, possible state duties and therefore implicitly, about contractual obligations, market failures and perhaps solidarity.

A *caveat* should be emphasized here, though. Undoubtedly, several hermeneutical doubts may occur, as in any questionnaire, by answering the questions in the different cases or legal situations. Since the aim was to find out the laymen's reactions to the financial crisis, the various terms were actually used in their everyday common understandings, provided that there are any. So here there should be more scenarios[214] to clarify.

First, when using the various legal *terminus technicus* which have no 'exact' correspondent terminology in the everyday life, a broader lay-conception of the terms are to be understood. Thus, for example, there are no distinctions amongst the different long-term loan agreements, whether these cover a consumer credit construction or a lease purchase contract or

[212] Special subjective note: due to the migration of my employee, the Faculty of Business Economics from the Technical Universtiy of Budapest (*BME*) to the ELTE (*Eötvös Lóránd Tudományegyetem*) Faculty of Business Economics in 2017, the respondents of the last survey were students of the *ELTE* in 2024.

[213] see RUE, P. Make way, millennials, here comes Gen Z. *About Campus*, 23.3. 2018. pp.5–12. on Gen-Z in the universities or more generally in the world: MAHAPATRA, G.P., BHULLAR, N. GUPTA, P. Gen Z: an emerging phenomenon. *NHRD Network Journal*, 15.2 2022. pp.246-256.

[214] see PÁZMÁNDI, K. A nyelvvel való visszaélés rétégei....

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a sales and purchase agreement. These are to be understood as long term binding obligations.

Second, there are certain legal conceptions which do comply with an everyday meaning but not necessarily to that one what the term would be used for. Consider, for example, the institution of private/individual bankruptcy, which was not even in the public discourse at the beginning of the conducting the survey (see footnotes on "luxury" and "homelessness" below). Bankruptcy, as such, is foggy and pejorative in traditional Hungarian common discourse. It might refer to an unworthy release from debt, but could mean a cunning release from it too. Owe exactly to the very nature of this survey, that the students filled in these questionnaires without having had the chance to distinguish among the various institutions in the questionnaire, this private bankruptcy institution might represent different conceptions or have dubious and vague objectives for the respondents. In any event, this term might not give enough insight into its real meaning in the survey.

Third, in some cases certain pre-conception is already presumed on the part of the respondents. So, for example, taking private loan for purchasing further real estates as an investment might qualify as private speculations for some, whereas business investment for others. As a matter of fact, who can tell, from certain aspect, it might be a fuzzy concept.

What makes a business to be a business, from a non-legal point of view? Also, the use of other somewhat vague terms, adjectives, like "luxurious" expenses, however relative their meanings might be, lack the prior clarifications or distinctions too, so they are used as common sense, whatever that might well be (see fn. 218. below).

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3.1.3. The basic scenarios

The whole questionnaire has basically three different groups of questions. The first group of questions is A) what would someone do in case a private debtor (a consumer) fails to perform in a long-term loan agreement concluded for further three very different purposes: i) the purchase of a flat, ii) the purchase of a luxurious sport car or a luxurious vacation, or finally iii) the purchase of real estates as an investment.[215] The second – here not to be discussed – group of questions B) concerns answers, like what would someone say if damage were caused at the workplace and the claim should be against a company (employer) or against an employee. The third group of questions C) deals with the attitudes towards business or rather business failures, and enquires whether the small and medium enterprises (SMEs) should be supported by any regulations steered by the state and eventually what sort of deliberative decision-making would be satisfactory for any business calculation.

The analysis of these data, received from the responding students and processed in a freely accessible PSPP database in 2016 and in excel in 2024, provides for the following results.

The basic scenarios of the private long-term loan agreement and the answers pertaining to them are the following (3.1., 3.2., 3.3.). The very first questions of the survey are whether one would help someone else who is in failure of performing a long-term loan agreement, depending on the objective of the spending and the circumstances causing the default.

Saving for what?

According to the first scenario, in which **a flat was purchased**, the indebted person failed, despite of his precautious acting by having calculated possible risks and costs well before the decision. He has failed due to the

[215] Certainly, these scenarios cover the everyday experiences of the times in the 2010's and onwards.

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global economic and financial crisis and because his employer was wound up, so he also loses his good job. The majority of the answers in 2013-2016 voted for help. (yes: 63.13 % — no: 32.96 %).[216]

This help was even more reinforced in 2024. (yes: 73,85% — no: 26.92%).

When the same question concerned a slightly different situation, namely, that the failure to perform was due to the fact that the debtor's wife got ill, and so needed more care that cost a lot of money and time, so he loses his job, the willingness of help even raise higher in 2013–2016. (yes: 84.64 % — no: 11.73 %).

These questions were answered in 2024 basically similarly. (yes: 88.46% — no: 11.54%).

On the other hand, when the pay back of the loan was stopped because the couple decides to divorce and that proves to be too expensive, the helping intentions decrease dramatically in 2013–2016. (yes: 20.95 % — no: 74.58 %).

These questions were answered more or less the same way with a bit of more concern towards those in need in 2024. (yes 33.08% — 64.62 %).

So far it may be said that the respondents between 2013 –2016 were quite sympathetic to the debtors. In the beginning of the 2000's it was well accepted to use credit for buying a place to live in even if one was without the means to do that. This may have reflected the spirit of the post-socialism too, that the minimum level of existence may also include housing, nonetheless, it was also a world wide experience.[217] However, even if not too many thought that this should not be so (~33% in 2016 and ~25% in 2024), yet this should not to conclude that these people would have said that prior

[216] Please note, that a few answer was illegible or missing, therefore the total of "yes" and "no" shall not be 100% in 2016, in contrast to the answers in 2024, when students were much more conscious and tidious in replying, still some responses were also illegible.

[217] See the problem of subprime mortgage in the 1990's in the USA and its widespread securitization by non-American banks as well all over Europe and the world.

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saving would have been the answer to such problems.[218] One thing is clear though, that respondents did punish those, who get into trouble upon their own faults, whatever this might mean. Obviously, the divorce was such a thing, whereas getting sick, of whatever kind, was not. Noteworthy is here nevertheless, that even this scenario of divorce could attract somewhat more supporters in 2024. In any event, these results should be read cautiously. In 2016 one could say, that the respondents were young, without own experience of the nature of a marriage and the diseases at all but in 2024 this statement would not hold truth after the pandemic and the serious lock-downs all over the world.

So, these data did not change radically in 2024. Students were more solidaristic with those who suffered losses due to market failures, such as in global crisis (10% more would help) or because of illness of the spouse (the % of supports of former very high willingness of help remained at 84.64%). And even the attitude toward the economic damage caused by a divorce did not turn around.

Helping but how?

In the next scenario, this first question is endowed with a different background. The aim of the loan is different, thus the debtor, under the same circumstances, **wishes to acquire a luxurious sport car or a luxurious vacation**[219], instead of a flat for the family. The failure of performance is however the same. Firstly, in case of the global financial crisis, the willingness to help the debtor is (relative to the above) very low. (yes: 14.53% — no: 82.40%).

Yet, even these answers mirrored a more solidaristic view in 2024. (yes: 20.00% — no: 79.23%).

[218] Quite certainly, there is no such question about savings, since otherwise the respondents would have reacted in a biased way.

[219] 'Luxury' might have meant 'greed' to some but 'necessity' to others. Assumedly, the answers reflect the distinctions

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Secondly, however, when the failed performance is due to the illness of the spouse, the wanted help is higher again. (yes: 54.75% — no: 42.18%).

These answers were also higher for the yes in 2024. (yes: 60.00% — no: 38.46%).

Thirdly, the vast majority refuses to help in the event of a divorce in 2016. (yes: 12.01% —no: 84.64%).

Which remains true in 2024 too, but even here the support has become a bit higher and what is more, higher than the support in case of an economic crisis. Students became more solidaristic (yes: 23,88 % – no: 76.38%) toward divorce!

The respondents nevertheless are seemingly less sympathetic with the idea of a luxurious spending financed out of a loan. However, it is still robustly accepted and supported if someone fails to perform due to illness (~ 55% would help in 2016 and 60% in 2024). It seems, that illness is regarded as an utterly bad and unjust fate, no matter why and how, which triggers sympathy and must be remedied. This soaring of the numbers may be owe to the COVID-19 experiences too, the pandemic hit the students extremely hard.

Clearly, however the *objective* of the spending (out of loan) makes quite a difference.

What is the role of responsibility?

In the final scenario, the loan is used differently again. Instead of buying a flat or getting a luxurious car or entertainment, the aim here is to ***purchase further real estates as investments*** for the future.

If global financial crisis caused the debtor to fail the performance, a substantial majority of the respondents said "no" to a helping request here in 2013–2016. (yes: 24.58% — no: 72.35%).

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Still, the solidarity with those in need is seemingly stronger even in this case too, in 2024. (yes: 33.08% — no: 64.62%).

If, however the spouse's illness were the reason to stop paying back the loan, the respondents were more willing to help in 2013–2016. (yes: 62.29% — no: 33.52%).

And in line with the previous findings, the support even in this scenario was higher in 2024. (yes: 70.00% — no: 26.92%).

In case of divorce, on the other hand, this helping willingness plummeted again in 2013–2016. (yes: 13.41% — no: 80.73%).

The support to help is also lower in case the non-performance is due to a divorce, yet it is still higher in 2024. (yes: 33.08 % — no: 64.62 %).

Interestingly enough, if one takes a closer look at the results of these three basic scenarios, it is striking what differences there are in comparison between the two major survey times, i.e. a more emphatical generation seems to have grown up in between, which survived the COVID-19 as its own experience. Certainly, the lock down misery, the rise of unemployment, the abrupt soaring inflation[220] after decades of non-inflation or even deflation due to the pandemic could be traced in all over the world, nonetheless the special Hungarian effects would be worth examining.[221]

[220] From a supply shock perspective see e.g.: RIO-CHANONA, del R.M, MEALY, P., PICHLER, A., LAFOND, F., FARMER, J.D. Supply and demand shocks in the COVID-19 pandemic: an industry and occupation perspective, *Oxford Review of Economic Policy*, Volume 36, Issue Supplement_1, 2020, pp.S94–S137. hhtps://doi.org/10.1093/oxrep/graa033 or from a lack of demand view see e.g.: CHETTY, R., FRIEDMAN, J.N., STEPNER, M. Opportunity Insights Team, The Economic Impacts of COVID-19: Evidence from a New Public Database Built Using Private Sector Data, *The Quarterly Journal of Economics*, Volume 139, Issue 2, May 2024. pp.829–889. hhtps://doi.org/10.1093/gje/gjad048

[221] COHN-BECH, S., FODA, K., ROITMAN, A. Drivers of Inflation: Hungary. *International Monetary Fund*. Volume 2023: Issue 004. 2023. p.22.

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Causes of failures compared

Yes for help in housing	**Yes** for help in luxurious spending	**Yes** for help in further real estate as investment	**Cause** of failures
63.13 %	14.53%	24.58 %	global crisis
84.64 %	54.75 %	62.29 %	illness of spouse
20.95 %	12.01 %	13.41 %	divorce

Table 1 for 2016

Yes for help in housing	**Yes** for help in luxurious spending	**Yes** for help in further real estate as investment	**Cause** of failures
73.85 %	20.00%	33.08 %	global crisis
88.46%	60.00 %	70.00 %	illness of spouse
33.08%	23.88 %	33.08 %	divorce

Table 1 for 2024

It seems to be important for the respondents what the aim of the long-term loan agreement is, and whether it is so justified, so as to be worth a common help. The minimum living existence (i.e., housing) is clearly more worth than a luxurious spending or a speculation as an investment. In any event, the respondents are also reacting on the variety of the causes of failures. The global financial crisis triggers help but much less than illness does.

It might well be the case that for these youngsters a divorce is such an overriding self default, that it is not worth further inquiries what the circumstances are/were. And it is true on the other way around, i.e., the spouse's illness is such a devastating impact that should be outweighed with help, again, regardless to the circumstances. It remains so, even if, as shown, a more sympathetic attitude has developed in recent years until 2024.

The questionnaire consisted of further inquiries related to the above

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mentioned scenarios, digging for the "why"s and the "how"s of the plain "yes" and "no" answers. The basic scenarios remaining the same, the later answers are analyzed in relation with the earlier ones. So, these cross-references are supposed to show what a respondent would say for further questions if at the start he decided for yes, for helping those in financial need, or on the other way round, what a respondent would say for further questions, if at the start he decided for no, for not helping those in financial need. Therefore, the tables below (Table 2–4) demonstrate also a cross reference scrutiny to the very questions, in which the first line of answers indicate whether the respondent would help (yes) or would not (no). Corollary, it means that the responses in the rows are related to the responses in the columns (yes—no).

3.1.4. The analysis

As a base line result here are the most important assessments concluded during the survey, subject to the analysis and pieces of evidence, of course as, hopefully, provided below.

- One can hardly distinguish among the respondents as to their attitude towards the state and the free market. Distrust in both institutions is just almost palpable (p.4.1.).
- The market rules are selectively accepted. In case of market failure, the solutions are generally implicitly ex¬pected from the state (p.4.2.).
- Readiness to help others in need is relatively widespread if and only the cause is not self-inflicted and the spending is justified (p.4.3.).
- However well acknowledged it is, that market failures are indispensable, the expected cure from the state regu¬lations are just not trusted (p.4.4.).

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One can hardly distinguish among the respondents as to their attitude towards the state (and the free market). Distrust in both institutions, market, and state, is just almost palpable.

Firstly, the question is, what do the respondents think, when to help, indeed, what sort of deliberation is to be concerned in the decision-makings. (The role of private savings).

In the first question, our fictitious debtor might have been a responsible person and besides the loan, he would make some savings too. So, he would take care of his own pension, private health service and future education for his children. In these cases, a new question arises in all scenarios, namely, whether the respondent would reconsider his willingness or refusal to help, if he knew that the debtor could not pay because he has saved (or is just saving) money for retirement, illness and education for his children.

In the case of a global financial crisis the answers are the following (Table 2/A).

In Aa) case, i.e., when the debt is spent on a flat to live in, those who would help in the first place, would more likely reconsider their positive answer than those who would not support the debtor at all. It should be noted here, that the "yes" group formed quite the majority of the respondents, i.e., 63.13% in 2016 but even more, 73,85%, in 2024. So, it seems, that almost half (42.11%) of the respondents ready to help in need, would not assist to the debtor, if they knew, the debtor had savings (no matter whasort of savings), which has not changed in 2024.

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Saving for what

	Minibrain has an average but well-paying job, which allows him to make plans for long-term future as well. He and his wife live with their 2 minor kids together.					
	Aa) They want a bigger flat because they still live at Minibrain's parents. So, he calculated that since he cannot afford to buy a flat. he takes a loan, which he later to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back		**Ab)** Minibrain wants to have a sport-car/a luxury vacation and calculates that even if he had such a solid financial background, he would not be able to cover such an expense. So, he takes a loan which he later fails to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back.		**Ac)** Minibrain thinks it is a good investment to purchase further real estates, to lease them or later to sell them for more. So, he takes a loan which he later fails to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back	
A	If he failed because his employer is wound up due to the global economic crisis.		If he failed because his employer is wound up due to the global economic crisis.		If he failed because his employer is wound up due to the global economic crisis,	
	Would you help him?		Would you help him?		Would you help him?	
answer	yes	no	yes	no	yes	no
2024	73.85%		20.00%	79.23%	33.08%	52.31%
2016	63.13%		14.53%	82.40%	24.58%	72.35%
yes 2024	40.77%		17.69%	82.31%	21.54%	76.15%
2016	42.11%	9.20%	50.19%	1.10%	38.94%	8.51%
B	If he failed because his wife got seriously ill and the treatment is expensive, time consuming and finally he loses his job too.		If he failed because his wife got seriously ill and the treatment is expensive, time consuming and finally he loses his job too.		If he failed because his wife got seriously ill and the treatment is expensive, time consuming and finally he loses his job too.	
	Would you help him?		Would you help him?		Would you help him?	
answer	yes	no	yes	no	yes	no
2024	88.46%		60.00%	38.46%	70.00%	26.92%
2016	84.64%		54.75%	42.18%	62.29%	33.52%
yes 2024	35.38%		15.38%	83.85%	23.08%	73.85%
2016	44.44%	9.79%	11.79%	9.79%	34.25%	4.55%
Would you reconsider it, if he could not pay because he saved money for retirement, illness, and education for his children?						

Table 2 (for A and B)

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C	If he failed because he and his wife decide to divorce and the facilitation of the two separate lives imposes significant financial burden. Would you help him?					
answer	yes	no	yes	no	yes	no
2024	33.08%	64.62%	23.88%	76.38%	33.08%	64.62%
2016	20.95%	74.58%	12.01%	84.64%	13.41%	80.73%
yes/2024	27.69%	70.77%	17.69%	82.31%	17.69%	80.00%
2016	34.02%	12.10%	31.39%	8.43%	43.61%	9.99%
Would you reconsider it, if he could not pay because he saved money for retirement, illness, and education for his children?						

Table 2 (for C)

Seemingly, the Ab) case is not much of a difference. In Ab) case, i.e., the luxurious spending case, a little more than the half (50.19% in 2016) of the "yes" respondents would reconsider the help and would be far less sympathetic with the debtor, if he knew about the savings. Here the odds are however, that this "little more than half" relates to a much less group of the respondents, the 14.53% original "no" group (as opposed to the 63.13%). So, it means, that the pattern is the same: the half of the ‘yes’ majority would reconsider the answer. But the multitude here is much less. These figures make difference only in relation to the total responding population. In Aa) those who would reconsider their positive answers are 25% of the respondents whereas in Ab) only 7%. Interestingly enough, this scenario is more characteristically disapproved in 2024 though (original "yes": 20,00% out of which would change mind: 17,69%).

Finally, the reconsideration of the ‘yes’ group is the least likely in case Ac), in which investments/speculations are the target of the loan. However, the difference between Aa) and Ac) seems to be within just a margin of deviation (42.11% vs. 38.94%). But this 38.94% is counted from the 20.95% "yes" of the original help group as opposed to that of the 74.58% "no".

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Nevertheless, the pattern is resembling to that of Aa) and Ab). And this is basically true for 2024 as well with the saying here too, that there is a more characteristical "yes".

To add it all up, one could draw the conclusion, that those who would not help in the first place at all – no matter whether they are in the majority or in the minority – would be less likely to reconsider their answers. And here, this point must be stressed even more. Because, the question could be construed the other way round, so that to emphasize that although one would not help right away, but would do so, nonetheless, upon learning that the debtor failed because he had had savings, thus the debtor proves to be a rational one, worthy of support. It seems that this kind of interpretation did not occur.

Conspicuously enough, when the failure to perform is due to the spouse's illness, the answers look very different (Table 2/B). The luxurious spending in case of the illness of the debtor's wife is the least favorable, therefore the least supportable deed among all things. The swings of reconsideration or not, i.e., the saying of "no" help instead of "yes" help, is the highest. (see Ab). Nevertheless, it should be borne in mind that these figures are very little if related to the total responses: they range from ~5.5% to ~7%.

And finally, if the stoppage of pay back is owe to the divorce, the results are as expected, (relatively) in accordance with the first scenario, i.e., in the case of global financial crisis (Table 2/C.). The difference however is still, that the original "yes" groups are smaller in this case, than in the housing provision case. That should definitely mean, that this investment/ speculation is rather regarded as business or as speculation which in failure would not worth public help.

One way to think about this, is that whatever the differences there might be, these data show little respect to the reasons why someone gets into

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trouble other than illness or divorce in the first place. As opposed to that, the very reason, that someone does have the aim to take care of himself and also of his family, matters little. Thus, one inevitably gets to the conclusion, that (financial) responsibility, (financial) autonomy, thereby freedom (of the state?) means little among young respondents even in 2024.

Another way to analyze these data, and it is remaining certainly unproven here, is whether or not these reconsiderations mean that the respondents look at the situation not as a sign of responsibility, but as a sign of financial capability of the debtor to pay out his debt. This attitude may therefore be interpreted as a manner mirroring a pure market answer. No one is in need who still has savings.

However, if this speculative thinking is right, this train of thought might also reflect a kind of lack of institutional thinking (in financial matters). First of all, long-term savings may not necessarily guarantee liquidity. Second of all, the bridging loans are designed also for exactly this kind of situations. Terminating a long-term savings contract before it is due, is not less of a damage than it is not to perform on time an installment of paying back a loan. If someone takes into consideration that long-term savings are delayed demands, then as a matter of social efficiency, the help in such a need should be, or may be, tackled with differently. Corollary, the discrepancy here between social justice and economic efficiency may be found to be false, but not for the respondents.

Besides, it should be noted, however, that in general, it is not acceptable, as such, if someone without the means asks a loan for luxurious spending. And this remains even then so, when it turns out that the debtor had savings, nonetheless.

And this is absolutely different from the case, in which sickness is involved in the failure of the performance. Certainly, this traditional view and

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this traditional ambience of sickness may seem anachronistic: "if you are ill, stay in bed". But, clearly, there are so many kinds of illness. Also, one should consider, that in Hungary, the health insurance is part of the state budget, however separate, and the contribution is collected as tax revenue. Illness is therefore already regarded as a living on public funds. No need for further support in case of luxurious expenses. Or it may be construed, in the contrary, that it is well justified (accepted) that ill people should be subsidized out of the public funds. But/or, corollary, people in Hungary have the impression, as a matter of fact, that ill people are generally poor or may become very quickly as one.

Briefly comparing these results for the sake of a possible conclusion, one might add the following doubts. The real question of the survey here was supposed to enquire the idea of self-support, or savings attitudes. It seems that the respondents would be more likely to help those in need who lack the means to get out of the financial problem. So far, so good. Since the here advocated help of the respondents proves to be, implicitly, state subsidized intervening measures (see below), it certainly causes some stress on the public budget, therefore this answer seems to be economically correct, efficient, and pacifying. Those who have savings should use it first and then be aided by the community.

There are many distinctive and delicate ramifications of this attitude though. One is political, i.e., however this conclusion might be true, voters tend to think differently. (And this is so despite the fact that one could say the students represent rather the middle class than the lower or the lowest strata of the society or of the voters.) The other one is financial and not less complicated. If one really ponders on the original question here, it should be obvious, that these kinds of savings are not at all (or not necessarily) big monies or significant wealth. These may rather be considered as conscious

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behavior of the middle class civic virtue attitude, to act as a financially independent individual. An individual of its Lockean or even Kantian sense and an independence in its conception as that of the enlightenment. So perhaps confusingly enough, to conclude that precisely those should be helped who lack the possibility to survive a financial crisis at the expense of those who have made certain savings – just in order to avoid exactly this financial trap – proves to be the trick of the reason. This kind of solutions therefore may become counter-productive. There seem to be no motivation at all to act financially responsible.[222] The third one is a sociological consideration, or educational for that matter. There is no doubt that only the most vulnerable needs to be protected in case of financial need and that it should be done even through the public assistance, i.e., the public budget. And it is true as well, of course, that this help may only be carried out at the expense of those, who are not in financial trouble, or less hurt by the crisis for whatever reason. Although it is all a matter of degree too. Notwithstanding, this kind of thinking creates a political-economic *circulus vitiosus*, which needs to be broken. And it can be done only through education (whatever that might mean, for generations to come or learning from scratch for every generation).

Secondly, the question is, helping but how. (The role of bankruptcy or preferential tax regime). The specific questions here concern two separate issues. Both may qualify as measures of definite state interventions but they put the burden of losses differently on the loss bearers. One of the questions is whether the respondent would support an individual bankruptcy for the

[222] This kind of arguments are also often used in the debates when the principles of the income tax regime is discussed: proportional, linear, fixed, etc. see: SCHOENBLUM, J. Schoenblum, J. (1995). Tax fairness or unfairness? A consideration of the philosophical bases for unequal taxation of individuals. *The American Journal of Tax Policy*. 12. 1995. pp. 221–271. or BYRNE, D. M. Locke, Property and Progressive Taxes. *Nebraska Law Review.* 78(3). 1999. pp.700–738. or MURPHY, L. and NAGEL, T. *The Myth of Ownership: Taxes and Justice* New York, 2002. —advocating new views in principles of equal sacrifice.

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debtor, the other one is whether the respondent would support a preferential tax system for private debtors. If one accepts the idea of individual bankruptcy, i.e., supports it, however intrusive it might be into the private sphere of the contractual parties, the losses nevertheless are still to be borne by the parties to the contract themselves. It is merely a new risk allocation which is being (re)negotiated in a case like this. On the other hand, if one promotes a preferential tax system for the private debtors, then he goes along with a distribution of losses among the taxpayers, which means among third parties, outsiders, to the contract. These considerations are even more important after COVID-19.[223]

In any event, the real question in law is whether these long-term contractual obligations are binding no matter what, or there should be certain possibilities to the parties for renegotiations.[224] If this latter were accepted, then the exact procedure should be laid down in advance, so that business calculations were possible. As a matter of fact, in private debts, one recognizes the rules of the consumer protection laws here, providing for the room for maneuver in advance, in which the parties may (fairly) reorganize their rights and duties, such as amending the contract or terminating the contract, etc.

The individual bankruptcy, however, is not the legal institute per se of the consumer protection. Since this allows, or rather facilitates, the renegotiations between the parties under strictly regulated circumstances, this is a much harsher state intervention forcing the creditors to enter into a new agreement if the private debtor unilaterally so requested. Good such law may create a win-win position however; thus it is not entirely a market

[223] see e.g.: FERRANNA, M. The Global Burden of the COVID-19 Pandemic: Comparing Benefit — Cost Analysis and Social Welfare Analysis. *Journal of Benefit — Cost Analysis*, p. 1 32. 2024 or LAVENTHAL, N. et al. The ethics of creating a resource allocation strategy during the COVID-19 pandemic. *Pediatrics*, 146.1. 2020.

[224] BOÓC, Á. Észrevételek a COVID-19 vírus hatásaira a magyar szerződéses jogban. *Veszélyes Anyagok*, 6.2: 2020. pp.3–5.

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unfriendly legal institution. The losses are taken by the parties themselves according to their new, certainly not quite regulation-free, agreement.[225]

As opposed to that, preferential tax system for private debtors, distorts the markets. One could certainly add that preferential tax system does exist in free markets as well, so to distinguish this legal institution, might be a little problematic for youngsters. Because what may fit to the business investments, may not be so for private spenders. The nature of their costs, the social costs are different, the (social) effectivity of the concluded but so failed private contracts is dubious.[226] Free market can deal with external costs if and only where there is no better solution for the socially desired contractual relations, see national defense or clean air, etc. But private spending is very different and may trigger many more problems beyond the reach of this survey, such as biased administrative decisions (corruption) or misrepresentation, etc.

One way of looking at the tables above (Table 3/A–3/C.), is to ask, how binding these long-term contractual obligations are to the debtors according to the respondents.[227] Not very much surprisingly, those who originally responded positively to help out those in financial need, answer overwhelmingly positive also to the questions whether they would support various state interfering measures.

[225] This institution is a hardly understood concept among the students even in 2024, though, which is no wonder since — as mentioned above — bankruptcy has a bad connotation in Hungary. One of a possible interpretation of the responses is that they fear, in this case the society takes the risk and cheaters can get away with it. This statement is founded on the results in which students generally support those in need, but actually do not know how. On the questions of "how" the answers are mostly "no"s. They do not trust the syystem.

[226] But of course requires second thoughts and further investigations. No one likes homeless people lingering around.

[227] Sadly enough, the answers may be confusing (the questions might have been confusing too), especially when compared with the third/last question in the line below (see there). Since the institution of private bankruptcy was non-existent even in the public discourse until mid-2015, its conception must have been a vague and broad idea of the respondents, meaning a special kind of termination of the contractual relation from 2013 to 2015. This reflects speculation of course, supported only by teaching experiences rather than data. The students in class at the beginning can hardly distinguish a winding up or a bankruptcy, let alone a private/individual bankruptcy. This has not changed much in 2024.

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If the performance failed because of the worldwide financial crisis, the majority of the respondents would support the help even with certain state intervention such as the individual bankruptcy and a little less intensively with the preferential tax regime;[228] see Aa) (Table 3/A). The pattern is somewhat similar in case of luxurious expenses, provided that one bears in mind that here the original "yes" group is the minority (14.53%); see Ab). The interesting situation is the question of investment/ speculation. As known, here the vast majority would say "no" (72.35%) and the vast majorty of this (73.78%) says "no" to the preferential tax system as a measure to help in need as well; see Ac). On the other hand, the support of the private bankruptcy is the highest in this group. Clearly, this scenario is regarded as business not worthy of help from public monies.

Having the above mentioned in mind, not surprisingly, this willingness to help is much-much higher when the pay back was stopped due to the fact that the debtor's spouse had become ill. The exception is again the luxurious expense in case of illness (Table3/B.). It is perhaps obvious, that the average respondent puts the blame on the creditors here. Why was money lent at all? Was it for profit? The further question occurs here though, whether respondents are able to distinguish the cases where the debtor is being sick at the time of entering into the contracts from those cases of getting the serious illness later, during the time of effectivity of the contract. Distinctions like these ones, are hard to be reflected in this survey, of course, especially because the respondents are students, who are quite likely not to have personal experiences with contracts, negotiations, and more importantly with the alleged prudential activities of the creditors.

[228] Please note, that the tables (Tables 3/A–3/C.) show the "yes" in the first row and the "no" in the second row. Therefore, in the second ("no") row the opposite results are to be calculated. Albeit this might be more obscure and harder to interpret, the reason why these tables nevertheless use this sort of form is that this might reflect the first impression better, namely that those who would help, would trust the market less, therefore presumably support individual bankruptcy as opposed to the preferential tax regime. Here thus the comparison would like to rely heavily on the expectations of the state duties. Only slight shift can be distinguished in 2024, toward a more robust universal support but total loss in the responses of "how"s.

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However, still there are quite a few, who believe that in case of basic housing problems for those in need the preferential tax system may be a solution, i.e., almost the half of the overwhelming majority (~44% of the 84.64% "yes" group, since 55.56% said no).

If the contract were breached because the debtor had divorced (Table 3/C.), the figures are again substantially less in favor of the debtors just as in the cases where the results reflect own faults. If help were to be granted though, there would be no significant differences whether to support the individual bankruptcy or the preferential tax regime.

All in all, the responses to the "help but how" is supposed to answer the question of how to be released from a debt, how to be free from an obligation taken upon voluntarily. On the one hand, the responses here are in the line of the above-mentioned findings again, namely, that basically the half of those who said "yes", would not support preferential tax system, meaning, that the help should not necessarily be provided for by the state budget. These results may trigger the interpretation that the respondents may well be aware of their personal financial interests as taxpayers in not advocating a preferential tax regime for the debtors in failure.

On the other hand, the idea of individual bankruptcy, however unclear this institution for the respondents might have been, seems to be quite as popular (or unpopular) for solving the problem as the preferential tax regime is, albeit in a way this allows the debtor to be released from his duties at the expense of the creditors rather than the taxpayers.

Since individual bankruptcy is rather missing in the public discourse the respondents might have been less familiar with this, and especially with its operation and aim. As a general conclusion, it could be confirmed though, that except for the minimum existing expectations, i.e. the provision of housing to those in need, where the majority would be the most sympathetic towards the debtors, the respondents are not very much in favor of

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these kinds of measures, or they are quite split on it, to say the least. Thus, in brief, this would just strengthen the main characteristic result of the survey, meaning that the respondents equally lack the trust in both the state and the market solutions.

And thirdly or finally, one of the most intriguing questions, not only for lawyers, is the following one: whether the profit making is an evil per se. (The role of responsibility, and not only for bad economic decisions).

Whether it is acceptable that the market situations are not necessarily win-win positions and so if there are bad financial calculations, the outcome of the decisions needs to be borne by the decision-maker. Or quite to the contrary, whether there should be a mandatory state correction for market failures, so that to insulate decision-makers from the consequences of their own decisions.

This allows to ask whether the long-term loan agreement is to be (may be) terminated because of the problems having occurred on the debtor's side but far beyond the debtor's reach. It means that certain events, such as war, epidemy, natural disaster, global financial crisis, uprise, revolution, etc., may not be the doing of either party, still they have the almost unendurable impact on them or only one of them. Should it matter to us, if only one party suffers from the devastating effect, or if one of the parties is better off, while the other is ruined owe to the changes in the circumstances, or should it not. In case of a private long-term loan agreement, there is no doubt, that the creditor undertakes a substantial risk, since the creditor generally does perform at once upon signing the contract, whereas the debtor has time to pay back. And this separation of deliveries of the parties to the contract, this discrepancy allowed by time, would make the risks of the parties unbalanced, unless specific guarantees are provided for in the terms and conditions otherwise.

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	Minibrain has an average but well-paying job, which allows him to make plans for long-term future as well. He and his wife live with their 2 minor kids together.					
	Aa) They want a bigger flat because they still live at Minibrain's parents. So, he calculated that since he cannot afford to buy a flat. he takes a loan, which he later fails to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back		**Ab)**Minibrain wants to have a sport-car/a luxury vacation and calculates that even if he had such a solid financial background, he would not be able to cover such an expense. So, he takes a loan which he later fails to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back.		**Ac)** Minibrain thinks it is a good investment to purchase further real estates, to lease them or later to sell them for more. So, he takes a loan which he later fails to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back	
A	If he failed because his employer is wound up due to the global economic crisis.		If he failed because his employer is wound up due to the global economic crisis.		If he failed because his employer is wound up due to the global economic crisis,	
	Would you help him?		Would you help him?		Would you help him?	
answer	yes	no	yes	no	yes	no
2016	63.13%	32.90%	14.53%	82.40%	24.58%	72.35%
2024	73.85%	26.92%	20.00%	79.23%	46.15%	52.31%
2016/yes	Would you support an individual bankruptcy?					
	55.34%	15.30%	65.96%	5.20%	48.08%	32.30%
2024/yes	42.31%	53.08%	28.46%	68.46%	33.85%	62.31%
	Would you support a preferential tax system for debtors?					
2016/ no	48.80%	19.70%	58.17%	7.90%	46.63%	27.78%
2024/ no	34.62%	63.42%	29.23%	69.46%	53.85%	43.08%
B	If he failed because his wife got seriously ill and the treatment is expensive, time consuming and finally he loses his job too.		If he failed because his wife got seriously ill, the treatment is expensive, time consuming and finally he loses his job too.		If he failed because his wife got seriously ill and the treatment is expensive, time consuming and finally he loses his job too.	
	Would you help him?		Would you help him?		Would you help him?	
answer	yes	no	yes	no	yes	no
2016	84.64%	11.73%	54.75%	42.18%	62.29%	33.52%
2024	88.46%	11.54%	60.00%	38.46%	70.00%	26.92%
	Would you support an individual bankruptcy?					
2016/ yes	28.46%	68.46%	16.39%	25.83%	51.57%	21.29%
2024/yes	43.85%	50.77%	33.08%	63.85%	42.31%	52.31%
	Would you support a preferential tax system for debtors?					
2016/no	55.56%	31.03%	14.73%	81.03%	42.36%	54.21%
2024/no	24.62%	82.31%	50.77%	47.69%	39.23%	57.69%

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C	If he failed because he and his wife decide to divorce and the facilitation of the two separate lives imposes significant financial burden. Would you help him?					
answer	yes	no	yes	no	yes	no
2016	20.95%	74.58%	12.01%	84.64%	13.41%	80.73%
2024	33.08%	64.62%	70.00%	26.92%	33.08%	64.62%
	Would you support an individual bankruptcy?					
2016/yes	52.05%	31.50%	50.65%	29.22%	49.62%	26.97%
2024/yes	33.08%	63.08%	42.31%	52.31%	30.00%	65.38%
	Would you support a preferential tax system for debtors?					
2016/no	59.02%	74.82%	44.82%	79.22%	49.62%	79.15%
2024/no	50.00%	48.46%	37.69%	59.23%	58.46%	38.46%

Table 3 Helping but how?

But what sort of events may be excusable or foreseeable and what others not?[229] The respondents in this survey, seemingly, decided that global financial crisis or illness are excusable, thus may trigger a rearrangement of the risk allocations. Divorce, on the other hand is not (see tables above). Now, why are they excusable? Does this mean that financial crisis and illness are unforeseeable and divorce is not? Nevertheless, some would definitely say that divorce is much more foreseeable in the modern western culture than epidemy. Whereas there, certainly, are regions on earth, (even in Hungary too, nowadays) where the opposite should be true. Especially after the recent pandemic.

Here are the results for the case of failure to perform in global financial crisis (Table 4/A). It shows clearly, that the majority would help in need (63.13%) and the overwhelming majority of these respondents who say

[229] For a philosophical quest for reasonable foreseeability as opposed to actual foresight based on blameworthiness or ignorant blameworthiness see: MILLER, D.J. Reasonable foreseeability and blameless ignorance. Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition. Vol 174.No.6. 2017. pp.1561–1581.

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"yes" to the help, would not agree with an interpretation that the creditors are profiteers. Therefore, only the 7% of all respondents would say the contracts are not to be paid back. So, implicitly, they do not seriously mean that the contracts should not be fulfilled.

But who should have the burden of failure then? Notwithstanding, if one looks at the other figures of the "no" group (32.9%), here the overwhelming majority is more inclined to blame the creditors (only 28.3% says no), and probably let the parties negotiate (see Aa) in Table 4/A) But these figures are also miniscule, i.e. 7% of all respondents. In case of the luxurious expenses the respondents have not too much of the solidarity. 82.40% would not help in the economic crisis for these spendings but would implicitly blame the creditors. Although only 9.80% of the 82.40% (these are the "no"-s) of these "no" respondents would say that the creditors are not usurers and the contractual obligations should be fulfilled, but this is 7% of the total answerers again. Again, not much change is traceable in 2024.

But who are the creditors? Banks, financial institutions, friends or employers, state, perhaps? And when are they the creditors? After having helped out a debtor in need with a bridging loan in a financial global crisis?

This is fairly different in the case, in which the failure to perform is due to the wife's illness and the spending out of loan covered luxurious entertainments (Table 4/B).

Here it seems to be obvious that the majority would feel solidarity for ill people, but would not support a luxurious expense, if someone is ill. In fact, this has been the case above (and here, see Table 4/C) too if one looks at the figures of luxurious expenses being cross referenced with the illness of the debtor's wife. Nevertheless, here it is more conspicuous than anywhere else, but for the above table (Table 4/C), that it is not at all clear whether the respondents believe, the creditors should have the burden of risk. In conjunction with what was said above about the attitude towards the problems

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of diseases though, the respondents here hold the creditors more liable for lending money irrationally, or lending rather for profiteering.

This interpretation raises further legally more relevant questions: when should an event be foreseeable[230] for which one has to take the liability in a contractual relation.[231] In case of a long-term loan agreement, the answer should clearly be that right at the entering into the contract.

The reason for this is the elapse of time between the exchange of performances of the contractual parties. Thus, sickness may only be foreseeable if the circumstances in the given case so suggest. Seemingly, the respondents here think, that the probability of a serious sickness is higher than that of the (global) financial crisis or of the divorce, as a matter of fact. Therefore, the creditor bears the risk for sickness, since the creditor should have known it better and/or calculated it.

Even if it were true that the Hungarian people are generally sick, it should also be a commonsense knowledge, that in every 20 years of an investment or a loan agreement or whatever, there will be at least 5-7 bad years too.

Perhaps, of course, it can also be construed, that the case of the divorce is not that it is unforeseeable,[232] but that it is own fault (Table 4/C). The figures in this divorce case are again different, but certainly in comfort with the other answers in the previous cases (Table 3/C.), where the pay back is stopped by the divorce of the debtor.

As an average, the respondents feel like helping is necessary for the

[230] SCOTT, H. The History of Foreseeability, *Current Legal Problems*, Volume 72, Issue 1, 2019. pp.287–314.

[231] This foreseeability and the damages problems may certainly be different if the contract is about management services (see CSEHI, Z. A vezető tisztségviselő polgári jogi felelősségének alapjai és irányai az új Polgári Törvénykönyv alapján. In: CSEHI, Z., SZABÓ, M. eds. *A vezető tisztségviselő felelőssége*. CompLex Wolters Kluwer, Budapest 2015. pp. 9–50.

[232] According to the statistics (KSH, 2013.), in the last three decades the numbers of the divorces in Hungary were the following: 1990: 24.888, 2000: 23.987, 2010: 23.873, 2023: 16.791 and the number of the marriages: 1990: 66.405, 2000: 48.110, 2010: 35.520, 2023: 50.139 Clearly half as many got divorced as got married. This cannot be construed as unforeseeable but surely still as self-default.

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failing debtors, unless the debtors' situation can be attributed to their own fault, such as divorce. This exception of divorce may however derive from the young and idealistic age of the respondents rather than represents a social exclusion. This attitude seems to be widespread in 2024 too on more solid grounds.

The market rules are selectively accepted, in case of market failure the solutions are generally implicitly expected from the state.

The processed data in the tables above (Tables 1–3) have further implications. The answers design a relatively ambiguous pattern about whether an obligation needs to be performed in the long run and who is to bear the burden of failure. Notwithstanding that the vast majority of the respondents accept that the creditors (banks?) are not profiteers or usurers as seen in tables above (Tables 3/A–3/C.), yet, only a few of them would go along with the consequences of such a decision. This straightforward conclusion however needs some clarifications and distinctions, of course.

Albeit depending on the situation, the majority would be willing to help in the case of the basic housing problems even if the overwhelming majority of these respondents would not necessarily blame the creditors for such circumstances. In these scenarios the "no" help groups are in minority and basically these are the most anxious about the creditors' being profiteers and would allow the non-performance of these contracts from the part of the debtors (see explicitly Table 4/A). One might realise right away, that these are the scenarios, where failure of the performance is caused by the global economic crisis. Therefore clearly, the respondents necessarily blame here the creditors for such circumstances. Interestingly enough, the universal solidarity attitude here is even more robust in 2024.

Whether the profit-making is an evil *per se*?

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What is the role of responsibility?

	Minibrain has an average but well-paying job, which allows him to make plans for long-term future as well. He and his wife live with their 2 minor kids together.					
	Aa) They want a bigger flat because they still live at Minibrain's parents. So, he calculated that since he cannot afford to buy a flat. he takes a loan, which he later fails to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back		**Ab)** Minibrain wants to have a sport-car/a luxury vacation and calculates that even if he had such a solid financial background, he would not be able to cover such an expense. So, he takes a loan which he later fails to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back.		**Ac)** Minibrain thinks it is a good investment to purchase further real estates, to lease them or later to sell them for more. So, he takes a loan which he later fails to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back	
A	If he failed because his employer is wound up due to the global economic crisis.		If he failed because his employer is wound up due to the global economic crisis.		If he failed because his employer is wound up due to the global economic crisis,	
	Would you help him?		Would you help him?		Would you help him?	
	yes	no	yes	no	yes	no
2016	63.13%	32.90%	14.53%	82.40%	24.58%	72.35%
2024	73.85%	26.92%	20.00%	79.23%	33.08%	64.62%
	Many believe that creditors are rich and usurers (profiteers), therefore in these cases the pay back is not obligatory. And you?					
2016 no	83.73%	28.30%	89.80%	9.80%	80.29%	6.62%
2024 no	85.38%	13.85%	83.08%	16.92%	86.15%	11.54%
B	If he failed because his wife got seriously ill and the treatment is expensive, time consuming and finally he loses his job too.		If he failed because his wife got seriously ill and the treatment is expensive, time consuming and finally he loses his job too.		If he failed because his wife got seriously ill and the treatment is expensive, time consuming and finally he loses his job too.	
	Would you help him?		Would you help him?		Would you help him?	
	yes	no	yes	no	yes	no
2016	84.64%	11.73%	54.75%	42.18%	62.29%	33.52%
2024	88.46%	11.54%	60.00%	38.46%	70.00%	26.92%
	Many believe that creditors are rich and usurers (profiteers), therefore in these cases the pay back is not obligatory. And you?					
2016 no	2.64%	85.80%	21.92%	85.80%	8.61%	88.04%
2024 no	12.31%	86.92%	10.00%	88.46%	10.00%	87.69%

Table 4 (for A and B)

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C	If he failed because he and his wife decide to divorce and the facilitation of the two separate lives imposes significant financial burden. Would you help him?					
answer	yes	no	yes	no	yes	no
2016	20.95%	74.58%	12.01%	84.64%	13.41%	80.73%
2024	33.08%	64.62%	23.88%	76.38%	33.08%	64.62%
	Many believe that creditors are rich and usurers (profiteers), therefore in these cases the pay back is not obligatory. And you ?					
2016 no	2.79%	88.47%	2.04%	87.65%	8.95%	87.89%
2024 no	9.23%	88.46%	15.38%	82.31%	10.00%	86.15%

Table 4 (for C)

More respondents would change their mind for help (~21% in 2016 as opposed to ~33% in 2024) if the cause was no fault, such as illness of the spouse, even if they agree that the creditors are not to be trusted. However, more answers reflect that ‚contracts must be served' principle in 2024. But still this shift is obviously slight.

The first explanation would be that the respondents simply do not care. They accept that help is needed, meaning also that they would expect to be assisted in such a case, but they do not bother further. This could also reflect that solidarity might well be in their thinking but not in their acting. Therefore implicitly, all these answers boil down to an acceptance or expectation of state interventions. They have no better idea. They do not trust the state but neither the market solutions. And no real change can be traced in this plausible interpretation in 2024.

Another possible interpretation may be that the vast majority believes that the contracts should be fulfilled and if impossibility occurs then it is not termination, but rather a possible modification of the contract is needed.

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And for this, rules are needed, of course. Market rules or state regulations? The first would lead to a circle problem, the latter to the state intervention again, implicitly.

In any event, these possible clarifications do not exclude each other. In the end, both conclusions come to the inevitable reliance in the state measures, even if only implicitly. Those respondents who would be willing to help right away incline to imply to a state measure of intervention into the market affairs. No further enquiry is needed, it is the task of the state to manage somehow. The big split in answering to the method of help (Tables 2/A–2/C) demonstrates the uncertainty of the respondents in this matter.

In the introductory part of the questionnaire, there are some general questions posed to map up the respondents' financial and social backgrounds. The vast majority of the respondents live in a highly indebted environment as debtors. 75.7% of the respondents said "yes" to the question in 2016 and 81.07% in 2024, if he was aware of any loan taken in the family.

Their mostly negative experience of getting indebted is shown in their answers to the question "to whom would they refer to in case of need for a *bridging loan*". In case of need the vast majority of them would rather refer to the state first and then to the parents, way ahead of a financial institute in 2016 (Table 5).[233] Here however there is a considerably different picture in 2024! Now the vast majority (87.69%) of the respondents would refer before everything else, to the financial institutions (32.31%) before referring to friends (27.69%).

And this is an interesting shift indeed concerning trust and perception. Many interpretations may occur: are parents better off in this generation? do these students have closer actual experience with banks — or just the opposite? do they have such a bad image, experience, of state interventions? One thing is true: this generation is post-COVID-19 generation sur-

[233] It should be noted, that several answers were allowed to be made here.

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viving a consequential lock down with disrupted economic supplies. Fact is, significantly less respondents would ask state help in 2024 (5.38%) in contrast to the results in 2016 (38.60%).

Who should help you?

In case you needed a bridging loan whom would you refer to?		
friend	**parent**	**colleague**
6.10%	26.70%	8.90%
27.69%	**87.69%**	**2.31%**
employer	**state**	**other**
1.70%	38.60%	59.70%
9.23%	**5.38%**	**3.85%**
financial institute		
8.90%		
32.31%		

Table 5

If one considers that the informal financial help (parent) includes also that of the friends and colleagues, this figure basically equaled also in 2016 with that of the state. This mirrors well the attitude of the respondents documented in the comments of the answers, namely that in need they would refer privately to friends and parents, *because if a serious trouble occurred, they would not necessarily be expected to pay back the full loan*. Certainly, it must be added that these respondents are young.

The serious distrust in the state comes into this picture here too. The loan agreement if concluded with the state is less likely to be enforced, than if it were signed with a financial institution (let alone a private one).[234] The

[234] The arguments here necessary lead too far to the free market concept or state aid, or of the state as a market participant in the private market, etc, which cannot be discussed here but certainly make a huge difference after the pandemic of 2019.

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respondents obviously rely on the vision that in case of financial troubles, one would be able to (re)negotiate with the state (whatever this institution means here for them) just as one could do that with the relatives or friends. Or, as seen in the answers of 2024, they just do not even think of it.

So, the question "who is the creditor" may not be irrelevant at all. Therefore, special attention should be paid to the answers of the category "other"s. Most of the respondents (59.70% in 2016) would ask money from "other" than friend, parent, colleague, financial institute, employer, or state. Which is not true in 2024, though.

It is striking, that in the event of financial difficulties, these youngsters would rather avoid the financial institutes. Clearly, the mistrust in the banks and other financial institutions is palpable among these respondents. This seems to be the culture: the hope (in category "others") for lottery, for a rich uncle abroad, just like in the economically weak Hungary in the beginning of the 20th c. (the Horthy-regime). Oddly enough, this has been changed profoundly in 2024.

The data from 2016 mean that these respondents grew up in an environment that tolerates the non-payback, the failure to perform, therefore rather negotiates with those whom they believe they can fail later with possibly no consequences at all (friends and parents) or with less painful consequences (state as opposed to the financial institutions). Could this be the narrative also in 2024, after the global financial crises of 2008 and the COVID-19?

Surely, conclusively the distrust against the market solutions cannot be worse than against that of the state. Who could trust a state that can renegotiate contracts. When? Under whose mandate? And at whose expense? This was a general encounter of people after the global financial crises of 2008 and the COVID-19, too.

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So, here there might be a slight change discovered, the attitude of 2016 would have led to a sly, 'common sense' behaviour, that one should rather be indebted to the state than not at all, since if not, then he should only be a net contributor to the public budget. Whatever simplistic idea this might sound this thinking may be mirrored in the answers in the survey. Yet, in 2024 it seems that the respondents think of the state help as more risk than help or simply not worthy.

It should be noted however, that these responses and comments included also, that in case they were to be asked to lend money to a friend in need, mostly they would not have asked any security for repayment either, again acknowledging the possibility of failure to perform, which remains true for 2024 as well.

Readiness to help others in need is relatively widespread if and only the cause is not self-inflicted and the spending is justified

Looking at the figures and the tables, one has to bear two things in mind. One would be the problem of impossibility to perform, and the other the foreseeability of this risk.

The fact that the impossibility of certain performance could be used as an excuse for the breach of a contract is not at all self-evident. The construing of impossibility[235] as a defense when non-performance is the fault of none of the parties, may qualify as a legal development. Instead of selling the defaulted party as a slave, he can be released from his duties. This changes in construing matters of impossibility are regarded as a legal development of bona fides in Roman Law and of Treu und Glauben (guter Glaube), good

[235] From a comparative point of view see: BYRD, S. B. *Einführung in die Anglo-Amerikanische Rechtssprache (Introduction to Anglo-American Law and Language)* Band II/Vol II. Contracts and Torts. 2. Auflage. C.H.Beck –Stämpfli. 2010. p.371. or BEALE, H., FAUVARQUE-COSSON, B., RUTGERS, J., VOGENAUER, S. *Contract Law. Cases, Materials and Text, Ius Commune Casebooks for the Common Law of Europe*. 3rd ed. Hart Publishing. 2019.

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faith, fairness, or equity in the various legal orders in the 18th and 19th centuries respectively.[236]

Notwithstanding the above, the real practical question here is how to solve the problem of an inefficient private loan agreement. And in addition to it, how to solve this problem if this inefficiency is widespread in the economy and affects a great deal of average people, as the data of the survey demonstrates it well (4.2. above).

No doubt that in such market failures a state intervention has already been approved in many modern constitutionalism, especially in those of the welfare states and so in the EU.[237] Legislations, state initiated rules, introduced on behalf of those less able to create a bargaining position in free markets are not brand new, even if they become more and more nuanced (or bureaucratic?) and sometimes less sometimes more intrusive, such as the labour contracts, the consumer protection provisions or the consumer credit protection regulations, let alone the special self-governing rules or ethical codes of certain businesses.

And exactly that is why it was interesting in 2016 that the respondents of this questionnaire seem to have mistrust in the state regulations almost equally to that of the market solutions, even then when they mostly believe that help is to be granted. This result might have shifted a bit in 2024, so that the mistrust against the state got deeper and the market got shallower, i.e., less depressing. Those who do not answer "yes" to help do not bother much. But they are in the minority.

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[236] FÖLDI, A. A jóhiszeműség és tisztesség elve. Intézménytörténeti vázlat a római jogtól napjainkig. *ELTE Állam- és Jogtudományi Kar*, Budapest. 2001.

[237] See e.g. the latest jurisdiction of the CJEU relating to the long-term (loan) agreements (C-96/14, C-449/13, C-482/13, C-484/13, C-485/13, C-487/13, etc), or see e.g. PÉTERVÁRI, K. The Foreign Currency-Based Loan Agreement and its Law and Economics Analysis. In: *Magyar Jogászegylet Értekezések*. 2015. pp.163–185. in which - among others - the Hungarian Constitutional Court decision of 2015 (*2/2015. ABhat*) was scrutinized. This decision was already one of a series of such decisions.

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However well acknowledged it is, that market failures are indispensable, the expected cure from the state regulations are just not trusted.

Besides the private debt issues, the survey was intended to spread out to the business debts and loans too.

The playing field here is designed rather for the smaller companies (SMEs). In this fictitious case again, the owner of a company has an own patent and an excellent long-term business model. Although the company had it well for a while, still, due to a decreasing demand, the turnover of the company was plummeting and turned into a loss. The owner takes more and more loans but without further investments the company faces bankruptcy. Since the firm's assets is subject to a secured loan taken before, the company cannot receive further commercial credit or only at an extra price.

In this case the questions focused on the rules of being able to get a loan, on the administrative restrictions, if any, and on the responsibility (or even liability) of a company making solid business decisions or on the responsibility of the state to watch over these problems, if not more (see Table 6/A–6/C).

The majority of the respondents (71.2% in 2016 and 70.23 in 2024) would not claim that the problems of the SMEs here are caused by the administrative rules. This may be interpreted in two ways though. One is that the majority accepts the market rule. The manager made bad business decisions. The other one is that the majority accepts the administrative rules as a fact but simply thinks that here this was not the cause. This is not to wonder. The question of course is always a matter of degree.

What is more telling here however (Table 6/A.), is that this group of majority which does accept the need for regulations and does not blame the administrative prescriptions would nevertheless incline to believe that one needs to lie ("declare non-realistic statements") in formal loan requests (30.50%), which is ~21% of all responses. Truly though, they are in the

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minority, but what a minority! Truly, also 62.90% of them (which is ~ 43% of all responses) believe that not disclosing a relevant fact in such a request form means fraud and one should be liable for that. But that is barely more than the half of the majority who accepts the rules, and not even the half of all answerers. Interestingly enough, the changes are only slight here too in 2024.

Now, those who do complain about the administrative rules are even more interesting. Evidently this is a tiny little group (of about 70 actual respondents) but are more convinced that the rules might require false statements to make (44.52%) and they also think, that this should qualify as a lie and be punished (49.57%). The students in 2024 are less convinced of it, but the tendency is quite similar. What kind of attitude should there be expected here if someone is determined to carry out a transparent but successful business?

And finally, if one looks at the last question, it is obvious that the overwhelming majority of the respondents accept the market rules by claiming that the business decision of the manager was not adequate. So, the overwhelming majority accepts the market rules but not the solution. This kind of thinking seems to be more robust in 2024.

It is just conspicuous, how the majority of the respondents, regardless of whether they trust the regulations or not, expect the state most of all, implicitly or not, to manage the regulations of the business. No doubt that the acceptance of a kind of a state duty to take care of small and medium entrepreneurs is more widespread among the respondents than not (Table 6/B).[238] And surprisingly enough (or not?), it is less so (51.36%) among those who are less suspicious about the administrative restrictions (71.2%).

[238] Please note, that here more answers were possible.

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Megabrain has an own patent and an excellent long-term business model. Thus, his small garage-firm leases the seat and the two cars of the company. The company had made good profit for some years but recently, due to the decreasing demand, the income of the company was plummeting and turned into a loss in the last couple of years. Although there is quite a competition in the market, Megabrain manages to obtain a bridging loan from a bank owe to his good will and connections. However, Megabrain does not disclose that his patent rights are going to expire and he has no intention to extend it. Without further investments, the company apparently goes bankrupt. Since the firm's assets is subject to a secured loan taken before, the company cannot receive other commercial credit or only at an extra price. In this case			
A		Many would blame the rules, claiming that they set administrative obstacles for the small entrepreneurs. And You?	Many would blame the rules, claiming that they set administrative obstacles for the small entrepreneurs. And You?
		2016 yes (21.6%) in total population	no (71.2%) in population
		2024 28.24%	70.23%
Many believe that debtors in a loan agreement often feel compelled to declare non-realistic statements. And You?	yes	44.52%	30.50%
		36.64%	61.07%
Many believe that Megabrain should be liable for fraud. And You?	yes	49.57%	50.90%
		76.34%	19.85%
Many believe that Megabrain had happened to be lucky and that lately made series of bad business decisions, and that he should have either left the business earlier or should have invested more by working harder and introducing new developments. And you?	yes	84.90%	14.10%
		74.81%	20.47%

Table 6 (for A)
Business plans, market failures and the credit

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B		Many would blame the rules, claiming that they set administrative obstacles for the small entrepreneurs. And You?	Many would blame the rules, claiming that they set administrative obstacles for the small entrepreneurs. And You?
		yes (21.6%) in total population	no (71.2%) in total population
		2024 28.24%	70.23%
Many believe that it is the state that has the duty to take care of small entrepreneurs in need. And You?	yes	76.65%	51.36%
		62.60%	25.95%
tax allowance	yes	57.37%	31.52%
		61.83%	38.93%
non-refundable support	yes	29.37%	13.23%
		30.53%	19.08%
appointment of state liquidator	yes	11.47%	11.28%
		16.03%	12.98%
buy out	yes	5.05%	7.00%
		10.69%	6.11%

Table 6 (for B)
Business plans, market failures and the credit

One way to look at it is that those who do blame the administrative obstacles in SMEs business expect more help and are more critical towards the existing rules. Thus, in this case one might ponder a little bit whether the distinction between the two groups are a sign of different attitude towards the market and the state or rather it is the critical attitude towards a well rooted culture biased to state intervention which divides the "yes" and "no" groups.

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C		Many would blame the rules, claiming that they set administrative obstacles for the small entrepreneurs. And You?	Many would blame the rules, claiming that they set administrative obstacles for the small entrepreneurs. And You?
		yes (21.6%) in total population	no (71.2%) in total population
		2024 28,4%	70.23%
Should there be an insurance fund financed by the market participants (companies), which in return, in case of bankruptcy, may grant favourable credit to the members/ companies. And You?	yes	72.52%	6.21%
		73.28%	7.63%
No need at all, it is the very task of the state. And You?	yes	8.27%	4.18%
		12.21%	8.40%

Table 6 (for C)
Business plans, market failures and the credit

This thinking might be tested in the responses of the "how". Should the state provide for tax allowance or state aid or manage more administrative intervening measures such as the appointment of state liquidator or carry out a buy-out. None of these may be considered as more market-friendly than the others, in the end all of these measures result in the taxpayers' help.

This is why it is more than striking to have a look at the answers in Table 6/C. When there is a rather market like solution of a saving management (sort of insurance, but obligatory) for a possible bankruptcy, the embracement of this institution is quite broad as opposed to that of a strict state aid (no matter what that might really mean).

Truly, the answers in 2024 ae not much more different than those were in 2013–2016.

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3.1.5. Who shall have the burden then?

All in all, one needs to come to the conclusion from the answers above that the majority of the respondents favors implicitly the state solutions as opposed to the market one, but trusts none of them.

No doubt that the overwhelming majority of the respondents accepts the market rules but not the solutions. Or rather, they accept the advantages of the market economy but refuse to live with their disadvantages. This is no wonder.

The question is whom to put the burden of remedying the bad individual decisions, when the pushing away of the responsibility is quite widespread. This question is even more interesting if one considers the fate of windfalls. Undoubtedly, if any windfall derived from this kind of decisions benefited the debtors but not the creditors, would be awarded to the debtors right away with no hesitation at all, as it was the case before the global crisis in the so called long-term consumer loan agreements based on the foreign exchange rates.

As mentioned at the very beginning, and as is often obvious in the answers, the respondents compose a new generation in the sense, that they were born after the Transition. This generation grew up in the stumbling first steps of the democracy and the market operations. This generation is uniquely overburdened with private debt, most of which will never be paid back.

This also reflects the fact that in the childhood of these respondents (from the 1990s to the early 2000s) there were no solid foundations for a healthy financial understanding in a fast-growing globalization. After having spent several decades in a command economy, then a little bit looser state-steered economy, Hungary has joined the free market economies in a time of a decreasing inflation, overall optimism about the capitalistic future, and in a swiftly growing worldwide consumption. As opposed to this global eco-

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nomic background the country had faced serious structural economic crisis (pension, health care, education), long term financial problems, budgetary restrictions, several austerity packages without real solutions. In contrast to this the new generation of the students in 2024 come from exactly opposite situation: they grew up in the much less optimistic decade of dot.com then the global financial crisis right before the outbreak of the pandemic. Their parents struggled with their own loans in front of their children.[239]

The minimum living existence as a fundamental (constitutional) right

The lack of private housing for youngsters has ever been a problem of the Kadar-regime,[240] thus, during (and after) the Transition this was one of the number one issues in politics too. The then newly established Constitutional Court has inherited already cases from its legal ancestor of the previous regime, dealing with the then long-term loan agreements. The issue was how to adapt the state subsidized (socialist) loan agreements to the market environment.[241]

[239] See the results of the questionnaires in 2013–2016.

[240] See e.g.: ANDORKA, R. et al. Magyarország az adatok tükrében: Foglalkoztatás; Fogyasztás; Lakáshelyzet; Időfelhasználás és életmód; Lakáshelyzet; Fogyasztás. RUDOLF, A., KOLOSI, T., VUKOVICH, G. eds. *Társadalmi Riport.* 1990. pp.87–97. or AUGUSTYNIAK, H., CSIZMADY, A., HEGEDŰS, J., LASZEK, J., OLSZEWSKI, K., SOMOGYI, E. Posztszocialista lakásrendszerek Magyarországon és Lengyelországban. *Közgazdasági szemle,* LXVI.évf. szeptember. 2019. pp.980–1004.

[241] See the constitutional Court case No. 32/1991. (VI. 6.) ABH. The case in question was about the enormous economic and financial discrepancy in the terms and conditions provided for in the newly entered long-term loan agreements on the one hand and those concluded still in the socialist regime on the other hand. The interest rate on the old loan was close to none, whereas it was around 30-35% in the new loan agreements. The legal issue here was, as is now too, whether it is justified for the state to intervene into private agreements and enforce amendments by legislation against even the wills of the (both) parties. The very circumstances differ though in a great deal, since the Transition back then had proved to be unforeseeable for the parties at the conclusion of their contracts, but never again this argument was ever accepted by the Constitutional Court until now. The article 226.§ (2) of the Civil Code of 1959 then in effect was even found by a judge back then constitutionally dubious, as a matter of fact, which however granted the means necessary for the transition to a market economy.

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And this want of an own housing behavior, this culturally overestimated precious goods,[242] is reflected well in the manner of the young generation too. Housing is always more supported by the respondents than not (first column in Table 7/A both in 2016 and in 2024), in case of illness this solidarity even grows (second column in Table 7/A again, both in 2016 and in 2024), but plummets considerably if they think the default was self-inflicted, as for example in the case of a divorce (third column in Table 7/A).

The luxurious expenses at the expense of others

The issue of luxurious expenses financed out of a long-term loan is a lot more complicated. Here the statements and actions do not seem to be in harmony with each other.

One way to look at it is that the negative impact of the circumstances triggers always sympathy. And it is true for quite a wild range of issues, it may be financial (economic crisis), biological (illness) or sociological (divorce) problem as certainly evidenced in the table below (Table 7/B).

Why would someone justify a common solidarity for an irrational use of others money (i.e., loan)? If one considers the cultural and historical background one is compelled to see a pattern. The desire to act and live like a rich man even at the expense of others is well rooted in the history. Truly, the vast majority would not support this idea. However, the recent abrupt, economically not well founded astronomical enrichness of the new political elite in the past decade seems to be tolerated if not accepted in the replies of 2024, which probably means that the students do distinguish the everyday life from that of the political one.

However, looking at the first column, at the responses in the case of "no"s, it is striking how definitely – almost in consent – the blame is put on

[242] See the case studies in KELLER, M. *Szocialista lakhatás? A lakáskérdés az 1950-es években Magyarországon.* L'Harmattan, Országos Széchenyi Könyvtár, Budapest. 2017. p.252.

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the creditors if the trouble was caused by the financial crisis. This means, that in 2016 the young generation overwhelmingly held the creditors (most likely the financial sectors in this case) responsible for the global economic crisis, and the debtors of such contracts as victims. Therefore, the obligations may be forgiven. And what is more, probably that is why, it is here where the preferential tax regime is the most advocated.

Who should have the burden of failure?

Minibrain has an average but well-paying job, which allows him to make plans for long-term future as well. He and his wife live with their 2 minor kids together						
A	If he failed because his employer is wound up due to the global economic crisis.		If he failed because his wife got seriously ill and the treatment is expensive, time consuming and finally he loses his job too.		If he failed because he and his wife decide to divorce and the facilitation of the two separate lives imposes significant financial burden.	
	Aa) They want a bigger flat because they still live at Minibrain's parents. So, he calculated that since he cannot afford to buy a flat. He takes a loan, which he later fails to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back					
	Would you help him?		Would you help him?		Would you help him?	
answer	yes	no	yes	no	yes	no
2016	63.13%	32.90%	84.64%	11.73%	20.96%	74.58%
2024	**76.85%**	**26.92%**	**88.46%**	**11.46%**	**33.08%**	**64.62%**
	Would you reconsider it, if you knew that he could not pay because he saved money for retirement. illness and education for his children?					
2016yes	42.11%	9.20%	44.44%	9.79%	34.02%	12.10%
2024/yes	**40.77%**	**58.46%**	**35.38%**	**64.62%**	**27.69%**	**70.77%**
	Would you support an individual bankruptcy?					
2016yes	55.34%	15.30%	61.81%	25.83%	52.05%	31.50%
2024/yes	**42.31%**	**53.08%**	**43.85%**	**50.77%**	**33.08%**	**63.08%**
	Would you support a preferential tax system for debtors?					
2016/no	48.80%	19.70%	55.56%	81.03%	59.02%	34.82%
2024/no	**34.62%**	**63.85%**	**24.62%**	**82.31%**	**50.00%**	**48.46%**
	Many believe that creditors are rich and usurers (profiteers), therefore in these cases the pay back is not obligatory. And you?					
2016/no	83.73%	28.30%	82.64%	85.80%	82.79%	8.47%
2024/no	**85.38%**	**13.85%**	**83.08%**	**16.92%**	**86.15%**	**1.54%**

Table 7 (for A)

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Yet, this has seemingly changed in the 2024 generation: overwhelming majority says that obligation has to be fulfilled.

And if it is so, which is very much evidenced here, the question is, those who would help (and do not think that the obligations are to be forgiven, see second column group "yes") would do that for what reason? As a matter of fact, this proves to be the group of people with real sympathy to others' problems. The proper means for help is not clear though. The group is divided in almost all measures by half and half in 2016. This however is less so in 2024: the answers cover more characteristically the principle of *pacta sunt servanda*.

B	**Ab)** Minibrain wants to have a sport-car/a luxury vacation and calculates that even if he had such a solid financial background, he would not be able to cover such an expense. So, he takes a loan which he later fails to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back.					
	Would you help him?		Would you help him?		Would you help him?	
answer	yes	no	yes	no	yes	no
2016	14.53%	82.40%	54.75%	42.18%	12.01%	84.64%
2024	**20.00%**	**79.23%**	**60.00%**	**38.46%**	**23.85%**	**75.38%**
	Would you reconsider it, if you knew that he could not pay because he saved money for retirement. illness and education for his children?					
2016/yes	50.19%	1.10%	11.79%	9.79%	31.39%	8.43%
2024/yes	**17.69%**	**82.31%**	**15.38%**	**83.35%**	**17.69%**	**82.31%**
	Would you support an individual bankruptcy?					
2016/yes	65.96%	5.20%	16.39%	25.83%	50.65%	29.22%
2024/yes	**28.46%**	**68.46%**	**33.08%**	**63.85%**	**28.46%**	**67.69%**
	Would you support a preferential tax system for debtors?					
2016/no	48.80%	19.70%	55.56%	81.03%	59.02%	34.82%
2024/no	**69.23%**	**29.23%**	**50.77%**	**47.69%**	**58.46%**	**39.23%**
	Many believe that creditors are rich and usurers (profiteers), therefore in these cases the pay back is not obligatory. And you?					
2016/no	89.80%	9.80%	85.80%	21.92%	82.04%	7.65%
2024/no	**86.92%**	**12.31%**	**88.46%**	**10.00%**	**87.69%**	**10.0%**

Table 7 (for B)

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C	**Ac)** Minibrain thinks it is a good investment to purchase further real estates, to lease them or later to sell them for more. So, he takes a loan which he later fails to pay in due instalments, and while his flat is going to be auctioned, the rest of the debt is still to be paid back					
	Would you help him?		Would you help him?		Would you help him?	
answer	yes	no	yes	no	yes	no
2016	24.58%	72.35%	62.29%	33.52%	13.41%	80.73%
2024	**46.15%**	**52.31%**	**70.00%**	**26.92%**	**33.08**	**64.62%**
	Would you reconsider it. if you knew that he could not pay because he saved money for retirement, illness, and education for his children?					
2016/yes	38.94%	8.51%	34.25%	4.55%	43.61%	9.99%
2024/yes	**21.54%**	**76.15%**	**23.08%**	**73.85%**	**17.69%**	**80.00%**
	Would you support an individual bankruptcy?					
2016/yes	48.08%	32.30%	51.57%	21.29%	49.62%	26.97%
2024/yes	**33.85%**	**62.31%**	**42.31%**	**52.31%**	**30.00%**	**65.38%**
	Would you support a preferential tax system for debtors?					
2016/no	46.63%	33.78%	42.36%	54.21%	49.62%	39.15%
2024/no	**53.85%**	**43.08%**	**39.23%**	**57.69%**	**58.46%**	**38.46%**
	Many believe that creditors are rich and usurers (profiteers), therefore in these cases the pay back is not obligatory. And you?					
2016/no	80.29%	6.62%	83.61%	8.04%	78.95%	7.89%
2024/no	**88.46%**	**9.23%**	**82.31%**	**15.38%**	**86.15%**	**10.00%**

Table 7 (for C)

Further interesting results are in the third column of Table 7/B. Here, it seems, the respondents regard the speculator/investor as being part of the problem rather than a victim. So, the help is missing here the most.

Speculation or investment (business without the legal formalities)

Originally, this question is to analyze the attitude towards hustlers, slickers (*"ügyeskedők"*). In this situation the debtor, without setting up a proper business as required by the law, acts as a "businessman" and uses the possibility to make money in a much friendlier, easier environment, clearly at the expense of others.

No doubt, this hustler manner is fairly well scattered in the Hungarian society, nevertheless, the respondents do not quite seem to realise it. Unquestionably, most of them would categorize this situation as a speculation

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not worthy of help and as a problem caused by own fault, and the debtor himself as the problem maker rather than the victim. The results are fairly similar in both 2016 and in 2024.

This doubt of presumption however, whether here the respondents are biased against business or speculation as such or just really identified the actors as hustlers, thereby not worthy of help, remains still to be developed.

3.1.6. Conclusion

As for a really brief conclusion of the surveys, one could say that the respondents act very logically and calculate very rationally. They do so, even if they mostly have no basic knowledge of the issues above but a hunch. The problem is that acting irresponsibly is rational because it pays off better than acting by the rules. To be able to embrace the disadvantages of the market economy one needs to be able to understand and manage them institutionally.

This survey, as it stands now, demonstrates exactly the lack of such an insight both in 2016 and in 2024, even if slight shifts are traceable towards an even less trusting attitude in the state in 2024.

The results depict a serious incapability of taking the responsibility for our deeds, which might be the real explanation of the universal readiness of help, but of not knowing how in reality or specifically. Yet, this vague expectation for a solution may plausibly be interpreted less as a need to push the responsibility away than as a general bad experience of the "state aid". This suggestion may well be demonstrated by the answers, which show a relatively ready help but always a split mostly in half and half in the "how"s. The "how" is just does not matter. So, it might reflect just a general desire of goodness without the thorough understanding of or deliberations

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of the (unntended) consequences.[243] Clearly these youngsters have no experiences[244] of themselves so far, so the responses mirror rather a cultural heritage.[245]

In these circumstances loan is an alternative, but exactly in these circumstances this loan is a very expensive alternative. Without trust (and it means here saving/investment too) in the system, the price of the loan is just going to be soaring, because it may be excused to fail the agreement regardless the consequences.

As to a final impression and conclusion, one faces a very blurred picture. Albeit it is clear that the overwhelming majority of the respondents accepts that the long-term promises are binding, still quite many of them are ready

[243] The eagerness to insulate the decision-makers from the negative consequences of their own bad economic decisions is so vivid, that it was quite a topic in 2017 in the public discourse relating to the amendments of the then brand new Civil Code. And acordingly Article 3:24. of the Hungarian Civil Code on the liability of the company management in various cases have been eased from the liability perspective of the management.

[244] It is to be noted here, that the disadvantages of solidarity are seldom discussed: such as the remarks of Philipp Genschel & Anton Hemmerijck in the State of the Union research on solidarity in Europe: " 1.) Solidarity is costly. It requires that group members pass some of their own physical, financial, human or organisational resources to members of the group in order to improve the well-being, or reduce the suffering of these other members. Solidarity involves sharing in a real, material sense. 2.) Solidarity is uneven. Solidarity involves transfers from better-off to less well-off group members. The transfers are zero-sum, at least in the short term. They flow from good risks to bad risks, from givers to takers, from net-contributors to net-beneficiaries with no immediate compensation. 3.) Solidarity breeds moral hazard. Solidarity unburdens actors from the need to self-protect against bad risk. This may induce careless or even openly exploitative and fraudulent behaviour that triggers unnecessary bad risks, i.e. risks that could have been avoided through appropriate self-protection, and thus further increasing the costs of solidarity". p.1.
And they carry on with clear words on the problem: "There are solutions to each of these problems but they are somewhat contradictory. To reduce the costs of solidarity, risk should be put on many shoulders. The risk pool should be large. To avoid the same actors always ending up at the paying-end of the solidarity relation, the risk pool should be heterogeneous so as to increase the chances of turn-taking in solidary giving and taking. Yet, to reduce moral hazard, the risk pool should be kept small and homogeneous. People tend to trust people who are like them because they have more scruples before betraying each other. p.2. *Solidarity in Europe*. Available from: hhtps:// www.researchgate.net/publication/325106423_Solidarity_in_Europe [accessed September 01, 2024].

[245] This lack of trust in the state operation is surveyed – among others – by András Sajó (SAJÓ, A. Az állam működési zavarainak társadalmi újratermelése. *Közgazdasági Szemle*. 55(7-8) 2008. pp.690–711.

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to appreciate the troubles of the debtor, especially if those troubles were caused by the global economic crisis or illness. None of these causes are considered by the respondents as a risk which needs to be (or should be) calculated or managed privately right before the entering into a contract. Thus, it seems that the majority of the respondents feel deeper for those in – not self-inflicted – needs. What own fault means however is not very clear and distinctive. This sympathy is also clouded by the fact that the solutions in these situations are not consequential. Their desire to help therefore are not supported by the reality but by some vague expectations from the public funds, the public hand (paraphrasing Adam Smith).

So, as it seems, the operation of the market is widely approved, working for profit is not at all cursed, provided, there are no failures. If market failure occurred, the solution is not expected from the market but rather from a vague conception of the state aid.

One might think right away, that basically this is what one witnesses also in the developed, welfare states too. In case of market failure, the regulation is felt to be necessary and right. The difference is, however, that here there is a traditional misgiving about the governmental interferences or reactions. Not because of the fear from the state intervening into the private autonomy, but because the state proves to be incompetent.[246]

Assuming that these conclusions are justified, the results are quite thought-provoking. More than three decades after the Transition, the new generation's reactions to the occurring financial-social problems have roots in the past socialism rather than in the capitalism. The internal reasons which caused the Transition – due to the global collapse of the Soviet regime – are seemingly gone: the devastating experiences of state intrusion, the dislike of socialist "Gleichschaltung", and so the definite desire to motivate creativity and individual rights instead. Independence, autonomy, and

[246] SAJÓ, A. Az állam működési zavarainak....

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self-esteem are not even traceable. What is left nowadays is the capitalistic objectives (an avidity to be wealthy) without the capitalistic virtues (the autonomous, financially independent, deliberating citizen).

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Chapter 3.2.

What Does a Promise Worth if Made by the State?[247]

This chapter enquires the legal nature of the budget law, wether the state can be held liable for its promises if it does that through the state budget. As to the legal conception of the state promise, as argued below, there are two types of public promise: i) the public law promise and ii) the private law promise. Again, there are two types of private promise: ii/a) the public promise based on a contract and ii/b) the public promise based on a specific budgetary law. Budgetary law strictu sensu *provides for an accountibility of the government mainly politically. So the government shall be answerable for its public law promises (elections, programs) only politically. The answer is therefore that a state promise can only be chargeable via the liability provisions of the Civil Code if it is made by the state as a civil law entity. These provisions cannot be applied to other state promises, even of they are clearly a promise and a commitment, and even if there is coverage for it in the budget, which in the given case is not a condition for a civil law obligation, for example. Political processes are,* preater iuram*, least restricted by law.*

3.2.1. Inroduction

It is of ancient origin that a promise is binding and that the acceptance of a promise therefore creates a bond.[248] While it is obvious that there are other

[247] For an earlier discussion of the problem see: PÉTERVÁRI, K. A Ptk és az állam. *Gazdaság és Jog*. Május, 5. 2014.

[248] Not neccessarily a legal bond, of course, if certain definitive elements of the contract misses, i.e. especially the intent to have a legal effect.

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doctrines and theories of the moral basis of contracts[249] (e.g. will theories,[250] cost-allocating, economic rationality,[251] symbolic exchange theories[252]), I will not deal with them here. The inherent conceptual element of a contract is the promise,[253] in today's Civil Code of Hungary (*Polgári törvénykönyv, Ptk*): performance is due according to the content of the obligation.[254] It may be that, for reasons of legal policy, not all promises create a legally enforceable obligation even if intended, but they are exceptions that tend to reinforce the rule (see e.g. promises without the required licence).

At the time of the emergence of liberal capitalism and the codification of civil law, the civil codes, inspired by the idea of liberalism, explicitly based the rules of contract on the will of the parties, i.e. the promise or its acceptance and reliance on it as a consequence of autonomous action.

At first sight, this is no different in the current and the new Civil Code. In this respect, would the classical liberal position still prevail in the area of the concept of contract? If yes, then in the case of contractual promises, if no impossibility may be proven and the capacity to act is there, will it be

[249] FULLER, L.L, & PERDUE, W.R. Jr. The Reliance Interest in Contract Damages: 1 *The Yale Law Journal,* Vol. 46, No. 1 (Nov., 1936), p. 52-96 and FULLER, L.L, & PERDUE, W.R. Jr. The Reliance Interest in Contract Damages: 2 *The Yale Law Journal,* Vol. 46, No. 3 (Jan., 1937), pp.373–420.

[250] Most recently see, e.g.: ZEMMRICH, V. *Die fehlerhafte Willensäußerung. Wille und Erklärung im deutschen und französischen Zivilrecht* XXI, p. 275. Gesellschaft für e.V. Rechtsvergleichung und Rechtsvereinheitlichung (RuR) 99 Mohr Siebeck. 2024.

[251] COOTER, R., ULEN, T. *Introduction to Law and Economics.* Pearson, Addison Wesley. 5th ed, 2008., LANGVARDT, A. W., BARNES, A. J., PRENKERT, J. D., MCCRORY, M. A., PERRY, J. E. *Business Law. The Ethical, Global, and E-Commerce Environment*. 17th ed. McGraw-Hill. 2019.

[252] MAUSS, M. *The Gift. The form and reason for exchange in archaic societies* Taylor & Francis e-Library, 2002. or SILBER, I. F. Bourdieu's Gift to Gift Theory: An Unacknowledged Trajectory, *Sociological Theory* 27:2 June 2009.

[253] FRIED, C. *Contract as Promise: A Theory of Contractual Obligation*, 2nd edn New York, 2015., BIX, B. H. Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried, 45 *Suffolk U. L. Rev.* 719. 2012., VOYAKIS, E. Contracts, Promises, and the Demands of Moral Agency, in FREEMAN, M. & HARRISON R. eds. *Law and Philosophy, Current Legal Issues* Oxford, 2007.

[254] Hungarian Civil Code: Ptk. 6:34. §

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binding no matter who makes the promise? Does that mean that a promise is binding even if it is made by the state? Who can act representing the state? Can the Civil Code even apply to the state (at least from a liberal perspective)? Or, precisely in order to ensure that the state is free from any overwhelming influence in the competitive sphere, should the Civil Code apply the same rules to the state in contractual relations?[255] Or, on the contrary, would negative protection of freedom against the state require the application of stricter restrictions?

But this is only the first impression. The principle of *limited liability* introduced by the development of economic law in the 19th century made it possible for a promisor (legal or natural person) in one position to bind itself or himself only in that position – not in another. This obligation defined by commercial law is sharply distinct from the original morality of the 'given word'.[256] And there is no doubt that this limited liability and the rules of separateness pertinent to this procedural possibilities also apply to the state. However, in this case, where the state is obliged, it is not primarily a question of the enforceability of the promise, but of its (political) willingness of enforceability, which is not at all an incidental, collateral matter.

However, the question of whether a promise is enforceable, even if made by the state, is first a question of whether the state can enter into a contract under the Civil Code in which the other party is entitled to enforce its rights. Every contractual relationship or promise contains exceptions or

[255] The answer to these questions is yes, according to the Ptk. (Hungarian Civil Code): Ptk. 3:405 (1) The State shall participate in civil relations as a legal person. (2) The minister vested with powers to oversee State property shall represent the State in civil relations. And Ptk. 3:406 [Liability for the obligations of the State] The State and legal persons being part of general government shall remain liable for their obligations arising out of or in connection with civil relations even in the absence of budgetary appropriations (see non-official official translation of the Act No V. of 2013). Yet, the questions are not entirely in vain, as this essay hopes to demonstrate it.

[256] At the same time, the delictual liability model (torts) included in the concept of the new Civil Code (Sections 6:540 (3) and 6:541) again approaches the classical concept, in that the member is jointly and severally liable with the company for damage caused intentionally to a third party or by a senior officer to a third party.

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conditions. In the case of a natural person, death, impossibility, bankruptcy or *force majeure* (*vis maior*) are typical examples. The state, or its coverage for the promises: the public budget, is also entitled to certain exemptions, otherwise it would be the state that would be discriminated against in the contractual partnership (which is, of course, *contradictio in adjecto*). But the state does not die, the cessation of existence is quite different if *force majeure* and the public budget is involved. In a democratic state, measures to avoid state bankruptcy or to compensate for the loss of revenue due to an economic crisis are a matter of social consultation and can/should be regulated on a normative basis. In this sense, the contractual promise can/should be guaranteed with the predictability expected from legislation. It is undeniable that the guarantee of the state's promise in the area of entitlements operates according to a so-called closed-cash effect. In other words, the fine-tuning of fiscal spending is left to the discretion of the governments of the day, but the governments' ability to do so is also limited by the proportion of revenues they receive at any given time and the extent to which the public debt can still be increased. Strengthening contractual obligations is therefore always a matter of discretion and social discourse (the economic rationality of solidarity).[257]

The following considerations aim to show that certain contractual relationships (entitlements, state promises, in particular social security) cannot be adequately protected by the contractual rules of the Civil Code alone, if there is no predictable long-term planned regulation in the relevant area of law. Such regulation may be satisfactory even if it only settles procedural issues, in which social debate is unavoidable (leaving aside for the moment any doubts about social debate and representation).

[257] Strictly speaking, one may conclude that Article 37 of the Fundamental Law (*Alaptörvény*) on the disciplines of public spending and the budget, are motivated by different reasonings and values. And so is, in a certain sense, the chapter on the Special Legal Order (*Különleges jogrend*).

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3.2.2. Two types of state promise[258]

There are two types of public promise: the *public law promise*[259] and the *private law promise.*[260] Again, there are two types of private promise: the public promise based on a contract and the public promise based on a specific budgetary law.

3.2.3. The public law promise

It is known that the state makes its general, universal promises through laws and updates them in the current budget law. The budget law is therefore the realization of the state promise. Since the budget law, on the other hand, is based on the program of the current government (and possibly its election promises, party manifestos), it is clear that the general, universal state promise is mostly a political issue. This state promise is of a public law nature, which is closely related to political processes. These state promises necessarily change, cease to exist and new ones arise. This also includes the classic night watchman state promises, which are generally believed to be unchangeable and outside the budget law, e.g. that the state will maintain order and protect the country's borders. Their effectiveness and quality also depend on the budget negotiation process in the parliament.

From a strictly positivist legal perspective, the legislator is completely free to amend the laws. This is inherent in governance.[261] In this sense, there is no obstacle to the state assuming new responsibility: even with retroactive effect, by creating a compensation fund for the past 20 years, from which it will compensate the victims for the damage caused by street

[258] Or perhaps public promise.
[259] *"Állami közjogi ígéret».*
[260] *"Állami magánjogi ígéret».*
[261] See in particular the writings and notes of Gaston Jèze (and Max Boucard) for students in this topic related to the budget especially: e.g. JEZE, G. & BOUCARD, M. *Cours élémentaire de science des finances et de législation financière française; manuel à l'usage des étudiants des facultés de droit et des candidats au Ministère des finances, à la Cour des comptes, à l'inspection des finances, etc.* 1909.

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demonstrations in order to ensure freedom of expression and (peaceful) assembly and the safety of citizens' lives and property. But there is also no obstacle to the legislator establishing a new obligation on others, on citizens or on certain market participants, and thus, even with retroactive effect,[262] imposing customs duties or taxes. From a strictly positivist legal perspective, there is no legal obstacle to this. This is why parliamentary, political power is under rational circumstances subject to judicial control.

That is why the question of whether there is a remedy, for example, if a public institution does not receive adequate funding to carry out its statutory tasks, is not really comprehensible. The general statutory guarantee, only becomes enforceable through the budget law. The general statutory provision is a general promise applicable to everyone; in the language of contracts: an invitation to treat, a call for proposals. The democratic political process, one might say, is nothing more than the offering of competing options and the choice between them. Continuous bargaining and the emergence of new options. The law of supply and demand applies in the same way as in markets. Yet, it is to be emphasized here, that the motivation for elections, whether rational, cultural, experiential or emotional in nature or motivation, is completely independent of this. Therefore it is undeniable that the market theory of elections leaves much to be desired. After all, if the voter remains in the minority, he receives goods that others have selected from the offer, and he can only get rid of the market by moving, i.e. he cannot terminate the contract and thus is not entitled to compensation.

Changes in laws are thus a natural part of political processes. The room for manoeuvre of governments depends on many things, but apparently the

[262] See PÉTERVÁRI, K. A szerzett jogok és a visszamenő hatály. *Magyar Jog*. 60:10 p 598-603. 2013, LASSALLE, F. *Das System der erworbenen Rechte. Eine Versöhnung des positiven Rechts und der Rechtsphilosophie*. J.B. Metzler'sche Verlagsbuchhandlung und Carl Ernst Poeschel Verlag GmbH. 1861. online: Kellenbenz, H. Lassalle, Ferdinand Johann Gottlieb: Das System der erworbenen Rechte. In: ARNOLD, H. L. ed. Kindlers Literatur Lexikon (KLL). J.B. Metzler, Stuttgart. 2020. https://doi.org/10.1007/978-3-476-05728-0_9694-1.

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law is the least important. The economic situation is perhaps the most decisive, since in a booming economy, with greater state revenue, promises can be kept more easily, and new promises can even be made without conflict. In a given case, of course, the economic limit is not necessarily a hard limit, since, for example, borrowing can significantly soften these limits. Annual budget legislation is therefore based on long-term plans and long-term government strategy under rational circumstances, also on taking into account international constraints.

The budget law therefore *concretizes abstract commitments*. And the concrete promises and obligations could already be enforced **theoretically**; in fact, not only through individual law suits and remedies,[263] but also in a political sense, through the final report of the national budget from the previous year as the moment of accountability of the government toward the parliament. Through the authorization given in the budget law, the beneficiaries can already have reasonable expectations, legitimate expectations, and legitimate trust in the government.

At the same time, since the legislator only authorizes the executive branch with the budget, the beneficiaries do not yet have a valid position of entitlement. The legal nature of the budget law is that the legislator, with the authorization contained therein, imposes on the executive branch the obligation to implement the fixed tasks – the government programme – using the previously approved payments; the estimates. Since this is ultimately the goal of the politics and the elections, the government must enjoy considerable freedom of manoevre in this regard, of course within the framework of the legislation. This freedom (or framework) is provided by the Public Finance Act[264] and related legislation, which, for example, allows the government to make adjustments to certain items within its own

[263] e.g.: GÁRDOS, I. A 4-es metró per polgári jogi vonatkozásai. In: BODZÁSI, B. ed. *A Polgári Jogi Tudományos Diákkör évkönyve 1999–2000. tanév*. Budapest, 2001, ELTE ÁJK, 105–116.
[264] *"Államháztartási törvény».*

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authority during implementation[265] or require that it seek the approval of the legislator if it wishes to change expenditures.[266]

The withdrawals of resources that occur during the budget year can thus be called anomalies, but if they occur with the approval of the legislator, from a strict legal positivist perspective, they are not legally worrisome.

There can be exemption from all obligations, the question is: how. From a purely legal point of view it does not matter[267] whether the given task is impossible due to political over-commitment, inadequate economic policy or objectively deteriorating economic and market conditions. The responsibility of the executive branch is unquestionable and this is not refuted by the fact that there are no lawsuits by rights holders. Obvious violations of law are not always enforceable or subject to legal remedies in the private sphere, and this is especially true in the field of rights or entitlements as opposed to the state.[268] The responsibility of the executive branch in creating the budget is clear. The compilation of the state budget starts from the expenditure side, not from the revenue side. When choosing promises, the government decides based on the government programme, according to its political philosophy. But once it has chosen, it is bound by the budget law. It is binding as long as the legislator does not modify it. And if it does, it will necessarily interfere with specific rights with retroactive effect.

It is a common argument for governments that a commitment is impossible or has become impossible, and in the former case the obligation is null and void, and in the latter it can apply an excuse of exemption. A frequently used attempt to escape from a given obligation by classifying it as an impossible commitment, if it was enacted during the government formed by the previous political opponent. Such impossibility may occur

[265] Like reallocation.
[266] See the supplementary budget.
[267] Except for corruption.
[268] "I would not ruin my carrier by claiming something that might corrupt my chances later…"

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in the mass of financial/economic stabilization packages. The challenges to these packages before the Constitutional Court were all made in order to enforce and maintain specific (legal, acquired or perceived) entitlements.

3.2.4. State promise in private law

The state private law promise can have two sources: a promise based on a contract and a promise based on the budget act – as concreticized.

State promise based on a contract

The first, a state promise based on a contract, is based on a fiction. The state participates in civil law legal relations as a legal person and is represented by the minister responsible for the supervision of state property.[269] With this fiction and the provisions of liability for state obligations[270] the new Ptk. also regulates the state's liability, similarly to the old one. That is, the state[271] is also liable for its obligations[272] arising from a civil law legal relationship in the absence of budgetary coverage.[273]

This type of state promise is therefore to be fulfilled within the framework of civil law, can be sued, and can be linked to a guarantee. It is classified completely differently than the other type of state promise raised above.

State promise specified / concreticized in the budget

But what if the state does not make its promise as a civil law legal entity, but the universal, general public law promise becomes concreticized. If there is

[269] Ptk. 3:405. § (1)-(2).
[270] Ptk. 3:406. §.
[271] And the legal person forming part of the state budget.
[272] Ptk. 3:406. §.
[273] From a sociology of law analysis, the reason for this is the following. This is the problem of individual ministries if there is no money to fulfill certain obligations. So obtaining an exemption from fulfillment would require an inter-ministerially agreed legislative proposal, plus winning over the ruling party faction. What is more, in this process there is a serious counter-interest from the part of the Party bureaucracy and the administration due to the disadvantegours precedent effect or bad PR effect.

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someone entitled, then there must be someone obligated.[274] Individualized promises directly authorize the entitled to perform some action, or to assume further obligations, relying on the now concrete promise. However, owe to the legal nature of the Budget Act, namely that it is the estimates covering the fulfilling of the political programme, no one is placed in the position of the entitled. The fact that the payments requested by the government have been approved by the legislator does not entitle anyone to demand performance based on it. The Budget Act is an authorization, not a commitment. The Budget Act only obliges the government to implement and only to implement its programme.

And here, at this point, one arrives to the public law promise analyzed in point 1 above, that is, to the fact that the promise specified in the budget is still only an obligation to be imposed on a state body, in order for the beneficiary to be placed in the position of the beneficiary.

3.2.5. Conclusion

Aware of all this, the question is whether the same applies to beneficiaries covered by the Social Security Fund[275] as to the above.

Pension and certain social – namely, social security – entitlements are fundamentally different from other entitlements, because they are based on a contractual promise. However, the pay-as-you-go pension system is not suitable for a contractual legal construction. According to the contract, the promise creates an entitlement, but at the moment of the contract conclusion it is not possible to see exactly what it is. This was true even before the political transition, but it is becoming increasingly apparent during, after or in between of global crises. Another question is whether the current economic paradigm is sustainable, i.e. whether it is possible to talk about

[274] If there is remedy, there is right — like in the old common law rule.
[275] *"Társadalombiztosítás"* — social security.

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a continuously expanding, developing economy, especially if the demographic structure of society is a pyramid at the top. Under such circumstances, the pay-as-you-go system is unpredictable and unjust, because the promise made when the contract was concluded was unpredictable. In other words, *laesio enormis* – or a kind of unconscientiousness – could be a valid objection for almost every incoming generation. Of course, the picture is coloured by the fact that the social security contribution as compensation here is not adjusted to the later promise, but to the payments that are currently due to the current pensioners. And there is no question of bargaining on an individual level at all.

The solidarity aspect of the system itself cannot hide the fact that the pension system in its current construction almost exclusively ensures the livelihood of the older generation; apart from family support. Does ensuring a minimum livelihood for a regular contributor, who has not been able to accumulate other assets – also owe to this obligatory contribution too –, constitute contractual performance? However, the opposite is also true: it is obviously not possible to deny the social assistance necessary for a minimum standard of life to someone who is not entitled to a pension?

The current Fundamental Law of 2011 creates a clear situation in this regard. According to Article XIX, paragraph 4, Hungary "promotes the provision of livelihood in old age by maintaining a unified state pension system based on social solidarity and by enabling the operation of voluntarily established social institutions". In other words, the state no longer promises anything when concluding a contract, perhaps only a benefit. In this way, the state withdraws from this area. Paradoxically, the Fundamental Law introduces the liberal state ideal in terms of social entitlements. The liberal answer to this would be that citizens should provide for themselves above the minimum level. But is this really the case? Section 2. (6) of the Fundamental Law – quite contradictory in itself – goes against this constitutional

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position. On the one hand, the payment of the social security contribution can be required even if there is no (counter)service behind it[276] and on the other hand, based on this section, the Social Security Fund is liable for its obligations even if it has no cover.[277]

Starting from Article XIX of the Fundamental Law, it is therefore no coincidence that the (previous) system of private pension funds was abolished. Private pension fund membership represented a half-hearted step from the entitlement/contractual system towards the private/property regime. The amount on its pension-account expressing verifiable, paid-in, inheritable property is a greater guarantee for the payer than contractual entitlement; not to mention its good faith principle effect on widespreading the culture of savings, in a post-socialist country.

It is obvious that in a society where pension entitlements based on solidarity vary unpredictably, the classical concept of contract is unable to cope with the enforcement of the rights of the parties. It cannot do anything about the defective performance, withdrawal of coverage, or bankruptcy of the party-state, i.e., it does not ensure the enforcement of the rights of the other party. Trust in this contractual promise is all the more important because the continuous payment of contributions deprives the vast majority of the supporters of this social security system of (possible) wealth accumulation. Thus, the contractual solution of entitlements not only does not secure citizens in their old age care, but also makes them vulnerable to constant public finance and budget problems.

The answer is therefore that a state promise can only be handled under the Civil Code if it is made by the state as a civil law entity. It cannot be applied to other state promises, although it is clearly a promise and a com-

[276] i.e., to this extent it is a tax-type payment, and to this extent the legal relationship would not be contractual in nature.

[277] Also strengthening the tax-type legal relationship of the Social Security relationship, as opposed to the contractual approach.

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mitment, and even if there is coverage for it in the budget, which in the given case is not a condition for a civil law obligation, for example. Political processes are, *preater iuram*, least restricted by law.

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PART 4.

CHANGES IN RISK ALLOCATIONS DUE TO NEW TECHNOLOGIES

Modern constitutional democracies focus their regulatory power in optimizing risks. Good laws are, which allocate liability on those who can defend from the occurrence of the risk the most efficiently. Efficient risk allocations may mean, among others, the lessening of the transaction costs for market participants, at the expense of taxpayers, or deterring participants from doing something, at the expense of the consumers. But what kind of risks should be managed by regulations, what kind of infrastructure should be upheld by public monies? While answers to these risk management questions concern politicians and academics alike, the Internet sweeps in stealthily and create global incompetence. Part 4. studies the challenges of the law facing the new disruptive technologies.

Chapter 4.1.

Who owns the data in the academic world or how do we access other people's research and data?

This is a provocative essay against copyright in scientific investigations and for freedom of research and free access made possible by the Internet. The Internet - at least web2.0 - has created an opportunity for freedom of expression that essentially questions the current version of copyright. Anyone can publish anything, orally, such as via Youtube, or in writing, in a blog, except for researchers who, being condemned to mandatory publication, can only officially access the public through academic journals or book (publishers). Academic publishers in this regard play the role of gatekeepers in that they bring some kind of control, an extra professional aspect to the discourse in exchange for remuneration. The following analysis discusses the role of copyright holders, publishers and authors, focusing exclusively on the world of scientific works, in an era in which research is almost entirely financed by public funds and in which freedom of research means not only the researcher's subjective right to publish his work creating thereby monopoly over his work, but also that the researcher has access to the work of others. The final conclusion of this investigation is that, the emphasis is once again shifting from the author to the work in the scientific world, just like in the old pre-Guttenbergian days. That means that only the moral rights pertinent to the copyright would remain in contrast to the monopolistic property rights of the author. So a researcher, as a private individual, can continue to be as an important player in the free market and a disseminator of 'popular' science.

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4.1.1. Introduction

On December 27, 2023, The New York Times announced that it was suing Open AI and Microsoft for copyright infringement,[278] alleging that the latter had illegally copied millions of articles owned by the publisher when training the AI. According to the plaintiffs of the lawsuit, the infringers had created a *competitor* to the newspaper - by building on the infringed databases — because each search would now foreseeably deprive The Times of significant revenue.[279]

A newspaper article from yesterday is not worth a penny, nor is it protected by law,[280] but an article from a newspaper or the collection of newspaper articles arranged in an archive dating back several decades or centuries is already a huge value. This is already the subject of the *sui generis* law protecting databases. This special branch of (copyright) law exists precisely because copyright itself could not extended to them: who owns these data, who are the authors, is the collection of these data original, is the collector of these data an author an editor, etc? Yet such protection was wanted because it undoubtedly require(d) a large investment and because the database undoubtedly has serious financial value. And it has an even more important value: such an archived database —proper — would theoretically be able to ensure the integrity of the works contained in it – roughly like microfilms.

The main thesis here is that the issue of authorship has become practically uncontrollable with the advent of the Internet, which in fact chal-

[278] The Times Sues OpenAI and Microsoft Over A.I. Use of Copyrighted Work. Millions of articles from The New York Times were used to train chatbots that now compete with it, the lawsuit said. (2023. december 27.). downloaded: 1.Sept. 2024. https://www.nytimes.com/2023/12/27/business/media/new-york-times-open-ai-microsoft-lawsuit.html

[279] The New York Times is suing OpenAI and Microsoft for copyright infringement / A lawsuit claims OpenAI copied millions of Times' articles to train the language models that power ChatGPT and Microsoft Copilot. https://www.theverge.com/2023/12/27/24016212/new-york-times-openai-microsoft-lawsuit-copyright-infringement. downloaded: 1.Sept. 2024.

[280] e.g.: In Hungary: Act LXXVI of 1999 On Copyright Art.1. (5) Copyright protection does not extend to facts and daily news items underlying announcements released in the printed press.

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lenges copyright with the constant non-transparent possible rewriting and transforming of others works, but definitely with the ability of artificial intelligence to generate texts.[281] From then on plagiarism is difficult to interpret. This all makes one wonder whether is it not the work itself that is important, its integrity, as opposed to the name of the author. In any event one thing is certain: the mostly, overwhelmingly publicly funded scientific world is different in this aspect from that of the private market.

4.1.2. Statement

The theses are as follows: 1) copyright is, among other things, a technology-dependent historically defined legal institution; it was not always and it is not necessary to be.[282] And from this follows the other thesis that 2) copyright is essentially a tool for establishing private property[283] that could

[281] Certainly, there are many issues related to emerging of the AI. e.g.: LEE, K., COOPER, A.F., GRIMMELMANN, J. Talkin' 'Bout AI Generation: Copyright and the Generative-AI Supply Chain. *Journal of the Copyright Society of the U.S.A.* (forthcoming 2024), or on the necessary legal reform to enhance global text and data mining research see: FLYNN, S. et al: *Science*, Volume 378, Issue 6623, pp. 951-953. 2022. or the same in the EU: SCHROFF, S. The purpose of copyright—moving beyond the theory „*Journal of Intellectual Property Law & Practice*, Volume 16, Issue 11, November 2021, pp.1262–1272, https://doi.org/10.1093/jiplp/jpab130 also see the problem of whether an AI can have copyright or not from the point of view of the AI: e.g.: BURK, D.L. Thirty-Six Views of Copyright Authorship, by Jackson Pollock 58 *Houston Law Review* p.263. 2020. and from the pint of view of the copyright holders of the data, e.g.: FRANCESCHELLI, G., MUSOLESI, M. Copyright in generative deep learning. *Data & Policy*. 2022; 4:e17. doi:10.1017/dap.2022.10 or LUCCHI, N. ChatGPT: A Case Study on Copyright Challenges for Generative Artificial Intelligence Systems. *European Journal of Risk Regulation*. pp.1–23. (2023), doi:10.1017/err.2023.59. Still, whether an AI can have copyright or not is not at all an interesting legal issue, see also below, the real legal issue is who has ownership (control?) over the data.

[282] Dissemination was always a complicated and expensive activity, (see JAKAB, É. *Szerzők, kiadók, kalózok. A szellemi alkotások kialakulása Európában.* Értekezések a Jogtudomány köréből. Akadémiai kiadó. p.204. 2012). the conditions of which were significantly improved by book printing, but it did not make it significantly cheaper in the sense that the Internet does today. What the printed book does have in common with the Internet is the facilitation of piracy. In fact, this is what actually brought copyright to life during the process of embourgoisement: publishers needed protection against cheap illegal reprints. Publishers of cheap illegal reprints however used the argument of free speech.

[283] See, e.g.: EASTERBROOK, F. H. Cyberspace and the Law of the Horse, *University of Chicago Legal Forum, 207 Chicago Unbound*. 1996. *https://*chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2147&context=journal_articles

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create market for the intellectual products as goods[284]for a limited time. This monopoly however lacks justification in publicly funded scientific world.[285]

4.1.3. Argument

The Internet has undoubtedly posed a challenge to copyright. The Internet instantly delivers a *copy* of any text, song, picture anywhere to anyone —in contrast to earlier times— now practically free of charge or almost free of charge, without any harm to the original copy. There is no longer a center and periphery if there is no censorship. Under such circumstances, even the enforcement of existing rules at the international level is difficult, as long as the copyright in force remains a particular,[286] territorial[287] national law.

Copyright basically exists in the conjuncture of two somewhat contradictory ideas: *free expression*, and by creating a motivation for authorship the *granting of monopoly.*[288] Its objective is the protection of thought in its manifest form.[289] According to this protection, the author of the work is placed in a monopoly position regarding his work for a certain period of time. The author can extend this protected status to the users of his works,

[284] And not at all to provide incentive to create works but for the possibility to collect the profit.

[285] Due to its special monopolistic power over the work, which thus impedes access to the copyrighted work.

[286] See e.g. SCHROFF, S. The purpose of copyright—moving beyond the theory, *Journal of Intellectual Property Law & Practice*, Volume 16, Issue 11, November 2021, p.1262–1272, on the development of some degree of EU copyright law and an analysis of its current obstacles. (https://doi.org/10.1093/jiplp/jpab130).

[287] It is no coincidence that the TRIPs Agreement, a supplementary agreement that protects intellectual property with more modern means, was created in 1995, about 100 years after the Berne Convention (of 1886).

[288] By protecting the manifested, expressed form of the idea, thought, etc. e.g.: The Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971) (Art. 7 (1)) provides for 50 years after the author's death, the USA and EU laws provide for 70 years.

[289] e.g. in Hungary: Act LXXVI of 1999 On Copyright Art. 1. (3) A work or creation is entitled to copyright protection on the basis of its individualistic and original nature deriving from the intellectual activity of the author. Copyright protection does not depend on quantitative, qualitative, or aesthetic characteristics or any judgment of the quality of the work.

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to the publishers as well.[290] In other words, the essence of copyright is that it recognizes the subjective right of the author to be able to reach the public without having his work changed or stolen, and to receive some compensation in return.

But freedom of expression is only a small part of the freedom of research, because *access* to the works of others is at least as important an element of research and so the protected work is the basis and starting point for later works. Moreover, professional scientific works are explicitly based on the professional circles and students mastering their content,[291] thinking about it further, and developing it. That is, using it. In order for this professional discourse to develop, however, access[292] to published studies is necessary. For this, the publisher represented an important added value in the not too old 17th–20th centuries, because without it, widespread publication, dissemination, —licenced— copying would have been unthinkable. A capital-rich investor was needed, and for this, property rights as a guarantee.[293]

The ownership right in the copy, i.e., the profit-making side of copyright, as a necessary accessory of the commodity

However, the world has become different in the field of scientific works. In this respect, the circumstances in which the old legal concept prevailed[294] and property rights could be assigned to things so that to create a market so that they could be put on the market for trading, is gone. Trade in this field has lost its meaning with the widespread of the public monies.

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[290] e.g. in Hungary: Act LXXVI of 1999 On Copyright Art. 16. (1) On the basis of copyright protection, authors have the exclusive right to utilize works in whole or any identifiable part, whether financially or non-financially, and to authorize each and every use. Unless otherwise stipulated in this Act, use permits can be obtained with use contracts.

[291] Their content. The slavish copying and excessive quoting are proof that this has not been achieved. (see JAKAB, É. *Szerzők, kiadók, kalózok*.... p.106. citing Fichte).

[292] Without discussing here the role of time.

[293] See the claim of The New York Times against Open AI (fn. 263. and 264.).

[294] Primarily in the common law concept, which is less influenced by codes.

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By the 20th and 21st centuries, the market for scientific works had changed significantly. Instead of private research, polymaths, and hobby scientists, an organized research community supported by public funds was created. This is true even if certain institutes are privately owned or research is conducted at private universities, but they are still largely supported by community funding, tenders, and projects. In other words, the majority of intellectual products — specifically with regard to copyright — exist in a context that has no market value. More precisely, the price and value of a professional article – whether medical, psychological, legal, or philosophical, etc. — are irrelevant. These works under copyright are quasi-by-products. These are immaterial, intellectual goods produced by researchers supported by public funds, they are actual by-products of a project.

As is well known, copyright does not protect the idea, but the expression, the manifest form of the thought or idea.[295] This is covered by the researcher's — employment or licencing —contract. At the same time, the knowledge that underlies these terms does not belong to the employer, nor to the institute, university or state. These intangible assets filter through to education[296] and thus absorb further social costs but in the meantime guarantee the return on previous public investments; in the best case scenario. In the last far more than half a century, these have been provided free of charge through individual rights and public expenditure; at least in certain parts of Europe.

Scientific research has thus become part of the state infrastructure, and just as the contractor does not charge for the use of public roads in the bud-

[295] e.g. In Hungary: Act LXXVI of 1999 On Copyright Art. 1 (6) Ideas, principles, theories, procedures, operating methods, and mathematical operations are not entitled to receive copyright protection.

[296] In public education or public higher education (asa well as in private ones, of course).

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get of each of his works, there would be no separate remuneration for the copyright (publishing) rights belonging to professional works.

In this context, the requirement of "publish or perish"[297] created the publishing houses of public funds too as the real market of these publications are the same circles of publicly funded researchers. Although scientists, researchers, authors ultimately transfer their copyrights[298] most often free of charge to the publishers, the publishers represent separate business interests by selling these articles in the market outside the academic world for good money.[299] These publishers even decide which article is published, when and where. In this respect, they can fulfill the important role of gatekeeper on the Internet, and thus their activity could be considered legitimate. After all, peer-reviewed works express a certain professional standard, a kind of selection criterion, some kind of professional control.[300] Which is primarily, of course, a help to laypeople, who would otherwise not be able to navigate in unknown scientific field: the publisher thereby guarantees with its name that the works it publishes meet the scientific standards according to the scientific standpoint and discourse of the time.[301]

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[297] i.e. the method of compulsory publishing of researchers.

[298] "Economic rights" of copyrights (in context of author's right, see below p.II.2.).

[299] See: LESSIG, L. *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 2004. or see the Creative Commons (the initiation of Aaron Swartz in 2013), or see SUBER, P. *Open Access.* MIT. 2012, on how for 350 years scholars have written peer-reviewed journal articles for impact, not for money, and are free to consent to open access without losing revenue, etc.

[300] So, plausibly, there might be more "mistakes" in open access journals. Still, the aim of the strategies of "Plan S" and "COalition S" is that the results of publicly funded researches need to be published in opren access journals. Interestingly enough Hungary is not among the countries which signed the commitments in 2018 (as opposed to Austria, France, Ireland, Italy, Louxembourg, The Nehterlands, Norway, Poland, Slovenia, Sweden, UK).

[301] However, this "censorial" role, if not justified, is more reminiscent of the English Stationers' Company of the 16th and 17th centuries. This organization, which included private publishers and printers, enjoyed privileged monopoly rights and included those who had the right to publish as the rightful owner, the owner of a manuscript. This business could work extremely well if the publisher owned enough popular works, or less so if the publisher with more modest means could not buy such works, or if the publisher owned manuscripts of less interest, whether rightfully or not. The point is, however, here, the exclusive, perpetual right and the privilege. That is, in the past, when granting a letter of privilege, the king could maintain an effective right of censorship (see also JAKAB, É. *Szerzők, kiadók, kalózok*.... p.44.).

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If a professional publisher introduces excessive business — perhaps political or religious —considerations into its publishing policy, this gatekeeper role becomes questionable and will transform into a censor.[302] In fact, scientific publishers are ultimately dependent on public funds just like researchers. Yet, researchers access other academics' published articles through databases of this sort of publishing houses, whose added value is the well searchable, organised, updated database.[303]

With the spread of the Internet, the problem of access occurs more from the side of source criticism. What can be considered a professionally controlled work, and if not, how justifiable it is a non-peer reviewed work. On what basis is it acceptable? But why would all this require a privileged monopoly status that does not cover any risks, but rather hinders the right to free speech and access. Publishers do not face much risk, since both researchers and publishers are ultimately state-supported segments of the economy in the developed West and with the principle of "publish or perish" their economic background is solid.[304]

Moral rights of copyright

While the publishing and accessibility of works were discussed above from the perspective of property rights protection, the following will focus on one's existential connection to the created intellectual work, work of art as

[302] Besides the fact that researchers can of course also appear on the internet as private individuals, they can blog/vlog and YouTube, and they can use the researchers' so-called Facebooks, like academia.edu or researchgate. After all, THIS is the essence of the internet.

[303] In Hungary, these databases of publishers, on the other hand, are often purchased by universities and scientific institutes in consortiums supported by public monies, because of their high prices, which means that it happens that a given established database or publisher in a country is not accessible because it is too expensive, e.g.: the Elsevier in 2019. Although this was not a unilateral deed of Hungary at all, since Hungary followed suit after Germany, the Netherlands, Sweden, etc. The problem with state-funding in such current system is, that the prestige of the publishers where researchers would like to appear or should appear, also depends on lobbying power of the publishing houses in the negotiations for the prices, as is well known.

[304] Dr. SZABÓ, C. *Elpazarolt orvostudomány*. *Hiteltelen kutatók, megbízhatatlan kísérletek*. Corvina kiadó, Budapest. 2024. 320.p.

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it is protected by the author's right (*Urheberrecht* or *droit d'auteur*).

While the right to the copy, i.e., the property rights background of the work[305] is usually linked to the writings[306] of Locke,[307] the continental development of copyright goes back primarily to Kant and Fichte.[308] The idea that every person is entitled to moral rights protection over his work (*ius personalissimum*) can obviously also be derived from natural law, similar to Locke's model. Yet, in this sense, the essence of creation is the expression of the personhood of man, which is certainly embodied in the work, but is not the same as it: the copy of the work maybe sold but the work as intellectual self cannot be detached from its creator, ever.

Thus the development of German law[309] finally arrives at the theory of *sui generis* author's right. That is, the acceptance of the duality that the author's right is of a dual nature: on the one hand, it has a property character, but at the same time it also has personal rights. Thus, the created, original work is marketable, copies of which can be distributed, copied, etc. for some remuneration, but on the other hand, despite the sale/purchase of the work, the author's right continues to exist: he has the right to the integrity of his work, so that it does not change, not to be changed against his will. The latter rights cannot be waived in any way, except if the author revokes them, i.e. removes his name from the work.

In other words, the other side of the copyright claim (author's right) requires highlighting this personality right[310] ensuring that the form can still be protected, that is, that changes in the state of the work can be tracked.

[305] i.e. the property rights associated with personal work.
[306] Locke: Second Treatise of Government (1690), Chapter V. of Property.
[307] See Éva Jakab›s interesting line of thought, how she traces Locke›s arguments about the nature of man back to Aristotle through the Institutes and Roman legal scholars (Gaius), and then the Stoics (JAKAB, É. *Szerzők, kiadók, kalózok*.... pp.46–58.).
[308] JAKAB, É. *Szerzők, kiadók, kalózok*.... p.101.
[309] Starting from the initial criminal law protection (see plagiarism, theft, fraud, forgery, etc.) through the search for private law (quasi-property law somewhat similar to that of common law).
[310] Moral rights.

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The right to the integrity of the work protects the researcher from theft, unauthorized copying, and forgery, and at the same time, this is what motivates him to ensure access and maintain professional discourse.

4.1.4. Conclusion

The ultimate question is, then, who owns the data in the scientific world? The one who writes the work or the one who pays for it? The immediate public ownership of publishing databases maintained with public funds, that is, the digital data that organizes professional discourse globally, is a clear goal. This is also because research can mostly only survive on big money. However, additional interests must be reconciled for this: cybersecurity and free accessibility. The freeness of charge and the scope of access, might be constrained geographically due to the reason of public funding. Price and access may of course be further nuanced as expected by territoriality and particularity. However, if we trace the reason back to its natural law origin, then access extends to all people.

The consequence of the thesis is that with the spread of the Internet, or at least artificial intelligence, in the world of researchers supported by public funds, the work becomes the essence again, as it used to be, and not the profit of the creator. The person of the scientist, of course, will continue to be clearly asserted in education, at conferences, and in the free market, in the competitive sphere.

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Chapter 4.2.

Expansion of Incompetence Owe to the Internet[311]

The Internet has a special new feature. The Internet connects. The Internet creates two parallel but intertwined worlds: the on-line and the off-line world. And by enabling ones to connect and use others' databases and softwares, the internet generates global incompetence. If softwares are defect on the internet it has physical consequences in the real world. With its connecting nature, internet inserts a third assisting party into all on-line transactions. The role of the traditional actors is undistinguishable and extra risks triggered by the internet are to be dealt with. The question of competence and liability faces challenges. One uses others' softwares or databases via the internet not necessarily knowing its defects, so defects may grow into others' softwares, like bugs via deep learning.

4.2.1. Internet as the Virtual Assisting Actor

The use of the internet may be a clear example for unleashed technology.[312] Because beyond the only seemingly paradigmatic changes brought about by the internet, the most radical ones lie in the interconnectedness of every relationship on the internet. For in all relations which are administered via the internet there is an extra actor, an assisting party, involved. Internet connects. One accesses the internet so that to use others' softwares or databases. But this connection inevitably results in the involvement of the internet as an extra actor. And it has three fundamental consequences: (i) the assurance of a global virtual standardization, (ii) the assurance of a global physical standardization and (iii) the problem of widespread incompetence.

[311] For an earlier versioin of these thoughts see: Pétervári, K. *Social Risks of Current Regulations* L'Harmattan, Paris, 2021. p.42.
[312] SHAPIRO, A. The Internet. *Foreign Policy*, No. 115 Summer, 1999. pp.14–27.

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ad i) The Assurance of a Global Virtual Standardization

Prior to the industrial revolution there was no general physical standardization at all. The post-industrial revolution times however witness a physical type of standardization. In fact, it is not total whatsoever, since this standardization has been achieved in the real world. That means that the productions exist in the physical world, therefore there are always here and now. Yet this fixation in time and space inevitably allows deviations from the standard according to the needs of the specific circumstances. This technologically, economically, legally, and culturally pre-determined environment naturally impedes standardization globally.[313]

But now, the internet grants the possibility of a total, global standardization, at least theoretically. The difference between the center and the periphery ceases to exist, because ideally at least, anyone can have access to the data simultaneously and instantaneously. There are products or services available now on the planet which need not have specific traits to be usable in special circumstances. Word processing or excel spreadsheets do not require specificities. In the recent period of industry 4.0 the unique characteristics of the products or services are not necessary. The problem of complexity is now the compatibility.

This sort of standardization may undoubtedly sound naïve. And indeed,

[313] Even globally: For years the Venezuelan Supreme Court operated via cloud computing from outside of the country and used Skype from at least 4 different venues such as the USA, Panama, Colombia and Chile. See: Since July 2017, the full tribunal in exile, as well as its executive committee, has been meeting in cyberspace *Bloomberg* Jan 2019. With the inclusion of the internet, what is new, is the speedy way of communications among the interested parties. The judges could follow the rules simultaneously, hold hearings, do research and publish their judgement instantaneously via the internet. But where do the information come from, most probably even sensitive data in these cases? How to reach the necessary databases from different countries? What if these data were in the clouds, meaning in a server somewhere not really transparent for the data owners or data holders? Under what jurisdiction are these data storable, locatable and accessible? Is it so that the physical here and now, long ago the core elements of the legal thinking, are not going to be relevant anymore? And does this mean that the question of competence and the question of the governing law is going to face challenges? Who and where, under what legal regime could act, commit a crime or become liable? Or, in this case, who and where could have authority to award a decision. see: Pétervári, K. *Social Risks of Current Regulations.* L'Harmattan Paris 2021. p.42.

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when (or in spite of that) the internet was privatized[314] in 1996, it naturally led to the protection of the national security requirements all over the globe. Perhaps this only reason is not necessarily equally applicable to all countries.[315] Thus, the stealthy, yet soft regulations end up in the unleashed, sometimes particular, regulations. However since internet conquered the world in an optimistic worldview in the 1990's the whoabout of the owner of the internet did not play a major role so far.

Recently, however a new protectionism[316] seems to expand all over the world.[317] This is partially an old fashioned not too well tailored response to the new challenges owe especially to the (disruptive) technological innovations.[318] Meanwhile however a new kind of technological sovereignty idea[319] evolves as well, which focuses on state involvement specifically in digital economy and (but)[320] standardization to provide for a motivating environment for market competition.

Notwithstanding these new born deliberate localizations again, the theoretically available global standardisation triggered by the ubiquitous inter-

[314] JEET SINGH, P. From a Public Internet to the Internet Mall. *Economic and Political Weekly*, Vol. 45, No. 42. 2010. pp.16–22.

[315] LEHR, W., CLARK, D., BAUER, S., BERGER, A., RICHTER, P. Whither the Public Internet? *Journal of Information Policy*, Vol. 9, 2019. pp.1–42.

[316] This goes without saying, of course, that there has always been certain type of protectionism, like in national defence, but the scale and the degree is being changed, also visibly in the global trading, the WTO system. see, e.g.: KUTLINA-DIMITROVA, Z., LAKATOS, C. The global costs of protectionism. *World Bank Policy Research Working Paper*, 2017, 8277. or BUSSIÈRE, M., PÉREZ-BARREIRO, E., STRAUB, R. & TAGLIONI, D. Protectionist responses to the crisis: Global trends and implications. *The World Economy*, 2011, 34.5: 826-852.

[317] HALMAI, P. Globalizáció versus deglobalizáció. *Hitelintézeti Szemle*, 22. évf. 2. szám, 2023. június, pp.5–24.

[318] INZELT, A. A technológiai szuverenitás felvilágosult koncepciója. *Portfolio*, április 16. https://www.portfolio.hu/gazdasag/20230416/a-technologiai-szuverenitas-felvilagosult-koncepcioja-608248. 2023.

[319] EDLER, J., BLIND, K., KROLL, H., & SCHUBERT, T. Technology sovereignty as an emerging frame for innovation policy. Defining rationales, ends and means. *Research Policy*, *52*(6), 2023. 104765.

[320] According to this notion in the era of the internet sovereignty is not an objective but a means and so it requires further global cooperation in scientific research and development beside the competition in the markets. Yet, the competitive power of the companies depend on the supporting environment established by the government via adequate modern digital infrustructure and standardization also through the internet. See INZELT, A technológiai szuverenitás....

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net, creates further distinctions. The software is connected to the internet and so accessed by the car. Internet connects in order to use others' softwares and databases. If something goes wrong, who is going to be responsible or liable then? And so, this insertion of an extra actor renders an extra layer to the liability chain. It is inevitable. Clearly, this model of relationships on the internet disrupts the concept of the privity of the contract, namely that a mutual agreement could have effect only on the parties to this agreement. Third parties may neither be beneficiary nor be held liable, unless expressly stipulated so, in the contract or by the governing law.

However, the internet provides for a level playing field for the hardware, the software, and the human action. What is more, the human action is not even indispensable anymore: the broker algorithms, bank transactions or certain robots, semi-autonomous self-driving cars exclude the human interference whatsoever. The actors are not liable in its traditional sense, due to lack of intent, the *mens rea*. The liability pattern of this sort of relationship certainly requires new aspects of the use of others' softwares and databases.

And this might (should) have impact on the relevant regulations. On the one hand, these uses of others' softwares or databases need rules, be it contractual or regulative. And on the other hand, these softwares and databases need protection as well. Since the purposefully switchable use of the various databases may demand the re-definition of the ownership and the investment interests or the use of robot algorithms.[321]

ad ii) The Assurance of a Global Physical Standardization

The current problem with the internet, from this point of view, is that an off-line and an on-line world co-exists. But this is not merely a parallel existence, but they intertwine. The deficiency of a software product is tan-

[321] LEISTNER, M. Big Data and the EU Database Directive 96/9/EC: Current Law and Potential for Reform. 2018. Available at *SSRN*: https://ssrn.com/abstract=3245937 or http://dx.doi.org/10.2139/ssrn.3245937.

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gible, has consequences in the physical world. A software driven defect in the braking system of a car may jeopardize life and limb of many on the roads. In all these cases the responsibility may be fact dependent, of course, but legally may not. It is certainly governed by negligent torts based on fault-liability in the common law systems (USA, UK), but not so in the European continent, where strict or objective, non-fault liability prevails.

Under the continental European solution, the decision in this case would not change a lot, since normally it is not the driver who is liable, but the operator/owner of the car. So, no fault of the driver needs to be proven by the injured plaintiff. In order to be exempted from this liability the owner/operator of the car has to be extremely cautious to avoid the accident, for even the defects in the car would not excuse them. The layers in the liability chain would however grow, and so would the blind liability, if the car needs to be linked to the internet due to lack of necessary space for the data.

On the other hand, in the case of negligent tort in the USA one has to act reasonably, with due care, and if it is shown, one is released from liability. Thus, one cannot neglect any default if perceived. If not perceived, that would be unreasonable negligence and if the proximate cause is established, it would draw legal liability with itself. If the user of the product realises that something goes wrong, has to react on that perception. It is a duty.

The car needs to be slowed down or even stopped. Without making sure that the problem is eliminated, the problem needs to be tackled with. This is the law of negligence in torts, or non-contractual derelicts. If the driver was not negligent then the product liability of the car producer or the software producer needs to be proven.

Yet, if the internet is involved as a third assisting actor, one may not have perception at all. One has no idea whether there is something wrong going on or not. The software or the driving of a car via the cloud computing may

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not allow human interference, often for safety reasons. Also, for safety reasons, there are special distinct fit-for-purpose computers, also known as robots, or smart cars for example. Owe to the application of the software via the internet, the different question of liability occurs in driving a car. Who is responsible: the hardware, the software, or the driver? Or, in legal terms, the product manufacturer, the software producer (SaaS in cloud computing) or the driver (owner or operator)?

ad iii) The Problem of Widespread Incompetence

And, from a legal point of view, here comes the third, and perhaps the most important consequence of the internet as an extra assisting actor being involved in these relations: namely the problem of widespread incompetence.

An abrupt total automatic switch off of the electronic devices in the moving car driven by specific softwares may cause damages, harm, or immediate death. As seen, this may come, in the near future, as a total surprise, without any human interference or knowledge. Where there is incompetence from the part of the user, the question is: in what way should he be liable, since there would be no way the driver/operator/owner could have had acted so that to avoid the accident. He could only show diligence and best effort by bringing the car to the service station regularly, for example.

On the other hand, if someone operates a product over which he has no full power, but has nevertheless the interest in doing so, should bear the risk of possible damages. Simply by operating a highly hazardous equipment triggers the stricter, non-subjective, liability. In other words, in these accidents for example, the driver/owner/operator can hardly be exempted from liability if damage occurred.

Interestingly enough, it was exactly the time of the industrial revolution, when the opposite of the objective liability, the subjective liability was introduced. As the children of the enlightenment and free will, the legislators

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gradually enacted the so-called subjective liability, meaning that the individual responsibility is grounded on the intents or the will and the deeds of the person. An individual is free and acts in accordance with his free will and intents, therefore any damage caused by him may be righteously borne by him too. Since this notion included total indemnification, this kind of liability proved to be an obstacle to the technical/technological development. The loss or the injury which could have been caused, for example, by the railway companies could well have exceeded the profits. The objective or strict liability however is a limited liability in the sense that it does not contain all damage, especially not the consequential damage, but in exchange for this easement, objective liability applies even if one is at no fault. This sort of legal institution is a mere risk allocation.

This involvement of the internet in these relationships render special emphasis on data safeness. Who should warrant that the data given in the used database are correct or undistortedly stored and applied? Who should account for a due logging so that the identity, the time, and the place of any possible access or change to the given database be traceable later on[322] (Djemame et al 2013). These questions to be answered demand further distinctions and an analysis of the deeds of the various actors involved: the data provider, the internet service provider, the data user and/or ultimately the customer who might not be the data user.

iii/a) *Incompetence from the Part of the Data Provider of Others' Softwares or Databases*

The data provider or perhaps a database owner need not be an expert as

[322] DJEMAME, K., BARNITZKE, B., CORRALES, M., KIRAN, M., JIANG, M., ARMSTRONG, D., FORGÓ, N., NWANKWO, I. Legal issues in clouds: towards a risk inventory. *Philosophical Transactions: Mathematical, Physical and Engineering Sciences,* Vol. 371, No. 1983, e-Science-towards the cloud: infrastructures, applications and research (28 January 2013), pp.1–17 Published by: Royal Society Stable URL: https://www.jstor.org/stable/41739965.

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the US case of the mushroom picking laymen shows.[323] In this court case the plaintiffs wanted to pick and eat wild mushrooms, so they had bought a mushroom encyclopedia. But after having the meal they got so sick that they needed a liver transplantation (*Winter v. G.P. Putnam's Sons*, 1991).[324] Defendants were the publishing company for publishing others book though. The liability question was twofold: the deficiency of the book itself and of the content therein. Since the book was other publishing company's book and it was not defect, the defendant was not liable for printing others' book. The reasoning included the problem of liability of publishing houses for reprinting others' books. The argument of the court may be rational and acceptable, even if it is hard to digest that an encyclopedia need not be correct. But what sort of data become obsolete? And when? And finally, what is more important: to have more information or to have checked information? Checked by whom?

Yet, the emphasis here is on the data or information of others. Internet connects and so generates global incompetence. For how to trace back the bad signals, the misinformation or misunderstanding or even hacking, in the interconnections of the various databases and softwares used throughout the internet causing defect in the services. Certainly, these softwares and databases have in-build protecting protocols but so far, we live with the recognition that there is no bug free software. Can disclaimer be applied in case a map becomes unduly un-updated, or a traffic code sign becomes obsolete? And could this be the case in the internet and especially in the case of driverless cars, for example? Surely, disclaimers may be applicable among the producers or the suppliers themselves, but it would work doubtedly in the consumers protection world. Regulation is going to prevail in this latter case, at least in the European continental legal regime.

[323] REVOLIDIS, I. & DAHI, A. The peculiar case of the mushroom picking robot: extra-contractual liability in robotics. *Robotics, AI and the Future of Law*, 2018. pp.57-79.
[324] Winter v. G.P. Putnam's Sons, 938 F.2d 1033 (9th Cir. 1991).

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iii/b) *Incompetence from the part of the Service Provider*

The service providers' liability has been a struggle ever since they exist. So far, a service provider is not liable for the illegal content uploaded by the users of the internet platforms or other devices. Because service providers do not owe strict liability, their liability is fault-based, and there can be no way, that all uploading be censored in advance. So, they have to be told, and so they are responsible in a case by case basis. In case of justified warning the uploading has to be taken down. If they knew or should have known that the uploading was illegal, they are liable according to the so-called notice and take down standard. This policy is still in effect – see Youtube, Facebook, Google etc,[325] – since at the moment not even the latest EU copyright directive, EU Directive 2019/790, has changed – or rather could change – this approach.[326] Nonetheless it is not at all bad news, since one should not promote institutional (let it be governmental or private) censorship and especially not at the expense of freedom of expression or the right to be informed.

The right to be forgotten policy enforced in the EU by the, wrong, decision of the CJEU[327] provides for a good example of how burdening this content liability may be. Service providers are literally given the right to constrain free speech. Besides, since internet is ubiquitous, deleting information in a specific jurisdiction will not necessarily bring about the cancellation of those data completely globally from the internet, as the case of the fight between Google and France demonstrates.[328] Nonetheless, such localization of

[325] TAN, C. Application of the terms of service. in: *Regulating Content on Social Media Book. Copyright, Terms of Service and Technological Features*, 2018.
[326] LENDVAI, Z. Controversies Around the New Copyright Directive. *Budapest Business Journal*, 21 June, 2019. https://www.bakermckenzie.com//-/media/files/insight/publications/2019/06/ controversies-around-the-new-copyright-directive.pdf.
[327] C-131/12 Gomez v. Google.
[328] C-507/17 Google v. CNIL.

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the internet, at least in the Euro-Atlantic world, should fail, according to the AG and other advocates and supporters of Google in this law suit.

iii/c) *Incompetence from the part of the Data User Other than the Customer*

The problem of competence regarding the data users other than the consumers embrace the good old issues of suppliers' product liability. Products must be safe, producers as well as suppliers have strict liability in this matter.

By the assistance of the internet, however, suppliers are often software producers or database owners. The smart, semi-autonomous or driverless cars reach out for data from the various databases located and accessed probably in the clouds. Yet, in contrast to the protection of the databases from illegal intrusion, the running of the driverless cars on the streets will trigger the problem of liability issues through the warranty problems of others' softwares too. These may well stand for the use of the free softwares and open source softwares. But how to tell which data are bugged and who should be liable. With the problem of deep learning this conundrum is going to get ever trickier finally rendering the user incompetent.

In any event, software liabilities are privileged ones. The liability is strict, but there always is a cap on the amount of compensation.

iii/d) *Incompetence from the part of the Data User, as ultimately the Customer*

Finally, the customers are, by definition, exempt from the need of being an expert. Notwithstanding because of the interconnection via the internet, internet adds another layer here too into the liability chain while blurring the traditional thresholds of human actions. As robots or algorithms take the place of the human steering, customers are no longer going to be the real actual drivers, not only because of the lack of understanding of the machine

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as has been the case for some time, but because of the actual exclusion of the human action by the robots.

Due to these concerns, it is intriguing to consider whether or not the application of strict liability is fairly justified. Clearly, in order to preserve the safety of the usable databases and the safety of others' softwares the actual legal solution is a sheer risk allocation rule.

Yet, if this is all only a risk allocation rule, then strict liability draws with itself the necessity of the insurance liability. These sort of insurance policies however do incorporate limited liability again. Theoretically software defects in the internet may by chance wipe out map information perhaps causing tremendous unthinkable damage. If there were no limit on these instances, there were no innovation in the first place. But weren't there really?[329]

4.2.2. Conclusion

This chapter hopes to have demonstrated that the notion of strict liability towards the consumers for the use of others' softwares or databases on the internet is a welcomed and efficient risk allocation rule. It is so, because otherwise one gets into a trap of never-ending tracing back to the origins of the problems in software bugs. Softwares in cyberspace are extremely intertwined and since robotics are often facilitated by/on the internet, the security of the softwares is a crucial point. The application of strict liability of either the driver, which can certainly be the driverless car, in the near future, or the producer or the owner, is justified first of all because of the acceptance that there is no bug-free software and because the very existence of the bug in the software may be discovered only by use. Owe to the problem of the extended incompetence prompted by the internet and shown above, the application of strict but limited liability for softwares may be a fair bargain.

[329] KEREN-PAZ, T., COCKBURN, T., EL HAJ, A. Regulating innovative treatments: information, risk allocation and redress, *Law, Innovation and Technology*, 11:1. 2019. pp.1–16.

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Chapter 4.3.

Regulatory and Applicatory Challenges Related to New Technologies[330]

In spite of the radical changes brought about by the new disruptive technologies, the law, as it is today, still operates with analogies and fictions. And as long as there are analogies and precedents or fictions available, the regulatory and applicatory challenges can be overcome. Since there are no homologous lawsuits, legislators and judges need to interpret previous cases. Beside interpretation courts and legislators employ analogies too.

In the following various legal tools are to be investigated which may be relevant in the time of AI, robotics, self-driving cars and machine-learning. These possible legal institutions are: i) legal personality, ii) vicarious liability and iii) culpability as opposed to strict – objective – liability. As all these legal techniques were familiar in the course of the legal history, none of these are new. Yet, the conceptions or the construction of these legal tools may change. But even the most radical recommendation of awarding a computer a legal personality, or constitutional fundamental rights, can found its roots in the past, like legal personality and criminal liability to organs created by the law, such as the companies, or the standing for the trees, which provides now legal protection to the environment.

4.3.1. Introduction

"Well, Senator, my position is not that there should be no regulation" said Mark Zuckerberg, the CEO of Facebook at the Senate hearing, in a dialogue with Senator Lindsey Graham (R-South Carolina).[331]

Having entered a search request into the search engine of the Google Scholar in 2018, one received more than 2.660.000 findings for the techni-

[330] For an earlier versioin of these thoughts see: Pétervári, K. *Social Risks of Current Regulations.* L'Harmattan Paris 2021. p.13.

[331] CNET Joint Commerce and Judiciary Committee SH-216, April 2018.

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cal term ‘legal paradigm’, even if there were only about 1% out of these, which really matched the request. And this was so despite the fact, that the notion of paradigm is not at all evidentially applicable in the social sciences or humanities, thus in the legal context. Yet, if one enters a similar research request now in 2024, one cannot find one relevant item.

Thomas Kuhn used the expression of paradigm, without the adjective, primarily to describe and to understand the truthfulness of the various and sometimes contradictory scientific assessments of natural sciences. His point of view was definitely historical and argued that certain statements may well qualify as scientific in one paradigm and not at all as such in another paradigm. Paradigm, summarized rudimentarily, would mean a complex world in which scientific development is achieved with putting the tiny little verified puzzles of the whole picture together. A paradigm shift would be brought about, put it again very unsophisticatedly, when certain puzzles could not fit in and so they challenge the truthfulness of the entire picture.

But these sorts of paradigms were meant to measure/commeasure sciences pure, which were computable or verifiable in its strict sense. Social sciences and humanities, on the other hand, are not based on calculations merely, even though economics, sociology, demography, statistics would so claim. In any event law, or legal studies, is evidence-based, uses interpretation, argumentation, and reasoning, and it relies much-much less on calculations.

But paradigm shifts, for their being a social construction too, sociologically may also be biased. Accordingly, the paradigm shift may be delayed or accelerated depending on the social embeddedness of the very advocates of the different puzzles fit or unfit into the relevant dogmatic picture of the existing paradigm.

Paradigm, nevertheless, may translate into a context: a context of rules and language, to simplify again. And if so, it may apply to the legal envi-

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ronment as well, since, in a way, law relies on reading and interpreting texts by using the rules of the language.

This chapter discussed the problem of paradigm shifts in legal thinking through the technique of analogies. It concluded that as long as the same interpreting tools, such as fictions, analogy, distinctions, etc., are applicable in the various incidents and the court cases, there is no paradigm shift in the normal science. *The answer is upto the courts, let's see why*.

4.3.2. The regulatory challenge

Analogies in regulating: EU v. USA

Unlike the other rivalling companies back in 2016, Uber, this innovative but fairly eccentric company, refused to apply for a permit in San Francisco when launched a test driving of its autonomous vehicles.[332] Although the new rules of California would have so required, and the authorities so enforced indeed, Uber deliberately chose to remain under the scope of the old regulations. Truly, the cars on the streets are driverless, but there is always an engineer behind the wheels, ready to intervene and so autonomous vehicles qualify as vehicles driven in a "conventional mode", Uber argued.

Unlike California, however, Pittsburgh, Pennsylvania, where Uber had its basic testing sites, did not have new rules on autonomous vehicles operating in the city. Since then, Uber has launched there its taxi services with a driverless car fleet. Lyft followed suit quickly.[333]

The rivalry among manufacturing companies of autonomous vehicles is so tense in the past decade, that one must but wonder, whether the rules matter at all. These cases do not mean that there are no regulations whatsoever, though. Interestingly enough, one of the first statements of the US federal authorities asserted the continuity of the existing structure of the

[332] Wired 2016/12.
[333] Wired 2016/12.

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legal institutions, namely that "the division of regulatory responsibility for motor vehicle operation between Federal and State authorities is clear… should remain largely unchanged for highly autonomous vehicles".[334]

The Europeans in the EU have somewhat analogous experiences but with a philosophically different attitude. Whereas it is a federal competence in the USA to decide who can access the public roads, this decision belongs rather to the competence of the Member States in the EU, so far, at least. And the Member States do use their power to regulate, and they regulate fairly disparately, of course. The Hungarian version of modification, for example, deals merely with the testing of the highly automated vehicles,[335] whereas the German one applies to the traffic itself, even if under strict scrutiny.[336] In any event, due to its determinant effect on the internal market, the EU will have to act at Union level.

The EU has, however, a rather ambiguous approach to the matter. It has shared competence in transportation policy,[337] but transportation in its stricter sense. It means that as far as it is indispensable for the common trade policy or competition within the internal market, this area is covered by the competence of the EU. So, the EU legislators are abiding by the otherwise classical notion of subsidiarity principle and proportionality principle. Under the principle of subsidiarity, "in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States,… but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".[338] Further, the propor-

[334] NHTSA Policy Guidance, 2016.
[335] 11/2017. (IV. 12.) NFM order.
[336] See: Achtes Gesetz zur Anderung des Strassenverkehrsgesetzes, vom 16. Juni, 2017, to be modified by the Coalition, see: Entwurf eines gesetzes zur Aenderung des Straßenverkehrsgesetzes und anderer straßenverkehrsrechtlicher Vorschriften. (Referentenentwurf des Bundesministeriums für Digitales und Verkehr. 29.08.2024.
[337] Article 4.2.(g) TFEU.
[338] Article 5.3 TFEU.

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tionality principle compels that the EU "shall not exceed what is necessary to achieve the objectives of the Treaties".[339]

On the other hand, road safety does not only extend to the commercial attributes of transportation, but also to the very basic idea of the European integration. Therefore, one might argue that free movement requirements trigger broader EU competences. Besides, the EU has again another kind of competence to act, namely "to carry out actions to support, coordinate or supplement the actions of the Member States in certain areas such as (a) the protection and improvement of human health; (b) industry or (d) tourism",[340] which all involve the very issue of the autonomous vehicles too.

These complicate structures of the EU, actually boil down to various, often soft, legal tools regarding road safety and autonomous vehicles, like declarations,[341] resolutions,[342] guidelines[343] but also directives[344] and regulations.[345] This structure of the legal competence in Europe is, therefore, conspicuously more complex, than that of the USA. Especially because the relevant authorities of the Member States still have further room for manoeuvre to regulate, since it is not yet preempted by the EU.

Yet, it is not preempted in the USA either. The U.S. Code, Title 49, Chapter 301-305 on motor vehicle safety, standards, and compliances, which basically corresponds to the EU regulations on type-approval of motor vehicles, is not yet adjusted to the automated vehicles, therefore many states issued special regulations. Having wished to stop that regulatory wave of the States, the Obama Administration in 2016 allowed the federal supervi-

339 Article 5.4 TFEU.
340 Article 6 TFEU.
341 Valletta Declaration on Road Safety, 2017.
342 Motion for a European Parliament Resolution of 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)).
343 16 January 2023, the European Commission was making available guidelines on methodology for network-wide road safety assessments.
344 Directive (EU) 2019/1936 on road infrastructure safety management (Official Journal on 26 November 2019).
345 Regulation (EU) 2017/1154 on type-approval of motor vehicles.

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sory regulating agency (NHTSA) to preliminarily exempt some automated vehicles from the compulsory compliance with certain requirements, until the Department of Transportation, DOT, elabourated an acceptable version of new regulations. This exemption[346] seems to be approved in both actually, competingly, debated Senate and House Bills and even in a growing scale.[347] The justification seems to be that technology becomes ever better and the driverless cars are much safer than the conventionally driven cars are.

In addition to the tiring issue of division of competences related to the topic, there are, however, other differences between the US and EU regulations: first, the divergent structure of the EU and the USA, secondly the divergent way of approach to the regulation as such and thirdly, the divergent basic legal institutions applicable in this field.

Certainly, due to its lacking of federalism, the cross-border incidents in the EU can trigger international law further complicating the legal problems, like in the case of a cross-border accident.[348] Mostly for this reason, the EU also employs a more administrative approach towards regulation, since it lacks the real power of enforcement, so the ticking of the check box in the compliance procedures is rather convenient. But this might not serve

[346] The H.R.3388 bill of 2017 preempts states from enacting laws regarding the design, construction, or performance of highly automated vehicles or automated driving systems unless such laws enact standards identical to federal standards.

[347] See: the Federal Act of Safely Ensuring Lives Future Deployment and Research In Vehicle Evolution or the SELF DRIVE Act, which applies certain safety exemptions and testing standards to highly automated vehicles. According to this Act the DOT (Department of Transport) must (1) inform prospective buyers of highly automated vehicles of the capabilities and limitations of such vehicles; (2) establish the Highly Automated Vehicle Advisory Council to, among other things, develop guidance regarding mobility access for the disabled, elderly, and underserved populations; (3) require all new passenger motor vehicles less than 10,000 pounds to be equipped with a rear seat occupant alert system; and (4) research updated safety standards for motor vehicle headlamps.

[348] KIILUNEN, V. Autonomous Vehicles, Competence and Liability in the EU – Answering the Call of the European Parliament. 2018. DOI: 10.13140/RG.2.2.10863.74403, or PÉTERVÁRI, K. Autonóm járművek és jogi felelősség — a "Tesla" baleset; avagy ki vezet(het)i az autót. *Gazdaság és Jog* 25. pp31–34. 2017. or NAGY, Cs. The Rome II Regulation and Traffic Accidents: Uniform Conflict Rules with Some Room for Forum Shopping – How So? *Journal of Private International Law* 6 1 2010. pp.93–108.

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the interest of the competing industry. The recent regulatory approach of the USA has, on the other hand, been very much innovative and competition-friendly above all. The exemption policy puts the risk of bad regulation, or no regulation whatsoever, on the federal regulatory agency. In the meantime, not even the States may legislate on the safety requirements of a driverless car, albeit especially big cities are tempted.

Needless to point out, that the mainstream European approach is conceptually different. Already at the beginning of the 2010's various working groups in the EU suggested a "top to the bottom" approach to the legal problems of robotics.[349] Certainly, there were rather convincing arguments supporting this attitude, like avoiding wastes by not investing in competing but failing research projects and thereby gaining time. Nevertheless, there was no guarantee, that an action plan based on administrative prescriptions, no matter how deliberated it was, would serve a safer and quicker result.[350] All such an approach could assure was, that whatever the result may be, that would be expensive. This undoubtedly provided less smooth pathway for innovative manufacturers, since the burden of risk was to be pushed on to the industry and not the administration. Surely, however this burden of risk is ultimately paid by the consumers, and the risk in this kind of world of innovation is generally allocated to the tax-payers. This may not be unfair but less efficient.

While the EU and also many of its Member States started the discussions on AI with ethical standards, "the US strategy, was largely silent on ethics".[351]

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[349] LEROUX, C. & LABRUTTO, R. Suggestion For A Green Paper On Legal Issues In Robotics – ELS issues in robotics. *Researchgate*. 2012. p.10.

[350] Finally, the EU passed the law on AI firstly in the world: Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence: after a Green Paper, then a White Paper COM(2020) 65 final, 2020), and then a Proposal for Regulation by the Commission (Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts, European Commission, COM (2021) 206 final, 21 April 2021).

[351] BURRI, T. The New Regulation of the European Union on Artificial Intelligence: Fuzzy Ethics

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Not surprisingly, though, in certain fields, the stakeholders may dictate in both worlds. The driverless cars run first of all in cities all over the world and both the US and the EU concentrate the scope of regulations on automated vehicles to the lighter type of cars. Thus, for example, lorries cannot be exempted in the USA. This may seem to be counterfactual, though, since automated lorries are expected to be less dangerous rolling on the public roads (like OTTO of Uber) than the automated cars in the cities. Nevertheless, due to the existing fear of employees, and the governments, the stakeholders' concerns are very strong and seemingly deserved legislative attention in this and other primarily robotics threatened industries.

The lack of the necessary skills to understand the applied technology makes the law-makers and the courts vulnerable to this controversial information asymmetry and might also have a disadvantageous impact on applying less reasoning and more technical slang. The unintended acceleration problems in car crashes in the Toyota case of 2009–2011 are good examples to that. The jury may not be competent enough to decide on real causation, some experts claim. Whether the undeniably many bugs in a software can be proven to directly lead to fatal crashes, that is the question. In traffic accidents the driver's negligence needs to be shown to find him liable under common law. The driver can defend himself by claiming, that it was not his fault but that of the car. Then the so called proximate cause has to be evidenced, namely, that the accident is the direct causation of the existence of all those bugs in the cars' software. And then the real question is, if an expert witness explains to the jury that the standard of the numbers of the bugs allowed in "one software": is zero, or maximum 5-6, and in the "relevant software" there are 1000 of them, then if the jury can count, the

Diffuse into Domestic Law and Sideline International Law. In: VÖNEKY, S., KELLMEYER, P., MUELLER, O., BURGARD, W. eds. *The Cambridge Handbook of Responsible Artificial Intelligence: Interdisciplinary Perspectives.* Cambridge Law Handbooks. CUP; 2022. pp.104–122. p.113.

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software producer will definitely be found liable, no matter whether that is verified to calculate the bugs so.[352] Although in this case Toyota finally lost generating billions of dollar damages, these sort of product liability situations do not necessarily end so.[353] And what is more, especially in the case of driverless cars there is no "one software" or it is almost impossible to track down the "relevant software", let alone the possibility of the car to develop "own softwares" with the deep learning method.

The new challenges provoked new models and there were various possible answers for how to create an architecture of the regulation by design and how to make designers be responsible for it. Some argued for translation from the real space to the cyberspace[354] a commitment to moral understandings and values in technical regulations too,[355] application of the rule of law considerations in the cyberspace too[356] or language gaming, design by communications.[357] These are all important issues so that to ascertain on

[352] CUMMINGS, D. Was the Jury Wrong about Toyota's Software? How Questionable Testimony on Embedded Software Tipped the Scales *IEEE Consumer Electronics Magazine* pp.103–107 2017. [DOI: 10.1109/MCE.2017.2684939] and PARRISH, M. *The 2009 Toyota Accelerator Scandal That Wasn't What It Seemed*. 2016.

[353] Truly, later the U.S. Department Of Transportation released results from NHTSA-NASA study of unintended acceleration in Toyota vehicles August 1, 2019: "NASA engineers found no electronic flaws in Toyota vehicles capable of producing the large throttle openings required to create dangerous high-speed unintended acceleration incidents. The two mechanical safety defects identified by NHTSA more than a year ago – "sticking" accelerator pedals and a design flaw that enabled accelerator pedals to become trapped by floor mats – remain the only known causes for these kinds of unsafe unintended acceleration incidents. Toyota has recalled nearly 8 million vehicles in the United States for these two defects".
U.S. Transportation Secretary Ray LaHood said, "We enlisted the best and brightest engineers to study Toyota's electronics systems, and the verdict is in. There is no electronic-based cause for unintended high-speed acceleration in Toyotas."

[354] LESSIG, L. Commentaries. The Law of the Horse: What Cyberlaw might Teach Us. *Harv Law Rev* 113 1999. pp.501–547.

[355] URQUHART, L. & RODDEN, T. A Legal Turn in Human Computer Interaction? Towards 'Regulation by Design' for the Internet of Things *Working Paper SSRN* March 2016.

[356] MURRAY, A. Looking back at the Law of the Horse: Why Cyberlaw and the Rule of Law are Important *Journal of Law, Technology & Society* Scripted 310. 2013.

[357] KOOPS, B., HILDEBRANDT, M. & JAQUET-CHIFFELLE, D. Bridging the Accountability Gap: Rights for New Entities in the Information Society? *Minn. J.L. Sci. & Tech* pp.497. 2010. or SANTIONI DE SIO, F., MECCACCI, G. Four Responsibility Gaps with Artificial Intelligence: Why they Matter and How to Address them. *Philos. Technol.* 34, pp.1057–1084

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whom to allocate the risk, the burden of proof, the impossibility of proving or the impossibility of foreseeability, to name but a few.

The regulatory challenge – are there robot-subjects or do the robots have legal personhoods/personalities

In fact, the regulatory challenge, related to the automated vehicles, is that it encompasses obviously many more legislative areas than just that of the transportation. Safety on roads covers a lot more than just a physical well-being or simply a being on the roads without accident.

Driverless cars create new environment. It presumes swiftly communicating softwares of others and complex infrastructures. But, most importantly, it allows on the spot decision-making without human interference. Apart from the usual technological development problems, therefore, this all requires, from a legal aspect, special cooperation of old market actors as well as innovative applications of old knowledge. Thus, beside the general manufacturing questions the legal institutions seem to be tested too.

If a driverless car is to make an on-the-spot, or even a predetermined but externally generated, decision, for example, it needs to rely on special networks of databases, involving the questions of ownership rights, copyright and software issues, beside personal data protection and liability considerations. A driverless car, to be able to navigate on the public roads, needs data owned by a competitor, a driverless car's data one-two-three cars of it ahead, or needs to have access to others' special databases without the necessary legal relationship between the parties, resulting in, perhaps, the lack or in the end of the privity of a contract. Yet, vehicle to vehicle (V2V) and vehicle to infrastructure (V2I) communication may be rendered on a general duty of care in the traffic. But it triggers further concerns of protecting one's data, one's private data in a commission trip of the driverless car.

2021. or ESPOSITO, E. *Artificial communication: How algorithms produce social intelligence.* MIT Press, 2022.

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Obviously, the conception of property constantly changes. No one really thinks nowadays that without possession one could not have ownership, although possession used to be the bases of ownership: what I could possess, what I could grasp and protect should be regarded as mine. Hence come the tangible goods. The intangible things or assets, on the other hand, posit real headaches for lawyers even today. Intangible things, nonetheless, are vital to the business. Long before, came the copyholders of the land, then the shareholders in the company, which could be owned and thus became negotiable separately from others. Then even the "market position" as such was recognized as a unique subject matter of transactions thereby creating ownership and value. Afterwards the database was awarded legal protection, as a special asset, *sui generis* subject matter of the copyright and the civil law. In the 2010' the hottest debated issue was the ownership of the data in the clouds.[358]

These piecemeal changes in law basically follow the demands of the business and provide guarantees to assets there, where it is so desired by the market practices. Capitalism has always been built on information capital, thus on the efficient allocation of property of information, like business secrets, copyright, patent, and know-hows.[359]

A self-driving car, however, generates further basic regulatory questions of robotics and law today. From a delicate legal point of view, there is an intriguing suggestion in the technology and law literature to consider.[360] Accordingly, depending on the nature of its purpose, task or function, an "intelligent" machine may be regarded either as a robot-object or a robot-

[358] REED, C. Information ‚Ownership' in the Cloud *Queen Mary School of Law Legal Studies Research Paper* 45. 2010. and recently: REED, C. Information Ownership in the Cloud in: MILLARD, C. (ed.), *Cloud Computing Law* 2nd Edn, Oxford University Press. 2021.

[359] COOTER, R. and ULEN, T. *Law and Economics.* Berkeley Law Books 6th ed 2016. pp.645.

[360] CALO, R. Robotics and the Lessons of Cyberlaw *Cal. L. Rev* 103 2015. p.513. and SANTOSUOSSO, A. & BOTTALICO, B. Robotics and the Law: A European Perspective Autonomous Systems: Why Intelligence matters. Conference Lecture, München, Automatik Industrie 4.0. 2016.

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subject. In a somewhat rude interpretation and summary, a robot-object, despite of its ability of information-transmission, qualifies as a thing in the eye of the law, if it is not autonomous. Autonomous in this respect would mean that the robot has independence, cognitive skills, and special cognitive architecture too. Cognitive architecture would further include three special elements: teleonomy (special directed purpose), adaptiveness (capacity to adjust to the environment when challenged) and teleology (capacity to interpret the environment and adjust goals and means accordingly). Therefore, a targeting system, the argument goes, is still a robot-object, because of lack of independence: the ultimate decision is made externally, an operator pushes the "fire" button. Also, a landmine may well be independent, but lacks cognitive skills, since it explodes automatically when so programmed. A self-driving car, on the other hand, may rather be regarded as a robot-subject: (i) it is independent, it requires no external influence, (ii) makes independent decisions (iii) it has directed purpose, it understands its purpose and it is capable to adapt its actions to the environment, necessary for its goals to achieve. The final conclusion of this narrative is that the robot-subjects would be recognized differently in the legal context. Instead of calling it a thing, it would be a "non-human" agent, acting on behalf of the principal, let it be the owner or not. And in this latter case, the relevant applicable laws are different. In lieu of property and intellectual property or employment rights, products liability issues or consumer and data protection, the applicable laws or legal institutions here would rather be the agency problems, legal capacity issues, criminal law, torts, the non-contractual liability, e-personhood, intent, etc.

Consequently, driverless cars may be called also as tele-operated autonomous vehicles with cognitive skills. These cognitive skills, with special respect to the latest results in deep learning, allow better adaptivity and decision-making of own-account. Deep learning, however, provokes fur-

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ther questions for lawyers: how to know whose software was bugged or whether it was the driverless car itself who generated the bug itself. So, are these autonomous vehicles equipped also with cognitive architect, as the theory requires it from a robot-subject?

Definitely not, yet. Asserting that a robot can speak or answer the questions – even all questions – does not mean that the robot understands what it says. There are plenty of examples to that: Bina48 in the 1990s, Watson Jr. from IBM in the turn of the century/2000, or Sophia in 2018.

Driverless cars become robot-subjects, again, no matter what the rule is, when risk allocation rules for innovation so desire. The robot-objects are not at all in the visier of the law because they first need to qualify as a thing. A thing is defined by the legal literature. A general definition is that it has to be something that a man can keep under his control or power; even the wind, or the sun. As soon as the robot-object becomes more evolved, one could argue, and bursts out of this control, it becomes a robot-subject any way, even if the rules do not recognize it. Liability issues however are not at all the subject matter of pure moral and legal concerns, there can be plenty of examples to that, like the legal entity and liability or even culpability of a company.[361]

The recent findings of neuroscience is that the free will, or the operation of a human brain maybe more pre-determined than it is generally accepted by the tort law or criminal law since at least the enlightenment.[362] So legal punishment might lose its ground and so it would put delicate questions to the law and robotics.[363]

[361] NANOS, A. Roman Slavery Law: A Competent Answer of how to Deal With Strong Artificial Intelligence? Review of Robot Rights with View of Czech and German Constitutional Law and Law History (November 5, 2020). *Charles University in Prague Faculty of Law Research Paper* No. 2020/III/3, Available at SSRN: https: //ssrn.com/abstract=3726000

[362] SWAAB, D. *We Are Our Brains. From the Womb to Alzheimer's*. Penguin Books Ltd 2014. p.432.

[363] ESZTERI, D. A mesterséges intelligencia fejlesztésének és üzemeltetésének egyes felelősségi

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Truly, these problems are not only legal questions but deeply rooted moral issues. The answers, therefore, more often than not, reflect one's own world view and one's tacit attitude towards legal norms as such, from a strictly legal point of view. If one accepts the view that the law is separate from any ethical concerns, than the law should be the matter of rational choice and economic interest beside the political deliberations. On the other hand, if it is not acceptable and one could not imagine a world without the moral foundations of the legal norms, then the answers to these challenges may lead to a very different path.

This chapter here, focuses on only a few of the problems, namely the privacy issues, the software issues, and the strict liability issues.

4.3.3. The applicatory challenges by analogies

The applicatory challenge by analogies – Privacy analogies

The construction of privacy changes. Robotics in the driverless cars are desperately data thirsty. They need various enormous databases to be able to operate. Thus, driverless cars running on the streets often induce legal problems such as invasion of privacy, illegal data collection, illicit categorization, and usage of them, to name but a few. Some of these include personal data, some infringe competition rules, copyrights, or property rights of database-owners.

So, what data and how should be protected?

The EU is highly sensitive to the personal data protection which is conspicuously demonstrated in the new General Data Protection Regulation (GDPR 2016/679). The idea of privacy by design (PbD) advocated in this piece of legal act is not at all brand new, it has been developed by the European Commission for some time, from the Privacy Establishing Tech-

kérdései. *Infokommunikáció és Jog.* 2015. pp.47–57. For an adaptive learning in this context, see: BUDA, A. A sokszínű mesterséges intelligencia. *Educatio*, 33.1: 2024. pp.1–12.

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nology project. However, the regulation itself was basically, though not entirely, triggered by the, allegedly, reckless use of the European citizens' personal data in the USA or US companies.[364] The regulation has effect also outside of the EU in the sense that any company wishing to make any business in the EU but settled in a non-EET country should also comply (USA, China).

No doubt that both the European Union and the United States recognize privacy as a fundamental notion. The U.S. Constitution enshrines protection against state intrusions and the Charter of Fundamental Rights of the European Union[365] as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms[366] each mandate that law and public authorities are not to interfere with private life. Notwithstanding, lately, the state/police surveillance demands ever more invasion of these rights and a want for more data, due the recent indispensably data-addictivity of the new technologies and their reliance on mass businesses, and so allegedly mass security.

As one of the most influential judges, Richard Posner, in the USA puts it, "privacy is mainly about trying to improve your social and business opportunities by concealing the sorts of bad activities that would cause other people not to want to deal with you".[367]

And this is perfectly demonstrated by the ECJ decision in the case of Gomez v. Google.[368] The decision is wrong for its being as overbroad and over-inclusive as it is. Vesting a right in Mr. Gomez to claim a deletion of his data from Google generates serious problems with free speech and rule of law. In this case Google Spain had digitized a local newspaper in which,

[364] e.g. Schrems v. Data Protection Commissioner C-362/14.
[365] The Charter, Article 6-8.
[366] The ECHR, Article 8.
[367] GILLESPIE, N. Richard Posner: Privacy is "Mainly" About Concealing Guilty Behavior. *Reason. Free Minds and Free Markets*. 2014.
[368] C-131/12.

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from that time on, if someone looked for an attorney in the region on-line in an advertisement, could bump into Advocate Gomez's house being at auction for overdue tax-depths. Upon Mr. Gomez claims the ECJ finally read the EU Treaty in a way, that Mr. Gomez was awarded the right to claim from Google to delete its link to his personal data. Hence there is a living right be forgotten in the EU.

Nonetheless, the right to be let alone advocated by Brandeis and Warren in 1890 was a conceptually diverging idea from the European right to be forgotten.[369] The right to be let alone meant something else, though the leading case back then might resemble to the problem of Mr. Gomez. In this legal suit Ms. Roberson, an attractive girl had had a picture made of her at a professional photo shop and in a short while she realised that her so taken picture covered the paper package of the flour in the relevant grocery shops all over New York.[370] Although the majority was in favour of the photographer, there was a powerful dissent in the decision of the New York Supreme Court, even citing the famous Brandeis-Warren article on privacy. Yet, this case emerged with the rising new technology of the smaller, portable photo camera allowing photographers to take pictures from anyone anytime anywhere, looking at the techniques of that time with a hindsight, and watching the then still man-size photo-cameras, this fear of invisible invasion of privacy by photographers must have only been a threat. However, the impression of the invasive being of photographers must have been felt real, because the new ever smaller and better versions of cameras came into the market so rapidly, that the threat must have felt very imminent even then.

Notwithstanding the internet, the crucial similarities in these two cases, more than a 100 years in between them, are that the actor who publishes or

[369] WARREN, S. and BRANDEIS, L. The Right to Privacy. *Harvard Law Rev*, 4, No. 5 1890. pp.193–220.
[370] Roberson v. Rochester Folding-Box Co., 71 N.Y.S. 876, 876 (N.Y. App. Div. 1901).

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who decides to publish certain personal data is not the "owner" of the personal data. And this actor, thanks to the technical facilities, may act independently. It should be noted though, that in the early case of Ms. Roberson there were no copyright issues in the USA, whereas nowadays this aspect is not negligible at all. Ownership rights in Cyberspace, or the ownership in information is quite an important topic, since several of the basic elements of the term ownership are missing, namely the classical "thingness" of the object of the ownership and the exclusivity, or the exclusive use, of the owned "thing".[371] On the other hand these cases show the huge difference in scale, in huge public access, which may matter the most.

Truly, the term privacy has problems and there is a discrepancy between the EU[372] and the USA.[373] Europe supports privacy even at the expense of free speech, and commercial speech too, which is the language of the business communication, the freedom of advertising and marketing. The USA does just the opposite. And indeed, legal privacy has many ramifications[374] and the construction of those may not always match between the American and the European one. First, there should be the right to have secrets from the State even (laws against unwarranted searches), secondly, the right to have own opinion and to let it be public (free speech), thirdly, the right to be let alone (tort laws, damages by delicts), and fourthly, the right to have fundamental decisions (rule of law principles, fair hearing, fair trial). In addition, the new kind of business-models enabled by the new technologies provide further privacy issues, like the cross-border jurisdictional legitimacy problems. Whereas Brandeis and Warren dealt with basically the

[371] REED, Information of Ownership...
[372] SCHOLLAERT, Victor. AI and legal personality in private law: An option worth considering (?). *European Review of Private Law*, 2023, 31.2/3.
[373] REIDENBERG, J. The Data Surveillance State in Europe and the United States, *Wake Forest L. Rev*. 49 2014. pp.583-608.
[374] GORMLEY, K. One Hundred Years of Privacy *Wisconsin Law Review. WILR* 1992. pp.1335. and recently: SOLOVE, D.J. *Understanding privacy*. Harvard university press, 2010.

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right to be let alone, the legal problems generated by the new technologies nowadays embrace all privacy elements.

Now, when a driverless car wishes to travel through several cities or countries in Europe, it needs to have access to a lot of databases. It uses for example, official public databases when gathers information about the street facilities. Then it uses private databases for meteorological data or pictures of the artificial world in the human environment, or outside. It may have access to personal data too when reaches out to the clouds and collects information about the exact location of a person, depending on the driverless car's mission. And again, it uses information which is owned by someone else(s). In these instances, the smart things full of personal data being used and stored in one's home might become a useful, but illicit?, resource to the driverless cars.

The prescribed 'privacy by design' in the GDPR may not necessarily be safe unless privacy is legally clarified, precisely described, and expressed to the designers and the design is specified in due course and in due terms. First of all, however, the GDPR is a general regulation and even if it is directly applicable, certain technicalities require further elaborations. Besides, these specificities need to be provided by the relevant authorities of the relevant Member States according to the applicable EU directives, such as the e-Privacy directive. Encoding privacy requirements into software is obviously, not at all self-evident in the EU.

Koops and Leenes criticize therefore that the entering into force of the GDPR and thereby the privacy by design, would not solve even the problems of the personal data owners.[375] According to their opinion this new regulation would not change the existing mode of operation and would not stop the pattern in which the industry tries "to achieve rule compliance by

[375] KOOPS, B. J. & LEENES, R. E. Privacy regulation cannot be hardcoded. A critical comment on the 'privacy by design' provision in data-protection law. *International Review of Law Computers & Technology* 28 preprint version 2014. pp.159–171.

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techno-regulation". The claim is, that what may be intelligible for a human, may not be as such for the machine, the driverless car.

The Turing test fails here. Even if this test can help to decide whether the other speaking party is a computer or a human, it cannot have any prediction whether this other party thinks or understands his doing as well. Searle has his relevant, even rethought, criticism with the Chinese room, in which a sole non-Chinese speaking human could answer Chinese questions with a dictionary and a grammar book without understanding the questions let alone the answers.[376] Should that now mean that the autonomous vehicle cannot be liable, and that the data collected by the driverless car on the street can be freely downloadable because it has no rights either?

A question, what data could be collected and under what purposes on the public roads, could therefore be very important. It could include to decide whether special human mental diseases may contribute to traffic accidents in the streets. Is it allowed that manufacturers collect data therefore on sensitive health issues for safety reasons or health preservation on the public roads? What is more, the transfer of such data may further create sensitive personal data infringement. In order to facilitate the designer to "translate" these kind of purposes and requirements into codes there are other possibilities. Instead of regulation by design Koops and Leenes offer the regulation through communication.[377] IoTs and autonomous vehicles should use data for profiling as well, since they in fact support one's routine activities, which, again, on the other hand, is a sensitive issue in the GDPR. This to be done needs prior and clear understanding and consent and in case of circumstantial changing,

[376] SEARLE, J. Minds, Brains and Programs. *Behavioral and Brain Sciences*, 3: 1980. pp.417–57., or recently: DWIVEDI, Y. K. et al. Opinion Paper:"So what if ChatGPT wrote it?" Multidisciplinary perspectives on opportunities, challenges and implications of generative conversational AI for research, practice and policy. *International Journal of Information Management*, 71: 2023. pp.102–142. or again fr educational purposes see: RUDOLPH, J., TAN, S. TAN, S. ChatGPT: Bullshit spewer or the end of traditional assessments in higher education? *Journal of applied learning and teaching*, 6.1: 2023. pp.342–363.

[377] KOOPS, B. J. & LEENES, R. E. Privacy regulation...p.9.

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the approval needs a renewal too. To translate these changes in time more thorough interpretation and understanding is suggested.

This structure of data protection does not sort out the question, though, citing Posner above, whether it would be such a problem, if certain personal data were less protected and more public, as it used to be prior to the capitalism. Despite of its newer regulatory model of the GDPR, the very existence of the GDPR is evidence of how the top bottom law making works in law and robotics. Advocates of the GDPR claim that this regulation is needed, because the bad practices should no longer be tolerated and thus the social conventions must be changed by the law, ultimately by legal sanctions. However, the GDPR could well create a rather administrative, check-the-box answers with a send-the-declarations-or-disclaimers always-everywhere attitude.

On the other hand, designers come to the market with products, with carefully prepared regulatory design, fit in the legal framework of the laboratory times. With the shift in time, however and when they really hit the market, the law changes and so should the regulation by design again, which again, is not so trivial. Koorps and Leenes demonstrate it by referring to the simple and surely predictable problem of aging: a minor needs the approval of the parents in order to have consent to data collection, but how to monitor its changes?

Surely, laws on robotics require from lawyers the understanding of technological details. And this is the challenge the law faces, and which may be described by the stealthy technologies which again would trigger a necessary interdisciplinary pragmatism.[378]

[378] RAJI, I. D., et al. The fallacy of AI functionality. In: *Proceedings of the 2022 ACM Conference on Fairness, Accountability, and Transparency*. p. 959-972. 2022., or URQUHART, L. and RODDEN, T. Towards User Centric Regulation. *SSRN 2979432*, 2017. or for a Hungarian relations: SOMKUTAS, P. and KŐHIDI, Á. Az önvezető autó szoftvere magas szintű szellemi alkotás vagy kifinomult károkozó. *In Medias Res 2* 2017. pp.232–269.

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The applicatory challenge by analogies – legal entity

Although it is a (statistical) fact that autonomous vehicles create safer public roads, still no one needs an extraordinarily vivid imagination to fancy how much damages an autonomous vehicle may cause, if something goes wrong, without any human interference. Certainly, as long as the machine follows the rule, the encrypted orders, it may not be held legally liable. But let's suppose that there is a fleet of driverless cars operated by a network of these cars. Is that sort of business enough for holding this network of autonomous vehicle responsible, even liable? If this business makes money, should the driverless cars also be able to make money?

Common sense, that to qualify as a legal subject, one does not need to be a natural person or a human being. And this is true the other way round, not all human beings are/were legal subjects. Good examples for the first are companies with or without legal personality, the state, or its agency, like the authorities, ministries. And examples for the latter are slaves. Currently, "everyone has the right to recognition everywhere as a person before the law".[379] Also as ius cogens, it is found in the Hungarian Civil Code as well.[380] Though "everyone" needs not necessarily be a human being, the preamble of the charter might be construed that way. A thing may be owned, a person acts and has self-consciousness about his doing it, about his doing it rightly or wrongly. Nonetheless not only (human) persons can cause changes to the environment, or damages for that matter. Frequent examples are animals, but plants or volcanos too, in fact.

It is a commonplace too that law is a social construction and as such, granting non-humans legal personhood (legal personality or legal entity) may be a matter of rational choice, depending upon the world view of the regulators though. For a historical analogy, companies acquired the title of

[379] The UN Charter Article 6.

[380] The Hungarian Civil Code, Articles 2:1 and 2:4 on the legal capacity of a human person and Article 3:1 on the legal capacity, and the scope, of a legal person.

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legal entity geographically sporadically but almost always driven by necessity motivated by business considerations.[381] Without a reliable, transparent registry, the creditors were finally awarded with the separation of the assets. In order to create a trustworthy business environment, the assets needed to be separated, so that to enable the creditors to have access to the company assets without competing with other private creditors of the company owners. So, the legal entity of a company was a good move, even so because soon the limited liability of the company indeed insulated the assets of the company not only from other creditors too but also from the owners and the private creditors of the owners. Credit became cheaper.

Legal personality therefore is not necessarily a moral issue. Legal personality or legal entity allows one then to be recognized by the law, so that any act of this entity be legally challengeable, have legal consequences. On the other hand, this legal entity may have also access to the courts in case of its grievances. Under classical European continental law legal capacity to have rights and duties is to be distinguished from the legal capacity to act which may be denied from non-human legal entities constructed merely by the law.[382]

And so, it is in the case of the companies. So is the legal capacity of a company limited, it cannot act on its own behalf. Needs an agent. Notwithstanding the limited liability of certain companies, the liability of the companies is recently extended to certain criminal activities. It means that the acts of certain employees, usually that of the management, can be attributed to the corporate entity, if this activity benefitted the company and the employee committed it as the manager of the company.

In any event this sort of development in legal thinking has ever been based on the economic interest, on property allocations. And so, even if it

[381] HANSMANN, H. & KRAAKMAN, R. The Essential Role of Organizational Law. *Yale Law Journal* 110 No 3 2000. pp.390–440.
[382] SMITH, B. Legal Personality 37 *Yale L.J.* 3. 1928. pp.283–299.

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seems now to be a shift in the legal thinking, it is not. Such application of a fiction is not at all new and conceptually the ultimate sanction is an analogy. The termination of the existence of the legal entity may be parallel to the execution of the human person. The reason of attributing this (criminal) deed to the company is therefore a moral and a business concern rather than a legal one. Why should the company be able to get away with a tax fraud, for example, when the company had the benefit of the crime and also the collateral, perhaps, for the remedies.

The idea is that the borderlines in the fields of liability have become blurred, and there are no longer clear distinctions among the territories of the criminal and the civil law or the administrative law liability. But this is not that big a change under common law, even if it creates debates under the German civil law tradition.[383]

The objective liability, the liability without negligence or intent is not at all a new legal institute. The idea, that it is not only the human that can cause harm is again not a new notion. These legal tools of interpretation, however, were designed to be applicable in environmental protection cases or anti-corruption cases and not for machines having impacts on humans' life.

And in this sense, there is a distinction. In the case of the AI, IoT or autonomous vehicle it is ultimately not the human whose action is being under scrutiny and then judged. Therefore, none of these cases raised as seriously the question of legal personhood as it is being discussed in relation with the IoTs nowadays.

The technological phases of the artificial intelligence (AI) obscure the borderlines of the development and so the level of capacity too. The legal capacity of these machines may be hard to fix. According to a widespread notion of conditions an AI needs to be conscious about itself in order to

[383] BÉRCES, V. A magyar büntetési rendszer reformjával kapcsolatos jogalkotási kérdések *IAS* pp.83-99. 2010., or LIGETI, K. Az Európai Unió büntetőpolitikája *ÁJT* 2002. pp.73–97. and ESZTERI, A mesterséges intelligencia...

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gain legal personhood. No doubt, it all leads us to the interpretation of the other minds problem and the predictions of others acting and doing. But neuroscience does use predictions very often even at courts, at criminal trials. And so does the judge at the court, the prosecutor, and the police too.[384] Clearly, the widespread use of such technique may not qualify the method as good but certainly as something practical which cannot be replaced with something better, so far.

The breaking point in questioning of the legal capacity of an AI was provided by Lawrence Solum's highly intriguing and illuminating article in 1992.[385] He wrote that, with due regard to the complexity of the issue, the answer needs to be a pragmatic one. So, he put the question, whether an AI may be a trustee. Solum distinguished three different levels of an AI. First, the AI absolutely routinely follows the rules/orders and serves basically as a huge library for the owner who actually makes the transaction with the AI's assistance. Secondly, the AI practically sorts out the business on its own and enters the contracts but needs the signature of the owner. And thirdly, the AI does everything alone. Solum's conclusion was that although the time was not ripe, there might come a turning point where the AI will claim for own perhaps constitutional rights: what would stop an AI to open up a Law Directory online and commission a lawyer to represent him at the court. Nick Bostrom would certainly object, alleging that it is due to the construction, the architect of the machine, which disables a machine to "think" as a human.[386] Solum further argues that multiculturalism prevents us from denying this possibilities for non-humans and he predicts the necessary change in legal concept of the legal personhood.

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[384] GARLAND, B. (ed) *Neuroscience and the Law. Brain, Mind and the Scales of Justice*. Dana Press New York Washington, DC. 2004. p.116.

[385] SOLUM, L. Legal Personhood for Artificial Intelligences, *N.C. L. Rev*. 70. 1992. p.1231.

[386] BOSTROM, N. Are we living in a computer simulation? *The Philosophical Quarterly* 53 211 pp.243–255. 2003. or more recently see: MÜLLER, V. C. Ethics of artificial intelligence and robotics. *plato.stanford.edu*. 2020.

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Twenty years later, Koops, Hildebrandt and Jaquet-Chiffelle relying heavily on this article and on its findings concluded still that at the time being, a proper construction of the existing laws would suffice.[387] After having screened and summarized the relevant new European (legal) literature, they argue that the laws are flexible enough and allows the interpretation of the laws on agency – however divergently in the USA and in the EU – to be applicable to the machines being built. On the other hand, they emphasize, that sooner or later, all of the researchers suggest modifications to the law and perhaps to the legal concept as well.[388]

According to their model, which recommends also a three-step approach, in the short-term, at the starting point, the interpretation and extension of the existing law suffices.[389] At this level, in case of a legal transaction, the acts of the computer may be attributed to the owner/user as his general intent. In case of invalidity problems, if the computer buys more shares than should have the court would have no difficulty to decide on the intent of the owner as the intent of the human and not that of the "electronic agent", since agency rules may not yet be applicable. As a middle term, they argue for a limited personhood with strict liability. At this level agency rules could already apply, so the agents need to be registered as such in a public registry which could allow the contracting parties to find the identity of the agent's principal.[390] Besides, they recommend the cautious introduction of a limited type of personhood for the e-Agent with a strict liability, so that the owner/user of the electronic agent may be found and be liable in its stead without questioning the intent. A further suggestion is that these electronic agents may receive a modest provision for their activities which may be a bases for an insurance fund in case damages occurred and they themselves may be found

[387] KOOPS, et al. Bridging the Accountability Gap....
[388] MATTHIAS, A. Automaten als Träger von Rechten. Plädoyer für eine Gesetzesänderung. *Logos Berlin Verlag*. 2008.
[389] KOOPS, et al. Bridging the Accountability Gap....p.554.
[390] KOOPS, et al. Bridging the Accountability Gap....p.555.

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liable (in civil law only), mostly because the owner/user may not be located or they deny that they gave reason to the transaction be in their names. And finally, or thirdly, when technology evolves further, the long term solution is a full personhood with "post-human" rights. Post-human rights would refer then also to that that this is not the "classical human rights" anymore. This should be the time though, when self-consciousness emerges. As a criticism to that smart future, it is argued too, that this sort of consciousness is rather facilitated by interconnectedness, thus not individual or "real". On the other hand, cognitive sciences pile up evidence to make us believe that "human identity itself emerges from distributed brain processes".[391]

To translate it all to the autonomous vehicles, it is for sure, that so far, we are at the threshold of level two and three. To attribute intent or *mens rea* to the driverless cars and let them prosecute or be prosecuted in criminal law, should have a long way to come so far. That would surely require a certain non-predictability or an intentional deviation from the rule, with purpose. That is not very likely yet. It is unlikely that a driverless car on mission to the airport to pick up a friend of the principal would go to the theatre instead to pick up the most celebrated actor in the region; and thereby causing a car crash in front of the entrance in the overcrowded street. However, strict liability in car accidents may be attributed to the driverless cars, since it does not demand the reasonable acting or the questioning of the reasonable care. Here there is no investigation into the proximate cause and thus the classical conditions like intent or fault, negligence or recklessness are not considered.

On the other hand, due to the damages a driverless car may cause, the risk must be assessed and allocated efficiently in advance. The autonomous vehicles' liability therefore may be paralleled with the strict or objective liability of the companies (product liability) in private law and be based on a

[391] KOOPS, et al. Bridging the Accountability Gap....p.559.

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simple risk allocation mechanism and not on intent. It is not the punishment or the retribution which should count, but the desire for restitution, the restoration of the assets status quo. The restoration of the wealth distribution to the pre-accident status quo is a private law principle as opposed to the criminal law ones. So, the question is to which model one reaches out. If this could cause a paradigm shift, then it seems, that the insurance lobby might object that, since with such a shift all could incalculably change.

The applicatory challenge by analogies – Software warrants and strict liability

In the case of an autonomous vehicle therefore liability issues may become somewhat complicated. Based on the three-step model of awarding legal entity to an AI an autonomous vehicle should linger somewhere between the second and the third phase, at best. That would mean that the driverless car could have a limited legal entity should be registered in a public registry and should be vested also with strict liability from the owner/user part. Driverless cars therefore should act as agents and their actions should create rights and obligations directly to the principal. Further capacities will definitely be awarded if liability on its own account will be more innovation-friendly.

In case of a car crash, the principal or the owner does not drive. This is not a big difference in most Member States in the EU, where strict liability laws apply in these cases, and, more often than not, the owner/operator of the car is liable, who might happen to be the driver but not necessarily. It can be so, since strict liability has no causal condition as in a negligent or intentional tort. Simply by operating a highly hazardous equipment triggers the stricter, non-subjective, liability. In other words, in these accidents the driver/owner/operator/principal can hardly be exempted from liability if damage occurred.

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On the other hand, where negligent tort rules apply, like mostly in the common law, the driver himself is liable only if negligent and therefore the proximate cause of the accident has to be cleared and proven by the plaintiff in order to be able to collect. The defendant in these cases can be released if he shows that the car was defected. In the event however, that the car is autonomous, the driver is the car itself, so the manufacturer would be highly motivated to grant certain legal personhood to the driverless cars. Then the autonomous vehicle, as an electronic agent will be held liable. Should it be strict liability applied directly, or should it remain a negligent tort?

In any event, the liability issues need to be determined on a case by case basis, regarding also the fact that with the driverless cars the software problems may override the hardware ones. And software failures are often harder to allocate but even harder to find the causal link with the necessary evidentiary standards. Like in the case of unintended acceleration software problems in certain Toyota types in the 2009, in which the victims of accidents managed to prove that the software of the braking system had bugs. The case remained controversial until years later the management of the Toyota Company confessed lying. The criticism pointed out that the causal link between the admitted bugs in the software and the direct cause of the accident was not proven at the court and the jury was wrong.[392] "It is well known that nearly all non-trivial software has bugs. Furthermore, because there are virtually an infinite number of different ways of solving a non-trivial problem using software, one can often find many opportunities for criticizing software quality, sometimes using criteria that are highly subjective. As a result, the plaintiffs in a software trial can be expected to attack the defendant's software by looking for bugs and criticizing the software's quality. If they can find bugs and show that more likely than not those bugs caused the accident, then they can establish causation. They can also use

[392] CUMMINGS, D. Was the Jury Wrong....

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purported measures of software quality, which may be subjective, to argue that the defendant failed to fulfill their duty to provide software of sufficient quality."[393]

Surely, the running of the driverless cars on the streets will trigger these sorts of liabilities through the warranty problems of others' softwares, like the use of the free softwares and open source softwares. In these cases, the risk and thus the liability questions need to be ascertained on a case by case basis and in case of doubts, the damages should be borne by those in whose interest the driverless cars were operated. The present rules on car crashes could well apply in the non-common-law countries, as said, where in such cases the strict liability is the rule.

Safety standards are a starting point in these cases, since consumer protection and product liability derive from the assumption that the product needs to be safe. But how safe? Obviously, a driverless car is regarded as to be safer than a car without or nearly autonomous driving. So, under common law jurisdiction the question is, if notwithstanding, there is an accident, then the manufacturer is liable if the driver is not at fault. Product liability consists of three elements: defect in the product, defect in the design and lack of warning or lack of instructions. To translate these into the software case, bugs should certainly qualify as defects in the software. In those autonomous vehicles though, in which the deep learning is a standard, a bug may not necessarily be programmed from the start but might have been learnt by the machine. In all these cases the state of the art defence may help out the manufacturer from liability. Since most of the car companies rely on many suppliers, the driverless cars contain various softwares from different manufacturers, embedded even. This makes even harder the proving of contributory negligence or the percentage of interaction in the operation of the hazardous equipment, the car, in the accident.

[393] CUMMINGS, D. Was the Jury Wrong... p.1.

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Additionally, the autonomous cars need data. These data, for cybersecurity reasons, are provided via separate, very quick Wi-Fi like facilities, like earlier the DSRC[394] or 6G in the USA, or 5G in Europe. The data flow needs to be free from misunderstanding, misinformation, and hacking. In case of misunderstanding the question is whether there is an interoperability problem, or the rival systems fail. In any event, the node needs to be found and decided where the faulty data came from. In-built cautious messages, designs, such as use 'break, if…', could release liability. There probably is a duty of care on the public roads among the actors, therefore, if there is a misinformation, then the sender of the information may be liable for negligence or fraudulent misrepresentation if he knew or should have known that the information was false. Besides, the receiver of the information needs to show reasonable care to rely on the information received and does not react if other information contradicts, like an obvious change in the traffic order. Cybersecurity protocols require special verifications of messages and other protection, but hacking remains an evergreen issue, the softwares have to be able to manage it. In the end special investigation is needed to find the very legal entity, the manufacturer, supplier, seller, repairer, owner, or operator to be liable. Bugs existence needs to be accepted, and the software so designed so that to react reasonably cautiously.

Despite of the Toyota case, software liabilities are generally privileged in the legal systems. In case of contractual breach, the damages are limited even above the standard of the foreseeability doctrine and in torts cases the rule of economic loss applies. These all serve the same purpose that purely economic damages cannot be recovered and that the costs of innovation be widespread. Softwares in Cyberspace are extremely intertwined and since robotics are often facilitated by/on the internet, the security of the softwares is a crucial point in driverless cars.

[394] Dedicated Short Range Communication.

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It is because robotics, and especially the driverless cars, unlike the softwares on the internet, are designed to be active in the real space, thereby much easier and more possibly causing more physical harms.

The application of strict liability of either the driver, which can certainly be the driverless car itself according to the level two-three above, or the producer or the owner, is justified first of all because of the acceptance that there is no bug-free software and because the very existence of the bug in the software may be discovered only by use. Thus, the real question boils down to the procedure or to the protocol to be followed by design in situations of emergency. It is important since strict liability might provide for exemption in cases where the accident is due to an unavoidable interference of an action from the outside of the scope of the operation of the hazardous equipment, the car.

4.3.4. Conclusion

In spite of the all-encompassing disruptive nature of the newest tech nologies, clearly, as is shown, there always is a pre-digital analogy for any rule, no matter whether these technologies are stealthy or unleashed. Recent innovations include stealthy technologies as well as unleashed ones every now and then triggering stealthy and sometimes unleashed regulations. In fact, however this should not be wondered, since these technological changes would not be called innovation if the rules were not to be challenged. For what is the point in those innovations which could fit in a rule having been visioned for some times in the past as fit to the future of then.

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