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Vorwort

This year our journal presents variety of subjects, which reflect the diversity of the IJVO lectures and the wide, comparative approach taken by the Association.

Angelos Kornilakis, in a piece titled „Abstraktionsprinzip, Besitzübergang und gutgläubiger Erwerb von Immobilien und beweglichen Sachen nach griechischem Recht“ engages into discusission on the Greek legal system, which takes an intermediate position between the German legal system, based on the “Abstraktionsprinzip” and the Austrian or Swiss legal systems that follow the “Kausalitätsprinzip”. The article analyses the foundations of the “Abstraktionsprinzip”, and introduces the provisions of the Greek law that apply to the transfer of property of movables and immovables, on which a detailed comparison of the two principles is based.

Thien Le Nguyen Gia provides a fascinating introduction into the Vietnamese legal system and its tradition in his article “Tradition of civil law and the core points of the New Civil Code of Vietnam”. The article, inspired by the enactments of a new Civil Code of Vietnam on 24 November 2015, presents the development of civil law in Vietnam, starting from the feudalism, through the French-ruled period, the Vietnam War period, the renovation and ending with the most recent occurrences. The Author not only describes the core points of the new Civil Code but also critically analyses them.

An insightful contribution of Celia Martinez-Escribano presents the influence of the DCFR in Spanish case law. Before presenting the development of case law that refers to the DCFR, the Author briefly focuses on the function of Spanish courts in private law cases. The article is illustrated with cases decided by the Supreme Court as well as courts of appeal.

Justyna Kurek’s focus is on spam, as since 2013 over 69,6% of all email traffic was generated by it. The article concentrates on the Polish legal system, presenting the provisions relating to the protection against spam, and in particular - the Act on Electronic Services. The Author argues that the current regulations seem to be insufficient and describes a concept of a synergic model of anti-spam protection, based on the idea that effective antispam protection also needs coordinated international action.

The closing contribution, “The burden of proof in discrimination processes – an unknown creature?” by Andreas Stein analyses special regime for distributing the burden of proof introduced by the European legislator and implemented in Germany in Art. 22 AGG. The Autor presents problems that result from the complexity of the rule and the need to introduce it as a part of very diversified procedural and evidentiary regulations of Member States.

Wishing all readers an inspiring lecture,

für das Präsidium 2015/2016

Dr. Aneta Wiewiórowska - Domagalska

Inhalt dieses Heftes

Angelos Kornilakis

Abstraktionsprinzip, Besitzübergang und gutgläubiger Erwerb von Immobilien und beweglichen Sachen nach griechischem Recht

I. Einleitung und Problemstellung

Das in den Rechtsordnungen des germanischen Rechtskreises herrschende Trennungsprinzip stellt zunächst die Frage nach dem Verhältnis zwischen Verpflichtungs- und Verfügungsgeschäft. Im Gegensatz zur römisch- und gemeinrechtlichen Tradition hat sich der deutsche Gesetzgeber für das Abstraktionsprinzip entschieden, eine Wahl, die eine breite Diskussion über die Vor- und Nachteile der Abstraktion im Gegensatz zum Kausalitätsprinzip ausgelöst hat. Das Problem konkretisiert sich praktisch in der Frage nach der Wirksamkeit des Verfügungsgeschäfts wenn das Verpflichtungsgeschäft sich als unwirksam erweist, der sog. äußeren Abstraktion[1].

Das Abstraktionsprinzip und der gutgläubige Erwerb vom Nichtberechtigten wurden als zwei, den Bedürfnissen der modernen freien Marktwirtschaft entsprechenden Neuerungen angesehen. Ihre Funktionsüberschneidung stellt jedoch die Frage nach dem Verhältnis zwischen den beiden Rechtsinstituten und insbesondere nach ihrer Rechtfertigung, denn beide stellen eine Beeinträchtigung des Eigentums bzw. der Interessen des ursprünglichen und kausallos verfügenden Eigentümers dar.

Eng damit verbunden kommt der Besitz in Betracht, dem im Wege des Publizitätsprinzips und durch die funktionale Hervorhebung der Tradition angesichts des Trennungsprinzips eine zentrale Rolle im Rahmen des modernen Sachenrechts, insbesondere für Fahrnisse, zugewiesen wird.

Allerdings haben diese Neuerungen das Kausalitätsprinzip nicht völlig verdrängt. Denn selbst in Rechtsordnungen, wo es keine Anwendung findet, wie in Deutschland, stellt das Kausalitätsprinzip den Ausgangspunkt der juristischen Erwägungen und Argumentationen dar. Und dies nicht nur oder vornehmlich aus historischen, sondern eher aus funktionellen

[1] Über die Unterscheidung zwischen äußerer und innerer Abstraktion s. *Jahr*, Romanistische Beiträge zur modernen Zivilrechtswissenschaft, AcP 1968, 9, 14 ff.

und logischen Gründen. Funktionell weil selbst in der abstraktionsbeherrschten deutschen Rechtsordnung nicht bezweifelt wird, dass abgesehen von der gesetzlichen Technik, also Vindikatio oder Restitutio, das Fehlen der *causa* die Rückgabe der übergegebenen Sache fordert. Logisch weil ebenfalls im Anwendungsbereich des Abstraktionsprinzips nur die innere Kausalität in der Lage ist, dem Besitzübergang seinen rechtlichen Sinn zu verleihen.

Das Abstraktionsprinzip muss also als eine Abweichung vom Kausalitätsprinzip gerechtfertigt werden und zwar unter Berücksichtigung der Funktionen sowohl des gutgläubigen Erwerbs als auch des Besitzes. Da die griechische Gesetzgebung eine mittlere Position zwischen dem in Deutschland alleinherrschenden Abstraktionsprinzip und dem in Österreich und der Schweiz alleinherrschenden Kausalitätsprinzip nimmt, stellt sie einen interessanten Fall dar, wo die zwei Prinzipien innerhalb derselben Rechtsordnung näher geprüft werden können. Dies setzt allerdings zunächst voraus, die Rechtfertigungsgründe des Abstraktionsprinzips näher zu betrachten.

II. Die Begründung des Abstraktionsprinzips

In der deutschsprachigen Theorie werden als Rechtfertigungsgründe für die Befürwortung des Abstraktionsprinzips und daher der Wirksamkeit des Verfügungsgeschäfts trotz der Unwirksamkeit des Verpflichtungsgeschäfts die Rechtssicherheit, der Verkehrsschutz, insbesondere unter dem Gesichtspunkt des Vertrauensschutzes des Nachmanns des Erwerbers oder seiner Gläubiger, die selbständige Stellung des Sachenrechts im System des BGB und die Verkehrsfähigkeit der wirtschaftlichen Güter bzw. die Erleichterung des Warenumsatzes angeführt[2].

Die griechische Theorie beruft sich einheitlich auf die Verkehrssicherheit als Rechtfertigungsgrund des Abstraktionsprinzips[3]. Die Verkehrssicherheit wird durch die Beweiserleichterung des Eigentümers bezüglich des rechtmäßigen derivativen Erwerbs

[2] S. dazu Mot. III, S. 6 ff., MünchKomm/*Oechsler*, § 929, Rn. 10 f., 6. Auf., Bd. 6, 2013; *Flume*, Allgemeiner Teil des Bürgerlichen Rechts, Bd. II, 4. Auf., 1992, S. 176; Staudinger/*Wiegeand* (2011), Vorbem zu §§ 929-931, Rn. 15; *Wolf/Neuner*, Allgemeiner Teil des Bürgerlichen Rechts, 10. Auf., 2012, § 29, Rn. 78 ff; *Wieling*, Das Abstraktionsprinzip für Europa, ZEuP 2001, 301, 304 f.; *Grigoleit*, Abstraktion und Willensmängel – Die Anfechtbarkeit des Verfügungsgeschäfts, AcP 1999, 379, 384; vgl. auch *Ferrari*, Vom Abstraktionsprinzip und Konsensualprinzip zum Traditionsprinzip, ZEuP 1993, 52, 66, der die verkehrsschützende Funktion des Abstraktionsprinzip in Frage stellt und die Förderung des Güterumsatzes als eigentliche Funktion des Abstraktionsprinzips anerkennt; und *Wiegand*, Die Entwicklung des Sachenrechts, AcP 1990, 112, 119, der die Bedürfnisse des freien wirtschaftlichen Verkehrs in einer freien Marktwirtschaft hervorhebt.

[3] Vgl. *Karibali-Tsiptsiou*, Property and Trust Law in Hellas, 2003, S. 225.

seines Eigentumsrechts und den Schutz des Nachmanns des Ersterwerbers konkretisiert. Es ist allerdings darauf hinzuweisen, dass, genauso wie im deutschen Zivilrecht, für beide Fälle Abhilfemechanismen vorhanden sind, nämlich die Eigentumsvermutungen für den Besitzer der Art. 1110 - 1111 AK* (vgl. § 1006 BGB) und der gutgläubiger Erwerb vom Nichtberechtigten gem. Art. 1036 ff. AK. Es wird sogar, aufgrund der gerade dargestellten Funktionsüberschneidung, einheitlich angenommen, dass die Einführung des Abstraktionsprinzips dispositives Recht darstellt. Die praktische Konsequenz ist, dass die Möglichkeit einer kausalen Gestaltung des abstrakten Rechtsgeschäfts von den Geschäftspartnern unbestritten anerkannt wird, sei es im Wege einer aufschiebenden oder auflösenden Bedingung, sei es im Wege der Annahme eines einheitlichen Rechtgeschäfts i.d.S. des Art. 181 AK (vgl. § 139 BGB), der entsprechend angewendet wird. Ferner wird es angenommen, dass das Verpflichtungsgeschäft als rechtfertigende *causa* funktionieren kann selbst wenn es zeitlich dem Verfügungsgeschäft nachfolgt.

Die Vergleichung und Beurteilung der verschiedenen Lösungen, die die jeweilige Rechtsordnung eingesetzt hat, setzt eine Klärung der angeführten Rechtfertigungsgründe und die Feststellung der Interessen, die die Rechtslage mitbestimmen, voraus. Nur dadurch kann die Antwort auf die Frage gefunden werden, ob die Abweichung vom Kausalitätsprinzip gerechtfertigt ist.

Die Rechtssicherheit gilt zusammen mit der Gerechtigkeit und der Zweckmäßigkeit als eine der drei Säulen der Rechtsidee[4]. Daraus folgt, dass die Berufung auf die Rechtssicherheit allein keine Rechtserkenntnis rechtfertigen vermag. Es besteht vielmehr eine Ergänzungsbedürftigkeit der drei erwähnten, der Rechtsidee immanenten Aufgaben, selbst wenn sie in Konflikt miteinander geraten. Rechtssicherheit bedeutet zunächst Orientierungssicherheit, was der Reihe nach Erkennbarkeit und Voraussehbarkeit erfordert. Die Interessenjurisprudenz hat dies zutreffend auf die menschlichen Kontinuitäts- und Stabilitätsinteressen zurückgeführt, i.d.S. dass, einmal begründete und wahrnehmbare Macht- Besitz- und Rechtslagen ohne den Konsens des Trägers der Rechtsposition bzw. ohne normkonformes

* AK= Αστικός Κώδικας, das griechische ZGB. Für eine deutsche Übersetzung des AK s. *Gogos*, Das Zivilgesetzbuch von Griechenland, 1951.

[4] S. dazu grundlegend *Radbruch*, Rechtsphilosophie, 7. Auf., 1970, S. 168 ff.; ferner *Henkel*, Einführung in die Rechtsphilosophie, 2. Auf., 1977, S. 445 ff.; *Koller*, Theorie des Rechts, 2. Auf., 1997, S. 60 f.

Handeln unbeeinträchtigt bestehen bleiben sollen[5]. Es ergibt sich also, dass die Rechtssicherheit eher den Schutz des kausallos Verfügenden verlangt, denn seine sachenrechtliche Rechtsposition wurde wegen des unwirksamen Verpflichtungsgeschäfts ohne seinen wirksamen Konsens bzw. ohne normkonformes Handeln verändert. Eine Beeinträchtigung seiner Rechtslage wäre nur im Falle einer dauernden und wahrnehmbaren Gegenposition eines Vertrauenden zu rechtfertigen. Auf der anderen Seite könnte die Rechtssicherheit durch das besondere Element der Realisierungssicherheit zumindest mittelbar für den Erwerber sprechen, denn das Abstraktionsprinzip verleiht ihm eine Beweiserleichterung bezüglich des derivativen Erwerbs seines Eigentumsrechts, wenn dies von einem Dritten in Frage gestellt wird, die allerdings wie schon erwähnt auch durch die Eigentumsvermutung für den Besitzer dem Erwerber zur Verfügung steht.

Das Gerechtigkeitspostulat verdeutlicht sich in zwei Maximen: *erstens*, jedem das seine zu gewähren (*suum cuique tribuere*) und *zweitens*, dem Gleichheitssatz, der für die hier erörterte Problematik unter der besonderen Form der ausgleichenden Gerechtigkeit in Betracht gezogen werden muss[6]. Beide Gesichtspunkte sprechen zunächst für den kausallos Verfügenden, denn eine ohne rechtlichen Grund eingetretene Vermögensverschiebung stellt einen typischen Fall einer Störung des Gleichgewichts des Besitzstandes zwischen den Beteiligten dar, die rückgängig zu machen ist. Abgesehen von der speziellen gesetzlichen Technik, *Restitutio* oder *Vindikatio*, ist kaum zu bezweifeln, dass das Gerechtigkeitspostulat letzten Endes die kausallos verfügte Sache dem Vermögen des Verfügenden zuordnet.

Das Zweckmäßigkeitspostulat[7], das ein angemessenes Zweck-Mittel-Verhältnis erfordert, könnte vielleicht die Anwendung des Abstraktionsprinzips im Verhältnis zwischen Veräußerer und Erwerber rechtfertigen, wenn der Anspruch aus ungerechtfertigten Bereicherung sich als angemessener im Vergleich zum Herausgabeanspruch erweist. Die Antwort hängt allerdings von der Abwägung der Interessen der Beteiligten einschließlich Dritter ab, seien sie die Gläubiger des Veräußerers oder des Erwerbers oder der gutgläubige Nachmann des letzteren. Ferner ist das Zweckmäßigkeitspostulat durch einen Vergleich zwischen der

[5] S. dazu *Coing*, Grundzüge der Rechtsphilosophie, 5. Auf., 1993, S. 148 f.; *Zippelius*, Rechtsphilosophie, 3. Auf., 1994, S. 169; Henkel (aaO, Fn. 4), S. 442; *Rehbinder*, Rechtssoziologie, 3. Auf., 1993, S. 151; *Rümelin*, Rechtssicherheit, 1924, S. 12.
[6] Dazu *Henkel* (aaO, Fn. 4), S. 395 ff.; *Radbruch* (aaO, Fn. 4), S. 125 f.; *derselbe*, Vorschule der Rechtsphilosophie, 2. Auf., 1959, S. 24 ff.
[7] S. dazu *Henkel* (aaO, Fn. 4), S. 427 ff.; *Radbruch* (aaO, Fn. 6), S. 27 ff.

Beweiserleichterung für den Eigentümer mittels der Eigentumsvermutungen für den Besitzer und dem Abstraktionsprinzip in Betracht zu ziehen.

Es steht also als Zwischenfazit fest, dass aus der Sicht der Rechtssicherheit das Abstraktionsprinzip nur im Falle einer dauernden und wahrnehmbaren und daher schutzwürdigen Gegenposition eines Vertrauenden oder wegen der Beweiserleichterungsfunktion zugunsten des Eigentümers zu rechtfertigen wäre, jedoch in beiden Fällen unter Berücksichtigung des Zweckmäßigkeitspostulats, das auch für das Rückabwicklungsverhältnis zwischen dem Veräußerer und dem Erwerber in Betracht gezogen werden muss.

Nach der grundlegenden Arbeit von *Bydlinski*[8] bezieht sich der Begriff der Verkehrssicherheit, soweit er mit dem Begriff der Rechtssicherheit nicht gleichgestellt wird, auf den Vertrauensschutz des Geschäftspartners. Damit werden die Vorausplanung und die Vorausberechnung der Verkehrsteilnehmer ermöglicht[9]. Laut *Bydlinski* ist der i.d.S. verstandene Begriff der Verkehrssicherheit auf die spezifische Funktion des rechtsgeschäftlichen Verkehrs, mittels der Privatautonomie den Güterumsatz zu fördern, zurückzuführen. Dementsprechend schutzwürdig ist derjenige, der fehlerfrei kontrahiert, eine Voraussetzung, die im Falle der nichtigen oder anfechtbaren Rechtsgeschäfte kaum erfüllt wird.

Die Berufung auf die selbständige Stellung des Sachenrechts im System des BGB[10] vermag das Abstraktionsprinzip kaum zu rechtfertigen, denn die systemische Selbständigkeit macht Sinn nur in Bezug auf die Zuordnungsfunktion der Sachenrechte, also nur soweit sie das Verhältnis zwischen der Sache und dem Träger des Sachenrechts bzw. die Befugnisse des letzteren in Bezug auf die Sache regeln. Die äußere Abstraktion bezieht sich allerdings auf das Verhältnis zwischen zwei Personen, dem Veräußerer und dem Erwerber und kann daher nicht nur im sachenrechtlichen Sinne beurteilt werden. Denn die systemische Selbständigkeit des Sachenrechts darf nicht darüber wegtäuschen, dass – ungeachtet der gesetzlichen Technik des Trennungsprinzips – für die Verkehrsteilnehmer jede Transaktion i.d.R. einen einheitlichen Vorgang darstellt, dessen wirtschaftliche Funktion darin besteht, eine Vermögensverschiebung zwischen zwei Personen zu erwirken und nicht bloß das Verhältnis einer Person zu einer Sache zu regulieren.

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[8] *Bydlinski*, Privatautonomie und objektive Grundlagen des verpflichtenden Rechtsgeschäftes, 1967, S. 131 ff.
[9] *Bydlinski* (aaO, Fn. 8), S. 137 ff.; vgl. auch *Rümelin* (aaO, Fn. 5), S. 14.
[10] Dazu Mot. III, S. 1, 6 ff.

Als letztes kommt die Erleichterung des Warenumsatzes als Rechtfertigungsgrund in Betracht. Im Rahmen der hier erörterten Problematik, also abgesehen von der Verkehrsfähigkeit der Forderung[11], bezieht sich die Erleichterung bzw. die Förderung des Warenumsatzes grundsätzlich auf die Entlastung des Nachmanns des Ersterwerbers, der das schuldrechtliche Rechtsgeschäft seines Vormannes nicht zu prüfen hat. Die Förderung des Güterumsatzes an sich stellt natürlich kein Gerechtigkeitspostulat dar, sondern ist vielmehr auf die politischen und wirtschaftlichen Vorstellungen des historischen Gesetzgebers zurückzuführen[12]. Es liegt allerdings nicht auf der Hand, dass die Einführung einer freien Marktwirtschaft und das daraus resultierende Bedürfnis nach einem freien Verkehrsrecht unbedingt das Abstraktionsprinzip voraussetzt, denn die freie Marktwirtschaft hat sich als funktionsfähig erwiesen nicht nur in den Rechtsordnungen, die sich für das Kausalitätsprinzip entschieden haben, wie z.B. die Schweiz, sondern auch in denjenigen, die vom Trennungsprinzip überhaupt abgesehen haben, wie die romanischen und angelsächsischen Rechtsordnungen.

Bydlinski behandelt den Güterumsatz in Zusammenhang mit dem Prinzip der Privatautonomie im Rahmen seiner Erläuterungen über die Bedeutung des Begriffs der Verkehrssicherheit[13]. Nach seiner Argumentation stelle der Güterumsatz die spezifische Funktion des rechtsgeschäftlichen Verkehrs und daher einen schutz- und förderungswürdigen Vorgang dar, denn die privatautonome Gestaltung der Rechtsverhältnisse der Verkehrsteilnehmer biete den besten Allokationsmechanismus und daher die beste Chance für die Befriedigung ihrer Bedürfnisse an. Die Schutz- und Förderungswürdigkeit setze allerdings ein fehlerfreies Kontrahieren voraus, das im Falle der Unwirksamkeit des verpflichtenden Rechtsgeschäfts i.d.R. nicht vorliegt, außer vielleicht - aber nicht unbedingt – für den Nachmann des Ersterwerbers.

Das Abstraktionsprinzip und die dadurch erzielte Umsatzförderung könnte allerdings auch im Wege der Ökonomischen Analyse des Rechts und insbesondere durch das der neuen Institutionenökonomik grundlegende *Coase Theorem*[14] gerechtfertigt werden. Das *Coase*

[11] Da das griechische Sachenrecht keine Grundschuld kennt, bleibt für das griechische Recht die Problematik über das Verhältnis zwischen Abstraktionsprinzip und Akzessorietät im Rahmen des Schuldrechts beschränkt.
[12] Dazu *Coing*, Europäisches Privatrecht, Bd. II, 1989, S. 89 f.
[13] *Bydlinski* (aaO, Fn. 8), S. 138 f.
[14] Dazu *Coase*, The problem of the Social Cost, JLE 1960, 1; s. auch *Schäfer/Ott*, Lehrbuch der ökonomischen Analyse des Rechts, 4. Auf., 2005, S. 101 ff; *Cooter/Ulen*, Law and Economics, 5th Ed., 2008, S. 95 ff.; *Veljanovski*, Economic Principles of Law, 2007, S. 43.

Theorem und die daraus resultierende, auch für das Recht gestellte Aufgabe, die Transaktionskosten so gering wie möglich zu halten, wäre in der Lage eine analytische Grundlage für die Beurteilung des Abstraktionsprinzips darzubieten. Nach *Coase* beeinträchtigt jede Steigerung der Transaktionskosten die effiziente Allokation der wirtschaftlichen Güter durch vertragliche Vereinbarungen. Würde dem Nachmann des Ersterwerbers hohe Informationskosten auferlegt, weil er die Eigentumslage seines Vormanns prüfen muss, hätte dies zur Folge, dass effiziente Geschäfte ausbleiben. Abgesehen von den gerechtfertigten Zweifeln, die der Begriff der Effizienz für die Rechtsanwendung mit sich bringt[15], scheint es plausibel, dass eine Erhöhung der Transaktionskosten den Güterumsatz zu beeinträchtigen vermag.

Darüber hinaus ist auch auf die praktische Unmöglichkeit der Beschaffung der nötigen Informationen in mehreren Fällen Rücksicht zu nehmen. Denn eine dauernde und systematisch asymmetrische Informationslage ist generell geeignet, die Funktion der Märkte zu verdrängen und nach dem berühmten Ansatz vom *Akerlof* einen sog. *Lemon Market*[16] - nach der amerikanischen Redewendung für das unbrauchbare Produkt - hervorzurufen. Natürlich betrifft die hier erörterte Problematik und daher die schädliche Informationsasymmetrie nicht die technische Qualität der angebotenen Güter, sondern die Qualifikation der Eigentumslage des Veräußerers. Allerdings wäre es nicht ganz verfehlt nach dem *Lemon Market* Ansatz zu behaupten, dass eine dauerhafte Informationsasymmetrie zwischen Veräußerern und Erwerbern bezüglich der Eigentumslage des ersteren zu einer Beschränkung des Umsatzes und daher zu einer Herabsetzung der Preise beitragen könnte.

Beide Momente kommen zunächst hier in Betracht, denn die Ungewissheit über die Eigentumslage des Veräußerers bedeutet entweder eine Erhöhung der Transaktionskosten für den Erwerber, der die Eigentumslage zu prüfen hat, oder schlechthin das Ausbleiben von Rechtsgeschäften wegen der praktischen Unmöglichkeit der Beschaffung der nötigen Informationen. In Zusammenhang mit dieser Analyse ist jedoch auf einen Umkehrargumentation hinzuweisen. Denn der Güterumsatz findet um der Privatautonomie willen statt und

[15] M. E. stellt die Vernachlässigung des Grundsatzes des abnehmenden Grenznutzens des Einkommens den Kern der Kritik an der Effizienzlehre dar, dazu zusammenfassend und in Zusammenhang mit dem Grundsatz der Privatautonomie *Kornilakis*, Privatautonomie, Treu und Glauben und „effiziente" Vertragsauslegung, FS Meier, 2015, S. 381, 383 f., m.w.H. allgemein über die Kritik am *Coase Theorem* und insbesondere am *Kaldor-Hicks* Kriterium s. *Schäfer/Ott* (aaO Fn. 14), S. 32 ff., 104 ff.; *Eidenmüller*, Effizienz als Rechtsprinzip, 3. Auf., 2005, S. 53 ff., 84 ff.; *Veljanovski*, Wealth Maximization, Law and Ethics – On the Limits of Economic Efficiency, IRLE 1981, 5, 12, 21.

[16] *Akerlof*, The Market for Lemons, Qualitative Uncertainty and the Market Mechanism, QJE 1970, S. 488 ff., *Schäfer/Ott* (aaO Fn. 14), S. 342 ff.

nicht umgekehrt. Die Rechtsgeschäfte dienen der Verwirklichung der Privatautonomie und nicht umgekehrt, sie sind Mittel zum Zweck und nicht Selbstzweck. Also Aufgabe des Privatrechts ist nicht die Güterumsatzförderung auf jeden Preis, sondern die Aufstellung eines rechtlichen Rahmens, wo die Verkehrsteilnehmer die Möglichkeit haben, durch ihr privatautonomes Handeln eine gerechte Einigung zu erzielen.

Nach der analytischen Darstellung der Rechtfertigungsgründe gilt als Fazit, dass außer dem Vertrauensschutz und der Beweiserleichterung des Eigentümers, Momente die vornehmlich auf die individuellen Interessen der Verkehrsteilnehmer zurückzuführen sind, ein allgemeines Interesse an der Erleichterung der Umsatzgeschäfte besteht, das das Abstraktionsprinzip zu rechtfertigen vermag, allerdings unter Berücksichtigung des Zweckmäßigkeitspostulats und nur als Mittel zum Zweck der Privatautonomie. Es soll auch hervorgehoben werden, dass in diesem Zusammenhang die Erleichterung der Umsatzgeschäfte nur eine relative Wirkung aufweist, denn sowohl die Rechtssicherheit als auch das Gerechtigkeitspostulat bieten erhebliche Gründe für den Schutz des Veräußerers insbesondere angesichts des fehlerhaften Verpflichtungsgeschäfts dar. Als letztes steht es fest, dass die individuellen Interessen der Teilnehmer unter drei eng miteinander verbundenen Konstellationen zu beurteilen sind, nämlich *erstens* dem Verhältnis zwischen Erstveräußerer und Ersterwerber, *zweitens* dem Verhältnis zwischen den Gläubigern des Ersterwerbers und dem Erstveräußerer bzw. seinen Gläubigern und *drittens* dem Verhältnis zwischen dem Erstveräußerer und dem Nachmann des Ersterwerbers.

III. Die Regelung des griechischen Rechts

Wie schon erwähnt nimmt die griechische Gesetzgebung eine mittlere Position zwischen dem in Deutschland alleinherrschenden Abstraktionsprinzip und dem in Österreich und der Schweiz alleinherrschenden Kausalitätsprinzip. Das griechische Sachenrecht konstruiert die Eigentumsübertragung bei Immobilien als ein kausales dingliches Rechtsgeschäft, während die Eigentumsübertragung bei beweglichen Sachen als ein abstraktes dingliches Rechtsgeschäft konzipiert wird.

Art. 1033 AK setzt als Tatbestandsmerkmal des Eigentumserwerbs an einem Grundstück die Einigung zwischen Eigentümer und Erwerber, dass das Eigentum an dem Grundstück aus einem gültigen Erwerbsgrund an den Erwerber übergehen soll, voraus. Darüber hinaus muss

die Einigung durch notarielle Beurkundung erfolgen und ins Transkriptionsbuch eingetragen werden[17]. Daraus ergibt sich, dass nach dem griechischen Sachenrecht eine gültige *causa* Voraussetzung eines gültigen Eigentumserwerbs von Immobilien ist. Eine allgemeine Regelung über die Möglichkeit eines gutgläubigen Erwerbs fällt aus, selbst wenn der Erwerber sich auf die Eintragungen des Transkriptionsbuchs berufen kann. Dies bedeutet, dass im Streitfall die Eintragungen keine unwiderlegbare Vermutung über die Eigentumslage anbieten, was *prima facie* die Verkehrssicherheit erheblich gefährden sollte. Eine Ausnahme zugunsten des gutgläubigen Erwerbers wird allerdings in zwei besonderen Fällen eingeführt. *Erstens*, werden nach Art. 1204 AK die von Dritten schon erworbenen Rechte nicht aufgehoben, wenn das eingetragene Rechtsgeschäft wegen Irrtums, arglistiger Täuschung oder Drohung nachträglich angefochten wird. *Zweitens*, sieht Art. 139 AK voraus, dass der Dritte, der in Unkenntnis eines Scheingeschäfts kontrahiert hat, von der Ungültigkeit des Scheingeschäfts unberührt bleibt, was nach der ganz h.M. auch den Erwerber eines Sachenrechts miterfasst.

Die oben dargestellte Lage wird sich mit der Vollendung des Grundbuchsystems, das vor mehreren Jahren eingeführt wurde und zurzeit und bis zu seiner Vollendung parallel zum Transkriptionssystem läuft, erheblich ändern, denn Art. 13 Abs. 3 des Grundbuchgesetzes räumt die Möglichkeit eines gutgläubigen Erwerbs auch für die Immobilien ein, wenn die Gutgläubigkeit des Erwerbers auf eine bis zur Vollendung des Erwerbsgeschäfts gültige Grundbuchseintragung zurückzuführen ist.

Die Anerkennung des Kausalitätsprinzips in Zusammenhang mit dem begrenzten Schutz des gutgläubigen Erwerbers nach dem Transkriptionssystem räumt dem Eigentümer die Möglichkeit ein, sein Eigentum vom Erwerber oder seinem Nachmann durch eine Vindikationsklage zurückzufordern, gerade weil die rechtliche Zuordnung der Sache zum Eigentum des Eigentümers trotz der fehlerhaften Eintragung ins Transkriptionsbuch unverändert bleibt, was theoretisch die Verkehrssicherheit in Frage stellen sollte. Allerdings hat sich die theoretische Gefahr für die Verkehrssicherheit als unrealistisch erwiesen. Trotz des mangelnden Schutzes des Erwerbers und des nur begrenzten Schutzes seines Nachmannes ist während der jahrzehntelangen Anwendung des Transkriptionssystems und des

[17] S dazu *Karibali-Tsiptsiou* (aaO Fn. 3), S. 223 ff.; *Karakostas*, Einführung in das Griechische Privatrecht, 2003, S. 65; *Yiannopoulos*, in: Kerameus/Kozyris (Hrsg.), Introduction to Greek Law, 3rd Ed., 2008, S. 159 ff.

Kausalitätsprinzips kaum ein Mangel an Verkehrssicherheit geschweige denn eine Verunsicherung bzw. Beeinträchtigung der Immobilien Transaktionen zu bemerken.

Der Eigentumserwerb einer Fahrnis setzt auf der anderen Seite keine gültige causa als Tatbestandsmerkmal voraus. Nach Art. 1034 AK reicht die rechtsgeschäftliche Einigung der beiden Teile über die Übertragung des Eigentums und die Übergabe des Besitzes der Sache vom Eigentümer an den Erwerber aus[18]. Für den Besitzübergang taugen sogar sämtliche Besitzübergangsmodalitäten. Steht der Besitz dem Eigentümer wegen einer Besitzentziehung nicht zu, wird der Besitzübergang durch die Abtretung des Herausgabeanspruchs ersetzt.

Das griechische Sachenrecht geht von der grundlegenden Unterscheidung zwischen Eigen- und Fremdbesitz aus, entsprechend den gemeinrechtlichen Begriffen der *possessio* und *detentio*[19]. Der Rechtsbesitz, also der auf ein beschränktes dingliches Recht zurückzuführende Besitz wie z.B. den Nießbrauch, wird als Quasi-Eigenbesitz gekennzeichnet, besteht natürlich parallel zum Eigenbesitz des Eigentümers und ist mit ihm im Allgemeinen gleichzusetzen. Der Unterschied bezieht sich auf das *animus*, denn der Quasi-Eigenbesitzer betrachtet die Sache nicht als ihm gehörend sondern als ihm aufgrund eines beschränkten dinglichen Rechts zur Verfügung gestellt. Als Besitzübergangsmodalitäten stehen neben der eigentlichen Übergabe die *longa* und *brevi manu traditio*, die Übertragung des Lagerscheins oder das Besitzkonstitut (Art. 976 – 978 AK), wobei der Veräußerer oder ein Dritter aufgrund eines vereinbarten Rechtsverhältnisses wie Miete als unmittelbarer Fremdbesitzer der Sache bleibt. Das durch die Einbeziehung Dritter erweitert aufgefasste Besitzkonstitut des griechischen Rechts ersetzt die Übertragung des mittelbaren Besitzes durch Abtretung des schuldrechtlichen Herausgabeanspruchs nach dem deutschen Recht. Nach der h.M. stellt die Besitzübertragung ein Rechtsgeschäft und keinen bloßen Realakt dar, selbst im Normalfalle der einfachen Besitzübertragung durch *traditio*. Ferner ist die Besitzübertragung als Rechtsgeschäft immer abstrakt, selbst wenn es um Immobilien handelt.

Die Anerkennung des Abstraktionsprinzips und die daraus ergebende Sicherheit für den Erwerber schließt keineswegs die Möglichkeit eines gutgläubigen Erwerbs vom

[18] Dazu *Karibali-Tsiptsiou* (aaO Fn. 3), S. 244 ff.
[19] Dazu *Karibali-Tsiptsiou* (aaO Fn. 3), S. 120 ff.; *Yiannopoulos* (aaO Fn. 17), S. 158 f.

Nichtberechtigten aus[20]. Art. 1036 ff. AK räumen die Möglichkeit eines gutgläubigen Erwerbs vom Nichtberechtigten für nicht gestohlene oder abhanden gekommene bewegliche Sachen, für Geld und Inhaberpapiere und für sämtliche beweglichen Sachen, die im Wege einer öffentlichen Versteigerung oder auf einer Messe oder einem Markt veräußert werden ein. Der Unterschied zum normalen Eigentumserwerb vom Berechtigten liegt nicht nur in dem Fehlen des Eigentums seitens des Veräußerers sondern auch in den Besitzübertragungsmodalitäten. Denn ein gutgläubiger Erwerb ist ausgeschlossen in allen Fällen eines Besitzkonstituts oder im Falle der Abtretung des Herausgabeanspruchs, also wenn der Erwerber keine tatsächliche Herrschaft über die Sache ausüben kann. In diesen Fällen wird die Übergabe wirksam erst wenn der Erwerber den Besitz tatsächlich erlangt und gleichzeitig immer noch gutgläubig bleibt.

IV. Interessenabwägung

1. Das Verhältnis zwischen Erstveräußerer und Ersterwerber

Das Verhältnis zwischen dem Erstveräußerer und dem Ersterwerber ist unter zwei Gesichtspunkten zu beurteilen. *Erstens*, für den Fall einer kausallosen Verfügung kommt das Verhältnis zwischen *Restitutio* und *Vindikatio*, *zweitens*, für den Fall einer bestehenden causa, die Beweiserleichterung für den Erwerber bezüglich seines Eigentumsrechts in Betracht.

In Bezug auf den zweiten Gesichtspunkt ist es der Eigentumsvermutung den Vorrang zu geben, denn die Beweislage des Ersterwerbers, der gesetzmäßig das Eigentum erworben hat, günstiger ist. Denn er hat nur seinen Besitz zu beweisen, während die durch das Abstraktionsprinzip erzielte Beweiserleichterung ohnehin den Beweis des gültigen Verfügungsgeschäfts erfordert. Auf der anderen Seite ist der kausallos Verfügende nicht schlechter gestellt, denn um die Sache bereicherungsrechtlich zurückverlangen zu dürfen oder nach dem Kausalitätsprinzip die Eigentumsvermutung zu widerlegen, muss er die Unwirksamkeit des Verpflichtungsgeschäfts beweisen. Die Eigentumsvermutung stellt also einen Pareto-optimalen Zustand dar, dem es nach dem Zweckmäßigkeitspostulat den Vorrang zu geben ist.

[20] Dazu *Karibali-Tsiptsiou* (aaO Fn. 3), S. 247 ff.

Das Verhältnis zwischen *Restitutio* und *Vindikatio* ist gemäß des Zweckmäßigkeitspostulats zu prüfen, da es außer Zweifel steht, dass die Sache dem Veräußerer zurückzugeben ist. Aus dem Vergleich zwischen dem bereicherungsrechtlichen Anspruch und dem Herausgabeanspruch ergeben sich Unterschiede bezüglich der Rechtslage des gutgläubigen Erwerbers vor der Zustellung der Klage[21], des Veräußerers, der in Kenntnis der Nichtschuld geleistet hat, und des sittenwidrig Leistenden[22]. Es muss an dieser Stelle jedoch darauf hingewiesen werden, dass trotz der Gegenmeinung des größten Teils der Theorie die griechische Rechtsprechung von einer materiellen Subsidiarität des Bereicherungsanspruchs ausgeht und daher die von der Theorie vorgeschlagene Anspruchskonkurrenz mit dem Herausgabeanspruch ausschließt.

Die Rechtslage des gutgläubigen Erwerbers vor der Zustellung der Klage unterscheidet sich nach der Anspruchsgrundlage bezüglich der Herausgabepflicht für Nutzungen und des Verwendungsersatzanspruchs. Im Rahmen des Herausgabeanspruchs scheidet die Herausgabepflicht für Nutzungen des gutgläubigen Erwerbers vor der Zustellung der Klage nach Art. 1100 AK völlig aus (vgl. § 993 BGB, der allerdings eine Ausnahme für Übermaßfrüchte vorsieht). Im Gegensatz dazu wird der bereicherungsrechtlich beklagte Erwerber zur Herausgabe aller gezogenen Nutzungen verpflichtet, gem. Art. 908 S. 2 AK (vgl. § 818 I BGB). Die traditionelle Meinung der Theorie wollte im Anschluss an die immerhin herrschende Rechtsprechung im Falle einer Konkurrenz der zwei Ansprüche, den bereicherungsrechtlichen Anspruch ausschließen. Allerdings sieht ein Teil der Theorie in der differenzierten Behandlung des Erwerbers einen Wertungswiderspruch an, denn im Falle des Abstraktionsprinzips wird der bereicherungsrechtlich beklagte Eigentümer schlechter gestellt als der sachenrechtlich beklagte Nichteigentümer im Falle des Kausalitätsprinzips. Deswegen wird die parallele Anwendung beide Vorschriften vorgeschlagen. Es liegt jedoch auf der Hand, dass der Anspruchskonkurrenz dem Kläger und nicht dem beklagten gutgläubigen Erwerber hilft.

Darüber hinaus kommt das Recht des Besitzers auf Verwendungsersatz in Betracht. Nach der herrschenden Auslegung des Art. 909 AK (vgl. § 818 III BGB) darf der Beklagte

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[21] Nach der Zustellung der bereicherungsrechtlichen Klage wird die Rechtslage vereinheitlicht, denn gem. Art. 910 und 348 AK finden die sachenrechtlichen Regelungen der Art. 1096 ff. AK über die Haftung des Besitzers für Nutzungen und Wertersatz und über sein Recht auf Verwendungsersatz Anwendung.

[22] S. zusammenfassend für das deutsche Recht *Larenz/Canaris*, Lehrbuch des Schuldrechts, Bd. II, HB. 2, Besonderer Teil, 13. Auf., 1994, § 74 I, S. 339 ff.

sämtliche Verwendungen, d.h. auch nützliche Verwendungen, mitberechnen, selbst wenn sie nicht oder nicht mehr werterhöhend sind. Auf der anderen Seite beschränkt Art. 1103 AK (vgl. § 996 BGB) das Verwendugsersatzrecht des sachenrechtlich Beklagten auf werterhöhende nützliche Verwendungen. Im Gegensatz zu den oben erwähnten Fällen wirkt hier die sachenrechtliche Regelung zulasten des gutgläubigen unverklagten Erwerbers. Ferner kann der Erwerber auf die für ihn günstigere bereicherungsrechtliche Regelung nur im Wege einer Einwendung berufen. Die Annahme einer Anspruchskonkurrenz hilft ihm also nicht.

Ein weiterer Unterschied besteht *prima facie* hinsichtlich des in Kenntnis der Nichtschuld und des sittenwidrig Leistenden. In beiden Fällen wird die Rückgabe durch einen Bereicherungsanspruch ausgeschlossen (Art. 905 – 907 AK, vgl. §§ 814, 817 BGB). Als causa für die Leistung in Kenntnis der Nichtschuld wird der Wille des Gebers anerkannt, der von dem rechtsgeschäftlichen Willen nicht zu unterscheiden ist. Nimmt der Empfänger die Leistung mit dem Einverständnis an, dass sie unentgeltlich erfolgt, liegt nach der h.M. im Falle einer Fahrnis eine Handschenkung vor. Dasselbe gilt *mutatis mutandis* für die Fälle einer einer sittlichen Pflicht entsprechenden Leistung[23]. Bei Immobilien kann jedoch die Zuwendung nicht in die Eigentumsübertragung bestehen, denn die letztere setzt eine notarielle Urkunde voraus. In diesem – grundsätzlich theoretischen – Fall würde die Zuwendung zwangsläufig in den Besitzübergang liegen, das Eigentum würde allerdings bei dem Geber bleiben. Das dauernde Auseinanderfallen von Besitz und Eigentum könnte nur im Wege der Annahme eines unentgeltlichen Gebrauchsüberlassungsvertrags erklärt werden, also i.d.R. einer Leihe, der auch ein kausales Verfügungsgeschäft stützen kann. Nach der Gegenmeinung liegt in den oben dargestellten fällen keine Schenkung unbedingt vor, sondern sollte die Rückforderung des in Kenntnis der Nichtschuld Geleisteten als einen Fall der unzulässigen Rechtsausübung qualifiziert werden, welche allerdings auch den Herausgabeanspruch auszuschließen vermag. Insofern besteht natürlich im Prinzip kein Unterschied zwischen Restitutio und Vindikatio, bleibt jedoch das dauernde Auseinanderfallen von Besitz und Eigentum bestehen.

Das Auseinanderfallen von Eigentum und Besitz wird beträchtlicher im Falle der sittenwidrigen Leistungen, deren Rückforderung durch einen Bereicherungsanspruch ebenso

[23] Vgl. *Larenz*, Lehrbuch des Schuldrechts, Bd. II, Hb. 1, Besonderer teil, 13. Auf., 1986, § 47 I, S. 199 und Fn. 12. Alternativ könnte die sittliche Pflicht als eine causa ex lege angesehen werden, s. dazu *Stathopoulos*, Bereicherungsherausgabe oder Rückabwicklung im Bereicherungsrecht, FS Sontis, 1977, 203, 221.

ausgeschlossen ist, soweit die Sittenwidrigkeit den Geber betrifft (Art. 907 AK, vgl. 817 BGB). Es handelt sich dabei allerdings um Ausnahmefälle, denn i.d.R. erfasst die Sittenwidrigkeit sowohl das Verpflichtungs- als auch das Verfügungsgeschäft. Wird jedoch ausnahmsweise das Verfügungsgeschäft von der Sittenwidrigkeit nicht betroffen, dann wird die bereicherungsrechtliche Rückforderung ausgeschlossen, während für die kausalen Verfügungsgeschäfte eine Rückforderung durch den Herausgabeanspruch zunächst als möglich erscheint. Deswegen wird der Ausschluss auch des Herausgabeanspruchs durch entsprechende Anwendung des Art. 907 AK vorgeschlagen. Dieselbe Rechtfolge könnte dadurch erreicht werden, indem die Ausübung des Herausgabeanspruchs als missbräuchlich nach dem Satz *nemo auditur propriam turpitudinem allegans* angesehen würde. Also auch in diesem Fall besteht im Prinzip kein Unterschied zwischen Restitutio und Vindikatio. Das Problem dabei bleibt allerdings das Auseinanderfallen vom Besitz und Eigentum, das in diesem Fall nicht durch die Annahme eines anderen als des sittenwidrigen Vertrages zu rechtfertigen ist und nur durch die Ersitzung beseitigt werden kann.

Es steht also fest, dass im Rahmen des Verhältnisses zwischen dem Erstveräußerer und dem Ersterwerber das Abstraktionsprinzip nicht durch das Zweckmäßigkeitspostulat gerechtfertigt werden kann. Denn die bestehenden Unterschiede zwischen *Restitutio* und *Vindikatio* betreffen in der Praxis nur die Rechtslage des gutgläubigen Erwerbers vor der Zustellung der Klage und sind für beide Teile symmetrisch vorteilhaft. Ferner hat die Anwendung der bereicherungsrechtlichen Vorschriften im Falle des in Kenntnis der Nichtschuld und des sittenwidrig Leistenden das dauernde Auseinanderfallen von Eigentum und Besitz zur Folge, das insbesondere bei der Sittenwidrigkeit – abgesehen von der zeitaufwendigen Ersitzungsmöglichkeit – kaum zu beseitigen ist, eine Folge, die zunächst durch das Kausalitätsprinzip vermieden wird. Ob der Ausschluss der Rückforderung selbst im Falle einer Vindikationsklage wünschenswert ist, mag für die hier erörternde Problematik dahingestellt bleiben, denn er betrifft eher die Frage nach der Behandlung des sittenwidrigen Rechtsgeschäfts im Allgemeinen als die Vergleichung zwischen Abstraktions- und Kausalitätsprinzips.

2. Das Verhältnis zwischen den Gläubigern des Ersterwerbers und dem Erstveräußerer bzw. seinen Gläubigern

Es ist also grundsätzlich das schutzwürdige Vertrauen Dritter, das durch das Verkehrssicherheitspostulat das Abstraktionsprinzip zu rechtfertigen vermag. Als schutzwürdige, vertrauende Dritten kommen der Nachmann des Erwerbers und die Gläubiger des letzteren in Betracht. Die Schutzbedürftigkeit der letzteren wird durch zwei Argumente begründet. *Erstens*, das Publizitätsprinzip, das durch die Besitzlage und insbesondere die Eigentumsvermutungen in Erscheinung tritt[24], und *zweitens*, das Bedürfnis nach einem sicheren Kreditgewährungsmechanismus, der durch den Grundsatz der *par conditio creditorum* konkretisiert wird[25].

Bei beweglichen Sachen dient der Eigenbesitz als Publizitätsmittel. Für die Gläubiger des Besitzers bleibt allerdings die Unterscheidung zwischen Fremd- und Eigenbesitz in den meisten Fällen unbewusst, denn sowohl das *animus* des Besitzers als auch die innere Kausalität, also die schuldrechtliche Grundlage des Besitzübergangs, sind i.d.R. unersichtlich. Ersichtlich für die Gläubiger ist nur die tatsächliche Herrschaft des Besitzers über die Sache. Deswegen entfaltet die Eigentumsvermutung für den Besitzer seine Wirkung nur im Falle eines Streits über das Eigentum und daher erfasst ihre Schutzfunktion nicht die Gläubiger des Besitzers.

Darüber hinaus setzt ein sicherer Kreditgewährungsmechanismus nicht die ausnahmslose Anwendung des Grundsatzes der *par conditio creditorum* voraus, die auch wirtschaftlich gesehen verfehlt wäre[26]. Deswegen wird im geltenden Recht dieser Grundsatz mit dem Prioritätsprinzip zugunsten der absonderungsberechtigten Gläubiger kombiniert. Es muss auch darauf hingewiesen werden, dass die Anwendung des Grundsatzes der *par conditio creditorum* auch diejenigen Gläubiger bevorzugt, die eine Kredit vor der in Frage stehenden Übertragung gewährt haben, und deshalb sich nicht auf die bestimmte Sache einlassen hatten. Ohnehin ist es äußerst fraglich, ob die Gläubiger i.d.R. sich auf bestimmte Fahrnisse des Schuldners eingelassen haben, es sei denn es handelt sich um eine besonders wertvolle Fahrnis. In diesen Fällen steht den Gläubigern jedoch die Möglichkeit eines Pfandrechts zu, das auch gutgläubig vom Nichtberechtigten zu erwerben ist und dem Grundmodel der

[24] So *Wieling* (aaO, Fn. 2), S. 305; vgl. auch *Schwab/Prütting*, Sachenrecht, 29. Auf., 2000, § 6 Rn. 46.
[25] Vgl. *Grigoleit* (aaO, Fn. 2), S. 387 ff.
[26] Zu den Problemen des Grundsatzes der *par conditio creditorum* aus der Sicht der ökonomischen Analyse vgl. *Schäfer/Ott*, aaO (Fn. 14), S. 593 ff.

Befriedigung der Gläubiger durch eine Kombination des Grundsatzes der *par conditio creditorum* und des Prioritätsprinzips entspricht.

Es besteht also kein Grund die Gläubiger des Erwerbers zulasten des Veräußerers oder seiner Gläubiger durch das Abstraktionsprinzip zu bevorzugen.

3. Das Verhältnis zwischen dem Erstveräußerer und dem Nachmann des Ersterwerbers

Schließlich kommt der Schutz des Nachmanns des Ersterwerbers in Betracht, der vertrauend auf die Besitzlage mit dem Ersterwerber kontrahiert. Zusammen mit seinem schutzwürdigen und auf der Eigentumsvermutung beruhenden Vertrauen kommt auch die Schwierigkeit bzw. Unmöglichkeit einer Prüfung seinerseits der Gültigkeit des verpflichtenden Rechtsgeschäfts zwischen dem Erstveräußerer und dem Ersterwerber in Betracht. Dem Schutz des Nachmanns wird jedoch auch durch die Regelungen über den gutgläubigen Erwerb vom Nichtberechtigten Rechnung getragen. Es handelt sich dabei um eine Funktionsüberschneidung mit dem Abstraktionsprinzip[27]. Es bleibt allerdings streitig ob die Funktionsüberschneidung das Abstraktionsprinzip entbehrlich macht oder nicht[28]. Es liegt auf der Hand, dass das Abstraktionsprinzip einen umfassenderen Schutz bietet, denn der Anwendungsbereich überschreitet denjenigen des gutgläubigen Erwerbs, was allerdings auch umgekehrt gilt. Der gutgläubige Erwerb findet Anwendung auch bei ursprünglichem Fremdbesitz, wenn also das Abstraktionsprinzip überhaupt nicht in Betracht kommt. Auf der anderen Seite wirkt das Abstraktionsprinzip ungeachtet der Gutgläubigkeit des Nachmanns. Es wird letztlich behauptet, dass im Gegensatz zum Abstraktionsprinzip das Kausalitätsprinzip auch den Anwendungsbereich der Regelung über den gutgläubigen Erwerb einschränken würde, denn in diesem Fall sollte sich die Gutgläubigkeit auf die Gültigkeit der *causa* richten[29]. Das Abstraktionsprinzip bietet ferner auch einen dogmatischen Vorteil. Indem es dem Ersterwerber als Eigentümer anerkennt, erwirbt der Nachmann vom Berechtigten. Dadurch werden die dogmatischen Probleme über die Rechtfertigung des Verlusts des Eigentums des Erstveräußerers durch den gutgläubigen Erwerb vermieden[30].

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[27] MünchKomm/*Oechsler* (aaO, Fn. 2), § 929, Rn. 11, m.w.H.
[28] Vgl. darüber *Grigoleit* (aaO, Fn. 2), S. 384, m.w.H. auf beide Meinungen.
[29] So MünchKomm/*Oechsler* (aaO, Fn. 2), § 929, Rn. 11.
[30] S. dazu *Wieling*, Sachenrecht, Bd. 1, 2. Auf., 2006, § 10 I 7, S. 367 ff.

Aus der Sicht der Interessenjurisprudenz handelt es sich um eine Abwägung zwischen den Interessen des Erstveräußerers und des Nachmanns des Ersterwerbers. Ferner stellt sich die Frage ob über den Privatinteressen hinaus auch ein Interesse der Allgemeinheit zu berücksichtigen ist, das meist unter dem Gesichtspunkt der Sicherheit und Leichtigkeit des Verkehrs in den Vordergrund gebracht wird[31].

Der Erstveräußerer hat ein berechtigtes Interesse sein kausallos verfügte Sache zurückzubekommen. Auf der anderen Seite soll der Nachmann des Ersterwerbers auf die Besitzlage und die Eigentumsvermutung vertrauen dürfen, sonst ginge das Publizitätsprinzip ins Leere. Diese Interessenabwägung findet vornämlich im Rahmen der Diskussion über den gutgläubigen Erwerb statt. Es liegt auf der Hand, dass im Rahmen dieser Diskussion der Erstveräußerer als Eigentümer behandelt wird, also seinerseits der Schutz des Eigentums eine gravierende Rolle spielt. Die Frage nach der Zuordnung der Sache zum Vermögen des Veräußerers oder des Erwerbers stellt allerdings den Kern der Problematik über das Abstraktionsprinzip dar. Es sollte daher keinen Unterschied machen, ob das Eigentum dem Erstveräußerer durch das Abstraktionsprinzip oder den gutgläubigen Erwerb verloren geht.

Zugunsten des Nachmanns des Ersterwerbers bzw. zulasten des Erstveräußerers und ursprünglichen Eigentümers werden das Verschulden des Eigentümers, die Handlung auf eigenes Risiko und der Rechtsschein bzw. die Veranlassung angeführt aber zugleich stark kritisiert[32]. Trotz der ausgeübten Kritik scheint der Rechtscheingedanke dem gutgläubigen Erwerb zunächst einen Rechtfertigungsgrund zu bieten. Denn die Kritik zieht die Funktion der Eigentumsvermutung nicht in Betracht. Es handelt sich nicht um eine rein prozessrechtliche Regelung, die freilich die Beweislast zwischen den Prozessparteien verteilt, sondern vielmehr um eine materiellrechtliche Regelung, deren Funktion die materiellrechtliche Rechtslage und nicht nur die Prozesslage betrifft[33] und daher in Zusammenhang mit dem Publizitätsprinzip die Grundlage für das schutzwürdige Vertrauen des Nachmanns bietet[34].

[31] Vgl. *Baur/Stürner*, Sachenrecht, 17. Auf., § 52 Rn. 8, m.w.H.
[32] S. dazu zusammenfassend *Wieling* (aaO, Fn. 30); *Zweigert*, Rechtsvergleichend-kritisches zum gutgläubigen Mobiliarerwerb, RabelsZ 1958, 1, 12 ff.
[33] Vgl. über die materiellrechtliche Funktion des § 1006 BGB, MünchKomm/*Baldus*, § 1006, Rn. 8 f., 6. Auf., Bd. 6, 2013.
[34] Vgl. *Schwab/Prütting* (aaO, Fn. 24), § 6 Rn. 46.

Da es sich dabei jedoch um eine widerlegbare Vermutung und nicht um eine Rechtsfiktion handelt ist ihr Anwendungsbereich nicht unbeschränkt. Es stellt sich also die Frage nach den Gründen, die den Schutzbereich einschränken. Als erster kommt die Gut- bzw. Bösgläubigkeit des Nachmanns in Betracht. Nach dem Publizitätsprinzip dürfen die Verkehrsteilnehmer auf die durch den Besitz ermittelnde Offenkundigkeit der dinglichen Rechtslage vertrauen. Wenn aber das Vertrauen auf die dingliche Rechtslage nur scheinbar ist, etwa weil der Nachmann die tatsächliche Rechtslage kennt oder zumindest ausreichende Gründe hat, darüber zu zweifeln, liegt kein eigentliches Vertrauen vor und ist der Nachmann daher nicht schutzwürdig. Dies soll unzweifelhaft auch für die Wirksamkeit des Verpflichtungsgeschäfts gelten, wenn das Verfügungsgeschäft kausal ist. Allerdings kann dem Nachmann nicht die Obliegenheit einer umfassenden rechtlichen Prüfung des Verpflichtungsgeschäfts seines Vormannes auferlegt werden. Der Maßstab der Fahrlässigkeit, die die Gutgläubigkeit aufheben würde, soll sich vielmehr an das dem durchschnittlichen Mensch Erkennbare richten.

Als zweite kommt die Ausnahme für gestohlene und abhanden gekommene Sachen. Da der gutgläubige Erwerb als Sozialbindung bzw. als eine zulässige Inhalts- und Schrankenbestimmung des Eigentums und nicht etwa als Enteignung angesehen wird[35], wird ebenfalls eine Abwägung zwischen den Interessen des Rechtsträgers und den Interessen Dritter und der Allgemeinheit gefordert[36] und zwar unter Berücksichtigung des Verhältnismäßigkeitsprinzips[37]. Dies bedeutet, dass die gesetzlichen Eingriffe nicht zu einer übermäßigen Belastung des Eigentümers führen dürfen. In einer modernen Wirtschaft findet die überwiegende Mehrheit der Transaktionen über Sachen zwischen Unternehmen bzw. zwischen Unternehmen und Haushalte statt, wobei die Gefahr der Übergabe einer gestohlenen oder abhanden gekommenen Sache praktisch null ist. Daher wäre in diesen extremen Ausnahmefällen ein Verlust des Eigentums durch den gutgläubigen Erwerb, wenn der ursprüngliche Eigentümer zur Verschaffung der neuen Besitzlage mit eigenem Handeln nicht beigetragen hat, nicht nur eine Belastung des Eigentums. Es wäre vielmehr eine Bevorzugung widerrechtlichen Handelns seitens des neuen Besitzers (Diebstahl bzw. Hehlerei, Verstoß gegen die zivilrechtlichen Vorschriften über die Pflichten des Finders, der im griechischen Recht auch strafbar nach Art. 375 grStGB ist), die nicht durch systemische Gründen zu rechtfertigen wäre, wie im Falle des Fehlen des Eigentums wegen eines rechtsgeschäftlichen Mangels.

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[35] [35] Dazu *Wieling* (aaO, Fn. 30), S. 370; *Zweigert* (aaO, Fn. 32), S. 15, beide m.w.H.
[36] Vgl. Sachs/*Wendt*, Grundgesetz Kommentar, 6. Auf., 2011, Art. 14 Rn. 54.
[37] Dazu *Depenheuer*, in: v. Mangoldt/Klein/Starck, GG I, 6. Auf., 2010, Art. 14 Rn. 226 f.

Auf der anderen Seite gewährt das Abstraktionsprinzip selbst dem bösgläubigen Nachmann, der wissentlich über die tatsächliche Rechtslage mit dem Ersterwerber kontrahiert, die Eigentumsübertragung. Eine Abhilfe wird dabei dem ursprünglichen Eigentümer nur für Ausnahmefälle durch die deliktsrechtliche Regelung über die sittenwidrige vorsätzliche Schädigung zur Verfügung gestellt. Da ein schutzwürdiges Individualinteresse hier fehlt, könnte nur ein Interesse der Allgemeinheit so einen raschen Eingriff rechtfertigen. Die Erfahrung hat allerdings gezeigt, dass die gefürchtete Beeinträchtigung des Güterumsatzes beim Fehlen des Abstraktionsprinzips eher unerheblich ist[38]. Denn einerseits bietet der gutgläubige Erwerb vom Nichtberechtigten ausreichenden Schutz und daher Sicherheit. Andererseits hat sich im Falle der kausalen Immobiliengeschäfte die Prüfung der Verpflichtungsgeschäfte im Transkriptionsamt als sicher und relativ günstig erwiesen. Die dadurch verursachte Erhöhung der Transaktionskosten hat den Immobilienmarkt nicht beeinträchtigt, denn sie sind geringfügig im Vergleich zum Wert des Vertragsgegenstandes.

V. Schlussfolgerungen

Aus den oben angeführten Erwägungen sind folgende Schlussfolgerungen zu ziehen:

1. Die Prüfung des Abstraktionsprinzips kann nur anhand des Vergleichs zwischen dem sachenrechtlichen Herausgabeanspruch und dem bereicherungsrechtlichen Anspruch und unter Berücksichtigung der Funktionen sowohl des gutgläubigen Erwerbs als auch des Besitzes vorgenommen werden.
2. Sowohl die schutzwürdigen Interesse Dritter als auch das allgemeine Interesse an einer Erleichterung des rechtsgeschäftlichen Güterumsatzes werden ausreichend durch die Abhilfemechanismen des gutgläubigen Erwerbs und der Eigentumsvermutungen für den Besitzer geschützt.
3. Bezüglich der Person des Erwerbers sind sowohl der sachenrechtlichen Vindikationsklage als auch den Eigentumsvermutungen für den Besitzer im Vergleich zum Abstraktionsprinzip und unter Berücksichtigung des Verhältnismäßigkeitspostulats den Vorrang zu geben, denn sie sind günstiger für den Erwerber ohne die Lage des Veräußerers erheblich zu beeinträchtigen.
4. Ein verlässliches und funktionierendes Registrierungssystem trägt zur Klarheit der Rechtslage bei und ist vorzuziehen - soweit es möglich ist - und die dadurch verursachten

[38] Vgl. auch *Wieling* (aaO, Fn. 30), S. 369.

Transaktionskosten geringfügig im Vergleich zum Wert des Vertragsgegenstandes sind. Entsprechend soll eine Korrektur des Coase Theorems angenommen werden.

5. Das Abstraktionsprinzip ist für eine marktorientierte, freie Wirtschaft nicht unentbehrlich.
6. Der durch das Abstraktionsprinzip erzielte Schutz übertrifft die Grenze der Zweckmäßigkeit, wie im Falle des Eigentumserwerbs vom bösgläubigen, in Kenntnis der wirklichen Rechtlage Dritten und bedarf daher zumindest in dieser Hinsicht der Korrektur.

Thien Le Nguyen Gia

Tradition of civil law and the core points of the New Civil Code of Vietnam

I. Tradition of civil law in Vietnam

Over its thousand years of history, Vietnamese law in general, and civil law in particular, has expressed the full range of changes to government and society. Vietnamese civil law, like other branches of the legal system, adapted the legal doctrines and legislative methods of other countries, while preserving its traditions and cultural legal customs. Through history, from feudalism to the present time, this part presents a short timeline of the Vietnamese legal system, of which civil law has obviously always been a vital part.

1. Feudalism

1.1 Structure of government

a) Central government

As in other countries in Asia, the Vietnamese government was based on the doctrine of the "central-power feudal mechanism" during the feudal period. Following the Confucianism ideology, the Emperor was the "*Son of God*" (Thiên tử, 天子) and represented the God in managing and deciding all matters in his country, which included the State, the laws, the policy, the people and others. The Emperor therefore had full power over the State, or it could be said that "*the Emperor was also the State*". Because the State was created by the overarching idea of the Emperor, it could not be divided into three branches (legislative, judicial and administrative) like the Western systems. The Emperor exercised his powers over all the citizens with the support of the bureaucrats. The bureaucrats were titled, upgraded and degraded by the Emperor, following really strict and transparent procedures. The central government was usually divided into six ministries: the Ministry of Personnel (Bộ Lại, 吏部), the Ministry of Rites (Bộ Lễ, 礼部), the Ministry of Revenue (Bộ Hộ, 户部), the Ministry of Defence (Bộ Binh, 兵部), the Ministry of Justice (Bộ Hình, 刑部) and the Ministry of Works (Bộ Công, 工部). Other bodies created by the Emperor to manage administration included the Temple of Literature

(Văn Miếu Quốc Tử Giám, 國子監), the Astronomical Service (Khâm Thiên Giám), the Institute of Royal Physician (Thái Y Viện), Censorate (Ngự Sử Đài, 御史台)[1] and the Grand Court of Revision (Đại lý tự, 大理寺). The central government did not have a body that would play the role of the court as in Western countries. Legal disputes were generally solved by the Ministry of Justice, and only certain specific cases could be decided or supervised by the Censorate or the Grand Court of Revision.

b) Local government

Although the names and levels of the local government differed during various dynasties, the country, in general, was divided into provinces, districts and communes. Officials of the local government took responsibility for administrating people, taxes, civil and agricultural lives. They also constituted the "court" to resolve disputes arising between people in their villages. The "court" in this case means the administrative organs of specific provinces or districts. The administrative and judicial functions in the local government overlapped, but the local government had no jurisdiction over legislation, which had to be enacted by the Emperor. Whilst the officials of the provinces and districts were appointed by the Emperor directly, the officials (xã trưởng – main commune chief, phó xã trưởng – deputy commune chief and others) of the communes were elected by the people from the Commune Council (Hội đồng kỳ mục or Hội đồng kỳ dịch)[2] of all villages. The officials were chosen from among the village's people,

[1] The Ministry of Personnel worked in area of appointing, degrading, upgrading the officers; the Ministry of Rites played a roles in ritual ceremony, scarifying and national examination; the Ministry of Defence governed the areas of the army, appointing and demoting military officers; the Ministry of Justice held the judicial and criminal process, but had no supervisory role over the Censorate or the Grand Court of Revision; the Ministry of Works was in charge of governmental construction project, maintenance roads and channels. The Temple of Literature was the first university of Vietnam, which educated children of officers as well as imperial people. The Astronomical Service supplied weather predictions, considered fortuitous days and moments for marriages and other events for the Emperor and his families. The Institute of the Royal Physician cared for the physical and mental treatment for the Emperor's families and high-level officers. The Censorate (also known as the Supreme Prosecutor) could be seen as an effective tool in the Emperor's hand to supervise not only the people, but also all the officers, regardless of their positions. Finally, the Grand Court of Division could be stated as the Court of Cassation, which helps the Emperor to supervise the cases decided in lower instances. See, Thanh Tam Tran, *Study on Nguyen Dynasty's officer*, Pub. Thuan Hoa, 1996, p. 25. *[Trần Thanh Tâm, Tìm hiểu quan chức nhà Nguyễn, Nxb. Thuận Hóa, 1996, tr. 25]*, Hucker, Chalers O, *Governmental Organisation of the Ming Dynasty*, Harvard Journal of Asiatic Studies, Vol 21, 12/1958, pp. 32 – 36.

[2] In 1921, the French governors transferred the Hội đồng kỳ mục (or Hội đồng kỳ dịch) to Hội đồng hương chính (Political Commune Council) in the South of Vietnam, and allowed all men above 25 holding property in the villages to apply for a position. Then, the French Governors demolished all Commune Councils and Political Commune Councils, and created new systems called Hội đồng kỳ hào, officials of those systems are selected among themselves, regardless of ideas of the commune's people. Finally, the Government of Republic of Vietnam replaced Hội đồng kỳ hào by Hội đồng Hương Chánh. See, Cửu

who presented ethical behaviour and had a good reputation for their conduct and performance. If the official committed an illegal or unethical deed, he would be degraded by the Commune Council. The communes constituted basic units of the society and could manage all the everyday activities by themselves. The Emperor allowed the communes to create their internal regulations, called "*commune charter*" (hương ước). The content of these charters differed from village to village, though most of them dealt with matters like land mechanism, encouraging agriculture, protecting the environment, administrative organisation, the responsibility of officials, spiritual culture and beliefs.[3] The Vietnamese had a proverb that went "Phép vua thua lệ làng" ("*the Emperor's laws yield to the village customs*"), which could lead to a situation where the commune would not respect the law of the central government and felt bound only by the charter. Some Emperors understood that this dangerous awareness could harm the national safety, and tried to persuade people to avoid the charters by issuing decrees. However, because of the vital role of the charters, these attempts were futile.

1.2 Specific points of laws

The laws of imperial Vietnam reflected all the peculiarities of Eastern feudalism. Unlike the Western systems, the eastern feudalism law had no clear distinctions between criminal and civil law, as all laws were seen as governing tools of the Emperor. Any breach of criminal or civil law meant that the party committing it did not respect the Emperor and his mechanisms, and this party must have been punished by penal disciplines. The laws, covering both civil and criminal provisions, not only played the role of the strict method of managing society, but also brought happiness and wealth to the entire kingdom. For instance, Article 581 of Quốc Triều Hình Luật of Lê Dynasty (National Dynasty Criminal Code) stated: "*Those who let their buffaloes and/or horses tread on or eat rice plants and/or mulberry of other people will be penalised with 80 canings and compensate for the damage. If they cannot harness their buffaloes and/or horses that go wild, they will be exempt from the canings.*" This is a provision of feudal laws proving that the legislative skills were quite sophisticated. In the event of unintentional fault, the owner cannot harness or control his buffaloes or horses going wild

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Long Giang, Toan Ánh, *Miền Bắc khai nguyên*, Nxb: Đại Nam, Sài Gòn, 1969, tr. 85-95. [Cuu Long Giang and Toan Anh, *Beginning of the North*, Pub. Dai Nam, Saigon, 1969, pp.85-91].

[3] Website: <http://huc.edu.vn/vi/spct/id156/VAN-HOA-HUONG-UOC---TU-TRUYEN-THONG-DEN-HIEN-DAI/>. (accessed on 4th April 2015).

suddenly, he only pays the compensation, if any. On the other hand, if the buffaloes or horses under a man's control eat the rice or plants of other people, then it is his intentional fault and he must be punished by the government for the unethical and illegal behaviour.

In the imperial laws of the Vietnamese Dynasties, there are two codes that attract scholarly attention also outside Vietnam: *Quốc triều hình luật of Lê Dynasty*[4] and *Hoàng Việt Luật Lệ of Nguyễn Dynasty (Viet Emperor Code and Regulation).*[5] They were composed in the two most glorious periods of Vietnamese's imperial period, which witnessed great achievements from governments, societies and production developments. The National Dynasty Criminal Code as well as the Viet Emperor Code and Regulation were composed using modern and effective methods,[6] provisions setting out the same norms were placed and regulated in the same volumes. The aims of the Codes were to protect agricultural relationships, manufacturing and societies. Although the terms of Codes were rooted in Vietnamese feudalism, the provisions on protecting elders, children, women and ethnic groups contained therein deserve to be cherished. Furthermore, these Codes predicted many cumbersome situations that occurred in practice. There are also some transplants from other jurisdictions, in particular China, though the Codes did not copy Chinese Codes provisions in full.[7]

2. French-ruled period

2.1 The structure of government

[4] The National Dynasty Criminal Code has 6 Volumes (13 Chapters) with 722 Articles. Those Chapters are Terms and General Principles (*Danh lệ*), Guards and Prohibitions (Cấm vệ), Violations of Regulations (*Vi chế*), Military Policy (*Quân chính*), Household and Marriage (Hộ hôn), Real Property *(Điền sản*), Criminal Sexual Offenses (*Gian thông*), Theft and Violent Crimes (*Đạo tặc*), Battery and Lawsuits (*Đấu tụng*), Deceit and Forgery (*Trá ngụy*), Miscellaneous Offences (Tạp luật), Arrests and Escapes (*Bộ vong*), Trials and Penal Administration (*Đoán ngục*).

[5] The Viet Emperor Code and Regulation has 22 Volumes and 398 Articles, those Volumes are listed as Table of Laws (*Mục lục về luật*), Definitions of Laws and Regulations (*Tên gọi Lệ, Luật*) consisting of 2 parts, Laws on Officers and Administrations (*Luật về quan lại, chức chế*) consisting of 2 parts, the Law on Civil matter consisting of 7 parts (*Luật dân, việc dân*), the Law on rites (*Luật về lễ tế tự*), the Law on the Military (*Luật về quân sự*), Criminal Law (*Luật hình*), the Law on works (*Luật hình về công việc*), the Comparison on and assimilation of provisions (*So sánh và sách dẫn các điều luật*).

[6] Website: <http://www.hids.hochiminhcity.gov.vn/c/document_library/get_file?uuid=468d7ba4-020d-45b4-b696-265eba595e57&groupId=13025>. (accessed on 4th April 2015).

[7] For instance, the National Dynasty Criminal Code transplanted 261 articles from the Code of the Tang Dynasty, 53 articles from the Ming Dynasty and created new 407 articles. See, Insun Yu, *Luật và xã hội Việt Nam thế kỷ XVII - XVIII*, Nxb. Khoa hoc Xã hội, Hà Nội, 1994, pp. 73-81 [Insun Yu, *Vietnamese Laws and Society in the centuries XVII – XVIII*, Pub. Social Sciences, Hanoi, 1994, pp.73-81].

After the Giap Than Treaty (6 June 1886), the French government formed a protectorate over central and north Vietnam, entitled Tonkin and Annam[8]. The south of Vietnam, called Cochinchina, had been delivered to France as a colony earlier (1862). In 1898, the cities of Hanoi, Haiphong and Danang were transferred to France as "*leased territories*". The French intervention caused many changes in Vietnamese society, which was still at a feudal stage, and then faced with many new circumstance as a "*semi-feudal colony*". Although the country was theoretically under the control of the Vietnamese Emperors, the French had the right to intervene deep into the governmental structure in practice, the jurisdiction had to face this also. To empower tight and effective management, the French Government established many officials in order to represent the French Government to rule the colony. The most powerful position, which had supreme rights over Indochina, was the Indochinese Governor General (Toàn quyền Đông Dương). He was appointed by the French President and was subject to the supervision and direction of the French Minister for Colonies. His powers were very wide and included ruling over Indochina, and organising government administration in political, military, civil, economic, financial, legal and diplomatic matters. He also governed military affairs, supervised and directed the French judicial system in the colony. Under the Indochinese Governor General, there were three senior officials, also appointed by the French President, which had the role of supreme officials in three parts of Vietnam: the Tonkin Resident Superior (Thống sứ Bắc Kỳ), the Resident Superior in Central Vietnam (Khâm sứ Trung Kỳ) and the Governor of Cochinchina (Thống đốc Nam Kỳ).[9] They were under the direction of the Indochinese Governor General, and played the roles in supervising and controlling local Emperor, mandarins of Nguyen Dynasty in all activities such as legislation (e.g. any laws or legal papers of the Emperor or mandarins must be passed by them), administration (e.g. they created a system of "*supportive clerks*" to supervise and rule the Nguyen's officials in their area) and judiciary (e.g. the judgments or decisions of local officers could be appealed or annulled by them). The French officers also created a French-styled court system that gathered three

[8] For the name of Annam, see Julia Alayne Grenier Burlette, *French influence overseas: The rise and fall of colonial Indochina (Master Thesis)*, Louisiana State University and Agricultural and Mechanical College, 2007, p. 8.
[9] Andrew L. Odell and Marlene F. Castillo, Vietnam in a Nutshell: *An Historical, Political and Commercial Overview*, International Law Practicum, Autumn 2008, Vol. 21, No. 2, p. 82.

stages of procedures (including first instance, appeal and cassation) in addition to the imperial judicial mechanism.

2.2 Legislation

Besides creating a "*supportive system*" to control the Nguyen Dynasty and the whole country, the French officials also applied certain French legal codes in Vietnam, such as the Civil Code of 1804, the Commercial Code of 1807, the Code of Criminal Procedures of 1808 and the Criminal Code of 1810. The Indochinese Governor General had the right to enact decrees, which constituted legal binding instruments or laws in all Indochina. The Tonkin Resident Superior, the French Resident in Central Vietnam and the Governor of Cochinchina also provided decrees that were effective in their governed area and had to be approved by the Indochinese Governor General, but if the Emperor wanted to enact new laws, he must have the approval of the Indochinese Governor General or the French Resident in Central Vietnam. During the term of French-rule, French officers enacted three new civil codes to apply independently in three areas of Vietnam. Those are Dân luật giản yếu[10] (*the Code of Civil Legislation in Annam*), Bộ Dân luật Bắc[11] (*the North Civil Code*) and Bộ Dân luật Trung (*the Central Civil Code*).[12] The Code of Civil Legislation in Annam was used throughout Conchichina. In Annam and Tonkin, the North Civil Code and the Central Civil Code were applicable – the Vietnamese version of the French Civil Code, which included just some words and sentences different from the French version. For the Nguyen Emperor's government, its legislation was built on Sắc (royal order), Chỉ (ordinace) and Dụ (decree).[13]

3. Vietnam War period

Vietnam regained its independence from French and created the government of Viet Nam Dan Chu Cong Hoa (*The Democratic Republic of Vietnam*) on 2 September

[10] Enacted on 3 October 1883. Although the name of this code is the Code of Summary of Civil Legislation in Annam, its scope was only in the area of marriage and family law.
[11] Enacted on13 July 1936.
[12] Enacted three Books on 13 July 1936, 8 January and 29 September 1939.
[13] "Sắc" were unimportant administrative documents of a general character, for example on the procedures for the recruitment of officers. "Chỉ" was also administrative documents on such specific issues such as the appointment or dismissal of officers. "Dụ" was a document of legislative or executive character, which was the most popular form of legal documents issued by Emperors. The ideas of legislation with French style occurred in Vietnam this term and has still affected on modern legislation of Vietnam.

1945.[14] In the first years of the new democracy, Vietnamese officers accepted to maintain the old laws except "*those provisions contrary to the independence and the regime of the democratic republic*" (Article 12 of Order 47 on 10 October 1945). With this provision, the legal system related to civil laws maintained its value almost in its entirety. In the nine years of resistance to the French conquering again, the government made efforts to erase the imperial rules and regulation in the civil law area, and created new civil provisions. One of the most prominent achievements in this term is Order 97 on 22 May 1950. In 1957, pursuant to a Directive of People's Supreme Court, no old laws could be applied to disputes between citizens. In 1959, the government enacted a new Law on Marriage and Family. In the south of Vietnam, a government supported by the United States was established in 1955. During its existence (1955-1975), the Republic of Vietnam governed civil laws based on the Central Civil Code and the Code of the Civil Legislation in Annam. This government also enacted a Law on Marriage and Family in 1959. Then, in 1972, this government passed the Civil Code, which virtually repeated the French Civil Code in both structure and regulations.

4. Renovation and current period

To increase production and the economy, and to encourage collecting property in the private sector, the Vietnamese government decided to change the economic form from a planned economy to a market-based economy. So as to govern various property relationships, the government issued many new legal instruments, such as the Law on marriage and family of 1986, the Law on land of 1987, the Law on direct investment in Vietnam of 1987, the Law on nationality of 1988, the Ordinance on economic contracts of 1989, the Ordinance on inheritance of 1990, the Ordinance on civil contracts of 1991, and the Law on land of 1993. In 1995, the Civil Code of Vietnam (CCV 1995) was passed after nearly ten years of deliberating and drafting, which was the first civil code after the war, and was even seen as the largest code of Vietnam so far. The CCV 1995 had much meaning, it showed that the Vietnamese legal system is gradually approaching the legislative methods of modern countries and has learned legal theory from many respective jurisdictions.[15] Although the CCV 1995 was quite simple and applied to civil

[14] This day has been also the Independence Day of Vietnam.

[15] CCV 1995 included 7 parts with 838 articles, those are Part I: General Provisions (Articles 1 - 171), Part II: Property and Ownership (Articles 172 - 284), Part III: Civil Obligation and Civil Contract (Articles 285 - 633), Part IV: Inheritance (Articles 624 - 689), Part V: Transferring Land Use Rights (Articles

life for just 10 years, it has taken the mission of determining the spirits of modern Vietnamese civil laws. To meet the needs of the new civil relations, especially to join the WTO, Vietnam had to harmonise its legal system in general, as well as its civil laws including the CCV 1995. After another 10 years, Vietnam enacted the Civil Code of 2005 (CCV 2005). The CCV 2005 maintained the structure of the CCV 1995 in full, but with fewer provisions than the CCP 1995.[16] Based on the structure of both CCV 1995 and CCV 2005, some comments can be abstracted. Vietnamese modern civil codes have learnt the structure of civil codes of both the German and French equivalents. The civil codes of Vietnam have general principles like the French Civil Code (in Chapter I of Part I). The provisions in Part I of the civil codes cover chapters on individual or natural persons, like both the French and the German Civil Codes. Chapter II on property and ownership looks like the French code, while the provisions in Chapter III on obligations look like those of the German code. The civil codes of Vietnam do not govern provisions on marriage and family, which is totally different from both the German Civil Code (in Book IV) and the French Code (Title V of Book I). In addition, there is a certain part of succession or inheritance in both the Vietnamese Civil Codes (Part IV) and the German Code (Book V), the French Code has just supplied inheritance as a small component of Book III on various ways of acquiring ownership. Lastly, the Vietnamese Civil Codes have three specific parts on transferring land use rights, intellectual property and transfer technology, and civil relations involving foreign elements.

II. Core points of the New Civil Code

After 10 years of existence, the CCV 2005 has partly solved emerging matters in the civil life of Vietnam. It has also contributed to strengthening the whole jurisdiction and almost overcame contradictions in the CCV 1995. However, the CCV 2005 has as many disadvantages of its own and needs to be amended. After the Government, and particularly the Ministry of Justice, finished the first draft of amendment of Civil Code (the Draft), the Standing Committee of the National Assembly enacted Resolution No

690 - 744), Part VI: Intellectual Property and Transfer Technology (Articles 745 - 825), Part VII: Civil Relations Involving Foreign Elements (Articles 826 - 838).

[16] The CCV 2005 has covered 7 parts with 777 articles, those are Parts I: General Provisions (Articles 1 - 162), Part II: Property and Ownership (Articles 162 - 279), Part III: Civil Obligation and Civil Contract (Articles 280 - 630), Part IV: Inheritance (Articles 631 - 687), Part V: Transferring Land Use Rights (Articles 688 - 735), Part VI: Intellectual Property and Transfer Technology (Articles 736 - 757), Part VII: Civil Relations Involving Foreign Elements (Articles 758 - 777).

857/NQ-UBTVQH13 on 25 December 2015 on collecting people's ideas about the first Draft. The aim of this resolution was to promote the owned right and collect ideas of people and to guarantee fixing the Constitution's provisions on the recognition, respect, protection and guarantee of human rights, citizenship rights, contribute to the economy, stabilise the legal environment for the socio-economic conditions for the country and people's life. The Draft has been composed to construct a general law, a foundational law for the legal system, to govern social relations based on the principles of freedom, autonomy, fairness and self-responsibility of parties, as well as to supply better protection for the individual's and legal person's rights in civil transactions.[17] After various arguments and changes to the first Draft, the National Assembly finally enacted a new Civil Code (the Civil Code 2015 - CCV 2015) on 24 November 2015.[18] The CCV 2015 contains 25 Chapters with 689 Articles. The CCV 2015 governs such matters as legal status, legal standards of behaviour of natural and legal persons; rights and obligations on the property and personality of natural and legal persons in transactions established on equality, autonomy, independence of property and responsibility (called civil transactions). The following part of the paper is to describe some core points of the Civil Code 2015 with arguments and critics.

1. Principle of non-refusal to resolve the case

Whenever provisions of law are unclear, they must undergo a process of interpretation. In many countries, the court is constitutionally given the right to interpret the laws in the event of doubts or a lack of appropriate provisions. However, in Vietnam, this right belongs officially to the Standing Committee of National Assembly. This solution was introduced in the Constitution of 1959 and has been maintained until now.[19] The courts, however, have the "unofficial function" to interpret the law because, although the constitution has not given the right to the courts, it is the courts that conduct legal interpretation naturally when adjudicating cases.[20] When resolving disputes, the courts

[17] Website: <http://vov.vn/chinh-tri/to-chuc-lay-y-kien-nhan-dan-ve-du-thao-bo-luat-dan-su-sua-doi-378123.vov> (accessed on 3rd February 2015).
[18] Website: <http://thuvienphapluat.vn/van-ban/Quyen-dan-su/Bo-luat-dan-su-2015-296215.aspx> (accessed on 3rd February 2016).
[19] Article 53 of the Constitution 1959, passed on 31 December 1959, listed 19 rights of the Standing Committee of the National Assembly, including the right to interpret the law. The new Constitution 2013 of Vietnam, in its Article 74, still give this right to the Standing Committee of the National Assembly.
[20] Thi Duyen Thao Pham, *Some Matters on Official Legal Interpretation in Vietnam today*, Pub. National Political Publishing, 2014, 165.

face numerous obstacles when the issues at stake are not expressly governed by legal provisions. In such cases, the courts can find customary laws, or can apply analogous provisions of laws[21] to resolve the problem at stake. However, if the court cannot establish a harmonised custom[22] or find an analogous provision, it means that the dispute is outside the scope of the existing legal provisions, and should be refused at trial. The considerations behind such situations led to accepting a principle that the court must resolve the case, even if there are no laws directly applicable to the dispute. In the process of amending the CCV 2015, this matter received much consideration.

Obviously, the courts have responsibilities to consider and resolve all disputes, even if there are no laws governing the dispute. If the principle of non-refusal to settle the case is not constructed in the new CCV, the code cannot protect the legitimate rights and interests of individuals and legal person on time and perfectly. In addition, Article 102 (3) of the Constitution 2013 provides: "The People's Courts have the duty to safeguard justice, human rights, citizens' rights, the socialist regime, the interests of the State, and the rights and legitimate interests of organisations and individuals."

Opposing ideas might be found in Article 103(2) of the Constitution 2013, which stipulates: "During a trial, the Judges and People's Assessors are independent and obey only the law. Agencies, organisations and individuals are prohibited from interfering in a trial by Judges and People's Assessors." This means that both the judges and the people's assessors must follow the law to resolve the case, so if there is no law to govern the case, the judging panel (the judges and/or the people's assessors) should not accept the case. Evidently, this idea has certain disadvantages, because the principle of the judges and/or the people's assessors obeying the law while judging must be understood that their inner attitudes and autonomies to decide the case are totally independent and impartial, and that they must follow the law. The law here construes of all kinds of law, including written law, customary law, analogous provisions, or even case law and legal doctrine. Therefore, the principle of non-refusal to resolve a case is not contrary to Article 103 (2) of the Constitution 2013, and actually becomes a polestar for the adjudication. There are also others who, while agreeing with the principle of non-refusal, consider that it should be in the Law on the Organisation of People's Courts or

[21] Article 3 of CCV 2005.

[22] Application of customary law has been meaningful in many cases, especially while the judges resolve the disputes amongst ethnical people or people in a traditional area, in which there have been much old conducts and rules.

the Civil Procedure Code rather than the Civil Code, because the Civil Code is the substantive law, while the principle should appear in procedural or administrative law. Although these ideas are partly concise, the principle of the non-refusal is to be found in Article 4 of French Civil Code.[23] Finally, in the CCV 2015, the legislators decided that the judges and/or the people's assessors have full responsibility to conduct a trial to solve the case, and they can apply not only customary laws and make use of legal analogy, but also refer to case laws or even legal doctrines.[24]

2. Subjects of household family and cooperative group

In everyday civil life, a natural person may enter into civil law relations with other natural persons, in particular married relationships or contracts. There are also cases where natural persons gather and create a group or an organisation to attend civil transactions, such as unions, social societies, or commercial companies. However, in organisations, the matter of a civil liability must be considered carefully. The civil liability of a member in a respective organisation cannot be seen as the liability of the entire organisation, and vice versa. However, there are specific circumstances where a natural person should be liable for an organisation's debts, i.e. a partnership. In Vietnam, the theory of partnership is dealt with under both company and civil law. In company law, partnership is regulated in Chapter V of the Law on Enterprises 2005, while in civil law it are enshrined in two special subjects: the household family (hộ gia đình) and the cooperative group (tổ hợp tác). These are, however, not legal persons, because they do not satisfy the requirements of Article 84 of CCV 2005,[25] and not natural persons, because they gather more than one person in a determined organisation.

Article 106 of CCV 2005 provides: "*family households, the members of which have household property used in common economic activities involving agriculture, forestry*

[23] Not only France, but also many other jurisdictions govern the principle of non-refusal to resolve, such as the Philippines and Switzerland, see Nguyen Gia Thien Le, *Basic principles of Civil Codes in the world and experiences for Vietnam*, Legislative Studies Journal, No.13 (269), July 2014, p. 62.

[24] Articles 5, 6 of CCV 2015. In the Report No. 963/BC-UBTVQH13 on Explanation, Acceptance and Amending on Draft of Civil Code of Standing Committee of National Assembly, the legislators confirmed that those provisions harmonise with the international regulations.

[25] An organisation is recognised as a legal entity if it satisfies all of the following conditions: it was legally established; it has a sophisticated organisational structure; it has property independent from other individuals and organisations and it voluntarily performs its obligations by recourse to such property; it participates independently in legal relations in its own name.

and fishery production or production and business activities in a number of other sectors provided by law, are subjects when participating in civil relations in such sectors." This definition is extremely unclear, and leads to many cumbersome matters in practice. The household family concerns the members of a family, such as parents, spouses, children, brothers, and other members. They must all be involved in agriculture, forestry and fishery production, or other businesses as set out in the law. The household family as a subject of civil transactions is totally different from the household term in family law, which is based on blood ties or rearing relations (Article 2 (3) of the Law on Marriage and Family 2014). The CCV 2015 does not govern household families as the subject of a legal transaction because members of family household often change residences (due to demerger, merger, birth, death, marriages), so determining the legal status of a family household's members when determining the rights or obligations is not easy. In addition, it is difficult to determine "multiple ownership property of family household", or the "common interest" of a family household in civil transactions, and it causes difficulties in determining the civil responsibilities of individuals or the household. Although activities related to the properties of a household family must be agreed by all members 15 years old or more, the household performs its deeds through the head of the household. The provisions on households have appeared in both the CCV 1995 and the CCV 2005, but until now, there have been no cases brought to the court where the household has been both the claimant and the defendant.[26]

For a cooperative group, Article 111(1) of CCV 2005 states "*a cooperative group formed on the basis of a cooperation contract certified by the people's committee of the commune, ward or township and entered into by three or more individuals who jointly contribute property and their efforts in order to perform certain tasks, to enjoy benefits mutually and to bear liabilities jointly, is a subject in civil relations.*" If a group of natural persons wants to create a cooperative group, they must have at least three members who contribute property and their efforts to perform certain tasks and to achieve interests. In addition, they must be certified by the people's committee of the commune-level local government. Currently there are 370,000 cooperative groups in Vietnam, but 80% of them are not certified, so only 74,000 are established and operating legally. In

[26] Ministry of Justice – Institute of Legal Science, Academic Comments on Civil Code 2005 (Vol. I), Pub. National Political Publishing, 2008, p. 264.

addition, the recent provisions on cooperative groups cause many difficulties in determining the legal status of the groups and the establishing duties of the group and its members. In practice, a cooperative group, similarly to the household family, has never been both claimant and defendant in a civil case. The legal structures of the household family and cooperative have not been harmonised in a modern civil code, and the aim of the draft was to re-shape them into a normal organisation without legal personality. The name "organisation without legal personality" could be quite long and not very charming, another name, such as "partnership group" (hội hợp danh) would be much more appropriate.

The CCV 2015 provides four articles (Article 101 to 104) to govern all types of organisations without legal personality, including household family, cooperative group and other forms. The legislators argued that all such organisations must exercise their deeds via representatives or members, to perform common legal rights and civil responsibilities. Prescribing household family and cooperative in a same chapter with other types of organisations with non-legal personality could be seen a bright achievement of the new Civil Code. On the one hand, the law still maintains the status of current household families as well as cooperative groups, while admitting that there are only two typical characters that could join in civil transactions (namely natural person and organisations with legal personality).

3. Legal effectiveness of a legal transaction that does not follow the form prescribed by law

Forms of civil transactions are the ways showing the parties' agreements. Through these forms, other people can understand the contents of the parties' transactions.[27] Articles 124 and 122 of the CCV 2005 stipulate that civil transactions can be formed as oral actions, in writing or through specific acts. Civil transactions concluded through electronic means in the form of data messages are deemed to be written civil transactions. Where the law provides that a civil transaction must be in writing, notarised, certified and/or registered, or that an application must be made to obtain permission for such a transaction, then such provisions must be complied with. In addition, the form of a civil

[27] Ministry of Justice – Institute of Legal Science, Academic Comments on Civil Code 2005 (Vol. I), Pub. National Political Publishing, 2008, p. 304.

transaction is a condition for its effectiveness in cases where the law so provides. However, while the law provides that the form of a civil transaction is a condition for its validity, in cases where the parties fails to comply with the form, at the request of one or all parties, a court or an authorised State body may make a decision compelling the parties to implement the formalities as provided for the transaction within a specified period of time. If such formalities are not complied with within that period of time, the transaction will be deemed invalid (Article 134 CCV 2005).

While the rules on the effectiveness of civil transaction are contained in the same code, their content is totally diverse. In the case law, judges have argued that in some specific contracts (leasing over six months, guarantee, mortgage) the form must be in writing or is invalid.[28] In addition, Article 145 CCV 1995 ruled that the parties have a limited term of one year in which to take legal action in the form of a civil transaction (this was removed by the CCV 2005). This mixture of legal provisions creates obstacles for courts to solve matters of declaring a civil transaction avoided due to its lack of form. Article 427 of the CCV 2005 gave parties two years to initialise a legal action requesting a court to resolve a dispute in contract. It is, however, unclear that what the consequences would be if a certain party or parties do not meet the form of the civil transaction after two years. It appears that the judges would, in that case, respect Article 122 rather than Article 134 when resolving the problem of a civil transaction's form. In the CCV 2015, the legislators intended to prevent the judges from annulling civil transactions,[29] so provisions of the CCV 2005 on the effectiveness of a civil transaction without appropriate forms remain in force. Article 129 CCV 2015 states that civil transactions that do not satisfy the conditions of form will be set aside, except for: (1) a civil transaction conducted in the wrong written from, where a party or parties has/have performed at least two-thirds of the obligations – at the request of a party or parties, the court will accept the effectiveness of that transaction; (2) a civil transaction conducted in writing that could not satisfy the requirements of the public authority and a notary, but where a party or parties has/have performed at least two-thirds of the obligations – at the request of a party or parties, the court will accept the effectiveness of that

[28] Website: <http://vibonline.com.vn/Forum/TopicDetail.aspx?TopicID=4311>. (accessed on 3rd February 2015).
[29] In Report No. 963/BC-UBTVQH13 on Explanation, Acceptance and Amending on Draft of Civil Code of Standing Committee of National Assembly.

transactions. In this case, parties do not need to meet the requirements of the public authority and notary.

4. Forms of ownership

The regime of ownership is the basis of a society regime and it shows the trends of the society's development.[30] Every decent regime of ownership contains many forms of ownerships. In Vietnam, three bases of the ownership regime are distinguished: the people's ownership, collective ownership and private ownership. Under these three bases, Article 172 CCV 2005 recognises six forms of ownership,[31] i.e. State ownership; collective ownership; private ownership; common ownership; ownership of political organisations and socio-political organisations, and ownership of socio-political professional organisations, social organisations and socio-professional organisations. The drafters of the CCV 2005 specifically listed these six forms of ownership, because this guarantees the proper exposition of the specific points of Vietnamese civil law.

The first Draft governed three forms of ownership, including the people's ownership, private ownership and common ownership (Articles 213 and 224 to 247). The supporters of this idea expressed that Article 53 of the Constitution officially mentions the type of people's ownership, therefore the CCV should accept this form so as to harmonise it with the Constitution 2013 The mechanism to possess, utilise and decide about the people's ownership has many specific points in comparison to other forms of ownership, as only the State has the ability to handle these rights. According to other opinions, the CCV should only govern two forms of ownership, namely private and common ownership, because the people's ownership construes to be a special part of common ownership, seen as a common-collective ownership based on fiduciary and management by the State. Obviously, the provisions of the Draft are clear and understandable, which sets out that the people's ownership is the ownership of public properties, including land, natural resources and other properties managed and invested by the State; private ownership is the

[30] Ministry of Justice – Institute of Legal Science, Academic Comments on Civil Code 2005 (Vol. I), Pub. National Political Publishing, 2008, p. 402.

[31] CCV 1995 provided for 7 forms of ownerships, consisted of all people ownership; ownership of political, social-political organisations; private ownership; public ownership; ownership of social organization, social-professional organisation; mixed ownership, common ownership.

ownership by an individual or legal person; and common ownership is the ownership of a group of individuals and/or legal entities.

5. Amending a contract when the circumstances change

The CCV 2005 does not give the court a right to amend a contract when the circumstances change. The CCV 2005 shows respect the State has for the freedom and autonomy of subjects in a contractual relationship. However, when parties perform rights and obligations under the contract, the circumstances present when the parties decided to conclude the contact might change. This might lead to the need to amend the contract to balance the rights and obligations of the parties. Article 433 of the first Draft on amending contracts stipulates that, when the circumstances change and the changes seriously affect the rights and interests of a party, the parties can amend the contract. If the parties cannot reach agreement in a reasonable time, the court can, based on its own initiative, terminate the contract; or amend the contract and balance the interests and obligations incurred due to the changes equally and fairly. The court can order a party who refuses to enter into negotiations or who breaks off negotiations without good will, to compensate the damage incurred to the other party.

There is also a contrary view, whereby this provision is not harmonised with the essence of a contract, which is autonomy and freedom. The court and other State organs should not intervene in the contract, or civil transactions in general. The current CCV stipulates that the parties can amend the contract due to the change of situation, and if the situation changes so severely that the parties cannot perform it, then it must be terminated, following an agreement or as prescribed by law. A solution whereby the court can adjudicate damages, force the parties to agree again, or force one party to compensate is apparently unadvisable and contradicts the essence of a contract.

However, according to other opinions, when the court amends the contract due to changed circumstances, it does not violate the autonomy of parties. They refer to Article 15 of the Draft, which deals with the limitations on performing civil rights. According to this rule, the court can amend the contract to balance the interests of parties in a civil relationship, to protect the stability of civil and commercial relations. The draft should allow the court to amend the contract under sophisticated conditions of the CCV. The

ability to amend contracts will also encourage contracts to be performed in practice, and improve the practice of civil transactions.

During the legislative process, the concern regarding to amending a contract while the initial situation changes received much attention.[32] In the end, the legislators decided that Article 420 of the CCV 2015 should maintain the legislative option expressed in the first Draft.[33] This means that the changes in circumstances must meet the following conditions: (1) the changes arise from a situation that occurred after the parties signed the contract; (2) the parties could not have predicted the changes at the time of concluding the contract; (3) the changes are so considerable that if the parties had known about them in advance, they would not have signed the contract, or would sign the contract with other content; (4) a party will incur losses or damage if the parties continue the performance of the contract; (5) the parties have adapted all the essential measures that are in their abilities and in accordance with the essence of the contract, but cannot eliminate or reduce the damage. In the case of changes in the circumstances, the party incurring the damage can suggest negotiating the contract with the other party in a reasonable time. If the parties cannot agree about amending the contracts, a party can file motion the court to: (1) terminate the contract at a reasonable time; (2) amend the contract to balance the legal rights and interest of the parties, the court only amend the contract if terminating it would cause larger damages to the parties in comparison with performing the amended contract.

[32] Website: <http://thoibaonganhang.vn/dieu-chinh-hop-dong-do-hoan-canh-thay-doi-loi-bat-cap-hai-39217.html> (accessed on 3rd February 2016).
[33] In the Report No. 963/BC-UBTVQH13 on Explanation, Acceptance and Amending on Draft of Civil Code of the Standing Committee of the National Assembly.

Celia Martínez-Escribano[1]

The Influence of the DCFR in Spanish Case Law

I. Overview

Although soft law is not binding, it can have at a certain point practical and legal effects. Several functions of soft law have been highlighted in the context of the EU[2]. In some cases, soft law is the expression of the desire to approximate legislations through an informal way, due to the non-binding nature of these rules, and it becomes especially relevant in fields where the EU is not competent to adopt hard law provisions[3]. Soft law respects the autonomy of the States, but at the same time it reveals an aim to approach national regulations and Stats can freely follow the proposals of soft law or not.

Where EU is not competent to adopt hard law provisions, States adopt their own national rules and in this task they may decide to follow the principles proposed in soft law instruments. In this respect, for example, DCFR or PECL are mere proposals of regulation that can be adopted by the States. Nevertheless, DCFR and PECL deal with some topics whose reform at national level is not always easy as it might imply the modification of the core of the Civil Code. In spite of this complex and difficult task, soft law may also lead the evolution of private law from other perspectives[4].

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2 See *Korkea-aho*, EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed? (2013), 58 Sc.St.L. 160,161. The author reflects Senden's categorization: first, soft law can announce hard legislation; second, soft law can be intended to elaborate the terms of legislation (post-law); and finally, soft law can be a real alternative to legislation (para-law). See also *Emane Meyo*, La force normative «invisible» de la soft law para-législative de l'Union européenne en droit privé des contrats (2014), 575 Revue de l'Union Européenne 95, refers to Hachez's clasification : soft law *péri-législative*, soft law *intra-législative*, soft law *para-législative*.

3 The problem of lack of competence regarding private law has been highlighted by *Sánchez Lorenzo*, Vías y límites a la unificación del Derecho privado europeo: «soft law versus hard law» o «Comisión contra Parlamento», in M. R. Díaz Romero et al., Derecho privado europeo: estado actual y perspectivas de futuro, (Madrid: Civitas, 2008) 382. See also *Korkea-aho*, EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed? (2013), 58 Sc.St.L. 165; *Emane Meyo*, La force normative «invisible» de la soft law para-législative de l'Union européenne en droit privé des contrats (2014), 575 Revue de l'Union Européenne 95.

4 *Korkea-aho*, EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed? (2013), 58 Sc.St.L. 175: "we need to add variety to EUsoft law research, which has traditionally focused on, and to a certain extent overstated, the role of EUcourts in giving effect to soft law…soft law constitutes a potentially legitimate vehicle for shaping European integration in the name of flexibility and diversity". Other authors point out the use of soft law rule by individuals in their economic and legal relationships; see *Emane Meyo*, La

One of the most effective ways where soft law can shape modern private law is through case law. As far as general rules can have different meanings, courts may approach the understanding of existing rules to the trends suggested or pointed out by soft law.

According to this idea, the purpose of this study is to show the influence of DCFR in Spanish case law as it may become a way to make possible the evolution of private law in spite of the absence of legal reforms. If a similar evolution would take place in other jurisdictions, an approach among countries would be reached in private law in light of soft law instruments like DCFR.

II. Approach to the function of Spanish courts in Private Law

The Spanish Civil Code was enacted in 1889 and important parts of it have not been modified since. Most of the rules related to contracts and property law are still as they were written when the Civil Code came into force. These are old rules from the 19th century, which in many aspects are far from the social and economic circumstances of current society, and even in some cases the wording is old-fashioned. The need to reform this part of Spanish law has already been pointed out by legal scholars[5]. However, a deep modification in this field has not been carried out yet.

In spite of these old rules, Spanish courts, including the Supreme Court, have to resolve current problems by applying old rules and trying to offer fair solutions adapted to the characteristics of our society. According to article 1.7 Civil Code, "Judges and Courts shall have the inexcusable duty to resolve in any event on the issues brought before them, abiding by system of sources set forth herein"[6].

force normative «invisible» de la soft law para-législative de l'Union européenne en droit privé des contrats (2014), 575 Revue de l'Union Européenne 99; or the use of soft law by attorneys-at-law and judges, see *Busch*, The Principles of European Contract Law before the Supreme Court of the Netherlands- On the Influence of the PECL in Dutch Legal Practice (2008), 3 ZEuP 550.

[5] See, for example, *Morales Moreno*, La modernización del derecho de obligaciones (Madrid: Thomson-Civitas, 2006). Currently, the Civil Law Professors Association in Spain is working on a new Draft of Civil Code, where soft law (basically PECL and DCFR) are in mind. The part related to obligations and contracts have already been published: Propuesta de Código Civil. Libros Quinto y Sexto (2016: Valencia, Tirant Lo Blanch)

[6] The translation of articles of the Civil Code in this study is the one provided by the Ministry of Justice in 2009, Colección Traducciones de Derecho Español, legal translator: S. de Ramón-Laca Clausen.

The "system of sources" is established in article 1.1. Civil Code: "statutes, customs and general legal principles". There is a hierarchical order among them, so the court has to apply first the statutes; in the absence of them, customs; and only if there is not any statute or costume for the case, the court has to resolve by applying general legal principles.

If a controversial issue is regulated by statute, it is not possible that a court resolves differently from what law states. So, when a problem arises for non-performance of a contract, for example, as this matter is ruled in the Civil Code, the court has to resolve by applying its rules. As in many cases they are old-fashioned rules, the solution may not be adapted to current social and economic circumstances. However, the solution of the cases is not mathematical. There is a narrow space where the decision of the court can move from one to another solution through the judicial task of interpretation and application of law. Sometimes, as rules are written in general terms, it is possible to hold different interpretations of the same rule. The court has to choose the suitable interpretation to reach a fair solution of the case.

The Civil Code contains the criteria for the interpretation of law in article 3.1:

"Rules shall be construed according to the proper meaning of their wording and in connection with the context, with their historical and legislative background and with the social reality of the time in which they are to be applied, mainly attending to their spirit and purpose".

The reference to "the social reality of the time in which they are to be applied" is a key instrument to adapt the interpretation of the old rules to current circumstances. As several interpretations of law are possible, the court can choose the most adequate in each case, and that makes possible the evolution of law even when the rules are not modified, as it is the case of general rules of contract law and property law.

On the other hand, the article 3.2 Civil Code states: "Equity must be taken into account in applying rules, but the resolutions of the Courts may only be based exclusively on equity when the law expressly allows this". This is another element revealing that the application

of law is not strict or automatic, but there is a little room where the decision can move from one to another solution based in equity, in order to reach a fair solution.

One of the tools that courts are using to adapt the interpretation of law is soft law. Not only DCFR, but also PECL have been taken into account (also before the publication of DCFR) to introduce a new interpretation of old rules with the intention to adapt them to current society. In this evolution of private law, the role of the Supreme Court must be highlighted. As we will see along this study, in spite of the passivity of the Spanish legislator regarding the up-dating of the Civil Code, private law is evolving and cases start to be resolved under a different understanding of law. In this sense, Roca Trías and Fernández Gregoraci have pointed out that «Spanish Law is not so far from the approach of the 'Modern Law of Obligations'»[7]. As the authors explain, the modernization of private law has been produced by different ways. One of them is the introduction of sectorial rules in private law as a result of the commitments of Spain in the international and European context[8]; and also the efforts of academics to provide proposals of new regulations, basically in contracts and tort law[9].

Specifically, one of the current problems in Spanish private law is that rules with an international or European origin offer in many cases a different approach than the Civil Code to similar problems, and the result is that those fields may differ widely from the general rules of the Civil Code. Then, there is not an internal coherence of the system, as rules governing sectorial fields and general rules are so far among them. An effort is required if we want a logical and coherent regulation of private law.

On the other hand, academics provide proposals of regulation to overcome the problems of the application of old rules to modern problems. Among these proposals, there have been some important efforts at European level with influence in Spain, basically PECL and DCFR. This study is focused in the role of the latter in the evolution of Spanish case law.

In the following pages we will see how private law is being modernised in Spain through case law. The study is mainly based in the judgements of the Spanish Supreme Court, due

[7] *Roca Trías/Fernández Gregoraci*, The Modern Law of Obligations in the Spanish High Court (2009), 1 ERCL 45; similarily, *Vaquer Aloy*, El Soft Law europeo en la jurisprudencia española: doce casos (2013), 1 Ars Iuris Salmanticensis 94.

[8] For example, the Convention on International Sale of Goods, and the incorporation of Directives, mainly in the context of consumer law.

[9] *Roca Trías/Fernández Gregoraci*, The Modern Law of Obligations in the Spanish High Court (2009), 1 ERCL 45-46.

to their specific role, different from the rest of the courts. As article 1.6 Civil Code states, "Case law shall complement the legal system by means of the doctrine repeatedly upheld by the Supreme Court in its interpretation and application of statutes, customs and general legal principles".

According to this rule, it is considered that two judgements of the Supreme Court that hold the same interpretation of law are case law. As case law is not a source of law, it could seem at first sight that its role in the modernisation of law is quite limited. But contrary to this idea, the Supreme Court has taken important decisions provoking a change in the way to resolve certain controversial issues. And what is more, according to article 1.6 Civil Code, case law of the Supreme Court determines which interpretation should prevail and other judges and courts are tied to this jurisprudence. They can only resolve in a different manner if they deeply argue the reasons that base other interpretation of law. It means that the strength of law to set up the reality is not only based in the rules, but also in the way they are interpreted and applied. And here, the Supreme Court has a chance to make changes and is taking it. The use of soft law in Spanish courts is not sporadic, but it is becoming a usual trend[10].

Also judgements of other courts are relevant although they have a different meaning (they are not "case law" in strict sense, i.e., a complement of the legal system although not a source of law). They are important from a practical perspective because they provide the solution for the cases, so the reality becomes drawn according to their solutions as far as there is not a judgement of the Supreme Court annulling it. And references to the DCFR are spreading rapidly in their judgements, so they deserve also some attention in this study.

III. Formal considerations in the development of case law referred to DCFR

Some formal considerations are interesting in this topic. For this reason, before analysing case law and the incidence of DCFR in the development of Spanish private law, it is worth taking a look to certain details from a formal point of view.

[10] The judgement of the Court of Appeal of Madrid, 31 May 2012, states: "es habitual también la invocación en la jurisprudencia de los Principios del Derecho europeo de contratos (Pecl), y su utilización como texto interpretativo de las normas vigentes en esta materia en nuestro Código Civil" (it is also usual in case law the reference to the Principles of European Contract Law (PECL) and its use as a text to interprete the rules of our Civil Code). See *Vaquer Aloy*, El Soft Law europeo en la jurisprudencia española: doce casos (2013), 1 Ars Iuris Salmanticensis 94.

The study is mainly focused on 10 judgements of the Spanish Supreme Court referring the DCFR[11]. The first one was published on 25th Mai 2009 and most of them appeared in the following years (2010-2012). After a short elapse, the tendency seems to have been retaken in 2016.

One interesting issue of these judgements is the judge who reported the cases[12]. In all the cases of the first and most fruitful period (25th May 2009 to 29th February 2012), the reporter was Encarnación Roca Trías, one of the persons who took part in the works that gave rise DCFR. One may think that her knowledge of DCFR due to her involvement in the works has been the reason to introduce it in Spanish case law. This judge moved in 2012 to the Constitutional Court and then it seems that references to DCFR in the Supreme Court judgements stopped. But the trend reappeared in two judgements reported by two other judges of the Supreme Court in 2016.

On the other hand, Spanish courts of appeal have received well DCFR in their judgements[13]. Nowadays there are 115 judgements that mention DCFR. It is clear that the references of the Supreme Court have been the reason to introduce it in case law of courts of appeal because the first judgements reproduced the wording of former Supreme Court judgements, and

[11] Apparently there are 14, but there is one which has been published with two different dates and with two different references (29th February 2012, 99/2012; 1st March 2012, 103/2012). In the STS 3rd September 2010 the reference to DCFR is not made to base the decision, but to explain that the behavior of one of the parties was valid, when he offered to the other party the reduction of the price, according to article III.3:601 DCFR. Here the reference to DCFR is not a part of the judicial argument but a quotation in the delimitation of the facts. And in the judgment of 15th June 2015, 333/2015 the reference to the DCFR is not made by the Supreme Court, but it is reflected in the judgment when it reproduces the wording of the court of appeal. For these reasons it appears in the data base that there are 13, while actually there are 11. However, one of them, the judgment of 6th May 2011, 306/2011, refers to a case of unjustified enrichment, but it mentions article II.-7:102 DCFR, related to "Initial impossibility or lack of right or authority to dispose". It is clear that it is a mistake, as unjustified enrichment is dealt in Book VII DCFR. However, the mistake makes difficult to guess what the Supreme Court meant, and for this reason the study of this judgment is excluded.

[12] Similarly, in Swedish law the influence of the DCFR and other rules of soft law in case law has been attached to the reporter of the judgments, as some judges (mainly *Håstad*, who formed part of the group of academics that authored the DCFR) seem to be particularly keen on the development of national private law in a European context. See *Monukka*, Transnational Contract Law Principles in Swedish Case Law – PICC, PECL and DCFR (2012), 57 Sc.St.L. 229-252.
And also the influence of the PECL in Dutch case law has been due to the fact that one of the judges (Hartkamp) was a member of the Lando Commission. See *Busch*, The Principles of European Contract Law before the Supreme Court of the Netherlands- On the Influence of the PECL in Dutch Legal Practice (2008), 3 ZEuP 552.

[13] The same happened with PECL: it was received first by the Supreme Court and rapidly spread among courts of appeal. See *Perales Viscasillas*, Aplicación jurisprudencial de los principios del derecho contractual europeo, in M. R. Díaz Romero et al., *Derecho privado europeo: estado actual y perspectivas de futuro*, (Madrid: Civitas, 2008) 463.

progressively it seems that courts of appeal started to introduce their own assessments concerning DCFR when they resolved the cases.

Let us see now the influence of DCFR in the Spanish Supreme Court case law, and how the references to DCFR have been spread in the appeal judgements.

IV. The DCFR and the Supreme Court Judgments

In the following pages I will show the new interpretation of some old rules of the Civil Code in light of DCFR by the Supreme Court and how it has been followed by courts of appeal. Basically, the judgments of the Supreme Court dealing with DCFR are focused on five topics. However, courts of appeal started to make their own references to DCFR and I will briefly expose some of them at a later time.

1. Topics influenced by DCFR

1.1 Good faith and fair dealing

STS 3rd December 2010, 769/2010, reporter: E. Roca Trías

A company failed in the repayment of a loan to the BBVA bank. The bank claimed but the procedure was annulled in 1994. In 2000, in a different procedure, BBVA was condemned to indemnify that company. In 2nd May 2005, the company claimed the execution of the condemnatory resolution. In 21st September 2005, BBVA claimed the restitution of the amount that the company had to pay since 1993 plus interests. The company argued that this claim was contrary to art. 7 Civil Code: "Rights must be exercised in accordance with the requirements of good faith".

The key issue in this case is the interpretation of article 7 Civil Code, which is a general rule not focused in contract law, but in the exercise of any right in Private law. Besides, the wording of the article is really vague as the rule does not establish what the "requirements" of good faith are. It has been difficult then, since the enactment of the Civil Code, to construct this rule and determine case by case whether the right had been exercised in accordance with the requirements of good faith. The doctrine developing this article has adopted the idea of *Verwirkung* of German Law. So, it has been accepted that according to article 7 Civil Code, a right cannot be exercised when the holder has not exercised it for a long time, and besides, his behaviour objectively revealed to the other party that the right

was not going to be exercised. That is not exactly what the wording of the article states, as it is just a general idea. Such understanding has been endorsed by PECL and UNIDROIT principles, and some Supreme Court decisions referred to them to base such interpretation of article 7 Civil Code[14]. More recently, this interpretation has been reinforced by article I.-1:103 (2) DCFR: Good faith and fair dealing:

"It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party's prior statements or conduct when the other party has reasonably relied on them to that other party's detriment."

The judgement specifically referred to article I.-1:103 (2) DCFR to construe article 7 Civil Code and, in this case, it was considered that creditor's attitude was not contrary to good faith.

STS 12th December 2011, 872/2011, reporter: E. Roca Trías

In 1985, a debtor failed in the repayment of a mortgage loan to a bank. The parties agreed the payment with the mortgaged house. In 2003, the bank claimed again for the total repayment of the debt and the debtor said that this behaviour was contrary to good faith.

The Supreme Court mentioned article I.-1:103 (2) DCFR: Good faith and fair dealing, and remembered also the doctrine of article 7 Civil Code with the traditional requirement of a lapse of time without exercising a right, and that this attitude creates a legitimate confidence in the other party that the right was not going to be exercised. It did not matter whether behaviour's purpose was to damage; it was enough to act contrary to the objective rules of good faith.

In this case, after analysing the circumstances, the court considered that the behaviour of the bank was contrary to good faith.

The doctrine where good faith is construed according to DCFR has found a very important echo among courts of appeal. Currently, there are 65 judgments of appeal referring to article

[14] *Roca Trías/Fernández Gregoraci*, The Modern Law of Obligations in the Spanish High Court (2009), 1 ERCL 58 refer to the judgments of 4 July 2006, 11 July 2011. See also *Vaquer Aloy*, El Soft Law europeo en la jurisprudencia española: doce casos (2013), 1 Ars Iuris Salmanticensis 96, 97.

I.-1:103 (2) DCFR, with explicit reference in most of the cases to these two judgments of the Supreme Court, which have been the origin of this general understanding of good faith. So, nowadays, the criterion or paradigm to determine whether an attitude or behaviour is according to the requirements of good faith is DCFR. The general terms of article 7 Civil Code are being construed, actually, with the same meaning as before the DCFR. But while former arguments for this interpretation were comparative law (*Verwirkung* of German law), later references to soft law became relevant. And now, as the DCFR endorses the traditional understanding of the rule, it is now invoked to justify or even legitimate this interpretation of article 7 Civil Code that is more detailed than the generic wording of the rule.

1.2 Favor negotii

STS 25th May 2009, 366/2009, reporter: E. Roca Trías

In this case, there was a contract of alimony between two parents and their four sons and daughters. According to it, the latter would have to take care of their parents until death and they would receive some goods in exchange. This contract is not ruled in Spanish law and problems arose when the parents died, because the mother's will was not coherent with the contract of alimony. The problem was to determine if the contract was void. The court held that the contract had to be respected and based this decision in article 1284 Civil Code (preference for interpretation of contract which gives terms effect); article 5:106 PECL and article II.-8:106 DCFR: preference for interpretation which gives terms effect.

All these rules contain the principle of *favor negotii*. Here the reference to DCFR is just to endorse a solution already contained in Spanish contract law, repeated in PECL and in DCFR.

1.3 Termination by fundamental non-performance

STS 22nd June 2010, 380/2010, reporter: E. Roca Trías

A "Contract of services of added value" was signed between a telephone company (Telefónica) and Coprinus, a company that predicted the future. By calling to a special number, customers' future would be predicted. But Coprinus was not using the prefix required for the special charge to the customers. When Telefónica realized this, it stopped paying Coprinus and claimed the termination of the contract. The effects of the non-performance

were termination of contract and restitution of benefits, based in the doctrine of article 1124 Civil Code and article III.- 3:509 and 3:510 DCFR.
According to this rule, the Supreme Court argued that all the amounts paid by Telefónica to Coprinus had to be returned, as Coprinus had never performed his obligations but Telefónica did it for a period of time.

A similar solution could have been achieved by applying the doctrine created in the interpretation of article 1124 Civil Code in light of other instruments of soft law, basically PECL[15]. Nevertheless, in this case DCFR was an additional argument to reinforce this understanding of the general terms contained in article 1124 Civil Code.

STS 29th February 2012, 99/2012, reporter: E. Roca Trías[16]

The problem arose in the context of a sale contract of touristic apartments. After the delivery of the apartments and payment of the price, the municipality denied the license for touristic activity in these apartments, so the buyers decided to terminate the contract although ownership had already been transferred to them. The buyers claimed for restitution of the price and indemnity for damages.

The Supreme Court stated that the termination of the contract provoked the termination of the obligations and restitution, with possible indemnity for damages. The Supreme Court referred to art. III.-3:510 to reinforce a decision that would have been reached also with the general doctrine of articles 1122 to 1124 Civil Code.

STS 25th May 2016, 438/2016, reporter: F. Pantaleón Prieto

It is a case of termination of contract because one of the parties did not perform his contractual obligation to deliver the goods and his attitude revealed that he had not the intention of fulfilment. The judgement referred to article 8:103 PECL and article III.-3:502 (2)(b): Termination for fundamental non-performance:

[15] The interpretation of article 1124 CC in light of the PECL has been highlighted by several authors, like *Perales Viscasillas*, Aplicación jurisprudencial de los principios del derecho contractual europeo, in M. R. Díaz Romero et al., *Derecho privado europeo: estado actual y perspectivas de futuro*, (Madrid: Civitas, 2008) 494.
[16] The same judgement was published with different date: 1st March 2012, and number: 103/2012.

"it is intentional or reckless and gives the creditor reason to believe that the debtor's future performance cannot be relied on".

Under the traditional understanding in Spanish contract law, debtor's fault was an essential element for fundamental non-performance, but the difficulty to provide evidence of fault was mitigated with some presumptions. Case law evolved to a modern understanding where debtor's fault is not yet an essential issue in cases of termination of the contract for fundamental non-performance. In this change, PECL and UNIDROIT principles were important arguments before DCFR[17], and now, it is also another reason to endorse current doctrine of contractual non-performance in Spanish law. So, the reference to DCFR is just to reinforce what already exists. As the judgment added, DCFR equals intentional and reckless non-performance, according also to the case law of the Supreme Court in current times, where the intention in the non-performance does not have specific consideration.

In all these cases of termination of contract for fundamental non-performance, DCFR is an additional argument to support the current understanding of this topic in Spanish case law. A change in the interpretation of the rules took place before DCFR, in light of other instruments of soft law. As now DCFR offers a similar perspective of this issue, it is quoted in case law, probably to show that also the last proposals in soft law offer this solution. This serves to endorse the interpretation of law made by the Supreme Court and, perhaps, give authority to this understanding of national rules, according to the European context.

1.4 Solidary obligations

STS 20th January 2010, 870/2009, reporter: Encarna Roca Trías

In the context of a package contract there was a bus accident and the travellers claimed the damages to the organizer and the two retailers. The issue was whether the obligation to indemnify damages was solidary or divided.

The Directive 90/314/EEC on package travel, package holidays and package tours does not specifically refer to this matter, leaving the Member States to freely decide about it. The

[17] See *Roca Trías/Fernández Gregoraci*, The Modern Law of Obligations in the Spanish High Court (2009), 1 ERCL 48-50; *Vaquer Aloy*, El Soft Law europeo en la jurisprudencia española: doce casos (2013), 1 Ars Iuris Salmanticensis 100-105; *Vendrell Cervantes*, The Application of the Principles of European Contract Law by Spanish Courts (2008), 3 ZEuP 535.

judgment examines the regulation in several Member States regarding the liability and concludes that there are big differences among them, due to the fact that the Directive can be interpreted in different ways. But the Spanish regulation of package contract did not specify this issue. Until the judgment of the Supreme Court, courts of appeal had deal with this issue but there was not a clear trend. Contrary to this, courts of appeal were divided, and while many of them had concluded that liability was solidary, there were also important judgments of appeal dividing the obligation among the organizer and retailers according to their specific scope of activity.

As the regulation and the interpretation of the rules of package contracts were not clear, it could be held that general rules of contracts and obligations should be applied. According to article 1137 Civil Code, the general rule in the law of obligations is that if nothing is stated in the contract, the default rule is that obligations are divided.

But far from this understanding, the Supreme Court held in this case that solidary should prevail. It is not the first case where the Supreme Court concludes that liability is solidary, in spite of the default rule of divided obligations. But as the Court recognizes in this judgment, some of the arguments alleged in other decisions cannot be dealt as general criteria, as they are based on circumstances that do not always concur. In this case, the Supreme Court adds new arguments in order to strengthen the idea of solidary obligations. The first of them is that consumer law recognizes as a general rule solidary when several persons are liable against a consumer for damages. And in order to reinforce this trend, the Supreme Court points out that also DCFR establishes solidary as the general rule. Specifically, the Court mentions article III.4:103 DCFR: When different types of obligation arise (2):

"If the terms do not determine the question, the liability of two or more debtors to perform the same obligation is solidary. Liability is solidary in particular where two or more persons are liable for the same damage".

Here the Supreme Court did not apply article 1137 Civil Code, i.e., the default rule of divided obligations. The Supreme Court analysed the context of the package contracts to found arguments in favour of solidary, but also referred to the DCFR to justify in this case the abandonment of the 19th century rules and that solidary prevails.

There is no doubt that this understanding protects the consumer, as it is easier to claim: the victim can join the same claim to the retailers and the organizer regardless of their specific contractual duties. And it is more beneficial for the victim because the risk of insolvency of one of the debtors is not borne by him, but by the other debtors[18].

The importance of this judgment is focused on the fact that the doubts about the liability in the context of package contracts disappear in Spanish law, in spite of the doubts created by the lack of clarity of the statutes in this field[19]. It must be noticed, however, that the substitution of divided by solidary obligations is a process with a wider background. Also in other fields different from package contracts solidary has prevailed in case law in spite of article 1137 CC[20]. Little by little, the abandonment of divided obligations as the default rule in spite of article 1137 Civil Code has been spread. In this sense, the judgment of the Supreme Court of 31 October 2005, 802/2005 is especially relevant. In that case, it was stated that article 1137 Civil Code was too rigid for the context of commercial relations, where it is required to offer guarantees to the creditor. Here, the Supreme Court changed the rule of divided obligations to solidary based in PECL[21]. And in the judgment of 20th January 2010, the Court extended the suitability of solidary to the context of consumer relations based in DCFR.

STS 8th October 2010, 597/2010, reporter: E. Roca Trías

[18] In this respect, see *Gómez Ligüerre*, Liability for damages caused to consumer of travel packages in Spain (2001), 2 ZEuP 421,422.

[19] Also *Gómez Ligüerre*, Liability for damages caused to consumer of travel packages in Spain (2001), 2 ZEuP 427.

[20] For example, the fact that divided obligations do not allow to achieving fair results lead to the Supreme Court to leave aside the default rule of article 1137 Civil Code in the field of liability for building defects in the late 60s of the last century, and the rule was not recognized by statute until 1999 with the Edification Regulation Act. While the STS 19th February 1959 (RJ 1959\486) clearly justified that obligations were divided, in the STS 5th May 1961 (RJ 1961\2310) the court changed to solidary, starting a trend that were strongly consolidated until the legal reform.

[21] "La rígida norma del artículo 1137 Código civil ha sido objeto de una interpretación correctora por parte de este Tribunal y muy especialmente en relación con las obligaciones mercantiles en las que, debido a la necesidad de ofrecer garantías a los acreedores, se ha llegado a proclamar el carácter solidario de las mismas, sobre todo cuando se busca y se produce un resultado conjunto (sentencias de 27 de julio de 2000 y 19 de abril de 2001). Ello está de acuerdo con lo que la sentencia de 27 de octubre de 1999 denomina «el acervo comercial de la Unión Europea», en la que el artículo 10: 102 de los Principios del Derecho europeo de contratos recoge el principio de la solidaridad cuando hay varios deudores obligados, principio tradicionalmente aplicado por este Tribunal cuando se trata de obligaciones mercantiles."
See also *Roca Trías/Fernández Gregoraci*, The Modern Law of Obligations in the Spanish High Court (2009), 1 ERCL 57; *Vaquer Aloy*, El Soft Law europeo en la jurisprudencia española: doce casos (2013), 1 Ars Iuris Salmanticensis 107, 108; *Vendrell Cervantes*, The Application of the Principles of European Contract Law by Spanish Courts (2008), 3 ZEuP 544.

There was a sale contract of some climate control devices that did not work properly. The issue was to determine the liability of the seller and the producer of the devices. Similarly to the case of the package travel, the Court stated that the liability was solidary in spite of the general rule of art. 1137 Civil Code, and based in art. III.- 4:103 DCFR. This solution protects in a better way the position of the creditor.

The important issue of this judgment is that the court consolidates the criteria argued before, so according to article 1.6 Civil Code, we could conclude that there is case law in strict sense ("doctrine repeatedly upheld by the Supreme Court"). Until this judgment, there were two cases where soft law served to justify solidary obligations: 1) a case in the context of commercial relations, and based in the PECL (STS 31st October 2015), and 2) a case in the context of consumer law, and based in the DCFR (STS 20th January 2010. But cases were different as they moved in different contexts and they were not connected enough to understand that they were based in the same doctrine. Besides, there were other judgments before DCFR and PECL where the Supreme Court considered that solidary was justified in the specific case in spite of the article 1137 Civil Code and under different arguments. The interesting thing in the STS 8th October 2010 is that the court quotes several judgements since 1981 that seemed to be isolated cases where the specific circumstances of the case justified an exception to the general rule of article 1137 Civil Code, and upheld a doctrine in favour of solidary when the obligations of the debtors where connected and supports this case law in the authority of a text of soft law: DCFR. The Supreme Court clearly recognizes here, with the endorsement of the DCFR, a criterion of solidary not contained specifically in the Civil Code. Now we can hold that when the obligations are connected, the general rule is solidary in spite of article 1137 Civil Code.

We may conclude that soft law, and in the last times basically the DCFR, are supporting this understanding of liability in spite of the wording of article 1137 Civil Code. This is a clear case of evolution of private law through case law in order to supply the passivity of the legislator, who has not yet modified important parts of the Civil Code from the 19th century. In the wording to Gómez Ligüerre: "this tendency reflects an open-minded approach of the Spanish Supreme Court to the unification of private law in Europe. An Example that should be followed" [22].

[22] *Gómez Ligüerre*, Liability for damages caused to consumer of travel packages in Spain (2001), 2 ZEuP 431.

This trend of spreading solidary obligations has been well received by courts of appeal. From the STS 8th October 2010, 597/2010 three judgments of courts of appeal have expressly recognized solidary basing the decision in case law and DCFR[23].

In short, the repetition of a doctrine by the Supreme Court in favour of solidary and the reception of this case law by courts of appeal might lead to conclude that in general terms there is a change from divided to solidary obligations as default rule.

1.5 Revocation of donation

STS 13th May 2010, 261/2010, reporter: E. Roca Trías

The parents made a donation to their daughter. Later, in the context of a matrimonial crisis, the father died and the mother was accused of his death. In the criminal procedure the daughter accused the mother of murder. The mother then claimed the revocation of the donation due to gross ingratitude.

Article 648.2º Civil Code considers a cause of revocation that the donee attributes to the donor a crime, even if he proves it, unless it is a crime against the donee, his spouse or children.

Traditionally, the problem has been the interpretation of the wording "attributes a crime", because it was not clear whether it was enough to say that the donor is the author of the crime, or the impeachment is required, or the criminal prosecution of the crime by the donee. Actually, the main problem is that Spanish regulation is very casuistic at this point, instead of offering a general idea of the causes of revocation.

The Supreme Court states that the rule is different from the trends of European regulations and refers to art. IV. H.- 4:201: revocation for gross ingratitude:

"A contract for the donation of goods may be revoked if the donee is guilty of gross ingratitude by intentionally committing a serious wrong against the donor"

[23] SAP Málaga, section 4, 14th April 2011, 198/2011; SAP Illes Balears, section 4, 342/2012, 17th July 2012; SAP Tarragona, section 1, 3rd March 2016, 103/2016.

DCFR requires to intentionally cause "serious wrong". The comments to the DCFR state: "serious wrong is deliberately left undefined and significant discretion is left to the courts".[24]

According to the regulation of DCFR, the Supreme Court decided that the interpretation of article 648.2 Civil Code had to be strict. In this case the criminal court stated that the daughter was not legitimated to prosecute the crime, and the Supreme Court said, based on a strict interpretation, that there was not gross ingratitude. The behaviour of the daughter from a procedural point of view did not matter, but the existence of a serious wrong. The Supreme Court did not deepen on the interpretation of "attribute a crime", as it had traditionally happened, but in the idea of serious wrong. The court left aside the casuistic approach of the Civil Code and adopted the position fixed in DCFR, where there is just a general idea and the court decides case by case whether there is a wrong serious enough to justify the revocation of the donation.[25]

The court argued that, as the daughter was not legitimated, no damage could be caused, so there was not a serious wrong. What the court did, according to the judicial discretion referred in the comments of DCFR, is to provide an interpretation of article 648.2 Civil Code where only those attitudes that really mean a serious wrong are included in the rule. In this case, then, DCFR is used to correct an old regulation and overcome the difficulties in the interpretation of the rule.

1.6 Grounds of invalidity of contracts

STS 12th February 2016, 59/2016, reporter: F.J. Orduña Moreno

In a case of inheritance, one of the heirs claimed the nullity of the contract of sharing-out because according to it this heir would receive a house which was inside a piece of land, and according to urban rules the house and the land could not be separated.

The Supreme Court resolved by applying the principle *favor partitionis*, and based the decision also in article II.-7:101 (grounds of invalidity of contracts) to state that the sharing-out was valid.

[24] Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) full edition, vol. 3, ed. C. von Bar and E. Clive (Munich: Sellier 2009) 2867.
[25] Similarly, *Vaquer Aloy*, El Soft Law europeo en la jurisprudencia española: doce casos (2013), 1 Ars Iuris Salmanticensis 110, 111.

It is an interesting case because the same solution would have been reached by merely applying the principle of *favor partitionis*. But, in addition the Supreme Court includes a reference to DCFR in a specific point where soft law proposes a regulation different from the current regulation of the Civil Code. It might be, perhaps, the intention to highlight that this understanding of the grounds of invalidity of contracts should prevail over the traditional position of Spanish contract law.

2. The function of DCFR in Spanish case law

After reading the judgments of the Supreme Court referring to DCFR, we conclude that such references are made basically with two different purposes:

a.- There are cases where DCFR is an additional argument to reinforce the current understanding of law. That is the case of articles I.-1:103 (2): Good faith and fair dealing; II.-8:106: Preference for interpretation which gives terms effects; III.-3:509 and 3:5010: Effects of termination. In these cases, DCFR serves to strengthen an interpretation of rules started with PECL. Here, the Supreme Court gives continuity to the trend started with PECL of supporting the decision in soft law in order to endorse a specific interpretation of law when terms are general and different interpretations of the same rule can be upheld. Probably in these cases, the solution would have been the same without DCFR, but it is mentioned to reinforce such understanding of law.

b.- There are other cases where DCFR is an argument to support a different way to resolve when the old-fashioned regulation is not adequate. That is the case of article IV.H.-4:201: Ingratitude of the donee; and article III.-4:103: When different types of obligations arise (2) solidary. Also, the reference to article II.-7:101: grounds of invalidity of contracts may be addressed to point out the suitability of a different understanding of this issue in Spanish law. However, it must be noticed that in this case the solution would have been the same based on the principle of *favor partitionis*. The reference to article II.-7:101 might be introduced to boost a change in this field.

Spanish authors have pointed out how DCFR is being used as a legal argument to justify case law of the Supreme Court, and especially to endorse current interpretation of law[26]. But, the legitimacy of the second group of judgements could be discussed. As said before, case law is created through the criteria used by the Supreme Court in the interpretation and application of statutes, costumes and general legal principles. At first sight, it might be difficult to understand that an instrument of soft law like DCFR is able to justify a change in case law that may contradict the wording of the Civil Code. It is easy to accept the utility of soft law in the interpretation of general rules or to fill a gap in the law, but it could be more difficult to admit the possibility that soft law might be used to modify a statute[27]. Probably it is not possible that case law clearly states that a specific article of the Civil Code has to be substituted in general terms by soft law when both rule the same issue in a different way. But as said before, one of the criteria for interpretation of law is the social reality of the time in which the rule has to be applied (article 3.1 Civil Code) [28], and the application of law can be modulated at a certain point by equity (article 3.2 Civil Code). I think that these two elements of the judicial activity are crucial to assess the judgments where DCFR is used to resolve in a different way than what could trigger according to the wording of certain articles of the Civil Code. If the Supreme Court (or other Spanish court) provides enough arguments showing that DCFR contains a solution for the case that fits better than the traditional rules of the 19th century Civil Code, it could be legitimated to offer a solution based in DCFR if it shows that if it is coherent with the legal context of the case.[29] What is more, probably it could be held that it is a duty of the courts to search a fair solution with the help of an interpretation of law according to the social reality and an application of rules in equity. And in order to develop these tasks, soft law may be a guide or a light that could inspire the solution. For example, in the case of solidary obligations, the solution is not only based in DCFR, but the

[26] In this respect, see *Vaquer Aloy*, El Soft Law europeo en la jurisprudencia española: doce casos (2013), 1 Ars Iuris Salmanticensis 111-113.

[27] *Perales Viscasillas*, Aplicación jurisprudencial de los principios del derecho contractual europeo, in M. R. Díaz Romero et al., Derecho privado europeo: estado actual y perspectivas de futuro, (Madrid: Civitas, 2008), 476.

[28] *Roca Trías/Fernández Gregoraci*, The Modern Law of Obligations in the Spanish High Court (2009), 1 ERCL 59. According to them, the legal basis to use soft law in the interpretation of the Civil Code may be found in article 3.1 and the social reality. The authors make with express mention to the judgment of 31st October 2005, where an explicit reference to the interpretation of the rule according to the social reality of the moment at which it applies is made to justify the reference to PECL. Same argument is valid nowadays for DCFR.

[29] The use of comparative law to resolve a case has been highlighted by *Smits*, Comparative Law and its Influence on National Legal Systems, in M. Reimann and R. Zimmermann (eds.), The Oxford Handbook of Comparative Law (2008: Oxford, Oxford University Press). About DCFR in case law, *Vaquer Aloy*, El Soft Law europeo en la jurisprudencia española: doce casos (2013), 1 Ars Iuris Salmanticensis 111-112.

Supreme Court shows that there are other elements revealing the suitability of this solution by providing additional arguments with reference to other rules of national law. But it is important that the judgment is well founded, so any shadow of arbitrariness is dissipated.

V. DCFR and Courts of Appeal

Nowadays there are 115 judgements of appeal referring to DCFR.[30] The apparition of DCFR in the judgements of the courts of appeal has been motivated by the references to it in the Supreme Court judgements. The first cases only mentioned DCFR when they reproduced the words of the Supreme Court in the sentences mentioned above. Most of them refer to art. I.-1:103 DCFR (62 judgements), so they just use DCFR to reinforce the normal solution of Spanish Law. But, little by little, courts of appeal started to introduce their own references to DCFR, even in topics where the Supreme Court had not mentioned it yet. This shows how this instrument is becoming widely used in the interpretation and application of private law by Spanish courts. Let us see a few examples of judgments of courts of appeal making their own references to the DCFR.

1º.- *SAP Las Palmas, section 4, 216/2013, 10th June*

There was a swap contract and the court had to decide whether there is a case of fraud when one of the parties hides some information with fraudulent intention. The solution was based in Spanish Stock Market Act that generally recognizes a general duty of information in this sector, and article II.-7:205: Fraud (2) DCFR, which is more accurate in this field and states:

"A misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false and is intended to induce the recipient to make a mistake. A non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake".

The consideration of fraud when one of the parties intends to induce the other party to make a mistake may be latent in the rules, but it is not explicit in the rules. However, DCFR is clear at this point and it seems that the court refers to it to give authority to such interpretation of law. In this case, the court induces a rule from a general duty of information connected to

[30] The time of writing this paper is September 2016.

what soft law specifically states about fraud. The combination of national rules with soft law leads to hold that there was a case of fraud.

2º.- *SAP Pontevedra, section 1, 451/2013, 4th December*

There was a lease contract where the term had not been specified. The problem was to determine the duration of the contract in this case. The judgment referred to article IV.B.2:102 DCFR "an indefinite lease period ends at the time specified in a notice of termination given by either party". Nevertheless, the court resolved using a different criterion: art. 1128 Civil Code, which implied that the court had to search the intention of the parties regarding the duration of the contract. In this case, the court concluded that the contract existed as far as the tenant wanted to develop his professional activity in that place.

Although the solution was not based in DCFR, the judgement reflects the knowledge of the text by Spanish judges and its consideration when they have to resolve a case. But perhaps the court did not feel legitimated enough to resolve according to soft law when the Civil Code contains different criteria. This kind of decisions are more typical of the Supreme Court, with stronger authority in the field of interpretation and application of law.

3º.- *SAP Granada, section 3, 143/2011, 31st March*

There was a lease contract of two vehicles, but the lessee stopped in the payment of the rent, so the lessor wanted the termination of the contract before the time agreed in the contract.

In Spanish law it is accepted that in case of non-performance of the contract, the other party has a right of termination, so non-judicial termination of the contract is possible. This understanding has already been accepted and consolidated before DCFR, based on other texts of soft law[31]. In this case, the court stated also that modern contract law specifically refers to non-judicial termination of the contract, with an explicit reference to article III.-3:507 DCFR: Notice of termination: "A right to terminate under this Section is exercised by notice to the debtor".

[31] *Vaquer Aloy*, El Soft Law europeo en la jurisprudencia española: doce casos (2013), 1 Ars Iuris Salmanticensis 105-106.

Similarly to other cases, the solution would have been the same without reference to DCFR because this interpretation was already introduced in Spain. But the reference to DCFR is made to support and restate the current interpretation of law and give legitimacy to it.

The interesting issue in these cases is that courts of appeal do not merely reproduce what the Supreme Court has stated, but introduce new references to DCFR, which means that not only judges of the Supreme Court are familiar with DCFR, but that the knowledge has been spread among Spanish judges and it is reflected in their judgments. However, a change in the interpretation and application of private law has to be legitimated by the Supreme Court to be considered as case law in strict sense.

VII. Conclusions

Although DCFR is not binding, it is progressively influencing Spanish case law. Even if the rules of DCFR are not hard law, they are provided of certain authority and can be followed voluntarily in European jurisdictions. In the Spanish case, it is frequently used as an argument to reinforce current understanding of law in a process that goes up and down, from the Supreme Court to the courts of appeal. DCFR is mentioned in the judgments probably because it gives authority to case law, although it usually does not imply a substantive change in private law. The case would have been resolved in the same way without reference to DCFR, but it is mentioned in the judgment to reinforce the legitimacy of the interpretation of law.

But in other cases the reference to DCFR accompanied by additional arguments in order to leave aside some old-fashioned rules of the Civil Code and to offer new solutions adapted to the needs of the market and current legal values. In these cases, soft law plays an important role in the evolution to Spanish private law towards the trends of European private law. These are cases where the Spanish regulation had revealed inadequate before, and some exceptions to general rules had been made case by case. But the reference to DCFR with additional arguments serves to give authority to change case law.

Consequently, Spanish law approaches to the proposals for a common private law made in DCFR. If other jurisdictions freely decided to act in a similar law, using DCFR as a criterion

in the interpretation of law, harmonisation of solutions in private law would be indirectly reached through case law.

Justyna Kurek

Anti-spam regulations in Poland. Legal qualification and its consequences in theory and practice

I. Introduction

Unsolicited correspondence, known as 'spam', is inextricably linked with electronic communication. In legal language, the concept is commonly identified with unsolicited and unwanted messages of a commercial nature. It is widely considered to be the scourge of the information age.[1] This phenomenon is closely associated with the development of electronic communications services. It is said that unsolicited traffic represents one of the major problems witnessed by modern digital communication.[2] The European Digital Agenda indicated that spam has evolved to such an extent that it is significantly slowing the transmission of electronic messages[3]. Due to the low operational costs, electronic spamming has steadily grown and spread to various media, like SMSs, web search engines, blogs and forums. Since 2013, over 69.6% of all email traffic was generated by spam.[4]

The explosive growth and evolution of the internet has brought about new and creative methods of advertising.[5] More than half of advertising efforts are aimed via websites and social media. This trend has brought forth a proliferation of advertising messages spread online.[6] Moreover, the online messages are often perceived as unsolicited and/or unwanted.[7] Considering the scale of the problem and the intense legal regulation against spam, it is important

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[1] *Potashman*, International Spam Regulation & Enforcement: Recommendations Following the Word Summit on the Information Society, Boston College International and Comparative Law Review, 2006, p. 323, available at: http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1050&context=iclr ? Links?

[2] *Hoeren*, Internetrecht, version April 2015, p. 260, available at: http://www.uni-muenster.de/Jura.itm/hoeren/materialien/Skript/Skript_Internetrecht_April_2015.pdf

[3] COM (2010) 245 - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Agenda for Europe.

[4] https://securelist.com/analysis/kaspersky-security-bulletin/58274/kaspersky-security-bulletin-spam-evolution-2013/

[5] *Janssens/Nijsten/van Goolen*, Spam and Marketing Communications, Procedia Economics and Finance, 12/ 2014, p]. 265.

[6] *de Bruyn/Lilien*,. A multi-stage model of word-of-mouth influence through viral marketing, International Journal of Research in Marketing, 25/2008, p. 151.

[7] *Janssens/Nijsten/van Goolen*, Spam and Marketing Communications, Procedia Economics and Finance, 12/ 2014, p. 265.

to ask about the reasons why the current regulations seem to be insufficient? The aim of this article is to propose a minimum standard for national legislation in the field of protection against spam.

II. The term SPAM

The term spam is not a legal term. It is commonly understood as information sent electronically (including not only commercial information) that jointly meets the following conditions: its content is irrelevant to the recipient's identity, due to the fact that the message may be sent to a number of independent recipients; the recipient has not expressed their prior consent to receiving the message (consent must be expressed on a verifiable, deliberate, explicit and revocable basis); the circumstances indicate that the sender's profit gained as a result of sending spam is grossly disproportionate when compared to the profit gained by the recipient from receiving the message.[8]

Despite the fact that the internet community understands of the term spam in such a wide way, EU law – in particular Article 13 point 1 of Directive 2002/58/EC[9] – narrows the scope of the term to unsolicited communications used for commercial purposes that are unsolicited and unwanted by a designated recipient. According to Article 13 of EC Directive 2002/58/EC, the use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent. This means that the provision of Article 13 prohibits using email addresses only for marketing purposes. The directive establishes an 'opt-in regime' where unsolicited emails may only be sent with prior agreement of the recipient. There are two categories of emails (or communication in general) that will be excluded from the scope of the prohibition: an exception for existing customer relationships, and marketing of similar products and services.

The sending of unsolicited text messages, either in the form of SMS messages, push mail messages or any similar format designed for consumer portable devices (mobile phones,

[8] http://www.mail-abuse.com/spam_def.html. This definition aptly describes the nature of the phenomenon of spam. In the Polish literature see also: *Kasprzycki*, Spam czyli niezamówiona komercyjna poczta elektroniczna [Spam as a unsolicited commercial electronic post], pp. 57-58; *Waglowski*, Spam a prawo – próba wskazania kierunków badawczych, [Spam and Law – An attempt to identify the research directions], Prawo i Ekonomia w telekomunikacji, No. 4/2003, p. 61.

[9] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) OJ L 201, 31.7.2002, pp. 37–47.

PDAs) also falls under the prohibition of Article 13.[10] According to Directive 2002/58/EC, "*Safeguards should be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes in particular by means of automated calling machines, telefaxes, and e-mails, including SMS messages. These forms of unsolicited commercial communications may on the one hand be relatively easy and cheap to send and on the other may impose a burden and/or cost on the recipient. Moreover, in some cases their volume may also cause difficulties for electronic communications networks and terminal equipment. For such forms of unsolicited communications for direct marketing, it is justified to require that prior explicit consent of the recipients is obtained before such communications are addressed to them. The single market requires a harmonized approach to ensure simple, Community-wide rules for businesses and users.*"

III. Protection against SPAM in the Polish legal system

The scope of Polish provisions relating to protection against spam is a result of the transposition of European legislation, in particular the implementation of two EU legal norms,

10 see: *Mednis*, Propozycje zmian prawnych w zakresie zwalczania spamu, [The proposal of legal changes in respect to counteracting of spam], Prawo Nowych Technologii, No. 4/2008, pp. 58-59.

namely Articles 6[11] and 7[12] of the EU Directive on Electronic Commerce[13] and Article 13[14] of the Directive on Privacy and Electronic Communications.[15]

The standards of European law were implemented into Polish law, resulting in numerous private and public law instruments. The instruments modelled on the European standards are combined with the tradition of Polish law, derived from the principles of the Polish Constitution,[16] the protection of fundamental rights and freedoms, notably the right to privacy and the constitutional guarantees of freedom, freedom of communication and confidentiality of

[11] Member States have to ensure that commercial communications that are part of, or constitute, an information society service comply at least with the following conditions: (a) the commercial communication shall be clearly identifiable as such; (b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable; (c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously; (d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

[12] (1) In addition to other requirements established by Community law, Member States that permit unsolicited commercial communication by electronic mail will ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient. (2) Without prejudice to Directive 97/7/EC and Directive 97/66/EC, Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

[13] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, pp. 1–16

[14] (1) The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent. (2) Notwithstanding paragraph 1, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use. (3) Member States will take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, in cases other than those referred to in paragraphs 1 and 2, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation. (4) In any event, the practice of sending electronic mail for purposes of direct marketing disguising or concealing the identity of the sender on whose behalf the communication is made, or without a valid address to which the recipient may send a request that such communications cease, shall be prohibited. (5) Paragraphs 1 and 3 apply to subscribers who are natural persons. Member States will also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected.

[15] In Polish literature see also: *Konarski*, Ustawa o świadczeniu usług drogą elektroniczną. [The Act on Electronic Services] The Commentary, Warszawa 2004, p. 16; *Kasprzycki*, Spam czyli niezamówiona komercyjna poczta elektroniczna. Zagadnienia cywilnoprawne, [Spam as an unsolicited commercial electronic post. The civil-law issues], Prace Instytutu Prawa Własności Intelektualnej Uniwersytetu Jagiellońskiego No. 91/2005, p. 140; *Kurek*, Ochrona przed niezamówioną korespondencją w komunikacji elektronicznej [Protection against unsolicited commercial correspondence in electronic communication], Warszawa 2013, p. 83.

[16] The Constitution of the Republic of Poland from 2 April 1997 (Dz.U. from 1997 No. 78 item 483 as amended).

communications. This leads to the creation of a horizontal protection model based on methods of regulating civil, criminal and administrative law.[17]

At the moment, under Polish law, the fundamental regulation is the Act on Electronic Services,[18] and in particular its Article 10.[19] According to this provision, sending unsolicited commercial information to a specified recipient who is a natural person is an act of unfair competition. On the one hand, in individual cases this will be subject to private prosecution (Article 24 of the Act on Electronic Services), but if the action would violate the collective interests of consumers within the meaning of Article 24 of the Law on Competition and Consumer protection,[20] sending unsolicited commercial information[21] will also constitute a practice infringing collective consumer interests.[22] In this case, spam protection is guaranteed via administrative procedure before the President of the Office for Competition and Consumer Protection.[23]

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[17] See: *Kurek*, Ochrona przed niezamówioną korespondencją w komunikacji elektronicznej, [Protection against unsolicited commercial correspondence in electronic communication], Warszawa, 2013.

[18] The Act on Electronic Services from 18 July 2002 (J.L. from 2013 item 1422).

[19] The problem of transposing Directive 2000/31/EU to Polish legislation, see: *Kot*, Dyrektywa Unii Europejskiej o handlu elektronicznym i jej implementacje do prawa cywilnego, [EU - Directive on Electronic Commerce and its implementation to Polish civil law], Kwartalnik Prawa Prywatnego No. 1/2001; *Kasprzyński*, Spam czyli niezamówiona komercyjna poczta elektroniczna. Zagadnienia cywilnoprawne [Spam as an unsolicited commercial electronic post. The civil-law issues], Prace Instytutu Prawa Własności Intelektualnej Uniwersytetu Jagiellońskiego No. 91/2005; *Kowalik* – Bańczak Ochrona przed spamem w prawie Unii Europejskiej [Protection against spam in EU law], in: Gołaczyński (red.), Prawo umów elektronicznych, Kraków 2006; *Kurek*, Problemy z dochodzeniem roszczeń w zakresie spamu na gruncie obowiązujących przepisów prawnych, [Redress of spam on the basis of existing Polish legislation. Problematic issues], Monitor Prawniczy No. 2/2009; *Kurek*, Nowe koncepcje ochrony antyspamowej w projekcie ustawy o zmianie ustawy Prawo telekomunikacyjne, [New concept of antispam protection in draft of new Act on ammandment to Telecommunication Law], Monitor Prawniczy No. 17/2009; *Gołaczyński*, Ustawa o świadczeniu usług drogą elektroniczną, The Commentary, [The Act on Electronic Services], Warszawa 2009.

[20] The Act on Competition and Consumer Protection from 15 December 2000 (J.L. from 2015 item 184).

[21] See: *Waglowski*, Spam a prawo – próba wskazania kierunków badawczych, [Spam and Law – An attempt to identify the research directions], Prawo i Ekonomia w Telekomuniakcji No. 4/2003; *Polański*, Prawne problemy spamdexingu, Prawo Nowych Technologii No. 2/2008.

[22] In the context of collective consumer interest, see: *Waglowski*, Spam w formie niezamówionej informacji handlowej jako delikt nieuczciwej konkurencji [Spam in the form of unsolicited commercial information as an act of unfair competition], in: A. Tubielewicz (red.), Problemy informatyki w zarządzaniu, Wydział Zarządzania i Ekonomii Politechniki Gdańskiej 2003; *Rączka*, Ochrona konsumentów w usługach świadczonych drogą elektroniczną, [Consumer protection in electronic services] Przegląd Prawa Handlowego No. 7/2005; *Kasprzycki*, Spam czyli niezamówiona komercyjna poczta elektroniczna. Zagadnienia cywilnoprawne, [Spam as an unsolicited commercial electronic post. The civil-law issues], Prace Instytutu Prawa Własności Intelektualnej Uniwersytetu Jagiellońskiego No. 91/2005; Kasprzycki, D. Ochrona Zbiorowych interesów konsumentów na przykładzie niezamówionej korespondenci [Protection of collective consumer interest on the excemple of unsolicited correspondence] [in:] Handel elektroniczny. Prawne Problemy, red. J. Barta, R. Markiewicz, Zakamycze Kraków 2005, J. Kurek, Ochrona Konsumentów przed nieuczciwymi praktykami marketingowymi w Inernecie, [Consumer protection against unfair marketing practices] Prawo Nowych Technologii No. 3/2008.

[23] The President of the OCCP issued two important decisions: The decision from 30.09.2003 No. RLU 29/03, The Journal of the President of OCCP No. 1/2004; The decision of the President of the OCCP from 24.08.2009 No Nr DDK-5/2009.

In addition to the Law on Electronic Services, anti-spam regulations can be found in the Act on Unfair Competition,[24] the Law on Combating Unfair Commercial Practices,[25] the Telecommunications Law,[26] and the Act on the Protection of Personal Data.[27] For example, sending spam can be classified as an act of unfair competition in advertising within the meaning of Article 16 § 5 of the Act on Combating Unfair Competition.[28] Furthermore, spam as a form of advertising constitutes substantial interference in privacy by misusing technical means of communication.[29]

A general ban on unsolicited commercial communications is also contained in Article 172 of the Telecommunications Act, which prohibits the use of automated calling systems for marketing purposes without the prior consent of the subscriber or end-user, threatened by a fine imposed by UKE (Article 209 of the Telecommunications Law).[30] However, in the event that an electronic address aimed at unsolicited advertising messages meets the conditions of personal data, then sending spam will also constitute an infringement of personal data protection.[31]

The ban on transmitting spam is also present in Article 9 § 3 of the Act on Combating Unfair Commercial Practices, which constitutes the implementation of an aggressive commercial practice within the meaning of Annex I, point 26 of Directive 2005/29 /EC on unfair

[24] The Act on Combating Unfair Competition of 16 April 1993 (J.L. from 2003 No 153 item 1503).
[25] The Act on Unfair Commercial Practices of 23 August 2007 (J.L. from 2016 item 3).
[26] The Act Telecommunication Law of 16 July 2004 (J.L. from 2014 item. 243).
[27] The Act on Personal Data Protection of 29 August 1997 (J.L. from 2015 item 2135).
[28] See: The Intervension of the President of the OCCP The Pressreleise from 26.09.2008 "Pop-up na cenzurowanym", http://www.uokik.gov.pl/aktualnosci.php?news_id=478#.

[29] See: *Nowińska*, Neutralna wypowiedź a zakaz prowadzenia reklamy ukrytej, [The neutral statement and the prohibition on covered advertising], Zeszyty Naukowe Uniwersytetu Jagiellońskiego, No. 69/1997, p. 139; *Waglowski*, Spam w formie niezamówionej informacji handlowej jako delikt nieuczciwej konkurencji [Spam in the form of unsolicited commercial information as an act of unfair competition], in: A. Tubielewicz (red.) Problemy informatyki w zarządzaniu, Wydział Zarządzania i Ekonomii Politechniki Gdańskiej 2003; *Kasprzycki*, Problemy reklamy kontekstowej, [The problems of contextual advertisement], Prace Instytutu Prawa Własności Intelektualnej, Uniwersytet Jagieloński, Zeszyt No. 100/2007; *Okoń*, Reklama 2:0 – Komunikacja marketingowa a społeczności sieciowe, [Advertisment 2:0 – marketing communication and net community], Prawo Nowych Technologii No. 4/2008

[30] *Kurek*, Nowe koncepcje ochrony antyspamowej w projekcie ustawy o zmianie ustawy Prawo telekomunikacyjne, [New concept of antispam protection in draft of new Act on Amendments to Telecommunication Law], Monitor Prawniczy No. 17/2009; *Litwiński*, Art. 172 Prawa telekomunikacyjnego – próba wykładni, [Art. 172 of the Telecommunication Act – An attempt at interpretation], Monitor Prawniczy 8/2015.

[31] See: *Kowalik* – Bańczyk, Ochrona przed spamem w prawie Unii Europejskiej [The protection against spam in EU law], in: Prawo umów elektronicznych, (red.) J. Gołaczyński, Zakamycze Kraków 2006; *Konarski*, Serwisy Społecznościowe – nowy paradygmat ochrony danych osobowych?, in: Ochrona danych osobowych. Skuteczność regulacji, (red.) G. Szpor, Municipium Warszawa 2009.

commercial practices.[32] The provision of Article 9 § 3 of the act prohibits the aggressive practice of a cumbersome and undeveloped act or a failure to a consumer, and prohibits tricking consumers into purchasing products via telephone, fax, email or other means of distance communication.[33]

To sum up, protection against spam is guaranteed under civil law through the protection of personal rights, protection against acts of unfair competition and protection of consumers against unfair commercial practices. In criminal law, the protection comes through legal means against manifestations of cybercrime and ICT crime and offences. A special role is played by measures of an administrative nature, including instruments of: protection of the collective economic interests of consumers, protection of personal data and the protection of IT security.

IV. The lack of effectiveness of the anti-spam regulation

Taking into account the statistics on spam and the intense legal regulations, it is important to ask why the current regulations seem to be insufficient? Does the ineffectiveness result from objective factors like: the evolution of the phenomenon or insufficient flexibility of legal norms? Or perhaps the legal protection models are based on a false assumption that it is possible to cope with a global problem and to protect against spam using national or regional regulations?

[32] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') OJ L 149, 11.6.2005, pp. 22–39.

[33] See i.e: *Namysłowska*, Zwalczanie nieuczciwych praktyk handlowych na podstawie dyrektywy 2005/29/WE (II) [Counteracting unfair commercial practices on the basis of the 2005/25/EC Directive], Przegląd Prawa Handlowego nr 3/2007; *Podrecki*, Dyrektywa o nieuczciwych praktykach handlowych i jej implementacja do prawa polskiego [EU – Directive on Unfair Commercial Practices and its Implementation to the Polish Legal System], ZNUJ PWiOWI Zeszyt 100/2007 Oficyna Wolters Kluwer, Kraków 2007; *Rogowski*, Agresywne praktyki rynkowe oraz ich implementacja do prawa polskiego, [Aggressive commercial practices and they implementation to the Polish legal system] Monitor Prawniczy nr 2/2008; *Kurek*, Nowe perspektywy walki ze spamem, [New perspective of fighting spam] Prawo Nowych Technologii nr 1/2008; *Kunkiel Kryńska*, Implementacja dyrektyw opartych na zasadzie harmonizacji pełnej na przykładzie dyrektywy o nieuczciwych praktykach handlowych, Monitor Prawniczy 17/2008 [The implementation of EU directives based on full harmonisation. An example of unfair commercial practices.]; *Michalak*, Przeciwdziałanie nieuczciwym praktykom rynkowym, Komentarz C.H. Beck, Warszawa 2008; [Counteracting unfair commercial practices. The Commentary]; *Namysłowska/Sztobryn*, Ukryta reklama po implementacji dyrektywy o nieuczciwych praktykach handlowych, [Covered advertisement after implementation of the EU – Directive on Unfair Commercial Practices], Państwo i Prawo nr 11/2008.

The currently used worldwide protection models are based on two opposite concepts: protection based on the theory of entrance (known as the opt-in model) and the theory of exit (known as the opt-out model). In the opt-in model, consumers must give their prior consent before personal information can be used. In the opt-out system, consumers can be included on a mailing list without prior consent, but are then able to unsubscribe. In the opt-out model, consumers need to take action to remove themselves from the list.[34] The answer to the question of which of these models is more efficient and better takes into account the interests of all market participants, requires taking many aspects into consideration, including benefits for end-users, the advertising industry and the operators. It is also important to take into account the cost and practical possibilities of enforcement under each of the models.[35]
In legal systems based on the opt-out model, it is possible to use an email address as long as the user does not object to this practice. The email address can be used until the recipient raises a successful objection. The recipient must be able to prove that he or she effectively objected to receiving spam messages. In the opt-out model, it is not important how the business came into possession of the email address – whether email addresses were acquired from an online forum, purchased from an address database or given by the client for the purpose of the transaction.

In the opt-out model, the user must only be given simple and effective mechanisms or instruments to object to the further use of his or her electronic address for marketing purposes.[36] In the legal system based on the opt-out model, it is possible to submit a general objection. A person who does not wish to receive any unsolicited communication may enter their contact data to a special scheme or a publicly available database. In such a situation, marketing companies are obliged to consistently verify their databases of address against the lists of exceptions. In the case of email addresses, the creation of such a publicly available database may result in a serious danger of it being used to send spam.

Analysing the anti-spam provisions from the perspective of the development of electronic commerce and the costs of doing business on-line shows that regulations based on the opt-

[34] See: *Milne/Bahl*, Are there differences between consumers' and marketers' privacy expectations? A segment- and technology level analysis, Journal of Public Policy & Marketing, 29 (1)/ 2010, p.138.
[35] See: *Kurek*, Ochrona przed niezamówioną korespondencją, [Protection against unsolicited commercial correspondence], p. 213 ff.
[36] See: *Pridge*, CanSpam Act – Legislative Approach to Unsolicited Commercial Email, Consumer Protection and the Law, October 2008; Compare the Report of the Federal Trade Commission for the Congress Do-Not-Mail Register: http://www.ftc.gov/reports/dneregistry/report.pdf.

out model are the least burdensome for businesses, both from a financial and a logistical point of view.[37] Unsolicited commercial communications may also be treated as a desirable source of information about the goods and services available on the market, particularly in the niche branches. In legal literature it is also stated that email, better than any other form of communication, improves and strengthens freedom of speech, which is the essence of a free democratic society.[38] In addition, it is a simple, cheap and effective advertising tool for small and medium companies. In practice, the efficiency of the opt-out model, which guarantees clear exit mechanisms, seems to be acceptable to consumers.

A different protection model is based on the theory of entry into the system (the opt-in model). This assumes that it is acceptable to use the electronic address only after obtaining the express consent of the recipient to contact him or her electronically. The consent of the recipient cannot be implied from another declaration of intent. This concept, unlike the opt-out model assumes that the burden of proving the fact of having the consent rests entirely with the sender (the business). The opt-in model causes lots of practical problems for businesses. There are reasonable doubts in relation to the acceptable form of asking for permission. For example: is it possible to send an unsolicited message to the recipient with a request for consent to send a commercial offer?

In many cases, the opt-in model means a double opt-in in practice.[39] In such a system, only double authentication causes the introduction of the email address to the mailing list Also in the case of the opt-in, it is necessary to guarantee to the recipient the right to object to receiving further marketing communications by sending messages. Just like in the opt-out model, such an objection makes the further use of the address strictly forbidden.

V. Concept of a synergic model of anti-spam protection

Spam, as a legal issue, has been the subject of interest of various international bodies. An important contribution was made by studies of the working group on spam (Spam Task

37 For a contrary opinion: *Rączka*, Ochrona Konsumentów w Usługach Świadczonych Drogą Elektroniczną, Przegląd Prawa Handlowego [Consumer protection in electronic services] No. 7/2005.
38 See: Soon H Ch, Invasion of Privacy v. Commercial Speech: Regulation of Spam with Comparative Constitutional Point of View, Albany Law Review, 2006.
39 See: *Hoeren*, E-Commerce und Recht – Ein Leitfaden durch das Dickicht des Internetrechts, Wirtschaftsmünsterland 2001, p. 88.

Force) within the OECD (Organization for Economic Cooperation and Development).[40] According to a survey conducted several years ago by the Spam Task Force, effective antispam protection needs not only measures at the national level, but also coordinated international action. The OECD report indicates that national coordination between public bodies involved in the process against spam is a precondition for international cooperation in this regard. At the same time, effective national cooperation is most effective when combined with the tools and powers of the competent authorities in the area of consumer law, criminal law, personal data protection and telecommunication law.

Individual instruments against spam should be used in the following areas:
- Consumer protection law – in the case of deceptive and misleading practices, charging for worthless products and fraudulent practices, 'scams', as well as extortion. These measures may also lead to sanctions under criminal law;
- Criminal law – when using electronic mail transmitted viruses, and for practices consisting of preventing the recipient's use of email accounts in connection with flooding him with unwanted spam, as well as in the case of fraudulent behaviour that meets the conditions for criminal acts (e.g. phishing);
- Personal data law – where spammers send unsolicited commercial correspondence for marketing purposes, without the prior consent of the recipient to the use of personal data (email);
- Telecommunications law – where email messages contain false representations and/or misleading designations of the subject consignment.

There have been attempts to introduce the OECD proposed model to Poland. On 29 November 2005, the Polish Government adopted the decision of the European Committee of the Council of Ministers on cooperation in the field of protection against spam.[41] The decision divided the powers in the fight against spam between the Ministry of Infrastructure, the President of the Office of Electronic Communications and the Inspector General of the Personal Data Protection. This concept was based on the idea of appointing a central spambox, which was to be located in the Ministry of Infrastructure. After investigation, each spam case was to be transferred to other bodies for examination: to the Inspector General of Personal Data Protection – in the case of complaints concerning a breach of personal data; to the Office of

40 RAPORT OECD - Raport OECD z dnia 13 maja 2005 roku, Anti-Spam Law Enforcement Report, http://www.oecd.org/data-oecd/18/43/34886680.pdf.

41 The decision is available at: http://www.uokik.gov.pl/download/Z2Z4L3Vva2lrL3BsL2RlZmF1bHRfYWt0dWFsbm9zY2kudjA-vMTI0LzMwLzEvcHJvamVrdF9kZWN5emppLmRvYw. oraz portalu http://prawo.vagla.pl/node/6086.

Electronic Communications – in the case of complaints concerning a breach of telecommunications secrecy; and to the President of the Office of Competition and Consumer Protection – in the case of mass complaints and in the event of an infringement of collective consumer interests. In addition, the cooperation procedure involved the conclusion of an appropriate arrangement on acting in the framework of the Research and Academic Computer Network – CERT Poland, the object of which was to be technical assistance in the investigation of spam.

VI. Conclusions

My comparative studies[42] on national legislations, EU directives and regulations of the OECD model indicate that the effectiveness of anti-spam protection depends on the consistency of definitions in describing the phenomenon in the widest possible range of national legal systems. National legislation should be technically neutral as far as possible, so it would be possible to apply it in the event of any change of technologies used for marketing purposes. The anti-spam regulations should at least prohibit the abuse of emails for commercial purposes. It is also acceptable to adopt more extensive protection and to criminalise all the cases of mass-spam correspondence. In my opinion, it is also necessary to separately regulate cases of qualified spam infringements, such as spam sent through zombie computers, confusing messages and emails with misleading headers.

The effectiveness of the anti-spam actions depends on the resources of law enforcement and the scope of competences held by public authorities. National authorities should be given a wide scope of power and opportunities, and it is necessary to ensure effective cooperation between the competent national authorities. The most effective forms of antispam regulation should combine using the powers of the authorities competent in the fields of consumer law, criminal law, personal data protection and telecommunications law.

In addition, close international cooperation between the competent national authorities is important for ensuring protection against spam. Opportunities for international cooperation and cooperation with internet service providers and organisations in the private sector play a vital role in the process of applying the law. Activities with the private sector for education

[42] For comparative studies see: *Kurek*, Ochrona przed niezamówioną korespondencją [Protection against unsolicited commercial correspondence], p. 218 ff.

and the promotion of best technological solutions for network security should be a supplementary element of an effective system of enforcement.

Dr Andreas Stein[1]

The burden of proof in discrimination processes – an unknown creature?

I. Introduction

In disputes concerning discrimination in labour law, claimants have to prove that the employer has treated them less favourably on any grounds prohibited under § 1 AGG.[2] This usually causes difficulties for the claimant, partly because (in the case of direct discrimination) the inner motives of the employer are decisive, and partly because (in the case of indirect discrimination) discriminatory effects of the supposedly neutral criteria and procedures used by the employer have to be demonstrated. These circumstances are exclusively influenced by the employer and the victim of discrimination has very limited access to them, if any. This applies not only to the discriminatory motivation, which is only exceptionally disclosed, but also to the indirect discriminatory criteria, such as the selection criteria for employment or the statistical overview of payment conditions in a company.

In order to remedy this lack of evidence, the European legislator has created – on the basis of the jurisprudence of the Court of Justice of the European Union (CJEU) – a special regime for distributing the burden of proof, which has been implemented in Germany in § 22 AGG. It is not a reversal of the burden of proof, but an alleviation in the burden of proof, which only leads to a real reversal with regard to the existence of a prohibited discrimination if the claimant is able to establish facts that give rise to a presumption that there is a prohibited discrimination.

Although this rule may not appear overly complex at first glance, there are a number of problems that partly result from the complex two-stage structure of the burden of proof shift, and partly from the need to implement it in the very diversified procedural and evidentiary regulations of the Member States.

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[1] The author is an official of the European Commission. He only expresses his personal opinion.
[2] The General Equal Treatment Act of 14 August 2006 (Allgemeines Gleichbehandlungsgesetz), German abbreviation: AGG.

The aim of this paper is to discuss these issues and to offer indications that facilitate the interpretation and application of the rule in conformity with the relevant Directives, and to prevent the inefficacy of the desired shift in the burden of proof for victims of discrimination. For this purpose, first the history of the burden of proof rule will be briefly outlined, and especially its development by the CJEU (part II), before discussing the difficulties in its transposition (part III) and in its application in judicial practice (part IV). Finally, the right of the claimant's access to information, which neither EU law nor German law expressly regulate, will be examined (part V).

II. History and content of the special rules on the burden of proof

The first and fundamental judgment of the CJEU concerning the burden of proof was issued in 1989 in the *Danfoss*[3] case. In a large Danish company, all employees in the same payment category received the same basic wage, but beyond that individual additional allowances were granted on a basis of a non-exhaustive list of criteria such as mobility, training or length of service. The employees only knew the final amount of their wages but were not able to judge on what basis the respective allowance was calculated. A trade union determined, on the basis of the salaries of 160 employees, that the average salary of male employees was 6.85% higher than the salary of female employees and alleged discrimination in remuneration on those grounds. The question was raised as to who bears the burden of proof that these differences in wages are based on gender-specific factors. In its response, the CJEU took into consideration that due to the absolute lack of transparency of the allowance system the employees had no other possibility than to compare the average wages of men and women. It concluded that they would have no effective means of enforcing the principle of equal payment unless the detection of different average wages shifted the burden of proof onto the employer to demonstrate that his wage policy is not discriminatory. Such a burden of proof forces the employer to indicate how the criteria for allowances are applied, and to make the payment system more transparent. The judgement is a decision in an individual case and does not provide a general rule about the burden of proof in discrimination disputes. However, the CJEU refers specifically to the need to adjust the national rules on the burden of proof where that is indispensable to ensure the effective enforcement of the principle of equal

[3] Case C-109/88, judgement of 17.10.1989

pay, which is prescribed by EU law. With that decision the essential nucleus of the concept of the shift of the burden of proof was developed.

The CJEU then made a decisive further step in its *Enderby* decision of 1993.[4] Again, the case concerned differences in remuneration, this time between female (speech therapists) and male (pharmacists) dominated professions in the British health service. The referring court asked a number of questions about the possible justification of differences in salary, including whether the principle of equal pay requires employers to objectively justify differences in pay between activities presumed to be of equal value. The Court took the opportunity to make certain fundamental statements about the burden of proof.

Based on the principle that the party relying on facts that may support his or her claim also has to prove those facts, the Court pointed out that the burden of proof is shifted in two scenarios. Firstly, in cases such as the *Danfoss* judgment, and secondly, in the case of decisions about discrimination of part time work by seemingly neutral regulations, where the CJEU decided that such regulations are prohibited as indirect discrimination, once it is established that significantly more women than men are affected by them, provided that the employer does not succeed in proving any justification by objective and non-discriminatory factors.[5] Although in the *Enderby* case none of these situations were present, the CJEU generalised the principle as follows: "*Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory."*[6]

In addition to the generalisation of the *Danfoss* principle, which shifts the burden of proof in order to secure the effectiveness of enforcing a discrimination ban in all situations of wage inequality, the decision also includes the innovation of a prima facie case of discrimination as a reason for shifting the burden of proof.

[4] Case C-127/92, judgement of 27.10.1993.
[5] Like for example in the case *Bilka* (C-170/84), judgement of 13.5.1986, und case *Nimz* (C-184/89), judgement of 7.2.1991.
[6] *Enderby*, Rz. 18.

After another decision confirming the same principles in another remuneration case,[7] the EU legislator stepped in. With Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, the rule on the burden of proof was created, following the case law, but also expanding the scope of its application to all cases of prohibited gender discrimination under European law. This is not simply a codification of the CJEU case law also because the wording with regard to the requirement of the burden of proof is different from the wording used by the CJEU. Instead of the establishment of facts that constitute a prima facie case of discrimination, Article 4 of the Directive required that facts have to be established that give rise to the presumption that there has been discrimination.

The expansion of anti-discrimination protection under European law in employment to the areas of racial and ethnic origin, religion, age, disability and sexual orientation was accompanied by the inclusion of a burden of proof provision with the same wording in all EU directives on equal treatment applicable to labour law which provides that:[8] "*when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment*."

This burden of proof rule does not change the starting point of the claimant's burden of proof for establishing discrimination. It improves the claimant's situation only in relation to one element of the facts supporting such a claim, namely that the discrimination is based on prohibited grounds, for example gender or ethnic origin. On the other hand, the claimant continues to bear the full burden of proof for the existence of a protected ground for discrimination, the existence of unfavourable treatment, the existence and extent of the damage to be compensated and the causal link between the discriminatory conduct and the damage.[9] The reduction of the burden of proof regarding the causal link between discrimination and the grounds for discrimination takes place in two stages. Firstly, the causality of the prohibited grounds for discrimination probable for an unfavourable treatment does not have to be proven beyond any reasonable doubt, it is sufficient to establish facts that give rise to the

[7] *Royal Copenhagen*, Case. C-400/93.
[8] Directive 2006/54/EC (gender), Art.19; Directive 2000/43/EC (race, ethnic origin), Art. 8; Directive 2000/78/EC (religion, disability, age, sexual orientation), Art. 10.
[9] MüKo-Thüsing, 7. ed., AGG § 22, para. 4; ErfK-Schlachter, 16. ed., AGG § 22, para. 2. Also in this direction ECJ in *Brunnenhofer*, Case C-381/99, judgement of 26.6.2001.

presumption of such causality on a balance of probabilities. Secondly, also the facts giving rise to that presumption, if contested, do not have to be proven beyond any reasonable doubt, but need only be substantiated according to the reduced standard of proof, i.e. on a balance of probabilities.[10] Once these conditions are met, the burden of proof is shifted, and the respondent has to prove[11] that there was no breach of the principle of equal treatment.

III. The transposition of the European rule on the burden of proof

The transposition of this rule into national legislation caused a series of problems that are firstly based on the fact that it is already not easy to formulate a provision on the shift of the burden of proof in the European instrument itself coherently in all the official languages of the EU. Secondly the different national procedural laws give divergent meaning even to identically worded concepts. Even though the legal concepts of the Directives have to be interpreted autonomously, in order to ensure the consistency of the application of EU law, this becomes particularly difficult since the specific EU rule on the burden of proof has to be applied in the context of national procedural law on evidence.[12]

The concept of *prima facie evidence*[13] in the German version of the burden of proof provision as a translation of the establishment of facts makes use of the same terminology as § 294 ZPO,[14] which applies in the context of provisional and protective measures instead of full proof. This concept makes it sufficient to establish that the relevant facts are more probable than not. However, it limits the party to certain types of evidence, which also exceptionally include affidavits.[15]

The comparison with other language versions illustrates that this approach is not self-evident. According to the Spanish wording of the directive, the mere presentation of facts ("*presentar hechos*") is at stake, while the English version seems to go in the opposite direction. The requirement "*to establish facts*" corresponds, according to English legal

[10] See the very clear explanations of this two-tiered nature of the reduction of the burden of proof by MüKo - Thüsing, 7. ed., § 22 AGG, para. 3 .
[11] A mere contra substantiation is not enough, compare Rust/Falke, § 22, para. 21.
[12] The wording in the Directives according to which Member States shall ensure this distribution of the burden of proof "*in accordance with the system of their national jurisdiction*", recognises this problem but does not provide a solution.
[13] Glaubhaftmachung.
[14] German Civil Procedure Code (henceforth: ZPO).
[15] Compare Musielak-Huber, ZPO, 12. ed. § 294 para. 3-5.

terminology, to the normal standard of proof without any reduction as implied by the concept of prima facie evidence.

But further complications arise from the way this provision is intertwined with the general national procedural law on evidence. The (supposed) contradiction between the full proof of the facts giving rise to the presumption of discrimination (English version) and a reduced standard of proof in terms of prima facie evidence (German version) needs to be examined on the basis of a comparison of the requirements of full proof under English law and prima facie evidence under German law. This scrutiny reveals that full proof under English civil procedural law basically requires just the preponderance of probability,[16] meaning that the standard of proof for full evidence is far below the requirements of German procedural law, and in this case actually corresponds to the balance of probabilities criterion that, under German law, is only sufficient for prima facie evidence for the purposes of interim legal protection. Hence in that respect there is therefore no contradiction between the English and German language versions of the EU burden of proof rule as to the actual evidentiary requirements, but it turns out that in the UK the rule on the burden of proof does not bring any real benefit for applicants in terms of reducing the standard of proof for facts giving rise to a presumption of discrimination.[17]

Additional problems arise in transposing the provisions of EU law correctly and without contradictions into national procedural law. This can be seen particularly clearly in the case of Germany where under § 611a (I) (3) BGB, the predecessor provision of § 22 AGG, a reversal of the burden of proof occurred where the employee provided prima facie evidence (*Glaubhaftmachung*) of facts that gave rise to the presumption of discrimination. The concept of prima facie evidence was not specifically defined for this purpose so that an interpretation in accordance with § 294 ZPO from the perspective of German courts seemed obvious. However, although prima facie evidence under EU law required a reduced standard of proof in terms of § 294 ZPO, by no means did it require the restriction to certain types of evidence, which runs counter to the purpose of alleviating evidentiary difficulties for victims of discrimination. Therefore, the Federal Labour Court[18] had to clarify that in this specific context prima facie evidence had to be understood not as being identical with § 294 ZPO in

[16] Halsbury's Laws of England, Civil Procedure, Volume 12 (2015) para 708 with other sources.
[17] But regarding the presumption of conformity (second stage).
[18] BAG NZA 2004, 540.

its entirety but exclusively as a reduced standard of proof shifting the burden of proof to the employer in situations where the court established on the balance of probabilities that there is a causal link between gender and disadvantage due to facts giving rise to a presumption of discrimination.

Despite this clarification, the argument that the requirement of prima facie evidence was often misunderstood as being identical with the meaning of that term in § 294 ZPO resulted in the wording of the rule on the burden of proof being changed in the final stages of the deliberations on the AGG. The intention of this change was a clarification without changing the law in comparison with § 611a BGB. § 22 AGG now reads as follows: "*Where, in a case of conflict, one of the parties is able to establish circumstantial evidence from which it may be presumed that there has been discrimination on one of the grounds referred to in § 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination*."[19]

No extraordinary legal expertise is needed to realise that this is a step backwards: instead of the concept of prima facie evidence (*Glaubhaftmachung*) that largely (if not completely) corresponds to that same concept in the ZPO, now the notion of full proof (*Beweis*) is introduced, which is also not specifically defined for this purpose but omits the crucial element of the reduction of the standard of proof. The new wording requires full proof with regard to the facts giving rise to the presumption and therefore no longer complies with the requirements of EU law.

The Federal Labour Court has repeatedly commented on the interpretation of § 22 AGG, albeit without discussing its compatibility with the requirements of EU law. The Court has made clear that an employee meets the requirements of the onus of demonstration (*Darlegungslast*) by presenting circumstantial evidence giving rise to a presumption of discrimination on one of the protected grounds. These requirements are met where the facts presented make it objectively likely on the balance of probabilities that discrimination on one of those grounds has taken place. The Court holds that by using the terms "circumstantial evidence" and "presumed", the law expresses that, in terms of causality between the

[19] In German: "*Wenn im Streitfall die eine Partei Indizien **beweist**, die eine Benachteiligung wegen eines in 1 genannten Grundes vermuten lassen, traegt die andere Partei die Beweislast dafuer, dass kein Verstoss gegen die Bestimmungen zum Schutz\ vor Benachteiligung vorgelegen hat*".

prohibited ground and the discrimination, it is sufficient to present facts that do not conclusively establish causality but justify the assumption that such causality exists.[20]

However, the reasoning as outlined above shows that the Federal Court has only clarified that § 22 AGG correctly transposes the second stage of the alleviation of the burden of proof laid down in the EU directives, concerning the reduced requirements for the causality relationship between certain facts and the existence of discrimination. There is, however, no clear statement as to the first stage of the burden of proof reduction, namely as to the standard of proof concerning the existence of the very facts that are presented as giving rise to a presumption of discrimination where these facts are contested. The Federal Labour Court only expresses what the claimant has to present in order to satisfy its onus of demonstration *(Darlegungslast*). By contrast, the Court leaves it open which requirements of proof (*Beweislast*) the plaintiff has to meet if the facts presented are contested by the other party , even though this occurs frequently in practice and causes major evidential difficulties for claimants. For example, regarding statements that are made during job interviews, the conclusion of a preponderance of probability of discrimination based on certain facts giving rise to a presumption may usually be made on the basis of experience. It will be much more difficult in practice to prove these very facts, i.e. to establish that the statements in question were actually made. Given the clear wording of § 22 AGG, the requirement of a full proof of this circumstantial evidence without any alleviation as necessary under EU law must be assumed. This is confirmed in recent decisions which explicitly point out that where the facts giving rise to the presumption of discrimination are contested, the plaintiff has the burden of proof for those facts without any reference to a reduced standard of proof.[21]

Nevertheless, the legal literature, mostly takes the view that no incompatibility with EU law exist,[22] and that at least an interpretation in conformity with EU law is possible,[23] especially with regard to the history of the provision and the reasoning provided in the legislative process, according to which there should be no change in substance as compared to the situation before. At the same time, it is sometimes claimed that when facts forming the basis of a presumption are contested, there has to be full proof of these facts in order to successfully

[20] Permanent jurisdiction, like Federal Labour Court NZA 2012, 1345; Federal Labour Court NZA 2012, 34; Federal Labour Court NZA 2011, 153; Federal Labour Court NZA 2010, 383.
[21]Federal Labour Court NZA 2010, 383; Federal Labour Court NZA 2015, 1380.
[22] For example, BeckOGK-Benecke, AGG § 22, para.3.
[23] MüKo - Thüsing, 7. ed., § 22 AGG, para. 2, 10; Rust/Falke, § 22, para. 28 (“with great effort“).

establish a presumption of discrimination.[24] The view that in line with EU law the facts forming the basis of the presumption only need to be established on a balance of probabilities is based only on one isolated decision of a first instance court,[25] or on decisions of the Federal Labour Court that do not justify such a position because they do not pronounce on the proof of the facts giving rise to a presumption but only on the effects of those facts, once established, on the presumption of discrimination.[26] As demonstrated above the Federal Labour Court did not make any clear statements on the standard of proof to establish these facts or even referred to the requirement of full proof in case the relevant facts are contested. In view of the unequivocal wording of the provision an interpretation providing an alleviation of the standard of proof for these facts would imply the risk of an interpretation *contra legem* regardless of the legislative history.

Therefore, there are doubts about the correct transposition of the burden of proof rule in Germany. Even in case of the most favourable interpretation in conformity with EU law – for which there are hardly any arguments in favour, namely the (incorrect) reasons for the revision of § 22 AGG – the wording is still misleading to a significant extent, which hardly fulfils the requirements of a clear and transparent as well as comprehensible implementation of EU law. This wording has a clear potential of preventing even professionally represented parties from enforcing their rights successfully.

The comparison with the situation in Austria reveals how many traps exist in the transposition of EU directives even on the basis of the same language versions. Paragraph 12 (12) of the Austrian Federal Equal Treatment Act[27] provides: "Should, in the event of a dispute, the affected person invoke a situation of discrimination, he/she has to present prima facie evidence. It is the responsibility of the respondent to prove that after weighing all the circumstances it is more probable that another motivation for which he presented prima facie evidence was decisive for the difference in treatment …" While the requirement of prima facie evidence (as opposed to full proof) for the claimant is clearly stated, there is uncertainty regarding the burden of proof once it is shifted to the respondent. Even though it is argued

[24] For example, BeckOGK-Benecke AGG § 22, paras. 22, 24; Grobys, NZA 2006, 898.
[25] Küttner-Kania, Personalbuch 2015, 22. ed., discrimination, para. 130 with reference to the Labour Court in Berlin NZA 08, 492.
[26] For example: ErfK-Schlachter, 16. ed., AGG § 22, para. 3, MüKo-Thüsing, 7. ed. AGG § 22, para. 10, both with reference Federal Labour Court NZA 2012, 34 and Federal Labour Court NZA 2010, 383, although the latter decision explicitly mentions the evidence requirement in the case of contestation.
[27] Bundes-Gleichbehandlungsgesetz

that the respondent has to prove that the unequal treatment is based on a non-discriminatory ground, the proof only refers to the preponderant probability of that motivation. In addition, the motive itself only has to be established through prima facie evidence. In contrast to Germany, doubts arise here from the fact that, in the case of a shift, a reduced standard of proof not provided by EU law seems to apply to the alleged perpetrator of discrimination. However, the Austrian Supreme Court has unequivocally clarified this issue. In a landmark decision it declared that, even though the wording of the Austrian law only requires a preponderant probability of a non-discriminatory ground, EU law requires full proof by the employer. Therefore, an interpretation of the Austrian provision in line with the directive requires the employer to establish full proof that there was no discrimination on his side.[28] Although it could be questioned whether the Supreme Court exceeded the limits of literal interpretation of the Austrian provision, there can be no doubt that the result of the interpretation is in accordance with the EU law.

IV. The practical application of the rules on the distribution of the burden of proof

Two recent judgments of the CJEU on the application of the rule of the burden of proof concerned the question whether public statements made by the employer on recruitment policy justify a presumption of discrimination and a shift in the burden of proof. In *Feryn*,[29] a Belgian employer stated that he could only hire domestic door fitters, rather than those with a different ethnic background, due to his customers' expectations, who would otherwise choose other service providers. The CJEU held that such a statement by itself constitutes sufficient justification for the presumption of discrimination, even without an identifiable victim, since the public statement is likely to strongly dissuade potential candidates with certain ethnic backgrounds from even apply and thus hinders their access to the labour market. Furthermore, the CJEU clarified that once prima facie evidence has been presented for the facts it is the employer's responsibility to prove that he has not breached the principle of equal treatment, for example by proving that the actual practice does not correspond with those statements. *Accept*[30] concerned a similar situation in that a prominent representative of a Romanian football club declared in an interview that he would under no circumstances hire a homosexual player. The fact that this former chief executive and shareholder of the club, even though he presented himself as a "patron", no longer held these roles at the time

[28] OGH ecolex 2008, 1046.
[29] Case C-54/07, judgement of 10.7.2008.
[30] Case C-54/07, judgement of 10.7.2008.

of the interview, and therefore could not legally bind the club, was not considered sufficient by the CJEU to exclude the presumption of discrimination. Rather, the fact that the employer has not clearly distanced himself from such statements was held to constitute a factor that may be taken into account in the overall assessment of the facts.

While in these cases the facts to be legally assessed were uncontested, there is a considerable difficulty in the practical judicial handling because of the two-stage nature of the application of the burden of proof rule. In the first stage, the burden of proof is shifted as a result of the prima facie evidence concerning the facts forming the basis of the presumption. The second stage concerns the provision of evidence by the respondent that there is no discrimination. In view of the common court practice of hearing and evaluating evidence in one go, the question arises as to how both stages can be separated from each other in order not to undermine the burden of proof rule, for instance by allowing the employer to use facts that he can plausibly substantiate but not fully prove, in order to undermine the basis of presumption, and therefore prevent a reversal of the burden of proof that would lead to him losing the dispute.

While the German Federal Labour Court and the CJEU have not dealt with these questions so far, English jurisprudence has already had to profoundly examine the related issues. The starting point was the English implementation of the burden of proof rule in the Race Relations Act, according to which it is the claimant's responsibility to establish facts on the balance of probabilities on the basis of which the court can assume discrimination "*in the absence of an adequate explanation*". In *Igen v. Wong*,[31] the Court of Appeal of England and Wales drew the conclusion that the respondents' arguments on justifications and alternative explanations have to be given no consideration during the first stage. It held that the question of a sufficient case for a presumption of discrimination has to be assessed on the basis of the supposed absence of justification and that the existence of a justification has to be exclusively examined during the second stage of the respondent's burden of proof. However, an exception was made for evidence that was presented by the respondent but actually contributes to establishing the presumption. A similar reasoning in principle was also suggested by the German Federal Labour Court, which stated in the only relevant decision that

[31] EWCA Civ 142 (18.02.2005); like this also recently the Northern Ireland Court of Appeal in *Miskelly v Restaurant Group*, NICA 15 (15.3.2013).

during the first stage the fact that the employer (who is obliged to prove and to explain only during the second stage) has not sufficiently substantiated his legal defence, cannot in itself be an indication of a (presumption of) discrimination. Nevertheless, it ruled that contradictory or inconsistent explanations by the employer might have the effect of circumstantial evidence.[32]

This position was later critically reviewed by the United Kingdom Employment Appeal Tribunal in *Laing v Manchester City Council.*[33] This case concerned alleged discriminatory behaviour of a superior towards a black employee, where the employer had stated and offered evidence that the superior behaved inappropriately not only towards the claimant and black workers but generally in relation to all subordinates. The Court considered it an artificial and inadequate separation of a single issue to disregarded this defence in the first stage and to take it into account only later, in the context of the counter-proof concerning the absence of discrimination. The Court argued that the respondent's submission was not a justification or alternative explanation of a prima facie discriminatory conduct but was a qualified contestation of the claimant's submission, which had to be taken into account already in order to assess whether the presumption of discrimination was justified at all.

These considerations suggest that the following distinction should be made with regard to the assessment of evidence in the context of the staged approach of EU law: if the respondent's submission refers directly to the facts that form the basis of the presumption, and which were submitted by the claimant, then it must be included in the first step of examining whether the prima facie establishment of facts that give rise to the discrimination presumption was successful. This includes submissions similar to those in *Laing*, according to which the alleged behaviour was, in principle, directed to all employees, since this is of direct importance for the question whether this behaviour is circumstantial evidence in the case of the claimant. However, as long as the respondent's submissions constitute explanations based on a clearly separable set of facts and circumstances, the latter can exclusively be examined during the second stage. For example, where discriminatory treatment of a female applicant during an interview is at stake (e.g. questions about pregnancy and family planning), the respondent's submission relating to this conversation and these questions should be assessed during the first stage of the prima facie establishment of the facts forming the basis for the presumption. If, on the other hand, the employer argues that the recruitment decision was

[32] Federal Labour Court NZA 2012, 1345.
[33] UKEAT 0128_06_2807 (28.7.2006).

made on the basis of a conversation with the previous employer and his performance assessment, an explanation unrelated to the job interview, this must be left out of consideration during the first stage, and can only be considered during the second stage, with the full burden of proof on the employer. Taking this submission into consideration during the first stage to shatter the prima facie case (even if there is no full proof of the facts of such a different explanation) would run counter to the purpose of the burden of proof rule, i.e. to reduce the evidence requirements for victims of discrimination. However, as the *Laing* case shows, a clear distinction between evidence material that directly relates to the facts, which form the basis of the presumption, and evidence material that relates to another explanatory approach, is not always easy in practice.

V. One step further – the discrimination victim's right of access to information.

Even though the EU burden of proof rule improves the situation of the victims of discrimination, there is reason to doubt whether this improvement is sufficient to significantly reduce the evidence difficulties they typically encounter. Since the facts that can be used as evidence often exclusively originate from the employer's sphere, it is difficult for claimants to assemble and demonstrate the critical mass of circumstantial evidence that could lead to a presumption of discrimination.

It is not unknown to national laws, where access to information relevant from an evidentiary point of view is reserved to one party only, to impose on that party certain procedural cooperation obligations with regard to the disclosure of such information.[34] Therefore, it is not surprising that in this context the question about an obligation to provide access to information arises. In view of the fact that access to circumstantial evidence is even more difficult for "outsiders" who are not in any employment relationship, it is not a coincidence that the two cases submitted to the CJEU concerned discrimination in the situation of a rejection of

[34] For example: MüKo-Prütting, ZPO, 4. ed., 6 286, paras. 129 – 131, according to which an increased burden of substantiation is the non-provisional party's responsibility if the respondent is not aware of the relevant facts because he/she is outside the course of the action. To the court ruling of the Federal Labour Court to rights to be informed Küttner-Kreitner, Personalbuch 2015, Nr. 76, Rz. 4 ff., including in the case of an assertion of a salary increase on the basis of the principle of equal treatment (Federal Labour Court NZA 05, 289). In the provisional order in the proceedings of Meister, BeckRS 2010, 71091, the Federal Labour Court outlines its case-law on the existence of information claims, but evaluates them as secondary obligations from the existence of an employment relationship, and therefore rejects them in the context of a mere application procedure.

an employment application. In both the *Kelly* case[35] and the *Meister* case,[36] which was submitted by the German Federal Labour Court, the claimants requested that documents of other applicants, in particular the employed ones, be disclosed to allow proof that the rejection of their application constituted a prohibited discrimination. The CJEU was asked whether such a right to be granted access to information could be derived from the rule on the burden of proof, or – in general – from the prohibition on discrimination.

In terms of the factual circumstances, there are substantial differences between the cases, which also had some influence on the CJEU's reasoning. In *Kelly*, the male claimant argued in a very general manner that he was more qualified than the least qualified female job applicant, but in the judgement there was no concrete indications to support this view. In addition, the recruiting university had not refused to disclose documents concerning other candidates completely, but had made them accessible in an edited form. The CJEU first stated that neither the right on the burden of proof under EU law nor the prohibition of discrimination entails a specific right of access to information in order to make it possible to substantiate the facts supporting a presumption of discrimination. However, the Court further held that it could not be ruled out that the refusal to provide information could jeopardise the objective pursued by the directives on equal treatment, and in this way prevent the rule on the burden of proof from being effective in practice. Further specifications as to when this may be the case, and what kind of repercussions it could have, were not made. However, that did not appear necessary in view of the specific circumstances of the case.

This was different from the *Meister* case, where there were at least certain indications of a possible discrimination. The claimant, a 45-year-old female system engineer of Russian descent, had applied for a position as an experienced software developer. Immediately after the rejection of her candidacy, without invitation to an interview, the employer placed an identical advert once more, but again did not invite the claimant, in spite of the fact that she applied again and indisputably fulfilled all the qualification requirements. She then sought compensation for discrimination on grounds of sex, age and ethnic origin, and also requested access to the application documents of the recruited candidate. The German Federal Labour Court referred the question, whether a right to be informed about the employment of another candidate and the employment criteria results from the rules on the burden of proof of the

[35] Case C-104/10, judgement of 21.7.2011.
[36] Case C-415/10, judgement of 19.4.2012.

relevant directives, and whether the refusal of such information constitutes a fact that could give rise to a presumption of discrimination.

The CJEU followed the decision in *Kelly,* but went a step further and pointed out that, in spite of the absence of a right of access to information under EU law, the national court had to ensure that the refusal to provide information would not jeopardise the objectives pursued by the directives. In particular, when examining whether there is sufficient circumstantial evidence to presume discrimination, it has to take into account all the circumstances of the individual case. It is therefore possible that the refusal of any access to information can itself be an indication that significantly contributes to the presumption of discrimination, and thus to a shift of the burden of proof. The CJEU clarified that it was for the requesting court to determine whether that was the case in the main proceedings. However, the Court specifically pointed out that it was relevant that, unlike in *Kelly*, any access to information was denied in circumstances where the applicant was unquestionably qualified, and that in spite of the repeated job advertisement and her two applications, she was not invited to an interview.

In the subsequent national decision, the German Federal Labour Court[37] concluded that the claimant had not presented plausible evidence giving rise to the presumption that there was discrimination. The decision was based on the reasoning that the sole refusal to provide information could not be treated as circumstantial evidence in view of the absence of an obligation to give access to information. It is necessary to provide at least a plausible presentation of indications why access to the refused information would makes it possible to demonstrate the adverse nature of treatment or would give rise to a presumption of discrimination according to the burden of proof rule in § 22 AGG. The circumstances cited by the CJEU, in particular the repeated job advertisement, were held to be unsound. The employer had already claimed in the first-instance legal dispute that he had not published the job advertisement again, but had booked it on the internet for a certain period of time, and then did not cancel it right away after the conclusion of the recruitment procedure.
This gives rise to a situation in which no right of access to information can be inferred from EU rules on the burden of proof, but the denial of information may possibly contribute to the presumption of discrimination. The refusal to provide information does not in itself

[37] Federal Labour Court EzA-SD 2013, no. 19.

constitute such a presumption, but it can add to other evidence with the effect that the burden of proof is shifted. It is still somewhat unclear how much other evidence there needs to be in order for the refusal of access to information to have that effect the extent of which also depends, according to the CJEU, on whether this information is completely refused or made available to a certain extent.

VI. Conclusion

The EU rules on the burden of proof in discrimination disputes are far more complex than it would appear at first glance. They only improve the procedural situation of victims of discrimination partially, namely with regard to the causal link between discriminatory behaviour and the prohibited grounds for discrimination. However, in that context there is a double simplification that reduces the standard of proof, both in terms of the existence of facts pointing to a possible discrimination and in terms of the inference of discrimination from such facts, to the requirement of a predominant probability. The correct transposition and implementation of these requirements in Germany does not appear to be secured on the basis of § 22 AGG. There are also questions regarding the specific design of the evidence procedure, whether the separation of two stages, as prescribed by European law, is adequately applied in practice. A right of access to information as a consequence of the need to effectively apply the rule on the burden of proof as well as the prohibition of discrimination appears to be possible in principle under the recent case-law of the CJEU, but it is subjected to conditions that need to be further explored but will lead to establishing this right only in a very limited number of cases. The European Commission has included an explicit right of access to information in the proposal for a directive on the improvement of gender equality in listed companies,[38] but this politically controversial directive has not yet been adopted.

[38] COM (2012) 614 final, 14.11.2012, Article 4(4).

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Veröffentlichungen

Aufsätze

Besprechung von Sjef van Erp und Bram Akkermans (Ed.), Cases, Materials and Text on Property Law (Oxford 2012) in: RabelsZ 79 (2015) S. 186-187

Grundfragen europäischen Sachenrechtsverständnisses in: JZ 2015 S. 845-859

Anwartschaft, Akzessorietät und Abstraktion in: Recht im Wandel europäischer und deutscher Rechtspolitik. Festschrift 200 Jahre Carl Heymanns Verlag (Köln u.a. 2015) S. 49-63

Die Gegenstände des sachenrechtlichen Besitzrechts in den Rechtsordnungen der Europäischen Union in: Rechtsdurchsetzung. Rechtsverwirklichung durch materielles Recht und Verfahrensrecht. Festschrift für Hans-Jürgen Ahrens (Köln u.a. 2016) S. 585-598

Besitzrechtliche Sachherrschaft. Eine rechtsvergleichende Skizze in: Eppur si muove: The Age of Uniform Law. Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday (Rome 2016), Vol. 2, S. 1927- 1944

Buchveröffentlichung

Ausländisches Privat- und Privatverfahrensrecht in deutscher Sprache (10. Aufl. Sellier European Law Publishers 2016). XXXII, 767 S.

Gemeineuropäisches Sachenrecht. Erster Band: Grundlagen, Gegenstände sachenrechtlichen Rechtsschutzes, Arten und Erscheinungsformen subjektiver Sachenrechte. LIX, 859 S., München: Beck 2015 (Jus Commune Europeaum)

Das Ständige Seminar zum Gemeineuropäischen Sachenrecht Dieses Buch basiert auf den Forschungsresultaten unseres Ständigen Seminars zum Gemeineuropäischen Sachenrecht. Das Material, das mir seine Mitglieder zur Verfügung gestellt haben, hätte ich mir aus eigener Kraft nicht erschließen können. Deshalb ist das Buch auch ihr Buch:
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Prof. Dr. Christoph Busch, Maître en Droit
Kommentierungen und Handbuchbeiträge
Kommentierung der Art. 246-246c EGBGB in: Beck'scher Online-Großkommentar (BeckOGK) (freigeschaltet 2/2016), (50 Normseiten)

Kommentierung der §§ 312-312k BGB in: Beck'scher Online-Großkommentar (BeckOGK) (freigeschaltet 8/2015), (113 Normseiten)

Aufsätze
Ein neues Vertrags- und Verbraucherrecht für Online-Plattformen im Digitalen Binnenmarkt? Diskussionsentwurf für eine mögliche Richtlinie (gemeinsam mit Gerhard Dannemann und Hans Schute-Nölke, Multimedia und Recht (MMR) 2016, 787-792

Towards a „New Approach" in European Consumer Law: Standardisation and Co-Regulation in the Digital Single Market, Journal of European Consumer and Market Law (EuCML) 2016, 197-198.

Crowdsourcing Consumer Confidence: How to Regulate Online Rating and Review Systems in the Collaborative Economy, in: De Franceschi (ed.), European Contract Law and the Digital Single Market: Implications of the Digital Revolution, Intersentia, Cambridge 2016, 223-243

Working Paper verfügbar auf SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799489.
The Future of Pre-contractual Information Duties: Personalization of Disclosure with Big Data, in: Twigg-Flesner (ed.), Research Handbook on EU Consumer and Contract Law, Edward Elgar, Cheltenham 2016, 221-240

Working Paper verfügbar auf SSRN: http://ssrn.com/abstract=2728315.
Identification of Gaps and Gap-filling under the Common European Sales Law – a Model for Uniform Law Instruments? In: Colombi Ciacchi (ed.), Contents and Effects of Contracts -Lessons to Learn From The Common European Sales Law (Studies in European Economic Law and Regulation, Vol. 7), Heidelberg: Springer 2016, 29-44.

The Rise of the Platform Economy: A New Challenge for EU Consumer Law, Journal of European Consumer and Market Law (EuCML) 2016, 3-10 (gemeinsam mit Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, Fryderyk Zoll)

Standardisation of Online Dispute Resolution Services: Towards a More Technological Approach, Journal of European Consumer and Market Law (EuCML) 2015, 50-58 (gemeinsam mit Simon Reinhold)

Rezensionen
Dimitrios Linardatos, Das Haftungssystem im bargeldlosen Zahlungsverkehr nach Umsetzung der Zahlungsdiensterichtlinie, in: Journal of European Consumer and Market Law (EuCML) 2015, 159.

Prof. Dr. Oliver Dörr
Unselbständige Beiträge:
Einführung, in: Völkerrechtliche Verträge, Beck-Texte im dtv Nr. 5031, 14. Aufl. 2016, S. XIII-XXII

Preisrecht im Vergabeverfahren – Zum Verhältnis von öffentlichem Preisrecht und Vergaberecht, in: Rechtsdurchsetzung - Rechtverwirklichung durch materielles Recht und Verfahrensrecht. Festschrift für Hans-Jürgen Ahrens, hrsg. v. W. Büscher u.a., 2016, S. 53-64

Gemeinwohlsicherung durch Vergaberecht, in: C. Stumpf u.a. (Hrsg.), Privatrecht, Wirtschaftsrecht, Verfassungsrecht. Festschrift für Peter-Christian Müller-Graff, 2015, S. 630-638

A European Constitutional Order?, in: Kobe University Law Review No. 49 (2015), S. 123-128
Obligations of the State of Origin of a Cyber Security Incident, in: German Yearbook of International Law 58 (2015), S. 87-99

Herausgeberschaft:
Völkerrechtliche Verträge, Beck-Texte im dtv Nr. 5031, 14. Aufl. 2016

Rezensionen:
Besprechung von: Johannes Saurer, Der Einzelne im europäischen Verwaltungsrecht. Die institutionelle Ausdifferenzierung der Verwaltungsorganisation der Europäischen Union in individueller Perspektive, 2014, in: Die Verwaltung 49 (2016), S. 119-127

Besprechung von: Richard K. Gardiner, Treaty Interpretation, 2nd edition 2015, in: German Yearbook of International Law 58 (2015), S. 531-532

Prof. Dr. Thomas Groß
Monografien
Die Legitimation der polyzentralen EU-Verwaltung, 2015

Public Participation in Infrastructure Planning, 2015 (Herausgeber)

Aufsätze u.ä.
The European Research Council – Legal Aspects of Research Funding, in: D. Jansen/I. Pruisken (Hrsg.)

The Changing Governance of Higher Education and Research, 2015, S. 179-187 (mit R. Karaalp)

Plädoyer für eine Pflicht zur Begründung von Polizeiverordnungen, NordÖR 2015, S. 467-472

Kollegialprinzip und Hochschulselbstverwaltung, DÖV 2016, S. 449-455

Demokratische Legitimation und Verwaltungsorganisation, JURA 2016, S. 1026-1036

Einwanderungspolitiken im Vergleich – Erwartungen an ein Einwanderungsgesetz in Deutschland, ZAR 2016, S. 262-268

Control without Command: Accountability Mechanisms for the EU Administration and their Limits, ZÖR 2016, S. 469-490

Die asymmetrische Funktionenordnung der demokratischen Verfassung - Zur Dekonstruktion des Gewaltenteilungsgrundsatzes, Der Staat 2016, S. 489-517

Art. 10 GG (Neubearbeitung), in: K.H. Friauf/W. Höfling (Hrsg.), Berliner Kommentar zum Grundgesetz, 52. Erg.-Lief. Dezember 2016

Buchbesprechungen
Johannes Saurer, Der Einzelne im europäischen Verwaltungsrecht, in: DÖV 2015, S. 32 f.

Uwe Kischel, Rechtsvergleichung, in: Die Verwaltung 2015, S. 581 ff.

Kay Hailbronner/Daniel Thym (Hrsg.), EU Migration Law, 2. Aufl. 2016, in: DVBl. 2017, S. 35

Prof. Dr. Hans Schulte-Nölke

Buchveröffentlichungen

DIN-Normen bei der Vergabe öffentlicher Dienstleistungsaufträge – Ein DIN Praxisleitfaden, DIN e.V., Berlin o.J., [2015], 23 S. (verfasst zusammen mit Christoph Busch/Oliver Dörr)

Neue Wege zur Durchsetzung des Verbraucherrechts, 2016, 207 S. (herausgegeben zusammen mit dem Bundesministerium der Justiz und für Verbraucherschutz)

Aufsätze

No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts, in: European Review of Private Law (ERPL) 2015, 195–216

The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law?, in: Journal of European Consumer and Market Law (EuCML) 2015, 135-139.

El Borrador del Marco Común de Referencia (Draft Common Frame of Reference, DCFR) - Un «restatement» europeo con reglas modelo para facilitar la interpretación de las normas y constituir una referencia legislativa, jurisprudencial y de formulación de contratos, in: Carmen Jerez Delgado (Hg.), Principios, definiciones y reglas de un derecho civil europeo: Marco Común de Referencia (DCFR), Boletin oficial del estado, 2015, 27-29.

Europäisierung des Haftungsrechts, in: Karlsruher Forum 2015: Europäisierung des Haftungsrechts und des Versicherungsvertragsrechts, mit Vorträgen von Hans Schulte-Nölke und Jürgen Basedow und Dokumentation der Diskussion, herausgegeben von Egon Lorenz, 2016, 5-65.

The Rise of the Platform Economy: A New Challenge for EU Consumer Law?, in: Journal of European Consumer and Market Law (EuCML) 2016, 3-10 (zusammen mit Christoph Busch/Aneta Wiewiorowska-Domagalska/Fryderyk Zoll).

Discussion Draft of a Directive on Online Intermediary Platforms, in: Journal of European Consumer and Market Law (EuCML) 2016, 164-169 ((zusammen mit Christoph Busch/Gerhard Dannemann/Aneta Wiewiorowska-Domagalska/ Fryderyk Zoll).
Available at SSRN: ssrn.com/abstract=2821590.

Ein neues Vertrags- und Verbraucherrecht für Online-Plattformen im Digitalen Binnenmarkt? - Diskussionsentwurf für eine mögliche EU-Richtlinie, in: MultiMedia und Recht (MMR) 2016, 787-792 (zusammen mit Christoph Busch/Gerhard Dannemann).

Plädoyer für eine bessere Durchsetzung des wirtschaftlichen Verbraucherschutzes in Deutschland in zwölf Thesen, in: Neue Wege zur Durchsetzung des Verbraucherrechts, herausgegeben von Hans Schulte-Nölke zusammen mit dem Bundesministerium der Justiz und für Verbraucherschutz, 2016, 197-203.

Rezensionen

Peter Oestmann, Geistliche und weltliche Gerichte im Alten Reich. Zuständigkeitsstreitigkeiten und Instanzenzüge. Köln 2012, in: Nds. Jahrbuch 2015, 340-342.

Dr. Carlos Nóbrega

Die Entwicklung des portugiesischen Sachenrechts - Eine systematische Gesamtbetrachtung unter besonderer Berücksichtigung der lusophonen Rechte (Göttingen 2015).

(National reporter - Portugal) in: European Commission, Study on all mandatory rules applicable to contractual obligations in contracts for sales of tangible goods sold at a distance and, in particular online, prepared by Martine Behar-Touchais et al. (Brussels 2016).

Dr. Magda Schusterová, LL.M.

Monographie

Der Friedensvertrag von Georg von Podiebrad von 1464 vor dem Hintergrund der spätmittelalterlichen Vertragspraxis, Universitätsverlag Osnabrück bei V&R unipress, 2016.

Enzyklopädie Eintrag

„Občanský zákoník" – Codice Civile Ceco, in: Digesto (Discipline privatistiche, Sezione Civile), Rodolfo Sacco, Torino 2016, S. 591-604.

"Mírové smlouvy českého středověku" (Friedensverträge des böhmischen Mittelalters), in: Encyklopedie českých právních dějin (Enzyklopädie der böhmischen Rechtsgeschichte), Bd. III, Karel Schelle, Jaromír Tauchen (Hrsg.), Plzeň 2016, S. 751-758.

Dr. Aneta Wiewiórowska-Domagalska

European Digital Guarantee, Study for the IMCO Committee, together with H. Schulte – Nölke, P. Kwiatkowski, M. Bieanias and A. Suilmann, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/595327/IPOL_STU(2016)595327_EN.pdf

Discussion Draft of a Directive on Online Intermediary Platforms, together with C. Busch, G. Dannemann, H. Schulte – Nölke and F. Zoll, Journal of European Consumer and Market Law no 5, 2016; available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821590

Franchising, Study for the IMCO Committee, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578978/IPOL_STU(2016)578978_EN.pdf

The rise of the platform economy: A new challenge for EU consumer law?, together with C. Busch, H. Schulte – Nölke, F. Zoll, Journal of European Consumer and Market Law no 1, 2016

A "good" change in the Polish Constitutional Tribunal?, together with E. Łętowska, Osteuropa-Recht, no 1, 2016

Wiąże ale nie przekonuje, wyrok Trybunału Konstytucyjnego w sprawie K 52/13 o uboju rytualnym, [It is binding but it is not convincing (a commentary) on the Constitutional Tribunal case 52/13 on the ritual slaughtering], together with E. Łętowska, M. Grochowski, Państwo i Prawo no 6, 2015

Dylematy aktorów rynku prawnego, replica [Dilemmas of the legal market actors – a replay], Dziennik Gazeta Prawna, 18 – 20.09 2015, no 182

Bułgarski standard, glosa do wyroku Sądu Najwyższego z 14 maja 2015 r. [Bulgarian standard, a glossary to the Supreme Court Judgement of 14 May 2015], Dziennik Gazeta Prawna, 21-23. 08. 2015, no 162,

Refleksje na tle orzecznictwa sądów powszechnych w zakresie sprzedaży konsumenckiej, [Reflections on the basis of consumer sales cases decided by ordinary courts.] Prawo w działaniu no 20, 2015

Mateusz Badowski

Legal limitations of public access to spatial data in Germany [in:] G. Szpor, A. Gryszczyńska, Access to spatial data and its limitations. Legal aspects, Zagreb 2015, S. 40-49.

Wpływ przetwarzania danych przestrzennych w smart city na bezpieczeństwo publiczne. Perspektywa polsko-niemiecka, [in:] G. Szpor, Internet rzeczy. Bezpieczeństwo w Smart City, Warszawa 2015, S. 245-258.

Jawność rejestrów publicznych w Niemczech [in:] A. Gryszczyńska, Rejestry publiczne. Jawność i interoperacyjność, Warszawa 2016, S. 57-71.

Zasady udostępniania danych z katastru nieruchomości w Niemczech [in:] A. Gryszczyńska, Rejestry publiczne. Jawność i interoperacyjność, Warszawa 2016, S. 438-457.

Access to spatial data in Europe- German perspective, Kobe Law Review 2016, S. 43-52.

Struktura tajemnic w Niemczech [in:] A. Gryszczyńska, Struktura tajemnic, Warszawa 2016 (2. Aufl.), S. 137-149.

Niemiecki Kodeks ochrony danych osobowych w usługach danych przestrzennych [in:] J. Gołaczyński, Wybrane dobre praktyki w zakresie usług elektronicznych, Warszawa 2016, S. 131-152