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State Immunity in Relation to Damage Caused by Legislation

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Abstract. Whenever we mention damage caused by legislation, the question arises if it is possible to talk about the liability of what defines the rules of liability. Is the civil court competent in deciding in these cases at all? It is doubtless that the concept of damage caused by legislation is on the threshold between public and private law, and immunity decides whether it is one or the other. More and more articles are written on the topic of damage caused by legislation, and their approaches to the root of the problem are all different. In this study, by analysing the issues of immunity with regard to damage caused by legislation, I try to reveal the past and present of regulations, and in this way the damage caused by legislation can be separated from the state's functional immunity.

Keywords: state liability, damage caused by legislation, state immunity, Hungary, Civil Code

1. Introduction

Article XXIV (2) of the Hungarian Constitution states that: 'Everyone shall have the right to compensation for any damage unlawfully caused to him or her by the authorities in the performance of their duties, as provided for by an act.'[1] However, who shall we contact in case when the authorities are responsible only for the execution of the harmful legislative provision or if the cause of violation of civil interests is the legislation itself?

If we mention damage caused by legislation, the question arises if it is possible to talk about the liability of what defines the rules of liability. Is the civil court even competent in rendering decisions in these cases at all? It is doubtless that

1 Translation by the author. Unless otherwise specified in the footnotes, all translations from non-English source materials are from the author.

the concept of damage caused by legislation is on the threshold between public and private law, and immunity decides whether it is one or the other. 'Immunity is somewhat the counterpoint of responsibility; it means irresponsibility. More precisely, immunity is a category that includes cases of the lack of impeachment. Immunity is a case, a situation in which, for some reason, a given legal subject cannot be called to account, although in fact the terms are given.'[2]

Although when we talk about legislation, and so about the most important competence of the major supreme body of popular representation that forms the rules that determine our everyday lives, in the case of certain decisions, it is hard to shift from a hierarchical relationship to an equal one. Absolute immunity is merely history by now, though this does not mean that every damage caused by law can be mended.

More and more articles are written on the topic of damage caused by legislation, and their approaches to the root of the problem are all different. In this study, by analysing the issues of immunity with regard to damage caused by legislation, I try to reveal the past and present of regulations, and in this way the damage caused by legislation can be separated from the state's functional immunity.

2. Immunity of the State. Premise

Discussing liability for damage caused by legislation, the first topic that has to be mentioned is the state's immunity. The simple reason for this is that if the state's immunity is persistent during the performance of the legislative action, then we cannot talk about damage caused by legislation. Currently, the immunity of the legislative body is a hardly rebuttable ideology. First of all, in my opinion, to orientate in this topic in agreement with the current position of legal theory and judicial practice, a stand must be taken regarding whether the damage caused by legislation is in the category of public or private law. By answering this question, we already formulate a view on the issue of the degree of immunity that the state is entitled to.

> In Hungarian legislation, it was common that the institution of the state's liability for damage was not admitted by any of the two branches of law as their own. They did not compete to add the state's liability for damages to the list of their own subjects. This reflects that […] the state's liability for damages is between private and administrative law, and practically it can be negotiated in both networks of these two branches of law; still, once for

2 Kecskés 1988. 13.

> all, it remains a foreign body as well. Its insertion is not perfect into any of the branches of law.[3]

The divergence of the ideas expressed in the topic results from the fact that while the legislative activity is in the category of public law, the possible damage caused by the legislation's outcome, the legal act that comes into effect, is in the category of private law by its very nature.

According to Judit Czukorné Farsang, while examining the immunity of the legislative body, one should take into consideration not the legislative process but the result of legislation, meaning the content of the injurious law in force or the absence of the law.[4] Dániel Karsai stands for the view that the process of legislation – procedurally – is indisputably in the category of public law; in certain aspects, it has relevance for public law, from which the application of the rules of private law bindingly follow.[5] Therefore, damage caused by legislation can be approached from the perspective of public law as well, which focuses on the legislative activity itself, the institutions and measures created by a central power.[6] The renowned representative of this concept is professor Attila Menyhárd. With regard to the subject, according to his standpoint, the legislative activity of the state shall not enter into the framework of private law as responsibility relies on some kind of liability, in this particular case being a claim for damage, on some kind of private law obligation, which does not make the state, as the final lawgiver, liable. If, in accordance with private law, the state acts as an owner, then it is the only condition during which the state is responsible for private law obligations.[7]

In connection with state immunity, the first principle that should be examined is how the elements of public and private law affect the immunity of the state and its legislative body. In that respect, state immunity can be divided into two groups. In the first group, such cases are listed in which the state as a legal entity enters into a contract, and in the second group those cases are included in which the state as a legislative body unilaterally controls certain rules, which oblige and authorize those who apply the law. Indeed, in theory, it would be possible to regulate the immunity of the state's contractual relationship (civil, private law relations) separately from its immunity during the legislative procedure (expression of public law). Thus, examining the state's liability for damages, separation is possible between the tasks executed by the state in the name of its sovereignty and the state's acts that were not carried out from the position of

3 Kecskés 1988. 253.
4 Czukorné Farsang 2019. 478.
5 Karsai 2014. 313.
6 Harmaty 2018. 775.
7 Menyhárd 2018. 882–883.

authority.[8] Therefore, our first task is to detach from state immunity those actions of the state in which it acts as a legal entity and not as a legislative body. If we can carry this out successfully, then the contractual relationship can be removed from the topic of liability for damage caused by legislation.

3. Functional Immunity

The doctrine of functional immunity contains situations in which the state takes part in the market economy and enters into a contract primarily as a legal entity and not as a legislative body since, 'in addition to exercising public authority, the state increasingly appears as an economic operator'.[9] Therefore, the doctrine of functional immunity has evolved to solve problems in which the state decides itself that in order to take part in the economic life, it enters into civil legal contracts. The state is in the special situation that it can decide for itself, for example, when using certain public assets, whether it wants to choose public law rules or private law rules; however, later there is no possibility in terms of switching from one to the other.[10]

The necessity of functional immunity and the unsustainability of the state's immunity was historically recognized when the state became involved in economic life and entered into trade by concluding private law contracts; however, in a possible legal dispute, the State utilized its sovereignty to exempt itself from the consequences.[11]

> In 1873, in the Charkieh affair, Justice Phillimore claimed as follows: The concept of giving the toga of a merchant to the state only in advantageous situations is untenable. However, when the State has to fulfil its obligations as a merchant, soon the toga is taken off, saying that it was just a disguise, and it puts on the ornate of the sovereign governor, as now it is advantageous, and it shirks its obligations, while its partner in business remains without compensation, back to square one.[12]

Pursuant to this view, the doctrine of functional immunity was integrated into the legal system first on the national and then on the international level as well. It declares that: 'the state is not entitled to immunity when the state acts not in

8 Boóc 2013. 507.
9 Lehotnay 2010. 396.
10 Papp 2018. 788.
11 Mádl–Vékás 2015. 184.
12 Id. 185.

its public law function (iure imperii) but in its private and commercial law role (iure gestuonis)'.[13]

In Hungary, Decree No 50 of 1953 (X. 23.), the Hungarian Labour Code (abbreviated according to its Hungarian name as the MT), was the first act in which the state's legal personality under private law was defined, in the following way:

> [t]hose assets which are not specifically attributed to any of the public entities by the national budget, and also assets which do not have specific purposes, yet as a result of legal provision or the provision of the claimant the state is entitled to them, the state directly obtains them, and the responsibility deriving from them is also the liability of the state. In such a case, the state is represented by the Minister of Finance.[14]

The 1959 edition of the Civil Code removes the state from the group of legal persons and defines it as a special, particular legal entity. Since the doctrine of functional immunity began to shake slightly during the socialist legal system, this special categorization made possible its empowerment with additional rights.[15] Thus, according to the doctrine of functional immunity, when the state enters into contracts as a party under private law, it cannot intervene in the same contract as a public entity. However, this doctrine was not fully implemented in practice.[16] The state as one of the contracting parties remains a Janus-faced institution. Thus, the state enters into a schizophrenic situation in private law relations and with a view to the protection of public interests, as in certain cases it may appear as a public law entity as well, blurring the boundaries between the roles of public and private law.[17] An example for the public law element merging into private law contract is the maximum sentence that can be imposed by the state in the case of a breach of contract of the other contracting party in concession contracts.[18] Thus, it is clear that in case of a breach of a concession contract the consequence is not a civil liability claim for damage but a public law sanction; however, it affects the non-state contracting party only. On the other hand, the state's actions – from a private law position – in case of any breach of contract do not have any consequence either on the level of private or on the level of public law. It may arise as a question whether this contractual concept can be inserted into the framework of public or private law or perhaps into the framework of contract law.

Based on the above, according to one definition, what we mean by functional immunity is each situation when the state as a legal subject enters into a private

13 Id. 185.
14 Kecskés 1988. 268.
15 Kecskés 1988. 269–271.
16 Zoványi 2016. 359.
17 Zoványi 2016. 360.
18 Zoványi 2016. 360.

law relationship; however – examining the theories –, it must be stated that in practice functional immunity does not include every private law situation, but only those cases are involved in which the state acts as a contractual party. Naturally, in this study, the idea of functional immunity is used in this sense. The system of principles invoked by Attila Menyhárd embodies the doctrine of functional immunity. Although this system acknowledges the liability of the state in private law contracts, it adds a special norm to the state's conduct of private relations and its ownership under private law. Namely, the state, even in its position of an owner, may be subject to the liability for enforceable obligations – such as in the case of failure with the consequences of compliance or compensation – only in cases regulated by public law instruments, primarily according to the rules of national asset and public finance management.[19]

To support his standpoint, the author refers to the judicial opinion on the decision of the legal proceeding for the so-called Budapest Metro Line 4. Indeed, the legal proceedings of Metro Line 4 focused on this question, where the courts in charge lined up contradictory arguments concerning state immunity. As a conclusion of the legal proceedings, it can be stated that the financing of the construction of Metro Line 4, which connects the south of Buda with Rákospalota, was divided in 60%–40% between the investor BKV and the Municipality of Budapest. However, in 1999, the State intended to exercise the right of withdrawal from their commitment, so the appropriation of the support of this investment was not submitted to the Parliament in the draft on that year's budget,[20] and thus it was not part of the budget bill either. Shortly afterwards, the State informed the Mayor of Budapest that it no longer supports the investment and that in the future the contract would be repealed.[21] After that, the Municipality of Budapest as the first and the BKV as the second plaintiff filed a lawsuit against the Hungarian State based on Section 123 of the Act on Civil Procedure (abbreviated as Pp.) in force at the time, to determine whether the termination of the contract was illegal, rendering the termination void, so the contract may be kept in force and the State can be obliged to fulfil the initial commitment. The courts of first and second instance found that the contract is still in force, its termination having been unlawful; however, the State maintained their decision of not fulfilling the contractual obligations of supporting the investment.[22] The subject matter of the second proceeding was about the performance of the State's contractual obligations and the fulfilment of the claim for damages. It is highly relevant to our topic that in this proceeding it was adduced by the defendant that the rules of private law should not be applied for this contract since it is not a private

19 Menyhárd 2018. 882.
20 Nagy 2003. 55.
21 Gárdos 2000. 2.
22 Gárdos 2000. 3.

contract but a public law instrument, and it is such a contingent category in which the performance depends on the state's financial situation; however, the last phrase of the contract in this legal proceeding is frequently used also in private law contracts, stipulating that 'issues not covered by this contract shall be ruled by the Civil Code' and that in case of dispute the judicial process was a contractual term as well.[23] Recorded by the court of first instance, it is stated that in the contentious case the main executive body of the State, the Government (the Cabinet), did not provide the DBR Metro project's budget appropriation for the subject year in the draft bill of the 1998 and 1999 budget. The defendant may not rely on its own failure with the purpose of deriving benefit from it.[24] Consequently, the legal basis and the suitability of use of the plaintiff's main claim proved to be well founded.

However, the Supreme Court opted for an opposing position and declared that the state was not entitled to have unlimited autonomy – namely, it may not have disposal of its assets indefinitely; as a result, the state as such may not enter into a direct private law relationship at the expense of the budget since the presentation of the Government's budget proposal is an administrative legal act, in which if the Government does not include the proper accomplishment in agreement with its private law relationship, this presentation cannot later be taken into account in a private law procedure. It clarifies in relation to the judgement rendered by the court of first instance that private law obligations cannot be guaranteed financing by the central government budgets and that also the compliance with such obligations are unenforceable.[25] The judgement about the rejection of the claim of the Municipality of Budapest was based on the fact that the State cannot be obligated to fulfil its liabilities concerning state assets in cases when the Parliament's legal declaration is needed to maintain the obligation. As a result, the bill on the central budget is approved by the Parliament as a sovereign legislative body, and it need not take into account the liabilities of the Government. Furthermore, concerns were raised that if the court obliged the Government to fulfil the contract, then the Parliament would in this way be ordered to amend the bill on the central budget. In the light of the above, in practice, the implementation of functional immunity of the state was not successful even at the dawn of the 21st century, and since then, by all means, the principle is applied that 'state immunity is a legal institution which affects fields in which its presence and operation cannot be explained either economically or socially or politically'.[26]

Concerning the question of state immunity, analysing its public and private law elements, we can state that if the state's conduct is viewed as a duty to

23 Gárdos 2000. 4.
24 Nagy 2003. 57.
25 Supreme Court Decision reported under No Gfv. X. 31.639/2001/12.
26 Kecskés 2001. 11.

compensate for damages only in its quality as an owner and in a way governed by public law elements, then in this case a contract concluded this way confuses elements of public and private law so that neither state liability nor private law claims shall arise from it. We can consider it as a step forward in legal development that the gain of these trials was Section 28, subsection (2) of the former Civil Code (abbreviated as the Ptk.), which stated that even in the absence of financial coverage or in case of exceeding the financial coverage provided for this purpose, the state shall remain liable for damage claims, reimbursement and compensation, and the contractual obligations committed to persons of good faith. According to the ministerial explanation attached to the phrases in parallel with public law regulations, the legislative body should settle the legal scope of state commitments also in the field of private law, and it can be solved by the amendment of the Ptk. The Ptk. was inconsistent with regard to budgetary institutions – it stated that even in cases of exceeding their financial coverage, they are still liable for damage claims, reimbursement, compensation, and their obligations incurred towards third parties; however, the same was not deemed compulsory for the Hungarian State as a private legal entity, a legal person. This deficiency contradicts the requirements of legal certainty, and it violates the security of economic exchange. The Hungarian State should be treated the same way by private law as other legal entities are, also including budgetary agencies in particular.[27]

The principle – still – maintained by Attila Menyhárd, according to which the state may hold liability as a public law entity only, in the course of which these contracts cannot be removed in practice from the scope of public law, became outdated from the aspect of legal theory with the legislative changes performed for this case already following the binding decision closing the legal proceedings of Metro Line 4.

Practically, the new Ptk. (the New Civil Code) maintained the former provisions, as recorded by its sections 3:405 and 3:406 that the state participates in private law relations as a legal entity. The representative of the state in private law relations is the minister responsible for state property. The obligation arising from laws controlling civil obligations is mandatory for the state and the legal entity as part of public finances also in the absence of financial coverage.[28]

In my consideration, based on the laws in force, the state's accountability in its contractual relations should not be a problem as a consequence of the fact that in these cases the state itself enters into legal relations; thus, it is obliged to bear the consequences related to it. Therefore, in my opinion, the issue of functional immunity is detachable from the topic of damages caused by legislation.

27 Czukorné Farsang 2019. 479.

28 Act No V. of 2013 regarding the Civil Code, § 3:405. § 3:406.

4. Legislative Immunity

Although the state's successful activity in economic life is not the most significant self-expression of the state, still '[w]e can get much closer to the very essence of the institution if it is assumed that the liability of the state is an integral part of the state's autonomous structure of legal subjectivity and constitutes one segment of the state's liability for regulations in property law (private law and international private law)'.[29] Nevertheless, state presence in the economy – in the 19th century – brought along the downfall of absolute state immunity. In that time period (1853–1861), Hungary adopted Austrian law, which repealed immunity.[30] Between 1874 and 1876, the alienation of Austrian law brought about the demand for the destruction of state immunity, which primarily incorporated state liability for damages caused by public officials, under the conditions of certain procedural criteria.[31] The expansion of the liability of the state is presented in Act No VIII of 1871 on the liability of judges and court officials, Act No XXXIII of 1896 on wrongful convictions in criminal law measures, and Act No XX of 1897, which provides for state liability for the damages caused by public officials in charge of asset management.[32] According to the views of Miklós Borsodi and László Kecskés, state liability, even without the detailed explanation, is accepted based upon customary law in Hungary from the 1890s. The Act on Private Law of 1900, however, states in its reasons significant and reformist principles when it 'refutes the financial concerns that were raised solely against the principle of state liability, demonstrating that in those states in which liability has existed for a long time, it has never brought about a considerable charge on the treasury'.[33] In the 1920s, the private legal nature of the subject fades away, and then the Soviet-type legislation repeatedly restored state immunity, which evidently, in principle, precludes any state liability for indemnification. This approach appeared not only in domestic but in international market associations as well. However, later, in the 1970s, exactly the rules of the code of private international law regulated the 'functionally relative' principle of immunity; still, this cannot be acknowledged as a form of real progress.[34]

In legislation, immunity was still irrebuttable based on Act IV of 1959 of the former Ptk. As the former Ptk. stated nothing about damage caused by legislation or about its precedent and method of compensation, the BH (judicial decision) No 1994.312 of the Supreme Court settled the issue as follows:

29 Kecskés 1988. 266.
30 Kecskés 1988. 251.
31 Kecskés 1988. 257.
32 Kecskés 1988. 258.
33 Kecskés 1988. 259.
34 Kecskés 1988. 320–328.

> the law sets universal and abstractly expressed rules of conduct, and thus in the case of legislation – also including the liability related to it – the rules of public law shall apply to it, which also provide protection for the legislative body in case of constitutional violations even if the Constitutional Court annuls the law and the annulment has a retroactive effect. The executive body's activity in creating norms is under constitutional control, but the occurrence of any possible damage brought about by the enactment of the normative general law does not create a private law legal relationship between the legislative body and the aggrieved party, wherefore the rules of civil liability for damages cannot be applied.

The Supreme Court of Justice of the time explained in the following way in its decision BH No 1998/334 that the rules of public law, more specifically the rules of constitutional law, shall apply to legislation, so that in this case an obligational relationship does not form between the legislative body and the aggrieved party. However, as the Supreme Court does not distinguish between certain legislative bodies, immunity applies to all lawmakers.[35] No significant change occurred even with the entry into force of the new Ptk., and for this reason the text in effect does not contain damage caused by legislation although there were plenty of proposals for it.

One of these proposals is the Concept (thesis) of the new Civil Code, which was accepted at the Codification Committee's meeting on 8 November 2001. In Book 6 of the new Civil Code, item V/10 records regarding state liability that:

> the rule of liability for damages caused in the exercise of public administration needs to be reconstructed. Accordingly, the state, regarding state bodies and organs of local government, is obligated to pay compensation for the damage caused by the activities of planning and management during its performance of public authority or because of the failure of these activities. It may not be held liable if it can prove that the damage was caused by a reason outside of its scope of activities, administration, control system or caused due to circumstances that could not be avoided or due to the unavertable conduct of the aggrieved party. The culpable contribution of the aggrieved party shall lead to the apportionment of the payable compensation.

It also states that these rules shall be applied in the case of claim for damages for wrongful arrest or unlawful detention. It points out that: 'The new Code should also set forth state liability for damages caused by legislation in case of unconstitutional legislation only.'[36] The first part of the proposal refers to damage

35 Lehotnay 2010. 400.

36 *Az új Polgári Törvénykönyv koncepciója* 2002.

caused in the exercise of administrative law, while the last sentence refers to damage caused by legislation. From the justification linked to the proposal, it is clear that practically the Concept intended to include (Civil Chamber, abbreviated as PK) statement No 42 of the Supreme Court of Justice (the Curia), according to which the liability for damages caused by the state, the local government, and their organs may be confirmed if the tort was performed during exercising public authority, i.e. in the framework of public authority activity or their failure to perform.

A significant idea of the Concept is that the rule of state liability for damages caused by legislation should be settled to some degree in the Code. However, this did not happen, and the bill justified it as follows: Based on the rules of the Ptk., the actions for compensation for damages caused by legislation was adamantly rejected by legal practice. The Proposal does not contain a specific regulation for the liability for damages caused by legislation, by reason of which, on the basis of a general liability structure, the legislative body is liable for the damage thus caused. There is no doubt that damage can be caused by unconstitutional legislation or by the failure of implementing EU obligations. In these cases, based on the general rule of delictual obligation, the aggrieved party may request the court to compensate for the damages caused.[37]

It is unfortunate to settle this way such a debate that is solved with exactly the opposite result in judicial practice;[38] however, it is certain that for the judicial practice the justification linked to the bill proved to be sufficient to prevent the exclusion of state liability in individual cases.

The general rules thus shall apply also to the legislative body according to Section 6:518 of the Ptk., which states the general prohibition of tort, Section 6:520 of the Ptk., which sets up the presumption of the tortious damage, and according to letter d) of the same section, it is not a tortious act if the injuring party caused the damage with a conduct protected by law and the conduct does not interfere with the legally protected interests of another person or the law obliges the injuring party to pay compensation. However, the debate of state immunity seems to be settled in a way that the state shall not benefit from it in case of damage caused by legislation, and thus with the tortious act it steps into the framework of private law, so sections 3:405 and 3:406 of Ptk. can apply to it as well. However, in the present case, the state, after determining the legal basis of damage caused by legislation, can be held liable as a legal entity. Based on this concept, sections 3:405–406 of the Ptk. are applicable not solely in cases of functional immunity but also in all cases in which the state enters into the frame of private law; consequently, also in the case of contractual liability of damage.

37 Bill No T/7971 on the Civil Code. http://www.parlament.hu/irom39/07971/07971.pdf (accessed on: 15.01.2018). 665.

38 Chiovini 2013.

5. Current Judicial Practice in the Field of Legislative Immunity

The absence of the legislative body's immunity was examined by the Municipal Court of Budapest in the legal proceeding related to liability for damage caused by legislation, in which the Municipality of Budaörs brought an action against the Hungarian State. The Hungarian State as the defendant argued for functional immunity, according to which in the absence of the normative provisions contributing to it, damage caused by legislation is not enforceable. By contrast, the court stated that according to Paragraph (2) of Article R) from the Hungarian Constitution the law shall be binding on every person, consequently on the state as well. Accordingly, the state shall be exempted from civil liability only if this exemption would be provided by law; however, there is no provision with such content in Hungarian legislation. The court in this round explained that the previous judicial practice deduced state immunity from the fact that they placed damage caused by legislation into the category of public law; however, none of the court judgements specifies the provision under law on which the position statement was based. Consequently, contrary to this judicial practice, it set law principles, namely popular sovereignty and the principle of the rule of law, against each other, and it explained that although it can be deduced from the principle of popular sovereignty that the people are the source of public authority, who exercise their power via elected representatives, the principle of the rule of law states that under the rule of law the only absolute authority is the constitutional authority though state bodies may exercise, solely within the framework of their competence, their authority deriving from the sovereign, the people. The sovereign does not empower the legislative body to overstep its constitutional framework; should this happen, then the legislative body is not performing its given duties entrusted to it by the sovereign, and thus it can be held accountable for this conduct.[39]

In my view, this question is in fact directly related to the fact that the reason why the legislative body has not yet declared either its own immunity or the absence of it is because it is not entitled to immunity by means of its derivative power. It is evident that in the non-factual private law cases the legislative body may not be held liable for every kind of detriment to citizens' financial circumstances by reason that as long as the law does not contravene a constitutional principle, the borders of public law are not crossed. However, when legislation causes damage in a verifiable manner, so that the injured party is subject to the disadvantage of the absence of liability, and the injuring party's conduct is part of the facts, a delictual (extra-contractual) relation arises by operation of law. Thus, in that case, the court examined the reference of the defendant, according to which the consequences of an instrument of legislation that goes beyond the limits of the

39 Decision of the Tribunal of the Capital reported under No P.20810/2017/28, para 6.

rule of law shall be the imposition of sanctions based solely on constitutional or political grounds, and it stated that:

> according to Section 6:2, subsection (1) of the Ptk., liability is a fact giving rise to an obligation. Obligation is a relation governed by private law. If the state, or the legislative body who is obliged to assume its liability, causes damage, then such obligation arises to which, by operation of law, the subject is the state.[40]

In the course of the same legal action, during the proceedings of the court of second instance, the Budapest Capital Regional Court also stated that the relevant form of the Ptk., related to delictual liability for damage caused by legislation, shall be applied. Its argument was based on the statements of ministerial justifications of the Ptk. Furthermore, the Regional Court also explained that based on the EU law for the damage of individuals the state shall be held liable, i.e. also when legislation breaches EU law, and thus it would not be compatible with the Constitution, nor with the principle of equality before the law if the state were exempted from liability with the existence of a domestic legal situation.

In the light of the above, it can be stated that state immunity cannot be justified by either the present theory or the practice in force. So, in terms of private law legal relations, meaning owner's liability, entrepreneurial responsibility, or liability for damage, the state does not benefit from immunity.

6. Conclusions

Damage caused by legislation is a complex and difficult category. In many cases related to this subject, judicial practice is consistent neither in situations seemingly clarified by legal provisions nor in the issue of functional immunity. Against this background, it is perhaps hardly surprising that we are still in the dark in terms of damage caused without legislative regulation, by pure legislation.

We cannot ignore the gratifying fact that the reputation of the legislative body previously benefiting from total immunity has changed dramatically, as while previously the state was entitled to unlimited immunity both in public and private law relations, the judicial practice has by now overcome this obsolete practice and declared the absence of state immunity in its private law relations, and thus also the possibility of the theoretical implementation of the liability for damage caused by legislation.

It is regrettable that – although with the enactment of the new Ptk. it would have been a possibility to regulate the issue, and the demand for it has already

40 Decision of the Tribunal of the Capital reported under No P.20810/2017/28, para 6.

been recognized by the legislative body – this possibility of law enforcement was only included into the rationale for legislation, and even there the only thing mentioned about it is that general rules shall apply to it. It might not have been the most appropriate wording in the circumstances of such a practical and legislative ambiguity.

We can thank judicial practice for the absence of state immunity, which proves to be the base of the enforceability of damage caused by legislation; however, with regard to the practical implementation of this legal statement, there are still a great number of tasks that need to be fulfilled by the judiciary, also the legislative body, the representatives of jurisprudence, and the appliers of the law as well.

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