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Origins of Warranty

„Since law, as a social norm, is the result of historical development, problems raised by the law in force can be seen dogmatically more clearly, if we go back to the roots.”¹

1. The Meaning of Consumer Protection and its Necessity

According to the general definition consumer protection is the complex entirety of the principles in the fields of economics, sociology, and law, which are devoted to protect the weaker party in commercial and contractual relations.²

The coordinate relation of parties – typical of civil law – has transformed in the 20th century. The gradual appearance of wholesalers and enterprises, building crossborder store chains, resulted in the termination of the balance of positions, that is how the intervention of the state became necessary in the field of legislation as well.³

As a response to the social effects of capitalism consumer protective politics first blossomed out in the 1st half of the 20th century in the United States of America.⁴ The approach soon found its followers in the countries of Western-Europe, producing in market economy, and its spread could already be shown in the 1970's in the law-making of the European Economic Communities, too.⁵ The European Union nowadays handles it as such a prominent area, that its regulation is required in all the member states including Hungary.

2. Consumer Protective Means of Civil Law

Consumer protection is carried out in numerous fields of law by constituting and developing substantial and procedural legal institutions.⁶ In Hungarian civil law we can also call many legal institutions 'consumer protective'.

Obligation to cooperate⁷ – as a principle of contract law – is parallel with the disclosure obligation,⁸ that is one of the most important rights of consumers.

In case of default – as breach of contract – consumers' interests are protected by the Civil Code rules of implied warranty, guarantee,⁹ and product liability regulated in a special law.¹⁰ It is also a strong means, that in case of some consumer contracts consumers can have the contract rescinded without reasoning within a given short period of time.¹¹

Despite the great number of special laws in Hungary our Civil Code also contains claudican cognate rules in the sake of consumers – opposite to dispositivity, typical of civil law.¹²

1 JAKAB ÉVA: Az árleszállítás mértéke a szavatossági perben (Jogtudományi Közlöny, 54., September 2000., 325-333. p.), 325. p., in the followings: JAKAB: Az árleszállítás mértéke

2 DR. BÁRTFAI JUDIT – DR. CSEKE DÓRA – DR. KERTÉSZ ÁGNES – DR. NÉMETH ANITA – DR. WALLACHER LAJOS: Szerződési jog – fogyasztóvédelem (HVGOrac Budapest, 2000.), 13. p., in the followings: BÁRTFAI – CSEKE – KERTÉSZ – NÉMETH – WALLACHER

3 BÁRTFAI – CSEKE – KERTÉSZ – NÉMETH – WALLACHER, 14-15. p.

4 FAZEKAS JUDIT: Fogyasztóvédelmi jog (CompLex Kiadó, Budapest, 2007.), 20. p., in the followings: FAZEKAS

5 See, for instance, the Consumer Protective Program of the Council of the EEC on 14th April 1975., FAZEKAS, 22. p.

6 VÉKÁS LAJOS: Fogyasztóvédelmi magánjog és az új Polgári Törvénykönyv (In: Tanulmányok Dr. Bérczi Imre egyetemi tanár születésének 70. évfordulójára, Acta Universitas Szegediensis, Acta Juridica et Politica, Szeged, 2000., 553-562. p.), 553. p., in the followings: VÉKÁS; BÁRTFAI – CSEKE – KERTÉSZ – NÉMETH – WALLACHER, 15. p.

7 The Civil Code of Hungary (in the followings: CCH), 205. § (3)

8 CLV. Act of 1997. about consumer protection, 12-15. §§; see also the laws about special contracts such as the 17/1999 (II. 5.) Government Decree about the distance contracts, 2-3. §§, in the followings: 17/1999. Gov. Dec.

9 See also the connecting 49/2003. (VII. 30.) Economic and Transport Ministry Decree about the enforcement of warranty and guarantee claims within the scope of consumer contracts.

10 X. Act of 1993.

11 See, for instance, the 4. § (1) of the 17/1999. Gov. Dec., here the deadline is 8 workdays.

12 To the legal systematical classification of consumer protection in the field of civil law see: VÉKÁS; the enumeration of the means is only exemplary here because of the limits of the length of the study.

3. Legal Historical Roots

Consumer protection is the production of modern times. However, in contractual relations already from the ancient prosperity of commerce we can discover those legal institutions, that protected the purchaser as the party of weaker position. Consumer protection or regarding the ancient relations rather so called 'purchaser protection' has – in this wider sense – few thousand-year-old traditions.

Rules of long past and today's achievements should not be separated because some current consumer protective provisions also stem from Roman Law.

Furthermore we can also draw a parallel between the requirements then and now concerning the conduct of the purchaser. According to the ancient principle of '*caveat emptor*' the purchaser had to examine the object carefully even before the sale was made.¹³ One model of consumer protection today, similarly to this, provides protection only for 'reasonably acting consumers'.¹⁴

4. Warranty in the Ancient Rome

The aim of this study is to discuss warranty as one of the strongest civil law means of consumer protection. In my opinion the target of consumer protective regulation in the area of civil law is to give normative solutions to those problems arisen in practice, that derive from the disadvantaged position of the consumer. Rules of warranty were devoted to provide this for the purchaser already in the ancient times.

Warranty in our effective civil law is the objective liability for default of the obligor of a synallagmatic contract.¹⁵ Its place is in the general part of law of obligations, so its rules apply to all synallagmatic contracts.

The legal historical roots of warranty can be found among the rules of sale in the ancient Rome. The warranty of that time – in a narrow sense – meant the objective liability of the vendor for latent defects.¹⁶ The extension of its rules to other contracts was casuistic at that time.¹⁷

In the followings I would like to sketch the historical formation of this legal institution and to compare its most important features at that time to those in the effective Hungarian law. My aim is to point out that the ancient rules remained through historic times to become a model for present time legislation.

4.1. Commercial Relations in Rome

In the archaic Rome the exchange of goods only began, however, according to many contemporary fragments it is certain, that even at that time weekly market existed in every Italian city and the 'private international' element was already present in land commerce.¹⁸

Due to the favourable geographical conditions sea-commerce also became frequent soon, that had – beside its blissful effects – unwanted consequences as well: it gave way to practicing piracy.¹⁹ This activity and the more and more frequent wars of conquest²⁰ in the 2nd century B.C. – by which Rome gained a lot of territory and thousands of prisoners of war – led to the prosperity of slave-trading.²¹ The demand for slaves was booming because they were the workmen in the productional economy.²² Their wholesale-trade was concluded at the slave-markets so these were early supervised by the state.²³

13 JAKAB ÉVA: Stipulationes aediliciae (Acta Universitas Szegediensis de Attila József Nominatae, Acta Juridica et Politica Tomus XLIV., Fasciculus 7., Szeged, 1993.), 60. p., in the followings: JAKAB: Stipulationes; ZIMMERMANN, REINHARD: The Law of Obligations.

Roman Foundations of the Civilian Tradition (Oxford University Press, New York, 1996.), 307. p., in the followings: ZIMMERMANN
14 This is the characteristic of the European majority and the judging practice of the European Court of Justice, but it is different in Germany, and also in the USA, where all consumers are protected regardless their expectable care and caution (FAZEKAS, 76. p.).

15 CCH 305. § (3); the default concerns to physical defects; the liability for legal defects belongs to warranty for eviction.

16 MOLNÁR IMRE – JAKAB ÉVA: Római jog (Leges Szeged, 2008.), 294. p., in the followings: MOLNÁR - JAKAB

17 *Ibid.*

18 Commercial relations for example with Ethrury, see: JAKAB: Stipulationes, 9. p.

19 JAKAB: Stipulationes, 10-13. p.

20 The most famous of these were the Punic Wars fought with Carthago between 264-146. B.C., and ended in the victory of Rome, MOLNÁR – JAKAB, 27. p.

21 PÓLAY ELEMÉR: Az eladói kötelezettség a preklasszikus római jogban (Acta Universitatis Szegediensis de Attila József Nominatae, Acta Juridica et Politica Tomus XI., Fasciculus 9., Szeged Hungaria, 1964.), 4. p., in the followings: PÓLAY

22 PÓLAY, 5. p.

23 ZIMMERMANN, 311. p.

On the other hand, from the upswing of commerce written fragments show that a practice spread at the market: the vendor promised in a guarantee-*stipulatio*²⁴ to the purchaser, that the object of sale was lack of certain latent defects.²⁵ This *stipulatio* was performed very often together with the *stipulatio* promising the warranty for eviction.²⁶ This commercial practice later appeared in the formula-collections as well,²⁷ as we can see in the book of Varro.

Varro rust. 2. 10. 5.:²⁸

*In horum emptione solet accedere peculium, aut excipi et stipulatio intercedere, sanum eum esse, furtis noxisque solutum aut si mancipio non datur, dupla promitti, aut si ita pacti simpla.*²⁹

The disadvantage of this guarantee-*stipulatio* is, however, that it was part of the bargain, therefore constituting the rules of warranty became a topical issue because of the privileged liability of vendors.³⁰

4.3. The Edict of the Aedilis Curulis

The *aedilis curulis* was the *magistrate*, whose main duty was to carry out the tasks concerning town security since 367. B.C.³¹ Due to blossoming commerce he gained also the duty to regulate the security of trade and sale at markets. In his *edict*, that is, his annual program he published the provisions on sale and the traders had to comply with those.³² The rules were probably constituted on the basis of the mentioned guarantee-*stipulatio* of vendors, since those reflected the accepted relevant defects in slave-trading the most.³³ The rules of the *aediles* went through many refinements and in the 1st century B.C. the *edict* tried to regulate the market-trade in a sophisticated form.

It contained first of all the provisions – in an itemized list – on the communication requirements on the side of the vendor. These were the followings: 1. whether the slave was healthy or had a disease; 2. whether it had a noxal liability for theft or other crimes;

3. whether it was a runaway; 4. whether it was a loiter on errands; 5. what was its nationality; 6. what its age was and whether it was a 'newly enslaved' or a 'slave of long standing';

7. whether it ever committed a capital offense; 8. whether it ever made any attempt upon its own life.

Now let us see a fragment about the *edict*!

D. 21. 1. 1. 1 Ulpianus 1 ad edictum aedilium curulium:

Aiunt aediles: Qui mancipia verdunt certiores faciant emptores, quid morbi vitiove cuique sit, quis fugitivus errove sit noxae solutus non sit: eademque omnia, cum ea mancipia venibunt, palam recte pronuntiatio...

*Item si quod mancipium capitalem fraudem admiserit, mortis consciendae sibi causa quid fecerit, inve harenam depugnandi causa ad bestias intromissus fuerit, ea omnia in venditione pronuntiatio: ex his enim causis iudicium dabimus...*³⁴

The catalogue of the defects included features the presence or absence of which highly influenced the purchaser's will of purchasing.³⁵

24 *Stipulatio* was a unilateral obligation in the ancient Roman law: to the solemnly asked question of the obligee (the creditor) the obligor (the debtor) gave an entirely identical answer, see: MOLNÁR – JAKAB, 277. p.

25 PÓLAY, 3. p., ZIMMERMANN, 310. p.

26 Since the objective of the action, commenced on this ground, was twice the purchase price, this promise of the vendor was called *stipulatio duplae*; JAKAB ÉVA: Apropó jogharmonizáció: gondolatok az ókori kellékszavatossági modell kapcsán (In: In memoriam Nagy Károly egyetemi tanár, Acta Universitatis Szegediensis, Acta Juridica et Politica Tomus LXI. Fasciculus 1-26., Szeged, 2002., 225-237. p.), 229. p., in the followings: JAKAB: Apropó jogharmonizáció

27 JAKAB: Apropó jogharmonizáció, 234. p.; JAKAB: Stipulationes, 29. p., 47. p.; see also: D. 21, 2, 31 Ulp. 42 ad Sab.

28 The book of Varro (M. Terentius Varro: Rerum Rusticarum Libri Tres) was written in the 1st century B.C. but its findings – regarding its wording – can be applied to the practice of the 2nd century B.C., too, PÓLAY, 7. p.; we can find very similar texts in the deeds of sale coming from the 2nd century B.C. from the ancient Herculaneum, Dacia, Egypt, Pamphily and Cilicy, see: JAKAB: Stipulationes, 76-79. p.

29 „At the time of sale also his assets go with the slave, or it is an exclusion; they conclude a contract stating that the slave is healthy, did not steal, caused no damage; if he is not sold by mancipation, the vendor guarantees twice of his price, or, if they agree otherwise, simply his price.”, see: M. Terentius VARRO: A mezőgazdaságról. Latinul és magyarul, fordította: Kun Ferenc, (Akadémiai Kiadó Budapest, 1971.), 345. p.; translation of the author.

30 Conditional undertaking of liability, PÓLAY, 8. p.

31 Description of the *aedilis curulis*: JAKAB: Stipulationes, 2nd chapter, 33-65. p., and PÓLAY, 8-9. p.

32 JAKAB: Stipulationes, 43. p.

33 JAKAB: Stipulationes, 28-29. p. and 47. p.; ZIMMERMANN, 311. p.

34 The *aediles* say: „Those who sell slaves are to apprise purchasers of any disease or defect in their wares and whether a given slave is a runaway, a loiter on errands, or still subject to noxal liability; all these matters they must proclaim in due manner when the slaves are sold...

Again, vendors must declare at the time of sale all that follows: any capital offense committed by the slave; any attempt which he has made upon his own life; and whether he has been sent into the arena to fight wild animals.

On these grounds, also we will give the action...”, translation from: The Digest of Justinian. Volume 2., Alan Watson (editor), (University of Pennsylvania Press, New York, 1998.), 144. p., in the followings: Digest 2

35 See also the fragments: D. 21. 1. 31. 21 Ulp. and D. 21. 1. 37 Ulp.

The first remedy provided by the *aedilis curulis* to the purchaser was the *actio redhibitoria*.³⁶ Its goal was the restoration of original conditions before the sale, that is, the rescission and it was given to the purchaser, if the vendor failed to tell the information about the features, set out in the *edict*, or if the presence or lack of a feature was promised but it was not correspond to the truth.³⁷

The tendencies in trade made the *aediles* provide actions in those cases as well when it was not the interest of the purchaser to give the slave back. This is how *actio quanti minoris* was born, which was the legal means of reducing the purchase price.³⁸

Although the commerce of the productional Rome put the emphasis onto slaves as the most important workmen, cattle (*iumenta* or *pecus*) had an important role in trade as well,³⁹ therefore the *aediles* applied their rules also to their trade.⁴⁰

The *aediles* later also defined the exact deadlines for the commencement of the actions. In the case of *actio redhibitoria* the parties were obliged to pay back the entire purchase price and to return the slave.⁴¹ The purchaser had 6 months to commence it.⁴²

Actio quanti minoris is the ancestor of reduction of the price – as the current warranty claim. It could be initiated within one year, the first 6 months of which the purchaser could choose, which claim he would have liked to put forward.⁴³ This rule became established in modern legal systems as the possibility to change to the other warranty claim.⁴⁴

These deadlines can be found – among others – in the following Digest-fragment:

*Tempus autem redhibitionis sex menses utiles habet: si autem mancipium non redhibeatur, sed quanto minoris agitur, annus utilis est...*⁴⁵

In case the vendor gave a guarantee-*stipulatio* and the damage, caused by the defect, already occurred the purchaser could take against him with *actio ex stipulatu*, however, it was an action before the *magistrate* of jurisdiction, the *praetor*.⁴⁶ The purchaser could choose between the actions before the *aedilis* and those before the *praetor* as these were parallel ways of enforcing their claims.⁴⁷

In Rome, if the vendor told something only to improve the marketableness saleability of the goods, it was not regarded an express promise so it did not impose liability for warranty (it was *nuda laudatio*).⁴⁸ In the case of current contracts there are advertisements, too, which are only invitations for offering.⁴⁹

Beside the objective warranty, the vendor was liable subjectively as well, for the defect caused by him at fault. In case the purchaser wanted to get satisfaction on this ground he could sue the vendor before the *praetor* with *actio empti*.⁵⁰

5. The Rules of Warranty in the Civil Code of Hungary

The provisions on implied warranty in our Civil Code are part of the consumer protective regulation and their place is among the general rules of law of obligations. The obligor is objectively liable for warranty in case of default.⁵¹ The Civil Code defines the cases of default but it does not give an itemized list of defects.⁵²

36 ZIMMERMANN, 317. p.

37 JAKAB: *Stipulationes*, 52. p.

38 JAKAB: *Az árleszállítás mértéke*, 327. p.

39 JAKAB: *Stipulationes*, 29. p.

40 See D. 21. 1. 38 pr. Ulp. and also D. 21. 1. 19. 6 Ulp. below (45th footnote).

41 ZIMMERMANN, 317. p.

42 JAKAB: *Stipulationes*, 55-56. p.

43 See: D. 44. 2. 25. 1 Jul., JAKAB: *Az árleszállítás mértéke*, 136. p. and D. 21. 1. 48. 1 Pomp. 23 ad Sab.; JAKAB: *Stipulationes*, 136. p.

44 See the previous footnote and CCH 306. § (1) a)-b) and 306/A. §, but according to the CCH only the change within the same level of claims is permitted.

45 D. 21. 1. 19. 6 Ulp.: „The priod for the action for rescission is six months of business days; but if the slave be not returned but the action for diminution be brought, a year of business days is open...”, *Digest 2*, 150. p.

46 JAKAB: *Stipulationes*, 81-82. p.

47 *Ibid.*

48 D. 18. 1. 43 pr. Flor. 8 inst.: *Ea quae commendandi causa in venditionibus dicuntur, si palam appareant, venditorem non obligant, veluti si dicat servum spenciosum, domum bene aedificatam...* „What a vendor says at the time of sale to commend his merchandise imposes no liability upon him if its content be obvious, say, that the slave is handsome or a house well built...”, *Digest 2*, 62. p.; JAKAB: *Stipulationes*, 62. p.; see also: D. 21. 1. 19 pr. Ulp.

49 For instance commercials on the television, such as in the TeleShop.

50 MOLNÁR – JAKAB, 292. p.

51 DR. BÁRTFAI JUDIT – DR. BOZZAY ERIKA – DR. KERTÉSZ ÁGNES – DR. WALLACHER LAJOS: Új szavatossági és jótállási szabályok. Fogyasztóvédelmi jogharmonizáció a polgári jogban és a polgári eljárásjogban (HVGOrac Budapest, 2004.), 18. p., in the followings: Új szavatossági és jótállási szabályok; see also D. 21. 1. 1. 2. Ulp., JAKAB ÉVA: *Kellékszavatosság és jótállás* (In: *Tanulmányok Benedek Ferenc tiszteletére, Studia Iuridica Auctoritate Universitatis Pécs Publicata 123*, Pécs, 1996., 113-123. p.), 116. p., in the followings: JAKAB: *Kellékszavatosság és jótállás*; CCH 305. § (3)

52 CCH 305. § (1)-(2)

After that the sanctions are regulated. Rights of warranty can be enforced in two steps.⁵³

The obligee primarily may demand for the repair or the replacement of the goods – according to their choice. These two claims did not exist yet in the ancient times. The second level of enforcement is the possibility of reduction of the price or having the contract rescinded – in this level the purchaser can also choose.⁵⁴ However, *in integrum restitutio* can be carried out only under special required circumstances,⁵⁵ opposite to the solution of ancient *magistrates* with what the vendors were tried to be obliged to perform appropriately.⁵⁶

It raises the question: In which solution prevails the interest of the consumers more completely and in which can they seek for real remedy to their injury?

Concerning the deadlines it is important to notice that the 6 months period of ancient warranty rules remained such a strong example to the legislators of modern times, that not only in Hungary but also across Europe this is the general deadline.⁵⁷

The consumer protective 'reversible presumption of default' also reminds us of the ancient rules. According to this, in case of consumer contracts defects – recognized within 6 months, counted from the performance – are to be considered as existing at the moment of the performance, until the obligor proves the contrary.⁵⁸

Similarly to the principle of '*caveat emptor*' today warranty also applies only to cases including latent defects.⁵⁹ It is well shown, if we compare the following fragment from the Digest with the 305/A. § (1) of the Civil Code.

D. 21. 1. 1. 6 Ulpianus 1 ad edictum aedilium curulium

*Si intellegatur vitium morbusve mancipii (ut plerumque signis quibusdam solent demonstrare vitia), potest dici edictum cessare: hoc enim tantum intuendum est, ne emptor decipiatur.*⁶⁰

Civil Code 305/A. § (1)

„If the consumer was or could reasonably have been aware of a defect at the time the contract was concluded, the obligor shall be excused of liability. The obligor shall also be excused of liability if lack of conformity has its origin in materials supplied by the consumer, provided that the consumer had been informed that the material was defective.”⁶¹

According to the survey in the 1st chapter of this study, in the legislation of the European Economic Communities and then that of the European Union also emphasized consumer protection as an area, that's importance gradually increased in the last three or four decades. Constituting the legal provisions providing this protection in the field of civil law (and also in other areas of law) became such a radical issue, that none of the member states can avoid it. The rules of the Directive 1999/44/EC was one of the laws of the EU that showed the way to legal harmonization of our Civil Code. It gave the basis to the longer deadlines of enforcing the claims of consumers to ease the access to real legal remedies.⁶²

6. Final Thoughts

My aim with this study was to shed light upon the thousands years old purchaser and consumer protective legal institution of warranty from the view of ancient rules. Through the overview we could see that from the principle of '*caveat emptor*' and the criterion of objectivity to the 1st warranty claims and the deadlines, how many of its features remained in the modern times.

I found it interesting to present warranty by going back so far in time, because – to quote Professor Attila Harmathy's words – it is efficient to observe the long-time changes of social, economic and legal processes in order to understand current issues.⁶³

53 CCH 306. § (1) a)-b)

54 Új szavatossági és jótállási szabályok, 21. p.

55 CCH 306. § (1) b)

56 JAKAB: Kellékszavatosság és jótállás, 117. p.

57 According to the recommendations of the 5th Article of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. [(in the followings: Directive 1999/44/EC), available: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0044:en:HTML>, (access: 30/11/2010.)] in the most European civil laws consumers have 2 years to enforce their warranty claims; this privilege is thanked to the reasons of economic circumstances and legal policy; CCH 308. § (4).

58 JAKAB: Kellékszavatosság és jótállás, 116. p.; CCH 305/A. § (2); Directive 1999/44/EC 5. Art. (3)

59 Directive 1999/44/EC 2. Art. (3); CCH 305/A. § (1); D. 21. 1. 1. 6 Ulp.

60 „If a defect in or disease of the slave be perceptible (and defects reveal themselves generally through symptoms), it may be said that the edict has no place; its concern is simply to ensure that a purchaser is not deceived.”, Digest 2, 144. p.

61 The English translation of the Civil Code of Hungary is available: <http://www.civil.info.hu/uploaded/documents/seged/NK/ActVof1959.doc> (access: 11/11/2010)

62 Directive 1999/44/EC 5. Art. (1); CCH 308. § (4) see above the 57th footnote; according to the 308/A. § (2), if the obligee is not able to enforce their claim because of an excusable reason they have 3 years to do so, counted from the performance.

63 The lecture of Professor Attila Harmathy about legal policy and civil law on 21th October 2010 at the Faculty of Law, University of Szeged

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- D. 21. 1. 31. 21 Ulpianus ad edictum aedilium curulium
- D. 21. 1. 37 Ulpianus ad edictum aedilium curulium
- D. 21. 1. 38 pr. Ulpianus ad edictum aedilium curulium
- D. 21. 1. 48. 1 Pomponius 23 ad Sabinum
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