LIBER AMICORUM
LÁSZLÓ TRÓCSÁNYI

Tanulmánykötet Trócsányi László 65. születésnapja alkalmából
Studies commemorating the 65th birthday of László Trócsányi
Mélanges offert à László Trócsányi pour ses 65 ans

Szerk./ed.: Kruzslicz, Péter – Sulyok, Márton – Szalai, Anikó

Szeged, 2021

Szerzők:

©Andréani, Pascale
©Badó Attila
©Balogh Elemér
©Blutman László
©Bodzási Balázs
©Chronowski Nóra
©Csehi Zoltán
©Cservák Csaba
©Csink Lóránt
©de Zwaan, Jaap
©Delpérée, Francis
©Dezső Márta
©Dienes-Oehm Egon
©F. Rozsnyai Krisztina
©Farkas Beáta
©Fejérdy Gergely
©Ferwagner Péter Ákos
©Flogaitis, Spyridon
©Gellén Klára
©Görög Márta
©Gültekin-Várkonyi Gizem
©Hajas Barnabás
©Hajdú József
©J. Nagy László
©Jakab Éva
©Károlyi György
©Karsai Krisztina
©Kecsmár Krisztián
©Kisari Miklós
©Kiss Barnabás
©Korhecz Tamás
©Kovács Péter
©Köbel Szilvia
©Kruzslicz Péter
©Kukorelli István
©Lourde, Albert
©Martonyi János
©Mathieu, Bertrand
©Miskolczi-Bodnár Péter
©Mouton, Jean-Denis
©Nagy Csongor István
©Paczolay Péter
©Patyi András
©Philip, Christian
©Raisz Anikó
©Schanda Balázs
©Smith, Eivind
©Somogyi Norbert
©Somssich Réka
©Sulyok Márton
©Sulyok Tamás
©Szabó Imre
©Szabó Marcel
©Szabó Zsolt
©Szajbély Katalin
©Szakály Zsuzsa
©Szalai András
©Szalai Anikó
©Szekeres Ildikó
©Szilágyi Ede
©Téglási András
©Tóth Károly
©Traser Julianna Sára
©Tribl Norbert
©Udvary Sándor
©Varga Zs. András
©Várhelyi Olivér
©Veress Emőd
©Zalai Anita

Szegedi Tudományegyetem Állam- és Jogtudományi Kar
Nemzetközi és Regionális Tanulmányok Intézet
Intézetvezető, felelős kiadó: Szalai Anikó

University of Szeged Faculty of Law
International and Regional Studies Institute
Head of Institute, publisher: Szalai, Anikó

Université de Szeged, Faculté de droit et des sciences politiques
Institut des études internationales et régionales
Directrice de l'Institut, éditrice: Szalai, Anikó

Kézirat lezárásának időpontja: 2021. január 31.

Szeged, 2021

ISBN 978-963-306-815-1

Tartalomjegyzék Contents Table des matières

KÖSZÖNTŐK – LAUDATIONS – MOTS DE SALUTATION

NEMZETI JOG – NATIONAL LAW – DROIT NATIONAL

EURÓPAI JOG – EUROPEAN LAW – DROIT EUROPÉEN

NEMZETKÖZI KAPCSOLATOK – INTERNATIONAL RELATIONS – RELATIONS INTERNATIONALES

Nagy Csongor István[1347]

Constitutional objections to opt-out collective actions: a cover up for a system failure?

Class actions, and in particular the notion that group members may be represented without express authorization, have been criticized from various angles. One of the major objections is that "representation without authorization" is unconstitutional due to its encroachment on private autonomy. In this paper, I demonstrate that although opt-out collective redress may entail constitutional concerns in some EU Member States, it is far from irreconcilable with the constitutional traditions common to the European Union's Member States. This suggests that the constitutional objections in Europe are rather a cover up for traditionalism and a deeper "sub-conscious" aversion to collective litigation.

The opt-out system may raise constitutional concerns, since "representation without authorization" may impair a party's private autonomy, which consists in this context of the right to decide whether or not to enforce a claim and how to enforce it.[1348] However, there are quite a few compelling arguments that suggest that the opt-out scheme, as far as small claims are concerned, should not be outright unconstitutional. Although collective redress may certainly be shaped in a manner that goes counter to constitutional requirements, the constitutional concerns relating to small claims are mainly an optical illusion.

European traditionalism is often wrapped up in constitutional parlance. In Germany, opt-out class actions appear to have been rejected, among others, for constitutional reasons: it has been argued that representation without authorization may raise serious constitutional concerns, e.g. it may impair the right to a hearing ("Recht zum rechtlichen Gehör") and the right of disposition ("Dispositionsgrundsatz").[1349] While it could be argued that silence could be regarded to imply acceptance, such a legal consequence may be entailed only by proper notice and it has been highly questionable whether constructive knowledge would suffice

[1347] professor, head of department, University of Szeged, Faculty of Law and Political Sciences

[1348] Commission Communication Towards a European Horizontal Framework for Collective Redress, COM(2013) 401 final, 11.

[1349] Greiner Christoph: Die Class Action im amerikanischen Recht und deutscher ordre public, Peter Lang, 1998., 189.; Fiedler Lilly: Class Actions zur Durchsetzung des europäischen Kartellrechts: Nutzen und mögliche prozessuale Ausgestaltung von kollektiven Rechtsschutzverfahren im deutschen Recht zur privaten Durchsetzung des europäischen Kartellrechts, Mohr Siebeck, 2010., 237-245.; Lange Sonja: Das begrenzte Gruppenverfahren: Konzeption eines Verfahrens zur Bewältigung von Großschäden auf der Basis des Kapitalanleger-Musterverfahrensgesetzes, Mohr Siebeck, 2011.; Stadler Astrid: Mass Tort Litigation, in Stürner Rolf, Kawano Masanori (eds.): *Comparative Studies on Business Tort Litigation*, Mohr Siebeck, 2011., 163., 172-173.

in this regard.[1350] The foregoing constitutional concerns have been taken so seriously that in 2005 the German Federal Cartel Office ("Bundeskartellamt"), notwithstanding the very strong policy for competition law's private enforcement, discarded the idea of opt-out class actions apparently because it was said to restrict the right to a hearing and to violate the principle that the party is the master of his own case (right of disposition).[1351]

In the context of French law, it has been consequently referred to the principle of "nul ne plaide par procureur" ("no one pleads by proxy"). According to this entrenched principle of French civil procedural law, for having standing, the plaintiff has to have a legitimate interest in the case and, to be legitimate, the interest must be direct and personal; as a corollary, all the persons involved in the lawsuit must be identified and represented in the procedure.[1352]

It is true that mandatory representation, that is, representation without authorization not supplemented by the right to opt-out, seems to be irreconcilable with constitutional requirements. For instance, in Spain, where the judgment's res judicata effects may extend to non-litigant group members, it has been convincingly argued that absent a specific statutory provision the right to opt out arises from the constitutional principles of due process and access to justice.[1353] However, representation without authorization supplemented with the right to opt out may merit a different treatment. It is noteworthy that this is in line with the US Supreme Court's stance that class actions based on representation without authorization meet the requirements of due process as long as members have the right to opt-out.[1354]

It has to be noted that a comparable set of constitutional arguments may be lined up for the introduction of class actions.

First, in the absence of a collective redress mechanism, numerous small claims would not get to court, and the collective action confers solely benefits on group members (provided they do not run the risk of being liable for the defendant's legal costs in case the group representative fails to win the action). It would be perverse to refer to the impairment of private

---

[1350] Stadler Astrid: Die internationale Anerkennung von Urteilen und Vergleichen aus Verfahren des kollektiven Rechtsschutzes mit op-out Mechanismen in Geimer Reinhold, Kaissis Athanassios, Thümmel Roderich C. (eds.): *Ars Aequi et Boni in Mundo. Festschrift für Rolf A. Schütze zum 80. Geburtstag*, Beck, 2015., 561., 569-578. For arguments that public notice in collective actions does not violate the principle of disposition *see* Halfmeier Axel: Recognition of a WCAM settlement in Germany in n. 30(2) Nederlands Internationaal Privaatrecht (NIPR) (2012). 176., 183.

[1351] Bundeskartellamt, Diskussionspapier: Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven 30-31 (2005), available at http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Bundeskartellamt%20-%20Private%20Kartellrechtsdurchsetzung.html?nn=3590858

[1352] Poisson Erwan, Fléchet Camille: 4.5.2. Proposed reforms in France in Chapter 4: Representative Actions and Proposed Reforms in the European Union in Karlsgodt Paul G. (ed.): *World Class Actions: A Guide to Group and Representative Actions Around the Globe*, OUP, 2012., 166.

[1353] For a comprehensive analysis on the Spanish class action mechanism, *see* Mieres Luis Javier: Acerca de la constitucionalidad de la nueva regulación de las acciones colectivas promovidas por asociaciones de consumidores y usuarios, Barcelona, 2000. *See also* Carballo Piñeiro Laura: Las acciones colectivas y su eficacia extraterritorial. Problemas de recepción y transplante de las class actions en Europa, Santiago de Compostela, 2009., 61-88.; López Jiménez J. M.: Las acciones colectivas como medio de protección de los derechos e intereses de los consumidores in *La Ley* no. 6852, 2008.; Marín López J. J.: Las acciones de clase en el Derecho español, (3) InDret 1, 2001., available at http://www.indret.com/pdf/057_es.pdf; Silguero Estagnan J.: Las acciones colectivas de grupo in *Aranzadi Civil-Mercantil*, núm. 22/2003, Pamplona, 2004. 9-10.

[1354] Philipps Petroleum v Shutts 472 US 797, 813-814 (1985).

autonomy in a case characterized by obligee inertia,[1355] where the law does not ensure the claim's practical enforceability.

Second, opt-out systems embed, by definition, the right to opt out. While mandatory representation (that is, when group members are compelled to be part of the group and cannot opt out) may obviously go counter to the right to private autonomy (that is, the right to decide whether to sue or not, and how to enforce the claim), there is no "forced membership" in case of an opt-out system. Group members can leave the group without any further. The opt-out scheme merely reverses the mechanism of adherence and infers assent from silence. In principle, a group member has to submit a declaration if he envisages being part of the action. In the opt-out system a group member has to submit a declaration if he does not want to be part of the claim. The group member makes the decision; and since experience shows that the vast majority of group members do not opt out, it is reasonable to reverse the mechanism of adherence.[1356]

It has to be noted that the opt-out system is much more constitutional and preserves private autonomy much better than the EU Injunction Directive[1357] covering thirteen consumer protection directives.[1358] The Directive authorizes various entities to launch proceedings for a declaratory judgment or injunction on behalf of a class of unidentified consumers without the need for any individual authorization or assent, and, theoretically, it does not make it possible for group members to leave the group. This means that group members cannot opt-out even if they want to; they are stuck in the group. Still, the constitutionality of the Injunction Directive has not been questioned.

Third, it has to be noted that while the right of disposition is constitutionally protected, access to justice is equally a constitutional fundamental right. The purpose of collective redress is to make practically unenforceable rights a reality.

[1355] *See* Eisenberg T., Miller G.P.: The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues, in 57 *Vanderbilt Law Review* (2004), 1529, 1532; Issacharoff S., Miller G.P.: Will Aggregate Litigation Come to Europe?, in 62 *Vanderbilt Law Review* (2009), 179, 203-206; Issacharoff S., Miller G.P.: Will aggregate litigation come to Europe?, in Backhaus G., Cassone A., Ramello G.B. (eds.): *The Law and Economics of Class Actions in Europe: Lessons from America*, Edward Elgar, 2012., 37, 60.

[1356] *See* Eisenberg T., Miller G.P. in 57 *Vanderbilt Law Review* (2004), 1529., 1532.; Issacharoff S., Miller G.P. in 62 *Vanderbilt Law Review* (2009), 179., 203-206.; Issacharoff S., Miller G.P. in Backhaus G., Cassone A., Ramello G.B. (eds.): *The Law and Economics of Class Actions in Europe: Lessons from America*, 37., 60.

[1357] Directive 2009/22/EC on injunctions for the protection of consumers' interests, [2009] OJ L 110/30.

[1358] The Directive covers, among others, Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Terms Directive), [1993] OJ L 95/29. The Court of Justice (CJEU) established in relation to the Unfair Terms Directive in Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.*, ECLI:EU:C:2012:242, para. 43-44, that judgments rendered in collective actions launched on the basis of Article 7 of the Unfair Terms Directive may and shall have legal effects on all interested consumers. "[T]he national courts are required (…) to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which those GBC [general business conditions] apply will not be bound by that term"; the Directive "does not preclude the declaration of invalidity of an unfair term included in the GBC of consumer contracts in an action for an injunction (…) from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same GBC apply, including with regard to those consumers who were not party to the injunction proceedings"; "*where the unfair nature of a term in the GBC has been acknowledged in such proceedings, national courts are required*, of their own motion, and also with regard to the future, *to take such action* thereon as is provided for by national law *in order to ensure that consumers who have concluded a contract with the seller or supplier to which those GBC apply will not be bound by that term.*" (emphasis added).

Whatever the strength of these arguments may be, interestingly, the rigid unconstitutionality argument has found no reflection in the constitutional case-law, which suggests that while certain limits do apply, opt-out mechanisms are not outright unconstitutional. While representation without authorization does call for a justification, it may be warranted in small value cases, which would very likely not be brought to court anyway. The cases that can be raised from national constitutional laws, used as arguments that the opt-out scheme is irreconcilable with national constitutional requirements, can be distinguished from the enforcement of small pecuniary claims in an opt-out collective procedure. In fact, in 2014 the French Constitutional Council (*Conseil Constitutionnel*) confirmed the recently introduced French regulatory regime, which, in certain points, has salient opt-out features.

The European Court of Human Rights (ECtHR) addressed the question of representation without authorization in *Lithgow v. United Kingdom*.[1359] The case emerged in the context of the UK's expropriation of a British company. To avoid the flood of individual actions, the law on nationalization provided for the appointment of a "stockholders' representative", who was to be elected by the shareholders or appointed by the government and whose power of attorney to claim compensation precluded group members' individual actions. In other words, the scheme established a mandatory representation without authorization where group members were forced to join and could not opt out.

The ECtHR proceeded from the proposition, as established in *Ashingdane*,[1360] that the

"right of access to the courts secured by Article 6 para. 1 (art. 6-1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals'."

The limitations may not impair the very essence of the right and need to "pursue a legitimate aim" and there needs to be "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."[1361] As to the scheme at stake, the ECtHR came to the conclusion that these conditions were met. The very essence of the right to a court was not impaired[1362] because individual rights were safeguarded, albeit indirectly: the group representative was "appointed by and represented the interests of all" group members and individual group members could seek remedy in case the representative breached one of his duties. This conclusion was not undermined by the fact that the group members' right to control the representative was very limited and it was not the individual shareholders but their community who was entitled to exercise these rights.[1363] Furthermore, the Court held that the scheme "pursued a legitimate aim, namely the desire to avoid, in the context of a large-scale nationalization measure, a multiplicity of claims and proceedings brought by individual shareholders" and there was "a reasonable relationship of proportionality between the means employed and this aim."[1364]

[1359] Case no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81 *Lithgow v. United Kingdom*, 8 July 1986, [1986] 8 ECHR 329.
[1360] Case no. 8225/78 *Ashingdane v. United Kingdom*, 28 May 1985, [1985] ECHR 8, Series A no. 93, para. 57.
[1361] *Lithgow*, para 194.
[1362] *Ibid.* Para 196.
[1363] *Ibid.* Para 196.
[1364] *Ibid.* Para 197.

The above jurisprudence was confirmed in *Wendenburg*.[1365] Here, in the context of a proceeding before the German Federal Constitutional Court ("Bundesverfassungsgericht"), the ECtHR, referring to *Lithgow*, held that while "the applicants were barred from appearing individually before that court", "in proceedings involving a decision for a collective number of individuals, it is not always required or even possible that every individual concerned is heard before the court."

National constitutional courts followed a very similar line of reasoning.

In the early '90s, due to the particular historical situation, the Hungarian Constitutional Court had the chance to adjudicate cases centering around representation without authorization. In 1989, the socialist regime collapsed in Hungary and the country adopted a new constitution,[1366] while the laws adopted beforehand persisted. Although the parliament tried to weed Hungarian law of the provisions that were not reconcilable with a constitutional democracy, some reminiscences remained and had to be quashed by the Constitutional Court. One of these was the rules of socialist law that conferred mandatory representation without authorization on the attorney-general and trade unions. These entities could launch civil proceedings even against the obligee's will. These laws had a very peculiar feature: the right of representation of these entities was general and mandatory, that is, they not only lacked the party's authorization, but the represented person could not opt out and terminate his own action. These rules were struck down by the Constitutional Court. However, the court also established that, if justified, "representation without authorization" can be constitutional. Albeit that these cases involved no class actions, they provide clear guidance also as to the constitutionality of the opt-out principle.

In *Case 8/1990 (IV.23.) AB*, the Hungarian Constitutional Court dealt with the trade unions' right to represent an employee without authorization. The constitutional concerns were entailed by the trade union's "mandatory power of attorney" and not by a "presumed power of attorney"; the legislation did not prevent trade unions from exercising the right of representation against the employee's will. The law empowered the trade union to intervene also in matters where the employee was not a member of the trade union. The Constitutional Court suggested that the legislator may maintain the trade union's right of representation in relation to its own members.

In *Case 1/1994. (I.7.) AB*, the Constitutional Court dealt with the attorney general's power to act on behalf of private parties. The Court held that party autonomy (right of disposition) embraces both the liberty to act and the liberty not to act; the attorney general's all-pervasive power to sue and appeal without the party's express assent restricts the party's constitutional rights and needs to be examined whether this restriction is necessary and proportionate. In this case, the Constitutional Court came to the conclusion that there were no constitutionally acceptable legitimate ends justifying the attorney general's general power to act on behalf of the party. Here again, the most important source of concern was the attorney general's "mandatory power of attorney", which could be exercised also against the party's will, if this was warranted by an important national or economic interest. At the same time, the Constitutional Court did not question the attorney general's power to sue in cases where the obligee

[1365] Case no. 71630/01 *Wendenburg and Others v. Germany*, 6 February 2003, [2003-II] ECHR 353.

[1366] Technically, it amended the old constitution comprehensively. However, in essence, the amendment, in fact, created a new constitution.

was not able to protect his rights. Quite the contrary, the Court held that in such cases representation without authorization is considered an inevitable restriction of party autonomy (right of disposition) and *"the protection of the subjective rights of the party who is unable to enforce or protect his rights is the constitutional obligation of the state. Accordingly, the state has to ensure that in such cases one of its organs acts for the sake of protecting the rights of the individual."*

In sum, the case-law of the Hungarian Constitutional Court suggests that representation without authorization may meet the constitutional requirements, if it is justified by a legitimate end. Both the absence of a "mandatory power of attorney" and the party's right to opt out point towards compliance with the constitutional requirements. While the above cases give no guidance as to whether public notice is sufficient or group members are to be informed individually about the collective action and their right to opt out, they indicate that if the party is unable to protect his rights, the state is even obliged to intervene.

The French Constitutional Council ("Conseil Constitutionnel") examined the question of representation without authorization[1367] first in 1989 in the context of trade unions' right to launch proceedings on behalf of their members, and recently it scrutinized the de facto opt-out mechanism introduced by the French legislator in 2014.

The matter concerning group actions initiated by a trade union on behalf of its members became famous in the European scholarship on class actions and had been referred to as an authority to justify the unconstitutionality of the opt-out system. Not surprisingly, this case centered around the issue of proper notice, which was considered to be an essential requirement against representation without authorization.

Here, the French Constitutional Council held that the employee is to be "afforded the opportunity to give his assent with full knowledge of the facts and that he remained free to conduct personally the defense of his interests" and he shall have the opportunity to opt out from the procedure. Furthermore, "the employee concerned must be informed by registered letter with a form of acknowledgement of receipt in order that he may, if he desires so, object to the trade union's initiative". This ruling has been interpreted by many as excluding the possibility of an opt-out system as such schemes secure no actual knowledge.[1368]

Although this question lost much of its significance as the 1989 decision, whatever its proper construction may be, seems to have been jumped by the 2014 decision analyzed below, it has to be noted that, arguably, the fact pattern addressed by the 1989 decision can be distinguished from opt-out systems in small claim procedures. The former dealt with a law that authorized trade unions to launch any action ("toutes actions") on behalf of the employee, including claims of unfair dismissal.[1369] Pecuniary small claims can be clearly distinguished from employment law claims at large, especially unfair dismissal matters: the latter normally involve higher stakes, higher monetary value and may lead to the employee's

---

[1367] On French constitutional considerations *see* Poisson Erwan, Fléchet Camille: 4.5.2. Proposed reforms in France in Chapter 4: Representative Actions and Proposed Reforms in the European Union in Karlsgodt Paul G. (ed.): *World Class Actions: A Guide to Group and Representative Actions Around the Globe*, OUP, 2012.

[1368] Dec. Cons. Const. N°89-257 DC, July 25th 1989. Reproduced in Magnier Véronique & Alleweldt Ralf: Country-report France in *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union 2* (2008), available at http://ec.europa.eu/consumers/redress_cons/fr-country-report-final.pdf

[1369] *Ibid.* para. 25.

readmission (which entails personal consequences). Furthermore, the French Constitutional Council did not hold that representation without authorization or inference of the right of representation from the employee's silence would be unconstitutional. Quite the contrary, it held that if the employee fails to object to the trade union's procedure, he can be regarded as adhering to it.[1370] The French Constitutional Council treated this case rather as an issue of notice: the employee has to be informed by registered mail and actual notice has to be ensured.[1371] Accordingly, the requirement established by the French Constitutional Council concerning opt-out regimes was proper notice. It has to be taken into consideration that, as noted above, the French statute's opt-out scheme covered the whole spectrum of employment claims and the constitutional requirements concerning the means of notice may be less stringent in case of small pecuniary claims.

In 2014, France adopted collective redress rules that remained within the limits set up by the decision of 1989. Although under the rules of 2014, the group representative may launch a collective action without the group members' express authorization, the final judgment, in essence, will extend only to those who expressly accept the award; at this stage, tacit adherence is not sufficient. This regime passed the test of constitutionality. It seems that it was decisive for the French Constitutional Council that the res judicata effects cover solely those group members who received compensation at the end of the procedure.[1372] Apparently, the circumstances that only benefits accrue to group members and that the judgment's res judicata effects cover only those group members who assented to it (since compensation can be paid only if the group member accepts the final judgment), were sufficient to satisfy the constitutional concerns.

[1370] *Ibid.* paras 25 et 26.

[1371] *Ibid.* para. 26.

[1372] Decision 2014-690 of 13 March 2014 (le 14 mars 2014, JORF n°0065 du 18 mars 2014, Texte n°2, Décision n° 2014-690 DC du 13 mars 2014), paras 10 et 16.