The mentation of the Action Theories in Legal Practice

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Abstract

In general, interaction between legal theory and practice raises numerous questions. From the aspect of legal practice the question arises as to whether legal theories exert any influence on legal practice at all and, if they do, how this is manifested in judgments or otherwise in the resolution of cases. Can court judgments be explained by legal theoretical argumentation? From the point of view of legal theory: what role do solutions of specific cases in practice play in legal theoretical explications? Within the problematics of interaction between legal theory and practice, these questions seem to be too general and impossible to answer within the scope of this short study, therefore, it seems reasonable to examine them in the context of the practical implementation of a specific legal institution of civil substantive and procedural law. My topic concerns right of action theories pertaining to the plaintiff’s commencement of action. Right of action theories deal with rights and obligations relating to judicial protection. The question raised by legal dogmatics is: on the basis of what right can the plaintiff apply to the court? Indeed, is it a right at all, which gives rise to specific obligations for the court or is it a mere possibility with incidental consequences? These are the questions that different right of action theories make an attempt at answering1: (1) the right of action theory based on a private law approach (2) right of action theories based on a public law approach: the abstract right of action theory, the actual right of action theory, the dual right of action theory, and (3) modern right of action

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theories: the socialist right of action theory, the claim to justice, the right of action and the right of access to the courts.

As far as the method of analysis is concerned, the primary objective of the study is – first of all – to examine the influence exerted by the individual right of action theories on legal practice, in other words, to what extent and in what way they can be utilized within the framework of the Hungarian legal system during the resolution of legal disputes. However, with regard to the interaction between legal theory and legal practice it is also an important question how often and in what depth legal theory deals with the solutions of individual legal cases, nevertheless – as a practising lawyer – I have merely been able to draw inferences about this based on my readings of Hungarian and German studies on legal theory and philosophy of law – spanning mainly the past one hundred years. Prior to answering the above multitude of questions, it is very important to clarify the basic notions I am going to use when expounding the individual right of action theories, with particular attention to the civil lawsuit and its aim; the action; citizens’ claim to legal protection; the assertion of rights; the right of access to the courts; the claim to justice and access to justice.

Key words: action, access to justice, civil lawsuit, claim, claim to legal protection, right of access to the courts, right of action theory, rights assertion

I. The Meaning of Right of Action and Basic Notions Connected with It

As a starting point it must be emphasized that the commencement of action is connected with the right of access to the courts, which is one of the most important criteria of the rule of law. Its origin may be traced back to the prohibition preventing the enforcement of subjective rights in an arbitrary manner, by taking the law into one’s hand. Thus, state legal order requires citizens to live and act in compliance with the provisions of law: the person who breaches this obligation does not merely violate the rights of the citizen concerned but he also indirectly manifests insubordination to the state legal order, therefore, the state has a duty to rectify
the injury to its prestige. Consequently, the exercise of judicial power is necessitated by essential state interest, since the state cannot allow its citizens to set the limits of their actions toward the others themselves, nor can the state allow any institution to do so that is not a judicial institution authorized by the state. However, the setting up and operation of the judicial organization was not accompanied by the recognition of the right of access to the courts as a subjective right, which took place only later in the second half of the 20th century.

The party requests legal protection within the framework of a civil lawsuit from the court, which — according to the generally recognized view of today — functions within the frames of a dual legal relation defined by Géza Magyary: “it consists of two public law relations conditioned on each other between the state and each litigant, on the basis of which the state defines, at the request of one party and on hearing the other,

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3 State jurisdiction or litigation was created to avoid people remedying their rights injuries by taking the law into their own hands, which might lead to further rights injuries. The party alleging the rights injury turned with his complaint to someone with the authority to make a judicial decision (chief, king, tribal assembly) and asked for a legal remedy. The complaint starting the lawsuit, the action, emerged from this. In a lawsuit, regulated by Roman law, the procedure started by the plaintiff setting out his claim and asking for the correct formula. If the defendant wanted to defend the action, the praetor granted the action, appointed a judge, introduced the formula to the parties, and appointed those present as witnesses. This phase is called the procedure starting act of the magistrate, or litis contestation, in which the parties leave the decision in their case to a judge under the conditions of the formula. Litis contestation is to provide remedy for the legal disputes between the parties. In HÁMÓRI Vilmos: Anyagi jog és kereset. (Sustantive Law and Actions). Jurisprudential Journal, 1978/ 10. p. 616.

4 The government, under authorization of the law, can transfer the right of decision making to legal forums other than the court, for instance arbitration court, however, the arbitration decision, always presupposes two contracts: one between the parties, who agree that, instead of the state court, a third party will make the decision in their dispute, and one between the parties and this third person who makes the decision. These give rise only to private law relations and not public law relations. In Ibid. MAGYARY, Géza: 1898. op.cit.n. 2 p.19.

the parties’ acts within the framework of some private law relation.” 

According to Sándor Plósz, the lawsuit is a proceeding, the chain of acts serving the purpose of asserting some private right: it is the form giving expression to the substance. Accordingly, based on the dualist definition of the aim of the civil lawsuit, this aim is, on the one hand, to assert individual subjective rights and on the other hand, to protect legal order and preserve legal peace. The citizen’s right to legal protection and access to the courts is closely connected with this individual claim to the protection of interests and with the state purpose, since – as Richard Schott writes – “just as the citizen of the state has a duty to defend the state at all times, similarly, the state also has the duty to provide legal protection to its citizens’ against the attacks of others […].” Consequently, the notion of rights assertion is connected with the legal protective role of the civil lawsuit. The accentuation of the legal protective role of the civil lawsuit was “fashionable” in the academic legal literature of the first half of the 20th century, according to which the main instrument of the assertion of civil rights before the court was constituted by the lawsuit, which was also referred to as “legal protective proceeding” by Hungarian procedural jurists of the 20th century.

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6 “dual legal relation theory” In MAGARY, Géza, 1898. op.cit. n. 2. p.11.

7 PLÓSZ, Sándor: A keresetjogról, (Right of Action) In Összegyűjtött dolgozatai, (Collection of Essays), Budapest, Magyar Tudományos Akadémia Kiadó ( Hungarian Academy of Sciences Publisher) 1927. p. 3.


The civil legal protective proceeding is commenced by an action\textsuperscript{12}, and the judicial means of legal protection is the judgment.\textsuperscript{13} The lawsuit may be commenced by a person interested in the legal dispute and/or who gets into the position of plaintiff as a result of filing the action.\textsuperscript{14} In \textit{Iuventius Celsus}\textsuperscript{15} formulation: “Nihil aliud est actio, quam ius quod sibi debetur, iudicio persequendi” (“An action is nothing else but the right to recover what is owed to us by means of a judicial proceeding”).\textsuperscript{16} The action is a (justified) application to the court for legal assistance and for the exercise of judicial power by the state. The justification for the application consists of the indication of the civil law relation with regard to which the plaintiff requests the court to establish the parties’ acts,\textsuperscript{17} in other words, it means the enforcement, if necessary, of substantive legal rules by the power of the state: the court (subsequently by way of execution).\textsuperscript{18} Based on this, the action is the primary means of protecting the subjective right that may be asserted by civil proceeding\textsuperscript{19}. In accordance with this, the court provides legal protection according to the rules relat-

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\bibitem{12} Hungarian legal literature differentiates between the subject-matter and the content of the action. The subject-matter of the claim is the substantive right to be enforced; the content is the express request for a decision to be made by the court, in consideration of the type of legal protection the party is asking for. Accordingly, we can differentiate between: actions for performance, declaratory and constitutive actions. In \textit{A polgári perrendtartás magyarázata 1 (Explanation of the Code of Civil Procedure)}. In NÉMETH, János - Kiss, Daisy (editors), Second revised edition, Budapest, Complex, 2006. p.712.
\bibitem{13} Ibid. Falcsik, Dezső: 1910, op.cit. n.10. p. 9.
\bibitem{14} Ibid. Kengyel, Miklós: 2008. op.cit. n.5. p. 217.
\bibitem{15} Juventius Celsus, jurist living in the second century A.D.
\bibitem{16} “An action is nothing else but the right to recover by judicial process that which is owing to one.” in Digest 44, 7, 51, See also In STRAUMANN Benjamin: Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius’s Early Works on Natural Law, \textit{Law and History Review}, Vol. 27, No.1, Spring 2009: http://www.historycooperative.org/journals/lhr/27.1/straumann.html (18 May 2011)
\bibitem{17} Ibid. Magyary, Géza: 1898. op.loc.n. 2. p.154.
\bibitem{18} Ibid. Hámori, Vilmos: 1978/10. loc.cit.n. 3. p.611.
\bibitem{19} NÉVAI, László: A kereset (The Action) In Szilbereky Jenő - NÉVAI László (editors): \textit{A polgári perrendtartás magyarázata (Explanation of the Code of Civil Procedure)} edition I., Budapest, 1976. p. 645. See also Ibid. KENGYEL Miklós: 2006. loc.cit.n. 12 p. 711. Parties have other means at their disposal to settle the dispute: application for the issue of a warrant for payment, application within the framework of non-litigious proceedings, etc.
\end{thebibliography}
ing to civil proceedings if the subjective right expressed in the form of a claim is infringed, contested or endangered. The action does not depend on the factual existence of the litigated subjective right, it is sufficient to allege its existence; consequently, it is not only an existing subjective right that may be asserted in the form of a claim (subjective right). Therefore, the definition of action is not precise for two reasons: on the one hand, the substantive law claim means the claim existing in reality, while the procedural claim means only the allegation of its existence, which coincides with the substantive law claim and results in a judgment corresponding to it only in the case of proof. On the other hand, there are cases where no legal relation has yet come into being between the parties and this relation may brought into being only by the court judgment\(^2\), therefore – in the absense of a legal relation – at the time of the filing of the action it is still not possible to speak of a subjective right or its protection, but merely of the court enforcing the provisions relating to the objective right. In such cases the action cannot be regarded as a way of protecting the subjective right but as a means of asserting the objective right.\(^2\)

*Claim* is not a distinctly legal notion: it is a demand, a wish or a desire based on a presumed or existing right or justified need.\(^2\) In academic legal literature one may find various definitions for the plaintiff’s *claim* as a legal notion,\(^2\) which may be divided in two main groups: *substantive law claims* and *procedural law claims*. The substantive law (private law)

\(^{20}\) For example: establishing paternity or maternity.

\(^{21}\) Ibid. HÁMORI, Vilmos, 1978/10. loc. cit.n. 3 p.618.


\(^{23}\) “Claim” as a legal term was first defined by Windscheid, according to whom “in Roman law, legal order is not a system of rights, but a system of enforceable claims and the action is an expression of this, however it is not the same as a rights claim.” In WINDScheid, Bernhard: *Die Actio des römischen Zivilrechts vom Standpunkte des heutigen Rechts*. Düsseldorf, 1856. pp.2, 5, 46., See also Ibid. HÁMORI, Vilmos: 1978/10. loc. cit. n. 3 p.611.
claim itself constitutes the subject-matter of the legal dispute, which is identified with the legal title. Procedural law claims may be divided into three groups: (1) the “claim to legal protection” (Rechtsschutzanspruch), which was introduced into academic literature relating to civil procedural law by Adolf Wach; (2) the conception of the claim (prozessuale Anspruch), according to which the plaintiff applies to the court to protect his rights by passing a favourable judgment; (3) the procedural law claim (prozessuale Anspruch) distinguished from the substantive law claim is the claim identified with the allegation of the right during the proceedings (Rechtsbehauptung), which constitutes the ground for the application for legal protection (Rechtsschutzgesuch), which already means the substantive law claim asserted within the framework of the legal proceeding. Consequently, the claim to legal protection – according to the conception that has crystallized in academic literature over the decades – is the parties’ claim against the state to a favourable judgment corresponding to their legal position, namely, a claim to an order of performance, a declaratory or a constitutive judgment; an enforcement claim to the assertion of a substantive law claim by way of judicial enforcement or a claim to the provision of security so as to ensure the satisfaction of claims by an order of attachment or the granting of a provisional measure. Today the existence of the claim (subjective right) is clearly distinguished from its maturity (its enforceability in court). As a result of the polemics of the 19th-20th centuries concerning the claim to legal protection, it became

25 A private law claim is the same as a claim to legal protection against the state. In Nizsalovszky Endre: Az alanyi magánjog és a perjog (Subjective Civil Law and Rules of the Court), Budapest 1942. p.25.
26 For example, Rosenberg, Leo; Lent, Friedrich; Stein, Friedrich represented this approach.
29 For example: in case of claims that cannot be enforced in court (naturalis obligacio) or in case of time limits.
clarified that legal protection – in other words, the possibility of rights assertion – was not realized merely by the court allowing the plaintiff’s action, but also by the court dismissing the plaintiff’s unfounded claim, since in this situation the defendant’s rights are being protected.

In the sphere of rights assertion, the legislator ensures those interested extensive possibilities to have recourse to institutions administering justice (court, notary public, mediator etc.) for settling their conflicts, that is to say, it ensures the right-seeker the possibility of access to the courts (or other authorities). The claim to the administration of justice is essentially the parties’ claim against the state to perform the activity of administering justice (administering law), which is a subjective public law right of parties founded on the Constitution. This is how the notion of rights assertion leads us to the examination of the question of access to justice. What does access to justice mean? – asks Blankenburg, then he continues: It means that law, substantive and procedural legal knowledge must be made available and accessible for everybody.30 The research “Access to Justice” launched by Mauro Cappelletti and Bryant Garth in the 1970s laid it down as a basic proposition that the existence of any substantive or procedural legal right as well as the commencement of a lawsuit is meaningless without the possibility of the effective assertion of the right. Therefore, at the end of 1970s access to justice was defined as any possibility ensured to citizens – supported by the state – to assert their substantive legal rights.31 Consequently, from this aspect, right assertion is always a notion preceding access to justice, because right assertion shows to whom and on what conditions the administration of justice is available, while access to justice is a category that presupposes right assertion. So the difference between the notions of right assertion and access to justice may be grasped in the fact that with regard to access


to justice, Capelletti does not speak merely of right assertion, but “making rights effective”.32

In one of his articles published in 1992 – approaching the question from a more distant perspective - Cappelletti considers access to justice both as a legal theoretical approach and a practical reform programme.33 Three decades after the conclusion of the programme academic literature defines the notion more globally. By now the notion of access to justice has become linked to reform efforts and reform movements ensuring the access of the poor to justice and the administration of justice. According to Austrian procedural jurist Matthias Kilian, access to justice is a rather comprehensive concept: it may be described as ways and possibilities that may be used by persons to obtain information, have access to legal services and resolve their legal disputes.34 In the formulation of Dutch researchers Ineke Van de Meene and Benjamin van Rooij, access to justice means all reform endeavours focussed on promoting the rights assertion of the poor and those on the brink of society (“marginalized people”) who cannot have access to justice and the administration of justice.35 According to the opinion of Australian author Christine Parker “the access-to-justice movement” is a worldwide coalition of law-makers, reformers as well as legal and social researchers in the interest of achieving more effective access to right assertion.36

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II. Specific Right of Action Theories

The action and right of action are not identical notions. The right of action means rights and obligations connected with legal protection by the judge, while action refers to the means of legal protection.

In procedural law, the foundations for the scientific examination of action – as the means of instituting legal proceedings – were laid by works written in the 19th century, which provided a thorough analysis of the basic institutions of civil proceedings. Among them, one of the relevant topics was the legal nature of the action. With the exception of the Italian Giuseppe Chiovenda\(^\text{37}\) and the Hungarian Sándor Plósz\(^\text{38}\), the proponents of right of action theories consisted of German legal scholars in the second half of the 19th century.\(^\text{39}\) As a result of the political changes – in the 20th century – Hungarian and German socialist legal professional literature dealt with the claim to legal protection only at the level of history of science because of the expressly rejective stance of contemporary legal procedural science – caused by the scientific prestige of those rejecting the theory and the weight of the arguments presented against it.\(^\text{40}\)

Right of action theories still represent an intellectual challenge for legal science – and for legal procedures in particular – which may be explained by the fact that they are directly connected with numerous fundamental and still unsolved or debated questions of procedural dogmatics: for example, with the problem of elements of civil substantive law embedded in procedural law; the approach of right of action from the aspect of private or public law, the evaluation of the nature of the legal relation between the judge, plaintiff and defendant; the theory relating to the preconditions of legal proceedings; the theoretical and statutory legal uncertainty surrounding the definition of legal protective interests; the evaluations of the purpose and social function of the civil proceeding.


\(^{38}\) Ibid. Plósz Sándor: 1927. op.cit.n.7.


at different times, or the realization of legal protection that may be guaranteed by the Constitution by means of civil proceedings.\footnote{Ibid. Kengyel Miklós: 1986/11, loc.cit.n. 28 p. 550.}

1. The Right of Action Theory Based on Private Law:

The notion of action, moreover, its double meaning (action, right of action) was known in Roman law already\footnote{Today the word action bears several meanings, for example: claim to the assertion of rights by means of judicial proceedings, the plaintiff’s petition etc... It is difficult to define the term actio in Roman law because it had more than one meaning: (a) Actio comes from the verb agere “to pursue, to act, to do” and originally meant an act or action taken before the magistrate. This ceremonious procedure of the parties, carried out according to the law, therefore meant the in iure part of the legal proceeding, but also the legal proceeding itself. (b) the other meaning of the word actio is the plaintiff’s act commencing the lawsuit. (c) permission to initiate a lawsuit. (d) right of action (e) in addition the word actio often stood for a specific type of lawsuit (actio civilis, actio honoraria, actio in ius, actio in factum, actio in rem, actio in personam, actio certa, actio incerta, condictio, vindicatio, petitio, querela, etc.; legal assistance given by the praetor outside of court included: interdictum, in integrum restituio, praetori stipulatio, refusal to grant the action, exceptio, replicatio, missio in possessionem) (f) a more abstract meaning of the word actio: a type of action belonging to a higher category, representing a special group of lawsuits (eg.: actio ex stipulato in personam actio).} in Roman law,\footnote{Roman law defines the term actio (action) as the plaintiff’s act initiating the court proceeding; primarily it is a purely formal act that is independent of the substantive right. Actio in a substantive meaning meant the subjective civil right, more precisely its phase where the plaintiff could enforce it through the court. This is called the claim (subjective right pursued through an action). In modern legal systems it lies in the nature of a civil right that it is enforceable through an action, in Roman law, however, it only existed if the praetor granted the action. In modern law there is only one type of action applying to all types of civil rights. In Roman law there were as many types of civil rights as there were types of action, because usually the creation of types of action gave rise to individual subjective rights. Thinking in right of action did not mean that people thought “I have a right to something” but that they were thinking that the praetor granted an action for something. Modern civil law is a system of independent substantive legal rules, at the same time, Roman law defined substantive legal rules in terms of right of action and rules of court. People were able to enforce their claim directly through the praetor’s action, without the praetor defining a civil right first.} Roman law – which
was in force in the major part of Germany as pandect law until 1 January 1900 – identified the subjective right with actio, or the right to sue.\footnote{In the Roman law the person whose civil right was violated could ask for legal assistance against the praetor, as a state organ, however, this was preconditioned on an injury to the party’s civil right. In Paulovits, Anita: *A jogerő kérdése a perjogtudományban és a közigazgatásban* (The question of legal force in civil procedural science and public administration), http://www.mjsz.uni-miskolc.hu/201001/6_paulovitsanita.pdf (2011.05.10) See also: Muther Theodor: *Zur Lehre von der römischen Actio, dem heutigen Klagerecht, der Litiscontestation, und der singularsuccession in Obligationen*. Erlangen, Andreas Deichert, 1857. p.45.} For in the beginning the private law right of action and the action as an act commencing (instituting) legal proceedings were not distinguished from each other, because the distinction between substantive and procedural law took a long time to develop.\footnote{Paulovits, Anita: 2011. loc.cit.n. 45.}

The most famous proponent of this theory is Friedrich Karl von Savi-\footnote{Von Savigny, Carl Friedrich: *System des heutigen ömischen Rechts*, Berlin, 1841-1856, V. Band, pp.4-5.}gni, according to whom action originated from the breach of private law by a specific act, which gave rise to a new private law relation – of a contract-like character – between the injured party and the infringer, namely, the plaintiff and the defendant.\footnote{Ibid. Kengyel, Miklós: 1986/11, loc.cit. n. 28. p.550.} In his view, the right of action forms part of private law, only the act relating to the action (Klaghandlung), and its conditions and form belong within the sphere of proceedings.\footnote{Ibid. Plósz, Sándor: 1927. op.cit.n. 7. pp.5.-6.} Therefore, Savigny, in his position, stressed that the precondition for the right of action is the existence of the plaintiff’s subjective private law right as well as the need for its protection in case this right is being endangered or infringed. According to Savigny, a person has a right of action if he has a subjective private law right, because it implies the infringed or endangered private law right and also the right to assert the private law interest by way of force. In his opinion the right of action is the subjective private law right in its “dynamic state”.\footnote{Kengyel, Miklós: A keresettől a bírósághoz fordulás jogáig. Tanulmányok Szamel Lajos}
However, Savigny’s right infringement theory was only able to explain the legal ground for actions for performance, and not for declaratory or constitutive actions. Consequently, the debate concerning the legal nature of the declaratory action caused the problem of right of action to be transposed into the sphere of public law.  

Savigny’s doctrine by all means deserves credit for providing clear and sharply distinguished notions, at the same time, - according to Sándor Plósz - right infringement does not constitute a legal ground for the action, it is merely its external cause triggering it off; moreover, there are cases when the provisions of positive law allow action even prior to the right infringement.

In his book published in 1856, Bernhard Windscheid – occupying a position contrary to Savigny – referred to the right of action as a right to be asserted against the state, while referring to the right against the adversary as a claim. Accordingly, rights and obligations relating to legal proceedings form a peculiar contract relation, the subjects of which are the parties and the court. According to his position, the actio is a special Roman institution and it is not possible to speak of actio in connection

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52 Ibid. Plósz, Sándor: 1927, op.cit.n. 7.
53 Fries, Jakob Friedrich (1773-1843) stated even before Windscheid in his posthumous work entitled “Politic”: “Laws defining people’s rational and wilful acts in social life, establishing rules and obligations for the subjects with regard to the conduct of others. The right against another and my right constitute the claim granted to me by such laws”. In Gysin Arnold: Rechtsphilosophie und Grundlagen des Privatrechts, Frankfurt am Main, 1969, p230. Dernburg’s the terms for claim, right of action, and action are merged, because according to him, claims emerged from action in a subjective sense, meaning the right to enforce the claim, and the request for enforcement. Dernburg, Heinrich: Pandekten I. Bd. 6. Berlin, 1900. p.86. See also Ibid. Hámori Vilmos: 1978/10. loc.cit.n. 3. p. 611.
54 Windscheid, Bernhard: Die Actio des römischen Zivilrechts vom Standpunkte des heutigen Rechts, Düsseldorf, 1856, pp.222-223.
with modern law.\footnote{Windscheid defines actio, as “the right to enforce our will by way of judicial process”. In Roman law actio existed instead of rights (obligationalis right), while in case of in rem actions it existed instead of claims relating to obligations. People won what was granted by the court (Gericht) and not what was granted by the right. So the action given by the magistrate mattered, who, standing above the law, granted or denied aid. In Windscheid, Bernhard: Die Actio des römischen Zivilrechts vom Standpunkte des heutigen Rechts, Düsseldorf, 1856, pp.222-223. see in Ibid. KENGYEL, Miklós: 1986/11, loc. cit.n. 28 p. 550.} This is explained by the fact that in Rome there was actio also without a preexisting right, where the praetor granted the right in the form of an actio (cases of praetoria actio). By action, Winscheid – in the second half of the 19th century – understood an act relating to the action which meant the right based on which an action can be commenced, however, this could not be identical with the claim. He thought that instead of right of action one should speak of a claim, because this constituted the basis of the right of action, which was the consequence.\footnote{Ibid. Plósz, Sándor: 1927. op.cit.n. 7. pp.14.-15.} Theodor Muther sharply criticized Windscheid’s position, as he considered that the original meaning of actio was form of action: prior to the granting of the formula, the plaintiff has a claim to the granting of the formula, when in his edictum the praetor promises such a formula concerning specific types of cases. Accordingly, the actio, as a right, is a claim to the granting of the formula. It is preconditioned on the right that is suitable for assertion in court and on the infringement of that right. The claim to the granting of the formula is directed against the praetor as the representative of state justice (public law) and differs from the original right existing against a private individual (private law). The infringement gives rise to two rights of public law character: the right of action for the injured party for state legal assistance and a right for the state against the infringer to terminate the infringement.\footnote{Ibid. pp. 16.-17.} Sándor Plósz approves of some of the points of Muther’s view, however, the theory of the state’s claim against the infringer and its distinction from private law is easily rebutted on the point that it is not the state but the injured party with the help of the state who asserts the right against the infringer.\footnote{Ibid. p. 17.}
According to the position of Ernst Immanuel Bekker, the actio – which is a right to legal protection - is a precondition for the assertion of the claim by force, in other words, the private law and public law rights are present together in the action: the plaintiff’s private law right against the defendant to take proceedings and his public law right against the state to a judicial decision. In his two-volume work entitled “Die Aktionen des Römischen Privatrechts”, Bekker considered it important to distinguish between the notions of actio and claim: the actio is a condition of the enforceability of the claim. Actio is the right, which is to be considered as existing when founding the iudicium (judgment), on the other hand, the claim is what the judge is qualified to recognize. In Roman legal proceedings these two were decided by two different persons, the magistratus and the iudex. In Bekker’s view, the actio means an unconditional right; the injured party may demand it from the court as an organ of state to examine the claims having a specific connection with the actio, and from the infringer to submit to this examination. Theodor Muther and Plósz Sándor also agree that Bekker was wrong when he included the person of the judge in the definition of claim (Anspruch).

The distinction between actio (substantive law) and claim (procedural law) with regard to the notion of party contributed to the formation of two positions in academic literature: according to the material or substantive law notion of party, only that person can be a party in a legal proceeding who appears as an obligee or obligor in the legal relation relating to the lawsuit or – based on a later modified version of the theory – who alleges this during the proceeding. The processual or the procedural law notion of party defines the person of parties much more generally: plaintiff is the person who by his action commences proceedings and defendant is the person against whom proceedings are commenced. In accordance with this, the notion of party is independent of whether the

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party really appears as a party in the substantive legal relation relating to the lawsuit or not.\textsuperscript{63}

However, the notion of material party does not stand the test of present-day legal practice, for which one may find several examples in our law in force: when after the demonstration of evidence the court dismisses the plaintiff’s action - in a judgment -, this means that the plaintiff could not have been a party, since he lacked the substantive right, accordingly, the statement of claim should have been dismissed by the court right at the beginning of the proceeding without the issue of process with reference to the lack of an existing substantive right, neither can the allegation of the existence of the right be justified if the plaintiff takes proceedings requesting the court to establish his lack of right or the non-existence of the disputed legal relation.\textsuperscript{64} A further counter-argument against the substantive law notion of party is that although it is the person interested in the legal dispute that is primarily entitled to the right to commence proceedings, however, the plaintiff’s position cannot always be considered voluntary, since legal regulations may also authorize other organs (for example, the prosecutor, notary, guardianship authority, trade union) to commence an action instead of the obligee of the substantive right. In these cases the right to conduct proceedings does not coincide with the substantive law right.\textsuperscript{65} In the past one hundred years\textsuperscript{66} Hungarian legal regulations in force have usually applied the notion of party in a processual sense, therefore, academic literature has also adopted this view, at the same time, there are also exceptions\textsuperscript{67}, where the substantive and processual party notions are markedly distinguished. The question of legal dogmatics – concerning which this theory may be utilized – lays partly in: which subjects of legal proceedings may proceed in the proceedings apart from the substantive law obligees – with the same rights

\textsuperscript{63} Ibid. Kengyel, Miklós: 2008. op.cit n. 1. p 139.
\textsuperscript{64} For instance, the action for negative declaratory judgment, in which the plaintiff asks the court to declare in a judgment the non-existence of a legal relation between the parties.
\textsuperscript{66} Act I of 1911 and Act III of 1952 on the Code of Civil Procedure
\textsuperscript{67} For example: in a case initiated by the prosecutor, the substantive obligee also participates as a party in the lawsuit. In Civil Procedure Code .64.§ sec.(3)
and obligations as material parties? And partly: how the parties and other participants of proceedings should be distinguished?68

2. Right of Action Theories Founded on Public Law

2.1. The abstract (independent) right of action theory:

The public law approach appeared already at the time of the criticism of the right of action based on private law, but the real step beyond the private law approach was made - in the second half of the 19th century - by Carl Friedrich von Gerber, who announced the claim of “subjects” to legal protection enforceable against the state, by which he laid the foundations for the interpretation of the right of action as a subjective public right.69 This was followed by the perception of civil proceeding as a public law relation by Oscar Bülow.70 In his work published in 1868, Bülow elaborated the theory of procedural legal relation, in accordance with which the proceeding is an independent legal relation completely different from the substantive right (claim), which gives rise to mutual rights and obligations for the parties and the court.71 But the final break with the private law roots of the right of action took place in the last third of the 19th century, when the proponents of the abstract right of action theory started to treat the right of action as independent from the litigated private right. Based on this, the right of action is but the citizen’s abstract right against the state, which is independent of the substantive private right.72 Accordingly, the right of action is a public law right against the state, in other words, right to adjudication, which is completely in-

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68 Separating the plaintiff and the defendant from the intervening party, the expert and the witness.


70 Ibid. Kengyel Miklós: 2010, op.loc.n. 43. p. 221.


72 Kengyel, Miklós: 2010, op.loc.n. 43. p. 222.
dependent of the fact whether the plaintiff really has a private law right against the defendant. This latter will be decided within the framework of the lawsuit in the final judgment.73

This point of view was expounded by the Hungarian Géza Magyary as follows: “as parties form a legal relation with the state during the proceedings based on the judicial prerogative, it follows that this legal relation is of public law character, because so is the exercise of judicial prerogative. This is explained by the fact that the public law relation is always a legal relation defining the relationship of the state, as an entity standing above all, to its own members. This legal relation is always a relation between two inequal factors, the state and its members, in which the former is superordinated and the latter are subordinated, and which confers rights only on the former and imposes obligations only on the latter.”74

The Hungarian Sándor Plósz considered the action - as an act instituting legal proceedings – a public law right by which the state may be demanded to try the legal dispute (institution of proceedings) and the defendant may be demanded to engage in the lawsuit. Therefore, the person who files his action with the court may, on the one hand, require the court to allow his action filed in conformity with the rules, issue a summons based on it and pass a judgment; on the other hand, he may require his adversary to make a statement concerning the action. Thus a public law obligation relating to the proceeding is also imposed on the defendant, who is obliged to participate in the legal relation resulting from the proceeding as a result of public law and as a person subjected to the state or court.75 However, the private law right does not have to exist for the legal dispute to be tried, it is sufficient if the plaintiff alleges

73 Paulovits, Anita: 2011. loc.cit.n. 45.
74 The sanctions the judge may impose in case the parties fail to carry out specific procedural acts clearly show the subordinate relation between the government and the parties: For example, if the defendant does not respond to the action initiated by the plaintiff, the judge accepts the facts presented by the plaintiff in the action as real and makes a decision in the case in accordance with them; Magyary, Géza: 1898. op.cit.n. 2. at pp.6-7.
75 Plósz, Sándor: 1927, op.cit.n. 7. pp.3o- 33.
The mentation of the Action Theories in Legal Practice

The right of action means the right to have recourse to the court, independently of the outcome of the judicial proceeding: “by the action the plaintiff demands the institution of proceedings, which is done with or without good reason. In the former situation, proceedings will be instituted, in the latter they will not.” 77

Plósz would be qualified as the most consistent proponent of the abstract theory, if he did not presume, parallel to the public law right of action, the existence of a private law right of action, which is referred to by him as the immanent characteristic of private law.78 Based on this, the plaintiff – according to Plósz – has a right to the action insofar as he alleges a private law relation.79 Accordingly, for the institution of proceedings – for the right of action taken in a processual sense – no real legal ground is necessary, however, this renders the public law character of the action debatable.80 He explained the plaintiff’s public law right against the state only by the fact that for the commencement of proceedings there is also a need for the procedural act of the court: the court, as a state organ, breaches its duty if it does not comply with the provisions of procedural rules, but this obligation does not extend to the passing of a just judgment.81

Similar views were expounded by the German Heinrich Degenkolb in his study on the right of action: the public law nature of the action is explained by the fact that “in a well-organized state governed by the rule

76 Kengyel, Miklós: 2008. op.cit.n. 7.p.222.
77 Plósz, Sándor: 1927. op.cit.n. 7.pp.31-32.
79 See also Plósz, Sándor: A kereseti jogról (The Right of Action), Magyar Igazságügy (Hungarian Justice Journal) 1876/5. pp. 232-243.
80 In Magyary’s opinion, the biggest problem with the theory of Sándor Plósz is that it considers the lawsuit a unified but three-sided legal relationship between the plaintiff, the defendant, and the state. However, according to the author, all legal relationships should be two-sided: one side is the obligee, the other side is the obligor. There may be more than one person on both sides, but only if they all share the same rights and obligations. In Magyary, Géza: 1898. op.loc.n. 2. p51., See also Paulovits, Anita: 2011. loc.cit.n.45.
of law, the plaintiff is granted the action in exchange for self-help, this is the price to be paid in exchange for renouncing self-help. With regard to the right of action this means that one side of the right of action is the defendant’s duty toward the plaintiff to enter the proceedings, the other side is the plaintiff’s “judgment expectation” of the state, which does not mean a favourable judgment but a judgment “in accordance with the law.” In a later essay, Degenkolb – arguing with the proponents of the actual right of action – distinguishes the abstract right of action prior to the proceedings as a right to proceedings (Recht auf Prozess) from “pure procedural law right of action” (Recht auf rechtliches Gehör). This approach already anticipated the dualistic conception of right of action, the separation of the right to commence an action and the right of action. During the scholarly debate between Degenkolb and Bülow, the latter modified his earlier position, while sharply criticized Degenkolb. The essence of Bülow’s theory lies in the idea that all procedural acts of the parties constitute merely the exercise of rights and not the performance of obligations: during the proceedings the defendant has a right to contradict (Abwehrprinzip), but nobody forces him to do so, accordingly, it is not his obligation. The proceeding is directed at establishing the right (Rechtsvergewisserungs –operation) without the state undertaking the protection of the right instead of the party.

The abstract right of action theory contributed to the development of procedural dogmatics by treating the right of action independently of the litigated substantive right; however, it did not provide a satisfactory

83 Degenkolb, Heinrich: Der Streit über den Klagerechtsbegriff In Beitrage zum Zivilprozess.. Leipzig, 1905.
85 Paulovits, Anita: 2011. loc.cit.n.45.
explanation for the nature of the right to commence an action or the defendant’s obligation to enter the proceedings against the plaintiff86 87.

The transposition of this theory into today’s judicial practice means that, if the statement of claim meets the requirements of legal regulations, the court will be obliged to proceed in the case, regardless of whether the plaintiff has an assertable substantive right or not, in other words, the claim to legal protection against the state was extended beyond real rights injuries to alleged ones as well. In case the plaintiff has no real rights injury caused by the defendant, the court will dismiss the plaintiff’s action in its judgment, which results in a res iudicata88 from the aspect of the legal dispute. The plaintiff’s action or the defendant’s cross-action against the plaintiff by means of the submission of a negative declaratory (cross-) action may be expressly aimed at the court to declare in a judgment that there is no legal relation between the plaintiff and the defendant.

2.2. The actual right of action theory and/or the claim to legal protection.

A decade after the abstract right of action theory, as a result of the arguments against it, a new theory was born: the actual right of action theory. Legal history tends to contrast the abstract and actual right of

86 According to Degenkolb, the defendant should take part in the lawsuit not as a result of his relation with the court but because of his direct relation with the plaintiff, because the defendant’s cooperation is necessary to achieve a decision. The plaintiff can demand this cooperation based on his personal right. The plaintiff can enforce the recognition of his personality by turning to the court, especially because lynch-law is forbidden. Then right of action as one arising from a personal right is a public right, since so is a personal right. However, the above mentioned obligation of the defendant should have preconditions: on the one hand, the plaintiff must be acting in good faith, and on the other hand, the plaintiff must really have a legal interest or right against the defendant. Degelkolb does not examine the relationship of the state and the parties, he only notes that the state requires those making a statement to tell the truth. In Ibid


88 Decisions made: The legal force of the final decision of the court prevents parties (or their legal successors) from initiating a lawsuit on the same basis or renewing the dispute. Code of Civil Procedure, § 229 Sec. (1)
action theories with each other, although it would be more acceptable to consider them as supplementing each other.\textsuperscript{89}

The theory of the claim to legal protection, right from its appearance, had divided processualists in two camps. The majority negates or, at least, contests its existence, because they do not recognize that the plaintiff and the defendant could have pretensions against the state or the court to a favourable decision. The minority – developing Adolf Wach’s theory further\textsuperscript{90} – still tries to bring newer and newer arguments to justify the existence of the claim to a favourable judgment.\textsuperscript{91}

The proponents of the actual right of action theory agreed with the position that had become crystallized concerning the abstract right of action that even those are entitled to a right of action, who lack both the subjective private law right and the relating legal protective interest against the state, but they considered the commencement of such an action a mere possibility, not a right. According to the representatives of the abstract right of action theory (\textit{Adolf Wach}\textsuperscript{92}, \textit{Paul Langheineken}\textsuperscript{93}, \textit{Konrad Hellwig}\textsuperscript{94}, \textit{Jenő Bacsó}\textsuperscript{95}), one is entitled to a right of action if he has a real, actual substantive right, based on which the plaintiff may have a claim against the state (court) to a judgment of favourable content corresponding to his action.\textsuperscript{96} According to this interpretation, the right of action corresponds to a subtype of the claim to legal protection, the

\textsuperscript{89} Kengyel Miklós: 2008.op.cit.n.1. p.222.
\textsuperscript{92} Wach, Adolf: 1855. 1979. 1889. op.loc.n.89.
\textsuperscript{93} Langheineken, Paul: \textit{Der Urteilanspruch. Ein Beitrag zur Lehre vom Klagerecht (Urteilsanspruch)} Leipzig, 1899.
\textsuperscript{95} Bacsó, Jenő: \textit{A jogvédelem előfeltételei a polgári perben (Requirements for Legal Aid in Civil Actions)}. Máramarossziget, 1910.
\textsuperscript{96} Kengyel, Miklós: 1986/11 loc.cit.n. 28.p.552.
judgment claim, which means the parties’ right to a favourable judgment. Therefore, the notion of the claim to legal protection is wider than that of the right of action, as apart from the legal proceeding and the judgment, there are also other means of legal protection by the state that serve to satisfy it (for example, execution, provisional measures).97 There are also differing views; for instance, in his book, Paul Langheineken used the notion of the judgment claim and the right of action as synonyms.98

According to Wach’s position presented in a later work of his99, the public law right to legal protection which the plaintiff is entitled to is not merely directed against the state, but also against the adversary – the defendant: the adversary has a public law obligation, under which he is obliged to submit to and tolerate the legal protective act.100

The proponents of the actual right of action theory recognized the defendant’s claim to legal protection, which meant if one was to consider the commencement of action the plaintiff’s right, then – according to Konrad Hellwig – one was also to recognize the defendant’s right to request the dismissal of the unfounded action (Freisprechungsanspruch), at the same time, both parties’ claims were directed at a favourable court judgment. The Hungarian Jenő Bacsó refers to the defendant’s claim as “declaratory claim”: “While the plaintiff is granted the legal protection requested in his petition in the form of an order of performance or a declaratory or constitutive judgment, the defendant as such receives protection only by way of a declaratory judgment, from which it flows that the defendant’s claim to legal protection is but a right to protection by a declaratory judgment.”101

Wach thought that the subject-matter of the legal proceeding was constituted both by the litigated substantive law relation and the plaintiff’s and defendant’s claims to legal protection. Konrad Hellwig, Friedrich

97 Ibid p.552.
100 Paulovits, Anita: 2011. loc.cit.n.45.
101 Bacsó, Jenő: 1910. op.loc.n. 94.at p.35. See also Kengyel, Miklós: 1986/11 loc.cit.n. 40. pp.552.-553.
Stein and James Goldschmidt all disapproved of this proposition, since the claim that may be asserted against the state differs from the plaintiff’s right that may be asserted against the defendant.\(^{102}\)

The representatives of the actual right of action theory placed great emphasis on the definition of the conditions of the claim to legal protection, which – upon the influence of Konrad Hellwig - were separated by them from the preconditions of the legal proceeding, at the same time, codes of civil procedure do not make a distinction between the preconditions of the lawsuit and those of legal protection, therefore, in practice – in the absence of an explanation provided by positive law – this idea proved useless and became the most “vulnerable” point of the theory.\(^{103}\) Apart from the lasting and precise definition of notions, the most powerful counter-argument raised against the claim to legal protection is that the parties have no right to a judgment of favourable content against the state exercising judicial power. This is explained by the fact that no source of law can be found that would lay down such an obligation for the state or court.\(^{104}\)

2.3 The dual right of action theory:

Surpassing Savigny’s private law approach, both the proponents of the abstract and actual theories accepted the public law nature of the action and gave similar explanations for it (renouncing self-help\(^{105}\), a claim to legal protection which everybody is entitled to\(^{106}\)). The division of the public law right of action theory in two branches – within a short


\(^{103}\) Kengyel Miklós: 1986/11 loc.cit.n. 28. p. 555.

\(^{104}\) Ibid p. 555.


\(^{106}\) Langheineken, Paul: Der Urteilanspruch. Ein Beitrag zur Lehre vom Klagerrecht (Urteilsanspruch) Leipzig, (1899) p 17.
period of time – can be explained by the fact that a significant difference in view had evolved concerning the question as to who\textsuperscript{107}, against whom\textsuperscript{108}, to what extent\textsuperscript{109}, and on what preconditions\textsuperscript{110} was entitled to legal protection that might be achieved by the right of action, as a result of which views the doctrine of the claim to legal protection was moved to the centre of scholarly criticism in the first decades of the 20\textsuperscript{th} century. Its critics contested both its practical importance and its theoretical value, and rejected it as “scientifically improductive”. Its proponents negated that the plaintiff would have any right to a favourable judgment prior to

\textsuperscript{107} If we consider the commencement of an action as a right instead of simply an option of the plaintiff (as the representatives of the abstract right of action did), we also need to recognize that in case of an unfounded lawsuit, the defendant has the right to request the action to be dismissed. If the plaintiff’s claim to a favourable judgment is unfounded, there is a claim for legal protection on the defendant’s side, that is, the court needs to decide in favour of the defendant. In Kengyel Miklós: 1986/11 loc.cit.n. 28. p. 553.

\textsuperscript{108} The claim for legal protection is primarily directed against the state (court), which – in certain cases – may be forced to carry out acts relating to the legal protection. According to Wach, the claim to legal protection can also be enforceable against the defendant, who has to endure the acts of legal protection. This opinion was rejected by academic literature, because the defendant’s obligation to endure exists in relation to the state, not the plaintiff. According to Bacsó, it is unnecessary to state the obligations of the defendant, because the law in abstracto, the judgment in concreto binds the defendant regardless of his/her will or assent. The plaintiff turns to the state for legal protection, not to the defendant, who could not provide it, at best he could meet his/her obligation relating to legal protection. In Wach, Adolf: Handbuch des deutschen Zivilprozessrechts Vol. 1. (Leipzig, 1855) p. 19. The detailed theoretical elaboration of the defendant’s claim to legal protection is connected with BüLOW, Oscar: Klage und Urteil. Eine Grundfrage des Verhältnisses zwischen Privatrecht und Prozess. Zeitschrift für deutschen Zivilprozess. Vol XXXI. 1910. pp. 23-24. Bacsó, Jenő 1910 op.loc.n.94., Kengyel Miklós: 1986/11 loc.cit.n. 28. p. 553.

\textsuperscript{109} Wach doubled the subject-matter of the lawsuit, one is the litigated substantive legal relations, the other is the plaintiff’s and the defendant’s claim for legal protection. According to him, the claim for legal protection is also valid, if there is no litigated right. As an example, he mentions the plaintiff’s action for negative declaratory judgment, the aim of which is not to bind the adversary in connection with the subjective right, but to maintain the undamaged legal status of the plaintiff. In Ibsn Wach, Adolf: 1855. pp. 19-23. See also Kengyel, Miklós: 1986/11 loc.cit.n. 28. p.552.

\textsuperscript{110} According to Langheineken, the assertion of a claim for legal protection depends on four conditions: the facts of the case, the legally significant nature of the claim to legal protection, and conformity with substantive and procedural rules. In LANGHEINEKEN Paul: 1899. op.loc.n.105. pp. 21-33.
the filing of the action, since the right to the judgment arises only at the
time of the conclusion of the trial, when the court must decide the case
either in favour of the plaintiff or the defendant.\textsuperscript{111} Besides the rejection,
however, there were also attempts to reconcile the abstract and actual
right of action theories, which gave birth to the “dual right of action the-
ory.”\textsuperscript{112} professed by the Hungarian \textit{Géza Magyary}, who claimed that the
person whose private right had been infringed or endangered, without
doubt, had a right of action, on the other hand, the person who had suf-
f ered no injury was also entitled to this right, because he was to receive
equal treatment under the law.\textsuperscript{113} Everybody is entitled to the right to
institute proceedings, without the provision of security, since if it was
conditioned on the provision of security, it would render the plaintiff’s
situation rather difficult. This could also lead to the plaintiff not receiv-
ing legal protection. Therefore, the law rather tolerates the initiation of
unfounded lawsuits than deprive the really injured or endangered right
of protection. Accordingly, Magyary thinks that everybody has a right
of action, so everybody may initiate legal proceedings without the pro-
vision of security. All plaintiffs receive the same treatment, regardless
of the extent to which their action is well-founded. All this serves the
purpose of avoiding adverse effects on the person whose right has really
been infringed or endangered. At the same time, Magyary underlines the
duty to tell the truth, which means that the plaintiff is obliged to present
the facts relating to legal protection in accordance with the reality, in
addition, he states that against the plaintiff’s action the defendant has a
right of defence so as to ensure that the defendant would suffer no unlaw-
ful disadvantage.\textsuperscript{114}

The practical significance of this theory lies, on the one hand, in the
anticipation of the basic right of access to the courts, on the other hand,
in the separation of the preconditions of the legal proceeding and those
of the claim to legal protection (the successful action). It was stated by

\textsuperscript{111} Kengyel Miklós: 1986/11 loc.cit.n. 28. p. 554.
\textsuperscript{112} Kengyel Miklós 2008. op.loc.n.1.pp. 222-223.
\textsuperscript{113} Magyary Géza - Nizsalovszky Endre: 1939 op.loc.n. 11. p. 353.
\textsuperscript{114} Magyary Géza: \textit{Magyar Polgári Perjog (Hungarian Civil Judicial Process)}, Budapest.
Hellwig already that if the procedural preconditions or the substantive law conditions were not met, the legal consequence was the same: the court could not make a decision on the merits of the case, however, in the first situation, it shall dismiss the plaintiff’s statement of claim without the issue of process, while in the second situation, the court shall dismiss the plaintiff’s action in its judgment, declaring that “the plaintiff is not entitled to request the state’s court to provide legal protection at present.”

3. Modern Right of Action Theories:

The abstract and actual right of action theories were greatly criticized, therefore, neither was acceptable for legal dogmatics, however, the influence of both may be detected in modern right of action theories. According to Josef Kohler, the legal proceeding constitutes a legal relation exclusively between the parties, because in legal proceedings rights and obligations arise only for the parties. The court participates in the proceeding as an element of public law, but this does not involve the court in a public law relation, because the court is not legally interested in the lawsuit. The legal proceeding does not give rise to rights for the parties against the court in any other way either, since the state – by the administration of justice – merely performs its duty toward the parties. According to Kohler, the idea that people are not entitled to legal protection from the state is proven primarily by the fact that noone considers legal protection an acquired right. Julius Wilhelm Plank holds a differing view: the legal order confers the power of deciding legal disputes on the state and, for this purpose, it establishes a special organ: the court, and it forces citizens to settle their disputes before the court. In accordance with this, one may speak, on the one hand, of a public law obligation of

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116 Kengyel, Miklós: op.loc.n.1. p. 223.
118 Paulovits Anita: 2011. loc.cit.n.45.
the court, and on the other hand, of public law rights of parties. As a result of this, a legal relation is formed between the court and the plaintiff, and maybe, between the court and the defendant, insofar as the defendant objects to the application of force requested by the plaintiff.\textsuperscript{120} It follows from \textit{Planc’s} view that the action is a right in relation to the court, because based on the principle of party control, the initiation or non-initiation of proceedings depends exclusively on the plaintiff, by which he recognizes the public law right of action, distinguishing between its procedural law and substantive law side. The procedural law side means that the defendant – based on the plaintiff’s action – may be forced to become engaged in the lawsuit; on the other hand, the material side is constituted by the fact that the defendant can be ordered to perform the claim.\textsuperscript{121}

The representatives of modern civil procedural science usually agree that the action, apart from the substantive right, also comprises the assertion of the right or lawful interest.\textsuperscript{122} With respect to this, \textit{László Gáspárdy} divides the notion of rights assertion in two: “clear distinction must be made between the abstract possibility of somebody becoming the initiator of a civil judicial proceeding (“right of action”) and the actual situation where the person initiating the proceeding is in possession of the conditions of success (“right of actionability”).”\textsuperscript{123} The right to commence an action means the right to legal proceedings, while the right of actionability means the right to the enforceability of the claim. The right to commence an action can essentially be considered the modern expression of the abstract right of action, while the right of actionability can be regarded as that of the actual right of action.\textsuperscript{124}

Having regard to the dual nature of the notion of right assertion, “the ability to initiate proceedings” must be separated from the conditions of

\textsuperscript{120} Ibid p.199. See in PAULOVITS, Anita: 2011. loc.cit.n. 45.
\textsuperscript{121} PAULOVITS, Anita: 2011. loc.cit.n. 45.
\textsuperscript{122} KEMGYEL, Miklós: 2005. op.loc.n. 121. p. 212.
\textsuperscript{123} GÁSPÁRDY, László: A jogérvényesítést elsegítő és akadályozó körülmények vizsgálata a magyar polgári igazságszolgáltatásban (Examining Factors Promoting and Preventing the Prosecution of a Right in Hungarian Civil Justice), Budapest, Hungarian Academy of Sciences Publisher 1985, p. 4.
“winning the lawsuit”. The ability to initiate proceedings, in other words, the assertion of legal self-interest or its absence is always the result of a subjective opinion, behind which there is always the underlying influence of various factors. The conditions for winning the lawsuit, however, are always connected with the possibility to realize equal opportunities.

3.1. One type of Modern Right of Action Theories is constituted by Socialist Right of Action Theory. The liberal approach of the 19th century to legal proceedings required civil proceedings to resolve legal disputes in the “shortest, simplest and most certain” way. The legal proceeding was regarded as the realization of individual interest. At the end of the century it was supplemented with the further legal political requirements of the “protection of legal peace” and “the protection of the legal order as a whole”. In the socialist procedural law of the 20th century – in contrast with the earlier liberal approach to legal proceedings – the main task of the court was to “explore the real rights of litigants and their relationship to each other”, therefore, the Act on the Code of Civil Procedure - following the pattern of the Soviet Code of Civil Procedure – defined the aim of the socialist civil proceedings and the task of the court as the revelation of the material truth. This meant that the court had to take evidence ex officio to ensure that the parties duly exercise their procedural rights and comply with their procedural obligations, while paying maximum attention to the protection of substantive rights. It became the duty of the court to

125 “Factors influencing the individual predictions of a subject of law from an objective aspect: possible costs of the legal action, estimated time, access to legal aid (representation, counselling), enforceability of the judgment containing an order against the defendant, and geographical availability of the authority. Factors in the subjective aspect: conforming to social customs, personal affectedness (stimulus threshold) of the legal entity making the decision, opinions about the success or failure of the potential legal action, the actions required to take and the gauge of the psychic burden, opinions about the deciding authority, anxiety caused by the retorsion of the adversary – or its lack, expected reactions to the possible lawsuit, the potentials of self-expression.” In GÁSPÁRDY, László: 1985, op.loc.n.122. p.4.

126 Code of Civil Procedure 3.§.
reveal, through active participation, the real facts, the parties’ real rights and their relationship, in other words, the objective truth.¹²⁷

Socialist legal procedural science rejected the bourgeois (liberal) right of action theories categorically¹²⁸, at the same time, the substituted laconically explained socialist right of action theory was not able to break away from the roots of the abstract and actual right of action, which is also indicated by the distinction between “processual” and “material” right of action.¹²⁹ Socialist civil procedural science makes a distinction between the right of action and the right to commence an action, as well as right of action taken in a substantive and procedural law sense.¹³⁰ According to the proponents of this theory (Abramov, Gurvich, Kleinman, Yugyelson), distinction should be made between right of action taken in a procedural and substantive sense.¹³¹ In a procedural law sense, the right of action means the right to commence an action, in other words, the plaintiff’s right to apply to the court, which is preconditioned on the parties’ capacity to sue and to be sued as well as compliance with the content requirements of the statement of claim. Based on the right of action taken in a substantive legal sense, the court may be required to allow the action, the condition of which is the existence of a right re-


¹²⁹ Kengyel Miklós: 1986/11 loc.cit.n. 28. p. 556.


quiring protection.\textsuperscript{132} According to László Névai, right of action taken in a “procedural sense” means: “...The court proceeds from the rule that a person may take action as a plaintiff only if the person is asserting his own subjective right or he has been authorized to assert someone else’s subjective right. The court checks if the person has a right to take action and whether the asserted right really requires protection (for example, the debt is overdue). Right of action taken in a substantive legal sense is closely connected with the subjective right the action is intended to protect. Consequently, further on, the court examines the essential elements of the legal relation litigated by the plaintiff, it checks the evidence and weighs the result of the presentation of evidence. This activity is aimed at establishing the existence of the right of action taken in a subjective sense.”\textsuperscript{133} This is reflected in the definition of the notion of “claim” as well: “the claim is not a separate subjective right, but only one phase of existence of the subjective right: the situation when all conditions have already been met for recourse to state force.”\textsuperscript{134}

\section*{3.2. Another type of Modern Right of Action Theories is the claim to justice:}

As a result of the influence of modern state law theories, the complete rejection of the claim to legal protection gave way to a more subtle evaluation of this theory. As the claim to legal protection does not merely mean the right to a favourable judgment but also the parties’ claim against the state taken in a wider sense to the performance of acts of legal protection, this latter proved compatible with the state’s general obligation to provide legal protection. This recognition rendered it possible to accept the idea that both parties had a right directed at the performance of legal protection taken in a general sense and assertable against the state. This

\textsuperscript{132} Kengyel, Miklós: 2010 op.cit.n.43. p. 223.


means that the court, as the state organ applying the law, is bound to apply the substantive law with regard to the proceeding and decide the legal dispute – in accordance with it – in favour of the plaintiff or defendant.135

According to the proponents of the claim to justice theory (Justizanspruch) (James Golschmidt136, Karl Heinz Schwab137, Walter Habscheid138, Leo Rosenberg139), this claim of the parties against the state to carry out the activity of administering justice (administering law) is not a possibility but a subjective public right founded on the Constitution.140 It arises as a claim against the state (court) at the time of the submission of the statement of claim, prior to this, one may speak of a possibility open to all, specified as the abstract right of action, based on which the party may apply to the court regardless of the infringement or endangerment of the substantive right. Accordingly, the performance of legal protection does not depend on judicial discretion, neither is it some type of favour for the parties, but this does not give rise to a claim to a favourable judgment – as the proponents of the actual right of action theory asserted – but to the examination and decision of the question relating to legal protection.141

139 Rosenberg, Leo: Lehrbuch des deutschen Zivilprozessrechts, Berlin, 1927
141 Kengyel, Miklós: 2010. op.cit.n.43. p. 223.
3.3. A third type of Modern Right of Action Theories is: the linking of the Right of Action with the right of access to the courts.

The right of access to the courts may be regarded as a modern expression of the right of action. It is narrower than the claim to justice, because it refers only to legal protection by the court, but it also includes the right to commence an action and the claim to a court decision on the merits. With regard to its content, it is, on the one hand, more than the possibility to commence an action formulated by the abstract right of action theory, and on the other hand, it is less than the right to a favourable court judgment presumed in the actual right of action theory.

Article 10 of the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948 deals with human rights relating to justice. Based on the principles declared in the Universal Declaration of Human Rights, the UN General Assembly adopted two covenants in 1966. Out of the two, the most important rights relating to justice are contained in the International Covenant of Civil and Political Rights. From the aspect of the right of access to the courts, the American Convention of Human Rights of 1969 is an important document, Article 8 of which deals with the right of access to the courts under the heading of “right to a fair trial”.

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142 Jurisdiction is not only exercised by the courts but also by: courts of arbitration, economic and employment arbitration committees, conciliatory bodies, etc.


144 “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” (Article 10)

145 “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” (Article 14)

146 “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.” (Article 8)
Article 6 of the Rome Convention on the Protection of Human Rights and Fundamental Freedoms promulgated on 4 November 1950 lays down that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]. Consequently, the Rome Convention ensures the right of access to a fair process, and also of access to a court proceeding. In the case of Delcourt v. Belgium, the European Court of Human Rights found that in a democratic society within the meaning of the Convention, the right to a fair administration of justice held such a prominent place that a restrictive interpretation of Article 6 para. 1 was not possible.\textsuperscript{147} It follows from this that Article 6 para. 1, also referring to civil cases, lays down, by its content, one aspect of the guarantees of equal rights, in accordance with which no one can be denied the possibility of access to the courts, in other words, the possibility of rights assertion. The Rome Convention was ratified by all Member States of the Union; therefore, the right to a fair trial is a common European value. The Charter of Fundamental Rights of the European Union further developed the provisions of Article 6 para. 1 of the Rome Convention.\textsuperscript{148} In accordance with Article 47 para. 3 of the Charter, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law, moreover, everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.\textsuperscript{149} This provision guarantees the conditions of effective access to justice already.

\textsuperscript{147} Judgment passed on 17\textsuperscript{th} January 1970 in the Delcourt v. Belgium case; ECHR 2689/65; Series A No. 11.

\textsuperscript{148} Scholler, Heinrich Der gleiche Zugang zu den Gerichten. In Jura (Journal), 2004/2. p. 119.

\textsuperscript{149} Official Journal 2007/C 303/01. The Hungarian translation of the Charter is “költségmentesség” (exemption from costs), in English it is “legal aid”, in French “aide juridictionnelle”, in German “Prozesskostenhilfe”, therefore, this notion means legal aid covering all exemptions and legal representation provided free of charge or at a reduced cost.
The texts of all five international documents contain that the court shall decide about citizens’ rights and obligations within the framework of just or fair and public proceedings. Since the French Revolution, publicity has been one of the most important principles of criminal and civil procedure. At the same time, the requirement of justice or fairness has a semblance of natural law, which may be accepted and approved as a declaration (or the indication of an objective to be achieved), but its practical implementation – resulting from the nature of civil proceedings – runs into difficulties. In order to resolve the obvious conflict between the basic principle and practice, the notion of justice should be used in a social and not in a philosophical sense, in other words, social justice should prevail in proceedings conducted by civil courts.150

With regard to the Hungarian regulation, József Farkas stressed it already in the middle of the 1980s that all subjects of law were entitled to the right of access to the courts, which gave rise to a right for them to demand it from the state that the court shall deal with the claim on the merits and make a decision about it.151 János Németh also drew attention to the fact that no state governed by the rule of law may question even the constitutional human right nature of the right of access to the courts and together with it, of access to justice, which imposes on the state the obligation to guarantee this constitutional right as well as the personal, economic etc. conditions required for its implementation.152

In Hungary in the era of the democratic political transformation of the second half of the 1980s and the relating democratic constitution-making, it was of great significance to emphasize the right of access to the courts, since the socialist Constitution153 regulated only the

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The right of the parties’ to the fair conduct of lawsuits is implemented by way of a procedure that ensures the realization of basic principles during the proceeding. Within this framework it is the duty of the court to assist the parties in the assertion of their rights relating to the adjudication of their legal dispute, the fair conduct of the lawsuit and its resolution within a reasonable time. The assertion of this right during the lawsuit means, on the one hand, that the court cannot decline to decide legal disputes that have been referred to it for civil litigious or non-litigious proceedings and, on the other hand, that it is obliged to ensure the conditions necessary for enabling the party to assert his right (for example, exemption from costs, the appointment of an advocate, recording the party’s orally presented petition in the records etc.) If the court fails to do so, the party may claim compensation from it.

Accordingly, based on the most general interpretation of the right of access to the courts, in the interest of the assertion of their rights, every-

154 According to László Névai “In the People’s Republic of Hungary […] jurisdiction is exclusively exercised by the courts.” Interpreting Civil Procedure. In Névai, László – Szilbereky, Jenő (eds.) Polgári eljárásgazdag (Civil Procedural Law), 4th reprint ed., Budapest, Tankönyvkiadó (Study Book Publisher) 1976. p. 70. Né vai’s point of view about the jurisdictional monopoly of courts did not stand the test even at the time of socialist trials, since jurisdiction was also exercised by economic and employment arbitration committees, certain council organs and notaries public.

155 Kengyel, Miklós: 2010. op.cit. n.43. at p. 38. It is the same in the Fundamental Law of Hungary, Paragraph 1. Article XXVIII., entry into force on 01/01/2012


157 Hungarian Code of Civil Procedure (HCCP) § 7 Sec. (1)-(2)

158 Hungarian Code of Civil Procedure (HCCP) § 2 Sec. (3)
body is entitled to initiate a judicial or other right assertion procedure.\footnote{Kengyel, Miklós:1989, loc.cit. n.49. p.137.}
At the same time, as a matter of fact, this does not actually mean that everybody can apply to the courts concerning their disputes, because the person who is at a disadvantage financially may not be able to afford the costs of the proceedings.

\section*{III. The Implementation of (Right of Action) Theories in Legal Practice}

*Peter Mes*, in the introduction to his study, argues that the starting point for a scientific analysis is not always the practical or dogmatic value of the legal institution, since the formation of legal theoretical concepts is always important and justified.\footnote{Mes, Peter: *Der Rechtsschutzanspruch, Prozessrechtliche Abhandlungen*, Heft 28. Köln, 1970}

Enacted law in force – in this case the Hungarian Code of Civil Procedure (HCCP) – provides information about how private law rights may be asserted, what means one may have recourse to in order to achieve the performance of private law obligations if the adversary party does not voluntarily fulfil them. Proceeding from this idea, law has a clearly practical orientation: it is directed at acts, it governs human activity and behaviour, which are expounded in detail by the individual branches of positive legal science. Then why is there a need to formulate legal theories, why is there a need for legal philosophy besides legal dogmatics? – asks *Gyula Moór* in one of his monographies,\footnote{Moór, Gyula: *Bevezetés a jogfilozófiába (Introduction to Legal Philosophy)*, In Philosophical Books Serial, Pfeifer Ferdinánd Publisher, 1923. Budapest p. 9.} which question is answered by him as follows: “statutory law contains norms, it lays down rules to be followed concerning human conduct; therefore, it sets objectives for human activity. This is how statutory law leads us into the world of objectives. The order of the world of objectives, the connection between the means and aims, however, does not merely constitute a causal relation, but the idea of “value” is also attached to it. In other words, the law sets aims for human activity, by which it creates a value
idea, as a result of which it has a stable value.” All this translated into the language of legal practice means that the law prescribes acts, but people are not merely supposed to act, but to act rightly, therefore, the question arises as to whether the act prescribed by the law is right or not? Legal theories provide help in deciding whether statutory law – as made by legal politics and applied in legal practice – is right or wrong, since the criticism of law is not a question of statutory law. On the other hand, different legal political interests may conflict with each other, in which case legal theories formulated by legal philosophy will provide help in making order in the world of values.

Based on the above thoughts it is unambiguous that there is a need for both the dogmatic and legal theoretical approach from the aspect of legal development, however, new questions also arise such as: can practising lawyers deal with the causes and effects of legal regulations and the content of correct legal rules, or is it better to leave this task to the representatives of a separate branch of science (for example, legal philosophy, legal theory, legal sociology, politology)? Since the “real” lawyer cannot be satisfied with the knowledge of statutory law, but he must also be familiar with all philosophical, sociological, social and legal historical knowledge necessary for the solution of the above problems, is it more reasonable to trust statutory lawyers with the solution of these problems? – asks Gyula Moór. In other words, is it justified to connect jurisprudence analysing statutory regulations and legal philosophy, which distances itself from the content of statutory rules and deals with the suppositions of positive legal sciences? Gyula Moór’s answer is that “if the solution of legal philosophical problems is trusted to positive legal science, then positive legal science is diverted from its own task, moreover, we cannot be certain that during the examination of these

163 The “proper law” is a concept used to estimate the content of statutory law from a higher moral perspective In Ibid. p. 29.
164 Ibid p. 23.
165 Ibid p. 33.
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questions, it would proceed as thoroughly as if it did not have to turn its attention to its own special task.”

The (right of action) theories the examination of which stands in the centre of the present study – through their proponents – compete with each other, sometimes supporting, sometimes contradicting each other. All theories try to find the most logical, unattackable and “lasting” solution possible by criticizing the essential propositions of earlier views.

Posterity looks upon the proponents of right of action theories with gratitute partly because of their definitions of notions and formulation of some logical conclusions, which were – mainly – based on critical comments on each other’s theories. With regard to the definition of notions, for example, Leo Rosenberg – a great opponent of the claim to legal protection theory – expounds that everybody creates their own system of norms, based on which a concrete legal norm can be explained. In the pandect law dogmatics of the 19th century, one deserved the greatest credit for inventing newer and newer distinctions and designations.” Rosenberg brought up “in defence” of the scholars of the claim to legal protection theory only that they had enriched the science of civil procedural law with the notion of the need for legal protection.” Another example is connected with the claim to justice (Justizanspruch), since as a result of the criticism that fell on the abstract and actual right of action theories, neither of them could become acceptable for science, therefore, in German procedural dogmatics – as the most progressive impact of the theories - a neutral notion was created, which, on the one hand, was suitable for explaining the content of right of action, and on the other hand, it served as a starting point for laying the foundations for the right of access to the courts. At the same time, legal dogmatic problems raised by right of action theories – from the aspect of present-day legal practice as well – may be grouped around several questions of key importance, the most important of which – in my opinion – include: (a) apart from real rights injuries, the actionability of presumed injuries as reflected in the doctrine of the preconditions of the lawsuit; (b) the plaintiff’s right to a favourable judgment against the defendant, within framework of the legal

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166 Ibid p. 34.
167 The system of norms is a scheme based on which a concrete legal norm is interpretable.
168 Rosenberg, Leo: 1927. op.cit. n.28 p. 259.
169 Kengyel, Miklós: 1986. loc.cit. n.28 p. 554.
protective task of the state (court); (c) the purpose and social evaluation of civil proceedings; (d) the nature of the (private law, public law) legal relation between the court-plaintiff-defendant; (e) the notion and actionability of the claim.

(a) In present-day legal practice one of the most important – still unsolved – problems is whether only the real rights injury should be actionable or the state should set in motion its machinery of justice in the case of alleged rights injuries as well based on an excessively wide interpretation of the right of access to the courts. The present regulation of the right of access to the courts is in conformity with the requirement of the rule of law contained in international conventions, on the other hand, extending it – beyond real disputes – to presumed legal disputes increases the prolongation of lawsuits and the workload of the courts, therefore, fewer “resources” can be used for the exploration of real rights injuries within the organizational system of courts.¹⁷¹ With regard to this, Tamás Lábady calls attention to the significance of the rules relating to the preconditions of lawsuits¹⁷². These rules serving the purpose of the simplification and acceleration of civil proceedings restrict the unfolding of proceedings destined to fail. In addition, he remarks that insofar as substantive law and procedural law are closely interconnected, rights of action taken in a substantive and procedural sense are not independent of each other either. Lábady defines the preconditions on which the party has the right to apply to the court, proceeding from the examination of the elements of content and form of the complex legal relation of the action. The deficiency of form or content of the elements of this legal relation sets the limits of the right to commence an action, among which Lábady distinguishes subjective, objective, content and time limits.¹⁷³ In Lábady’s view, the aim of the commencement of action, as an institution of procedural law, is to ensure legal protection. Legal


protection, however, is attached only to the existence of some real right. Therefore, it is not possible to regard the lawsuit initiated without cause as conflicting with the aim of civil proceedings, because in the absence of a substantive right there may be no question of real legal protection.\textsuperscript{174} This approach developed in the era of socialist civil procedure, following the democratic transformation of the political system the Constitutional Court of Hungary, in its decision of 1993\textsuperscript{175}, took a different position, in accordance with which it conflicts with the Constitution if the court dismisses the statement of claim without the issue of a summons where the plaintiff’s claim was “clearly unfounded” or it was “directed at an impossible service” (declaratory judgment). In its reasoning attached to the decision, the Constitutional Court pointed out that the right of access to the courts could not mean an unlimited subjective right to the initiation of a lawsuit; however, the examination of the otherwise necessary preconditions for the lawsuit cannot affect or restrict the essential content of the fundamental right.\textsuperscript{176}

Considering the present – significantly different – regulation in force, the courts are in a very difficult situation concerning the “sifting out” of lawsuits started without cause. Although the Code of Civil Procedure requires the plaintiff to “specify in the statement of claim the right to be asserted together with the presentation of the facts on which it is founded and the supporting evidence”\textsuperscript{177}, however, the court may “remedy” this situation only by issuing an order for completion and not by dismissing the statement of claim without the issue of a summons.\textsuperscript{178} Completion may take place several times during the proceedings, since in accordance with judicial practice, the statement of claim can be dismissed only if the deficiencies are such as to render it impossible to adjudicate the statement of claim. Deficiencies of a different type must be completed

\textsuperscript{174} Ibid p. 449.  
\textsuperscript{175} Decision № 59/1993. (XI.29) AB of the Constitutional Court  
\textsuperscript{177} Code of Civil Procedure §121 Sec. (1) (c)  
\textsuperscript{178} Code of Civil Procedure §130 Sec. (1) (j)
during the proceedings.\textsuperscript{179} This usually occurs in the case of deficiencies of a procedural nature and not relating to questions of substantive law.\textsuperscript{180} Based on the principle of adversarial hearing, the court does not have a possibility to take evidence ex officio, it may decide exclusively based on the evidence presented to it by the parties, who may present evidence practically until the passing of the first instance decision (judgment).

(b) The plaintiff’s right to a favourable judgment against the defendant is connected with the parties’ legitimacy relating to the lawsuit (right of actionability, right to claim enforcement), which is basically a question pertaining to substantive law falling outside the notion of the right to institute legal proceedings and the parties’ capacity to sue and to be sued: it refers to the substantive legal relationship between the party and the subject-matter of the lawsuit, in other words, it means whether the plaintiff is entitled to the right asserted by the action against the defendant. The regulation in force relating to this question is problematic in legal practice, because the situations in which the statement of claim may be dismissed without the issue of a summons\textsuperscript{181} are limited to cases where the group of persons entitled to commence proceedings (plaintiff) and to be sued (defendant) are specified unambiguously – in accordance with the regulation\textsuperscript{182}, otherwise, the court is to apply the rule according to which “determining whether the plaintiff has the right to assert his claim” (right of actionability) against the defendants specified by him is a question pertaining to the merits of the case relating to substantive law, about which the court must decide by passing a judgment. In this case the court can neither dismiss the statement of claim without the issue of a summons, nor can it discontinue proceedings.\textsuperscript{183} In the case of the lack of legitimacy relating to the lawsuit, therefore, the action must be


\textsuperscript{180} For example: The plaintiff, after incorrect indication of the defendant’s address, informs the court that he/she cannot supply the defendant’s correct address. (Supreme Court Decision: Gf. V. 30 518/1988 – 11/414 BH 1988.) In \textit{Kengyel, Miklós: 2006. loc.cit.n.12} p. 805.

\textsuperscript{181} Code of Civil Procedure § 130 Sec. (1) (g)

\textsuperscript{182} For example: actions relating to status, compulsory joinder of parties.

\textsuperscript{183} Court decisions 388. 2001. BH, 201. 2001. BH., 182.. 1999. BH See also \textit{Kengyel, Miklós: 2006. loc.cit.n.12} p. 802.
dismissed in a judgment, which does not mean a favourable judgment for the plaintiff, but before this may be declared by the court in a decision on the merits (judgment), it must conduct a long evidentiary procedure in order to clarify legitimacy relating to the lawsuit, consequently, it is not possible to avoid the series of trials that will prove unnecessary for the passing of judgment.

(c) Concerning the aim and social evaluation of civil proceedings, it must be pointed out that the Code of Civil Procedure containing the rules relating to litigious proceedings – just like all legal regulations – is basically required to guarantee legal security as well as the realization and enforceability of fundamental rights and principles. The amendment of the Code of Civil Procedure following the democratic political transformation of 1989 - instead of the objective of the just resolution of the legal dispute - in conformity with the requirements of the era – formulated a new objective: the requirement of fair process, which - in accordance with the contents of Article 6 of the Convention on Human Rights and Fundamental Freedoms – endeavours to ensure the impartial resolution of legal disputes for the parties.


185 Act CX of 1999 amending the Code of Civil Procedure

186 The court had to determine the objective truth reflecting the factual reality even if any of the parties did not meet his/her obligation of burden of proof. In. Farkas, József: 1956. op.cit.n.39. pp. 23-27., See also Kengyel Miklós: 2008. op.cit.n.1. p. 33.

187 The Constitutional Court in a 1992 decision declared that there is no constitutional guarantee that the truth is always uncovered. “The Constitution merely provides right to court proceedings and can not guarantee that the result and ruling would always be correct” (Decision № 9/1992 (I.30.) AB of the Constitutional Court). According to the Hungarian Constitutional Court, “fair procedure” includes the necessary qualities required from the court and the procedure (e.g. just trial) and, at the same time, ensures the effectiveness of all procedural guarantees laid down in the Constitution (equal opportunity, independent and impartial court, judgment within a reasonable time limit) (Decision № 6/1998 (III.11) AB of the Constitutional Court), See also Kiss, Daisy: loc. cit.n.184.
The judge is in a difficult situation from several aspects: parties expect of him a quick and just judgment, the non-fulfilment of which – in the opinion of the parties – constitutes one of the most frequent causes of actions for damages against the trial judge, at the same time, the judge is not authorised by law to find out the truth (to take evidence ex officio). Concerning adjudication within a reasonable time, parties are entitled to the legal remedy of “protest against the prolongation of proceedings”\(^{188}\), which is connected with the principle of proceeding within a reasonable time – contained in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, however, the grounds for filing such a protest – if the court has failed to observe the deadline set for him by the Act, if no measure has been taken against the person responsible for this omission, if a reasonable period of time has passed since the court’s last constructive measure during which the court could have carried out the procedural act\(^{189}\) - practically ensure protection for the parties against the trial judge, which may be considered problematic because only one out of the three grounds can be concretized.

The essence of the problem lies in the disappearance of “truth” from civil proceedings. As the court does not take evidence ex officio\(^{190}\), it is obvious that the revelation of truth cannot be guaranteed, the court is merely charged with the task of ensuring that “the parties may assert their right relating to the adjudication of legal disputes, the fair conduct of lawsuits and their resolution within a reasonable time.”\(^{191}\) “By this distinction, the difference between the justness of the decision and the justness of proceedings has become emphatic. The amendment of the Act\(^{192}\) “exempted” the court from its obligation to establish the facts in the judgment in accordance with the actual facts. I do not consider – sharing the opinion of Daisy Kiss – the requirement of a just decision an outdated category “that has had its day”. The parties’ dispute cannot be decided without the extensive exploration of the facts, without finding

\(^{188}\) Code of Civil Procedure §114/A-114/B.

\(^{189}\) Code of Civil Procedure § 114/A. Sec. (2) (a)-(c)

\(^{190}\) exception: lawsuits relating to status

\(^{191}\) Code of Civil Procedure § 2 Sec. (1) See also Kiss, Daisy: 2011. loc. cit.n.183.

\(^{192}\) Act CX of 1999 amending the Code of Civil Procedure
out and examining the causes giving rise to the rights injury, the weighing of social context and the taking into account of the parties’ personal circumstances. If the requirement of the justness of decision, which lies in the above, is rejected, right-seeking citizens will lose the chance of the court decision providing a real solution to their disputes instead of leading to more tension. Roman lawyer *Iuventius Celsus* had the point of view already that law did not merely consist of the totality of rules of conduct enforced by the state, but it was their final purpose, which was to make justice prevail. Besides the justness of the decision, another problem brought about by abolishing the ex officio taking of evidence is: the judge’s inability to make a decision. Through the unjustified adjournments of the trial, this may lead to a prolongation of the trial, moreover, to fears on the part of the judge of the first instance court that his judgment on the merits might be set aside at second instance with reference to lack of proof.

(d) The procedural (public law) legal relation between the court and the parties is an important factor with regard to the exercise of procedural rights and the performance of procedural obligations, furthermore, it requires the examination of whether there could be a procedural (public law) relation as well between the parties – in relation to each other – apart from the private law legal relation, as a result of which the parties may become direct public law obligors and obligees in relation to each other. The practical significance of this question – in my view – lies in the fact that between those who are in a procedural (public law) legal relation – in relation to the subjective right to commence an action – an obligation arises for the court to examine the claim by conducting the necessary evidentiary procedure and an ex lege obligation arises for the defendant to become engaged in the lawsuit.

The problem of the legal relation between the court-plaintiff-defendant appears in present-day legal practice in the form that concerning questions relating to the relationship between the parties and the state (court), it must be clarified unambiguously whether the judge is ex-

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194 The Good and Fair Art of Law “*Ius est ars boni et aequi*” In Digesta ULPIANUS 1.1.1.1.
pounding the content of the rules of some statutory law or he intends to comply with legal political requirements which point out trends in legal development or declare generally applicable doctrines. The mixing of these may generate a process endangering legal development, as the aim is to perform different tasks: in the first case, to set forth the content of legal regulations, in the other case, to examine the consequences of legal regulations. Therefore, the jurisprudent must be sharply distinguished from the legal theoretician qualified for the creation of legal theories, the legal sociologist and the representatives of political legal science in accordance with Hans Kelsen’s doctrine of “pure legal theory” (reine Rechtslehre).

On the other hand, based on the legal relation between the parties and the state, the extent of the plaintiff’s obligation to produce evidence (principle of adversarial hearing) and of the defendant’s obligation to get engaged in the lawsuit is problematic. With regard to the question as to how detailed specification the plaintiff should provide in the statement of claim of the factual basis of the action, academic literature distinguishes between the principles of the individualization and substantiation of the action. In accordance with the former, the action is not founded on the facts, but the allegation of a right, therefore, the statement of claim shall primarily define the right to be asserted, while the specification of allegations of fact and evidence is not by all means necessary, accordingly, the plaintiff is required to present in the statement of claim only what is necessary for clearly distinguishing the right to be asserted from any other right. As opposed to this, the principle of substantiation lays down that in the statement of claim the plaintiff is required to present the facts necessary for the revelation of truth. The Hungarian Code of Civil Procedure in force follows the principle of substantiation. The defen-

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195 Moőr, Gyula: 1923. op.cit.n. 160. p. 34.
196 The aim of legal science is to create a jurisprudence free of political, ethncial, moral and scientific conceptions, differentiating Sein and Sollen. See Kelsen, Hans: Reine Rechtslehre, Zweite, vollständig neu bearbeitete und erweiterte Auflage 1960, Nachdruch Österreichische Staatsdruckerei, Wien. 1992
197 Kengyel, Miklós: 2006. loc.cit.n.12 p. 713.
198 Code of Civil Procedure §121 Sec. (1)
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The defendant’s statement (counter-petition) against the plaintiff’s claim, which may either be directed at the discontinuance of proceedings (formal counter-petition) or contain a defence on the merits: cross-action, offset claim (counter-petition on the merits), practically means the defendant’s engagement in the lawsuit, which may usually be presented by him to the court orally at the first hearing or in writing prior to it – following the receipt of the statement of claim\(^{199}\). Despite the above regulation – in accordance with the lack of ex officio evidence – the judge may only endeavour to achieve that the parties make their detailed presentations of facts relating to the case and their evidentiary motions at the first hearing at the latest. The legislator – in order to prevent the prolongation of lawsuits – as a matter of fact, holds out the prospect of a sanction resulting in the forfeiture of the right (which means the making of a decision without waiting for the presentation of the party) if either of the parties delays with the presentation of their allegations of fact, statements or evidence without a just cause and does not rectify this omission even after he has been called upon to do so by the court\(^ {200}\), however – without the ex officio taking of evidence – the scope of this cannot be defined, since the Act lays down only that presentation should be made in due time for the careful conduct of the lawsuit furthering proceedings\(^ {201}\), so judges avoid applying this sanction in practice. This, as a matter of fact, is meant to restrict, within the confines of the given regulation, the possibility of the plaintiff’s negligent conduct and the protraction of the lawsuit caused by the defendant, but unfortunately, this aim is not achieved, therefore – in my view – where the judge’s possibilities for the real exploration of the legal dispute “weaken” during the lawsuit, in other words, the scope of the public law legal relation between the court and the parties decreases, it becomes justified to strengthen the public law relation between the parties by holding out the prospect of various sanctions.\(^ {202}\) Accordingly, I

\(^{199}\) Code of Civil Procedure § 139

\(^{200}\) Code of Civil Procedure § 141 Sec. (6)

\(^{201}\) Code of Civil Procedure § 141 Sec. (2)

\(^{202}\) In my opinion the English “payment-into-court” system or the American Michigan Mediation mechanism is a good example for this.

The “payment-into-court” system: The defendant offers a certain amount of money to the plaintiff. If accepted, the lawsuit comes to an end. If rejected, and the amount paid to the
agree with László Névai’s statement that a rather important factor of the simplification and acceleration of civil proceedings is constituted by the increased concentration of the parties on their case\textsuperscript{203}, which the legislator must endeavour to achieve by all possible means.

Basically, in the present situation – because of the inaccuracy of the regulation – the main guarantee of the justness of proceedings is the judge.\textsuperscript{204} Judges shall at all times remain true to the oath they have taken; they may not refuse to perform their judicial duties; and they shall handle the cases assigned in a dedicated and conscientious manner;\textsuperscript{205} accordingly, the judge weighs the extent of the parties presentations and statements relating to the lawsuit, the level of the exploration of facts necessary for the decision on the merits, at the same time, he faces the parties’ and their legal representatives’ tactics aimed at the prolongation of the lawsuit, their claims to a just judgment and the expectations of the second instance court relating to the exploration of the facts - without

plaintiff is smaller at the end of the procedure than what the defendant offered before, the plaintiff pays for his/her own plus the defendant’s expenses incurred from the day of the offer. If the plaintiff is awarded with a bigger amount than what was offered, then it is considered as if the defendant did not make an offer. In CAPELLETI, Mauro: 1976. loc.cit.n.31 p. 708.

The Michigan system: If the plaintiff does not accept the compensation offered by the defendant in a suit for damages, he/she is entitled to the 110 % of the offered amount at the end of the procedure in order not to be the losing party in terms of procedural costs. If the plaintiff loses (given less than 110 % of the offered amount) he is obliged to pay the costs of the proceedings plus the fee of the opponent’s attorney. If the plaintiff makes an offer that is declined by the defendant, and the plaintiff is given 90% at the end of the procedure, the defendant is obliged to pay the above mentioned costs. So the Michigan system ‘punishes’ the defendant as well as the plaintiff if they don not accept a fair deal. The Michigan system provides a preliminary calculation of the possible costs, which makes it possible for the parties to rely on an objective opinion in terms of procedural costs. In CAPELLETI, Mauro: 1976. loc.cit.n. 31 p. 709.


\textsuperscript{204} Kiss Daisy: 2011. loc. cit.n.184.

\textsuperscript{205} Act LXVII of 1997 on the Legal Status and Remuneration of Judges, § 21.
clear statutory provisions or the possibility of the application of effective sanctions.

(e) Right of action theories have drawn attention to the important question as to what extent the claim can be considered identical in its content with the party’s substantive right or obligation. The definitions of notions have clarified that the substantive law claim and its enforceability in court do not coincide necessarily\textsuperscript{206}, but apart from this, numerous other questions arise concerning legal practice: for example, in the case of one substantive law claim (one legal relation) which may be founded on several, competing legal regulations (claim with multiple foundations), one may speak of the rivalry of legal regulations, consequently, in the case of identical facts it may be a question of interpretation which regulation is applicable, and it is very difficult to rank regulations in this respect. In the present-day world of legislative “dumping” – mostly without concept – both the appliers of law and right-seeking citizens are in a very difficult position, since based on the principle of party control\textsuperscript{207} there is great uncertainty in judicial practice concerning the question of legal title – specified by the parties. The starting point is that based on the legal regulation in force, the parties are the “masters of the case”, it is the parties who define the subject-matter of the lawsuit and by this, the scope of action of the judicial proceeding.\textsuperscript{208} Although legal practice does not fully identify the idea of being bound by the relief sought with that of being bound by the legal title, with reference to the fact that the court’s task is to adjudicate the legal relation on which the claim is founded and

\textsuperscript{206} “The substantive law claim means a real, existing claim while the procedural claim only means its allegation, which corresponds to the substantive law claim and results in a decision corresponding to it only in case of proof ….There are cases in which there is no legal relationship between the parties and it may only be created by the judgment of the court, therefore – for lack of legal relations – we can not talk about subjective right and its protection at the time of the commencement of the action.” In HÁMORI, Vilmos: 1978.loc.cit.n. 3. p. 618.

\textsuperscript{207} “The parties’ and the court’s relation to the subject-matter of the lawsuit is best expressed by the principle of party control out of the fundamental principles of civil procedural law. The court – unless a provision is made to the contrary - is bound by the parties’ claims and the declaration of rights.” Code of Civil Procedure, § 3 Sec. (2)

\textsuperscript{208} KENGYEL, Miklós: 2008. op.cit.n. 1 p. 76., “Ne eat iudex ultra petita partium.”
the decision cannot be hindered by the fact that the plaintiff specified the legal title for his claim erroneously, however, this mistake may only be “corrected” by the court if all the facts, evidence, data necessary for correct qualification are at the court’s disposal, which is prevented by the lack of the ex officio taking of evidence. It must be remembered that the cause of action (substantive law) and the claim (processual claim) are closely interconnected, therefore it is not possible to speak of an enforceable claim without establishing the legal ground for the action and of a legal ground in the absence of an enforceable claim, which also raises important questions with regard to the judgment, the legal force attached to it and its scope.

During the analysis of the impact of the individual right of action theories on legal practice, I have outlined from which aspects they could be utilized during the resolution of legal disputes. The answers to the questions posed in the introduction have led – apart from several legal problems of key importance awaiting solution – to two main conclusions: one of them is the question of the interaction between legal theories and legal practice, based on the examination of which I have concluded that: legal theory applied in legal practice shapes social consciousness, which inspires the legislator to find even better solutions. Legal theories practically constitute some type of constructive criticism, which is indispensable for legal development. The objectivity of legal theories is very important, because abstract solutions that are far removed from reality do not have a creative impact on legal practice, consequently, they cannot exert a long-term influence on legal culture either. In my view, legal theories formulated in academic literature – aiming to concetrate on the development of a particular legal institution – must expound all useful arguments in a thousand ways so as to exert due influence on legislators and the appliers of law. On the other hand, this requires appliers of law to be familiar with legal theory to the same extent as the representatives of legal theory are required to be familiar with legal practice, effectiveness can only be guaranteed based on the principle of reciprocity.

210 Court Decision EBH 2004.1143.
The other question concerns the social role-taking of applicers of law – in particular that of judges – and of the representatives of legal theory. The work of judges must be regarded as an activity that goes beyond the implementation of current political aims manifested in judgments relating to individual cases, while the work of legal scholars must be considered an activity manifested in the creation of essays and scientific analyses laying the foundations for legal or, rather, universal human culture\footnote{Szabadfalvi József: Viszony az elődökhöz [Relations to Predecessors], Világosság “Clarity” Journal, 2004/4 pp. 5-21., See also Horvath, Barna Bevezetés a jogtudományba (Introduction to Jurisprudence), Szeged, Szeged Városi Nyomda és Könyvkiadó (Szeged Town Publisher), 1932.}; which activities build a bridge between legal theory and legal practice in the interest of the more effective realization of social values. This translated into procedural law means the simplification, acceleration of procedure, increasing its efficiency and its approximation to social expectations.