Goose-stepping? The concept of the Hungarian public administration contract from a private law point of view

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Abstract

The author addresses questions raised in the professional literature of public law (e.g.: the applicability of the Hungarian Civil Code to public law contracts), alongside the contradictions (e.g.: there isn't a unified set of denotations and categories) and problems included therein, and the one-sidedness thereof (the disregarding of the respective works of private law). We analyze the selected material by concisely explaining the relation between public law and private law in Hungary. The author pays special attention to the Hungarian public law definitions as well as the contract-types with their characteristics, and finally, conclusions are drawn, and compatible perspectives are proposed.

Keywords: *public law, private law, public administration contract, authority contract.*

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1. Introduction

The concept of the Hungarian public administration contract has not experienced any development at all in the past decades; however, it has preserved its roots from the socialist era. Neither do the theories of Hungarian public law experts examine the nature of this contract within our constantly changing and progressive contractual world, or the solutions thereof by other European countries', and lastly, not from a private law contractual approach. The public law approaches are separated from each other (as they do not reflect on one another), and do not aim to provide a general framework to the interpretation of the public administration contract. Nor does the ad hoc and situation-dependent legislation in Hungarian public law assist in aiming to work out an applicable, comprehensive and general contractual regime.[2]

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[2] See more on these views: Papp Tekla, Der öffentlich-rechtliche Vertrag aus Sicht einer Privatrechtlerin," *Jahrbuch für Ostrecht,* 60, no. 1 (2019): 141-160.; Papp Tekla, *Atipikus szerződések* (Budapest: hvgorac, 2019); Papp Tekla, „A közigazgatási szerződés egy magánjogász szemszögéből," *Jogtudományi Közlöny,*73, no. 7-8 (2018): 313-323.

2. A brief description of the Hungarian contract law regime[3]

The schematic system of contracts in Hungary can be divided into public and private law contracts. Within the private law contracts one can further distinguish the subcategories of contracts in obligational law and contracts out of obligational law (e.g.: the contract of incorporation, being sui generis, organizational: creating a legal subject, and cooperational: business-governing contract).[4] The contracts of obligational law can be broken down even further into named and unnamed agreements: the named contracts include typical and atypical contracts, and the unnamed contracts include mixed contracts and de facto innominate contracts.[5]

The Hungarian Civil Code (HCC: Act V of 2013, Book Six, Part Three) includes the named typical contracts. Each contract-type is grouped according to the mutually shared essence,[6] the direct subject of the contracts: the grouping is exercised from the aspect of the demeanors to be executed on the basis of the agreement,[7] i.e.: transmission of property, enterprise-type, commissioning-type, contract of using, of depositing, of trading and distribution and lease of right, loan- and account-, securities-, insurance-, maintenance and life annuity, and contracts of civil partnership.

The judgement of the atypical contracts is very different in Europe, there is no dominant approach:[8] the atypical contracts are innominate contracts in France (contrat atypique/inommé, and within so, these contrats spécifiquement autonomes mean include the distribution, lease-, license and franchise contracts).[9] Atypical

[3] This subtitle is based on the synthesis of the Hungarian classifications of contracts, see in: Papp Tekla, *Szerződések tipizálása – atipikus szerződések* (Dissertation for title doctor of the Hungarian Academy of Science, 2019) http://real-d.mtak.hu/1285/ (8 November 2021).

[4] Auer Ádám and Bakos Kitti and Buzasi Barnabás and Farkas Csaba and Nótári Tamás and Papp Tekla, *Társasági jog* (Szeged: Lectum Kiadó, 2011), 54.

[5] Vörös Imre *A nemzetközi gazdasági kapcsolatok joga I.* (Budapest: KRIM Bt., 2004), 7.

[6] Vékás Lajos (ed), *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez* (Budapest: Complex, 2008), 866.

[7] Vékás Lajos (ed), *A Polgári Törvénykönyv magyarázatokkal* (Budapest: Complex, 2013), 679.

[8] Papp, *Atipikus szerződések,* 16-19., 28-29.

[9] Murad Ferid, *Das französische Zivilrecht* (Frankfurt am Main – Berlin: Alfred Metzner Verlag, 1971): 403-405.; Ewan McKendrick (ed.), *Guide on Commercial Law* (London: Penguin Books, 2010): 155.; Solène Rowan, „The new French law of contract," *International Comparative Law Quaterly* 66, no. 5 (2017): 1-20.; definition.actufinance.fr/contrat-atypique-264 (15 June 2015); www.rachatducredit.com/contrat-atypique.html (15 June 2015); Philippe Malinvaud and Dominique Fenouillet, *Droit des obligations* (Paris: LexisNexis Litec., 2010), 58.; Pascal Fréchette, *La qualification des contrats* (2010), http://www.erudit.org/revue/cd/2010/ v51/n2/045635ar.html (15 June 2015).

agreements are also innominate but without regulation in Serbia,[10] Turkey[11] and Spain (los contratos atipicos).[12] The contracts outside of the scope of Civil Code are atypical in Netherland;[13] the contracts outside of the scope of Civil Code and therefore similarly in innominate under atypical contracts in Bohemia,[14] Poland,[15] Romania.[16] In Italy[17] the atypical contracts lie outside of purview of Civil Code, therefore innominate but remain sui generis contracts. The, where as atypical contracts can be found in Switzerland within the innominate contracts as sui generis agreement.[18] Atypical contracts are characterized as only sui generis contracts in Austria;[19] typenfremde Verträge[20] are equal with atypical contracts in Germany with

[10] Jelena Perovic, „Contract Law in Serbia." in *Private Law in Eastern Europe, Autonomous Developments or Legal Transplants?* ed. Christa Jessel-Holst and Rainer Kulms and Alexander Trunk (Tübingen: Mohr Siebeck, 2010), 98-99.; Oliver Antic, „Imenovani i neimenovani obligacioni ugovori u savremenom obligacionom pravu," *Anali Pravnog fakulteta u Beogradu* 52, no. 1-2 (2004): 79-115.; Dudás Attila and Papp Tekla, „Atipikus szerződések Magyarországon és Szerbiában," *Debreceni Jogi Műhely* 10, no. 3 (2013) http://www.debrecenijogimuhely.hu/archivum/3_2013/atipikus (20 May 2013).

[11] Meltem Ercan Ozler and Sevgi Dursun Ateş, *Compromise Contract in Turkish Law of Obligations* (2014), http://www.cluteinstitute. com/conference-proceedings/2014MUPapers/Article%20309.pdf (18 September 2015).

[12] http//vlex.com/source/contratos-atipicos-aspectos-juridicos-667 (15 June 2015); http://www.estudecho.com/documentos/ mercantil2/00000099770975656.html (15 June 2015).

[13] Kisfaludi András, „Hollandia új Polgári Törvénykönyvének néhány tanulsága a magyar kodifikáció számára," *Polgári Jogi Kodifikáció* 2, no. 2 (1999): 22-26.

[14] http://pravniradce.ihned.cz/c1-22286420-leasingova-smlouva-o-koupi-najate-veci (15 June 2015).

[15] http://www.przetargipubliczne.pl/numery/maj-2007/leasing-a-zamowienia-publiczne.html (15 June 2018).

[16] Constantin Stătescu and Corneliu Birsan, *Drept civil. Teoria generala a obligaţiilor* (Bucarest: Hamangiu, 2008), 34; http://www.scribd.com/doc/57762395/37/Acte-numite-si-nenumite (15 June 2015).

[17] http://www.eulaw.egov.bg/DocumentDisplay.aspx?ID=172115 (2015. 06. 15.); http://tobegin.it/files/2011/09/i-contratti-atipici.pdf (15 June 2015); Maria Cristina Diener, *Il contratto in generale* (Giuffré, 2011) http://tobegin.it/files/2011/09/i-contratti-atipici.pdf (15 June 2015).

[18] For example: Leasing, Factoring, Franchising, Lizenzvertrag, Fernunterrichtsvertrag, verwandte Absatzmittlunsvertrag, Kreditkartengeschäft, joint-venture-agreement, Management Consulting Vertrag etc.; Adam Kramer, *Contract Law: An Index and Digest of Published Writing* (Oxford and Portland, Oregon: Hart Publishing, 2010), 22.; Heinrich Honsell and Nedim Peter Vogt and Wolfgang Wilfand, (eds.), *Kommentar zum schweizerischen Privatrecht, Obligationenrecht I.* (Basel: Helbing&Lichtenhahn, 1992); Theo Guhl, *Das Schweizerische Obligationenrecht mit Einschluss des Handels und Wertpapierrecht* (Zürich: Schulthess Polygraphischer Verlag, 1972), 290.; http://www.rwi.uzh.ch/elt-lst-huguenin/orbt/innominatvertrag/de/html/index.html (18 September 2015); Andreas Binder and Thomas Geiser and Vito Roberto, *Einführung ins Privatrecht* (2008), http://www.binderlegal.ch/uploads/media/Binder_Geiser_Roberto_Einfuehrung_ins_Privatrecht_2008.pdf (14 September 2015).

[19] Rudolf Welser (ed.) *Fachwörterbuch zum bürgerlichen Recht.* (Wien: Manzsche Verlags- und Universitätsbuchhandlung, 2005), 592; http://www.uibk.ac.at/zivilrecht/bach/kap5_0.xml?section=3;section-view=true (18 September 2015).

[20] Karl Larenz and Claus-Wilhelm Canaris, *Lehrbuch des Schuldrechts. Band II/2. Besonderer Teil* (München: C. H. Beck'sche Verlagsbuchhandlung, 1994), 42., 60.

two subvarieties: atypical in narrow sense (for example timesharing contract)[21] and typical in trade (as Factoring-, Franchising- and Lizenzverträge).[22]

The main characteristics of the group of atypical contracts are the following in the concerning Hungarian legal literature:[23]

- as usual, the atypical agreements do not have any Hungarian designations, but they bear names of foreign origins (e.g.: franchise-szerződés for 'franchise agreement', licenciaszerződés for 'license agreements');
- the section of 'Particular contracts' in the HCC (Book Six, Part Three) does not regulate the atypical contracts, these are not to be classified into those contract-types designated in here;[24]
- foreign models of practice and law-making did both play a significant role in the course of the development and the establishment of the rules on the atypical contracts in Hungary;
- atypical contracts are exposed to a decisive volume of public law 'impulses': they are prone to being influenced by public law norms and atypical contracts are qualified as commercial transactions;[25]
- the practice has consistently 'broken swords' for the written format: not necessarily as an equipment of validity, rather as a safety tool, with its function as a means of proof;
- it was the commitment to deliver a detailed and accurate written wording that has hence generated the application of the general contractual terms and conditions[26] and also the utilization of blank contracts (for example in the cases of the licence-, lease-, factoring- and franchise- contracts);
- as the atypical contracts are rendered to regulate longterm market relations, they are usually directed at permanent legal relationships;[27]
- with the exceptions of the syndicate agreement, the consortium contract, and the franchise-agreement, the atypical contracts are codified in acts (e.g.: the

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[21] BGB 481-487. §§; Dietmar O. Reich and Peter Schmitz, *Einführung in das Bürgerliche Recht* (Wiesbaden: Verlag Gabler, 2000), 178.; Markus Stoffels, *Gesetzlich nicht geregelte Schuldverträge* (Tübingen: Verlag Mehr, 2001), 15.

[22] Welser, *Fachwörterbuch zum bürgerlichen Recht,* 592.

[23] Papp, *Atipikus szerződések,* 30-32.

[24] Nevertheless, it must well be noted that this conceptualization is relative: the recodification of the HCC has established a new foundation in this respect (see: in terms of the financial lease contract, the factoring-contract, and the franchise-contract).

[25] Lamm Vanda and Peschka Vilmos (eds.), *Jogi lexikon* (Budapest: KJK Kerszöv, 2000), 332.: „Such type of a relationship creating inbetween the participants of economic life, which keeps evolving, broadening, due to the fast-pace transformation of the ongoing economic development and turnover"; „if any of the parties shall get involved in the legal transaction, possessing the expertise, or the professional knowledge in regard to the conduction of similar transactions, then as a manifestation of the higher demands and enhanced expectations these transactions are also considered as commercial."

[26] See the details in: Leszkoven László, „Az általános szerződési feltételek útján létrejövő szerződések," *Gazdaság és Jog*, 22, no. 10 (2014): 3-9.

[27] See also*:* Sándor István (ed.), *Előadásvázlatok a kötelmi jog különös részéből* (Budapest: Patrocinium, 2011), 192-193.

concession agreement, the medical treatment contract), on the level of government decrees (e.g.: timesharing-contracts) or within implemented international treaties (e.g.: in the cases of factoring and lease), whereas the licence-agreement, the merchandising contract and the PPP-contract appear sporadically, in a few statutes of law.

On the basis of the group features at present it is the syndicate agreement, the PPP-contract, the distant contract, the contracts in relation to e-commerce services, the contracts negotiated away from business premises, the timesharing-contract, the consortium contract, the concession agreement, the license agreement, the franchise-agreement, the merchandising contract, the lease-contract, the factoring-contract, and the medical care contract that are classified among atypical contracts in Hungary.

The category of 'mixed contracts' (contractus mixtus) have been worked out regarding the qualification of some of the modern contracts:[28] several types of contracts, composed of typical ones.[29] This non-named contractual class of obligation comprises those agreements which include the services of several named contracts in several ways:[30] they can be type-unifying contracts (e.g.: a contract of sales mixed with gifting) where the elements of various contracts are blending, more precisely, it can neither be detected, nor separated which provision derives from which contract; or they can be type-combinatory contracts (e.g.: depositing contract mixed with transportation and undertaking)[31] where the features of different contracts are not blending with one another, but they are mixing within a new contract in a way that they can still remain separable and identifiable; or they can be contracts directed entirely at one peculiar service (e.g.: the agreement to be made on the fulfilling of the duties as a 'housekeeper'), yet carrying no special attributes in the rest of their features, and without diverting from the contracts covered by the HCC.

The de facto innominate contracts shall usually appear under the notion of 'Agreement', regulating non-permanent legal relations, yet covering an occassional (no regular occurrence) as well as special legal transaction. Unlike the atypical contracts, they have no denominations, they are not so widespread, whilst being individual, unique contracts, without any normative background.[32] The rights and

[28] Szladits Károly, *A magyar magánjog vázlata II. rész* (Budapest: Grill K. Könyvkiadó Vállalata, 1933), 174.; Eörsi Gyula, „A szerződések rendszere," in: *Kötelmi jog, Különös rész,* ed. Eörsi Gyula and Kemenes Béla and Sárándi Imre and Világhy Miklós (Budapest: Tankönyvkiadó, 1984) 6-8.; Novotni Zoltán, *Magyar polgári jog, Kötelmi jog, Különös rész* (Budapest: Tankönyvkiadó, 1977), 90.; Vékás Lajos, *A szerződési rendszer fejlődési csomópontjai* (Budapest: Akadémiai Kiadó, 1977), 90.

[29] Szladits Károly, *A magyar magánjog vázlata* (Budapest: Grill Károly Könyvkiadóvállalata, 1935), 175.

[30] Regional Court of Appeal of the Hungarian Capital 17. Pf. 20 615/2010/3.

[31] Regional Court of the Area of Budapest G.40.147/2010/38.

[32] Szudoczky Rita, „A szerződési rendszer (A Polgári Törvénykönyvben nem nevesített szerződések helye a szerződési rendszerben)," in *A Polgári Jogi Tudományos Diákkör Évkönyve 1998-1999.* (Budapest: ELTE ÁJTK, 2000), 125.; Nizsalovszky Endre, *Kötelmi jog, Általános tanok* (Budapest: MEFESZ Jogász Kör, 1949), 225-226.

obligations deriving from the innominate contracts can be settled with the application of the common rules on obligation and contracts laid down in the HCC (see as one example in relation to an agreement considered close to servitude by nature, but not eligible to be qualified as a profit-loan,[33] or a peculiar undertaking of an obligation not qualifying as a contract of surety).[34]

In addition, a 'mixing' of the branches of law can also be observed over the terrain of the contracts: by the present days a good number of agreements have shaped up with mixed legal branches, for instance the contract of public services, the contract of public procurement, the contract of subvention.[35] In these cases, it is not by virtue of the direct subject of the contract (the service) how the contracts are to be qualified as mixed, but on the basis of that it is the legal norms of several legal branches to be applicable to them, whereby setting the overall dynamics of the contract.

In my view, the evolvement of the economic and social circumstances, and the transformations on the terrain of the contracts, having been resulting from globalization, are generating the development process from the direction of the de facto innominate contracts heading towards the denominated typical contracts.

3. The correlation betwen public law and private law in Hungary

Through an international comparison it can be concluded that the English law is not familiar with the distinction made in contract law between private law and public law,[36] the Dutch law,[37] the Austrian law[38] and Polish law[39] separate the two legal branches from each other, with that they declare the majority of the contractual relations between public law subjects as mixed contracts, as opposed to this, the public administration contract does have a vast tradition in France[40] and Germany,[41] and even though the Danish law shall use the expressions of private law and public law, but the category of a 'public (law) contract' is not elaborately prepared (its type and object is unspecific, the only given aspect is that one of the contracting parties

[33] LB Pfv. I/A. 20.446/2001. (Supreme Court).
[34] BH 1992. 239. (Court Order).
[35] Papp Tekla, „A támogatási szerződés I." *Céghírnök* 22, no. 6 (2012): 12- 14. and „A támogatási szerződés II." *Céghírnök 22*, no. 7 (2012): 3-6.
[36] Hugh Beale and Bénédicte Fauvarque-Cosson and Jacobien Rutgers and Denis Tallon and Stefan Vogenauer, *Cases, Materials and Text on Contract Law* (Oxford and Portland, Oregon: Hart Publishing, 2010), 160-167.; *Introduction to law.* https://nios.ac.in/media/ documents/SrSec338 New/338_Introduction_To_Law_Eng/338_Introduction_To_Law_Eng_L12.pdf (12 January 2021).
[37] Beale et al. *Cases, Materials and Text on Contract Law,* 160-167.
[38] Johannes Oehlboeck and Immanuel Gerstner, *The Austrian legal system: a brief overview*, https:// www.nyulawglobal.org/globalex/ Austria.html. (12 January 2021).
[39] *Green paper an optimal vision of the Civil Code of the Republic of Poland* ed. Zbigniew Radvanski, Ministry of Justice https://www.ejcl.org/112/greenbookfinal-2.pdf. (12 January 2021).
[40] Alan W. Mewett, „The theory of government contracts," *McGill Law Journal* 5, no. 4 (1959): 222-246.
[41] Beale et al. *Cases, Materials and Text on Contract Law,* 160-167.

is a public law personality),[42] while the Public Contracts Code is applicable in Italy.[43]

The separation of public law and private law has been standing in the midst of discussions for a long time in Hungary: it was already in the first half of the tewntieth century when such legal relationships, which fell under the governance of both public and private law, were either treated as absolutely opposite counter-parts,[44] or recognized as existent.[45]

The acceptance of the nature of this duality, and also its reconciliation can both be observed still in the present days:

- the public law actions of public law personalities cannot be qualified by the private law, for „this would create such a blend of public law - private law, which shall result in inextricable conflicts within the legal system";[46]
- the penetration of the public interest into private law is evaluated as the growth of the public law capacity of the private law, with that it may only take place in an extremely moderate and indirect manner;[47]
- accepting the private law contract as a tool for the realization of the activity of the state;[48]
- the application of compehensive, consensus categories in both branches of law (without considering duality as an a priori asset), which shall become filled with content by special statutes of law.[49]

In respect of the interactions and the mutual overlappings of the two legal branches, the following two tendencies can serve as the examples: on the one hand, the growth of the public law capacity of the contracts,[50] and on the other hand, the growth of the contractual capacity of public law.[51]

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[42] Vibe G. Ulfbeck, „The liability of public authorities in Denmark," in *The liability of public authorities in comparative perspective,* ed. Ken Oliphant (Cambridge – Antwerp – Portland: Intersentia, 2016), 108.

[43] https://iclg.com/practice-areas/public-procurement-laws-and-regulations/italy;https://content.next. westlaw.com/9-521-2163?__lrT S=20210212124929572&transitionType=Default&contextData= (sc.Default)&firstPage=true (12 January 2021).

[44] Kuncz Ödön, *A jog birodalma, Bevezetés a jog- és államtudományba* (Budapest: Grill Károly Könyvkiadóvállalata, 1946), 129.

[45] Beck Salamon, „Szerződés, mint közigazgatási jogviszony," *Polgári Jog (Közgazdaság és Pénzügy)* 14, no. 5 (1938): 250-252.

[46] Petrik Ferenc, „Közszerződés a közjog és a polgári jog határán," *Gazdaság és Jog* 13, no. 11 (2005): 7.

[47] Darázs Lénárd, „Közérdekvédelem a tisztességtelen szerződési feltételek megítélésében," *Opuscula Civilia* 2, no. 1 (2017): 2., https://antk.uni-nke.hu/tanszekek/civilisztikai-tanszek/opuscula-civilia/2017 (10 January 2018).

[48] Kisfaludi András, „A szerződés jogintézménye az állami funkciók ellátásában," *Polgári Jog* 3, no. 1 (2018): 4., 11., https://net.jogtar. hu/jogszabaly?docid=a1800101.poj (15 May 2018).

[49] Auer Ádám, „A jogi személyiség a közjog és a magánjog paradigmájában – fragmentum," in *Ünnepi kötet a 70 éves Janza Frigyes tiszteletére,* ed. Boda József and Felkai László and Patyi András (Budapest: Dialóg Campus Kiadó, 2017), 54-55.

[50] The Hungarian Constitutional Court - in its several resolutions - has called the attention to „the growth of the public law capacity" of contracts (state intervention, re-evaluation and alteration of contractual obligations, incidental termination of contracts); Constitutional Court resolutions No.: 32/1991. (VI. 6.), 1473/B/1991., 43/1995. (VI. 30.) and 66/1995. (XI. 24.)

[51] Phillip J. Cooper, „Government contracts in public administration: the role and environment of the contracting officer," *Public Administration Review* 40, no. 5 (1980): 459-468.; Artan Spahiu, „Public

The judicial practice has also acknowledged that through the linking of the legal relations of public law and private law with each other, a complexity of the legal relationship can thereby be produced, yet it shall „not be allowed 'to be swinging' back and forth inbetween the legal relations of public and private law, in other words always to borrow an element from where it seems more practical."[52] So „the public administration sector – in lack of any applicable statutory provisions – shall freely decide over whether to choose the private law, or the public administration path regarding the providing for the use of the public assets."[53] Nevertheless, once this decision of the public administration has been drawn, then the practitioners, utilizers of law must consistently follow through either one of the paths of private law,[54] or public law,[55] without mixing or blending the legal institutions and definitions of the two separate legal branches.[56]

4. The designations of the contracts in the Hungarian public law

Zoltán Magyary divides the actions of public administration into technical acts, organic acts, and public administration law acts, placing the contracts of public administration law in the last type (a contract signed by and between two public administration law personalities upon the subject of any public administration matter).[57]

The professional literature has also adopted the following expressions used for public law: 'state-governance'and 'public law contract' have been used interchangeably, as synonyms of each other;[58] 'public law contract' has been used as a collective expression (the public administration contract is claimed to belong within the same category);[59] 'public contract';[60] and 'public administration contract'.[61]

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interest opposite the freedom of contractual will in administrative contracts in the Republic of Albania," *Academic Journal of Interdisciplinary Studies* 6, no. 2 (2017): 37-48.

[52] Resolution No.: Kof.5033/2017/4. by the Municipality Committee of the Curia (with references made to several Constitutional Court resolutions).

[53] Menyhárd Attila, „Köztulajdon – közdolgok – forgalomképesség," *Polgári Jogi Kodifikáció* 7, no. 1 (2005): 2., 6., 8.

[54] Constitutional Court resolution No.: 3091/2016. (V. 12.).

[55] BDT 2019. 3964. (Casebook of the Courts): If the exercising of public law rights and the performing of public law obligations are realized by private law relationships, the provisions of private law are authorative in these relations.

[56] Auer Ádám and Papp Tekla, „A corporate governance jelentősége a köztulajdonban lévő gazdasági társaságoknál," *Jogtudományi Közlöny* 72, no. 5 (2017): 219.

[57] Magyary Zoltán, *Magyar közigazgatás, A közigazgatás szerepe a XX. század államában, A magyar közigazgatás szervezete, működése és jogi rendje* (Budapest: Királyi Magyar Egyetemi Nyomda, 1942), 587-588.

[58] Szamel Lajos, „A közigazgatás fejlesztésének komplex tudományos vizsgálata, Az államigazgatási szerződés," *Állam és Igazgatás* 34, no. 6 (1984): 522-541.

[59] Petrik Ferenc, „A közgazgatási aktus alakváltozása, a közszerződés," *Magyar Közigazgatás* 55, no. 5 (2005): 67-75.; Olajos István *A közjogi szerződés mint a támogatásokkal kapcsolatos jogalkalmazás egy útja* (Miskolc: Sectio Juridica et Politica, Tomus XXIX, 2011), 503-514.

[60] Horváth M. Tamás, „Csendes fordulat, A közszolgáltatásokkal kapcsolatos uniós politika változásának eredete és hatása," *Jogtudományi Közlöny* 68, no. 4 (2013): 173-183.

[61] Patyi András and Varga Zs. András, *Általános közigazgatási jog (az Alaptörvény rendszerében)* (Budapest: Dialóg Campus Kiadó, 2013), 248-250.; Fazekas Marianna and Ficzere Lajos (eds.),

We can perceive that the professional literature on public law is not unanimous in terms of the terminology, and neither is the judicial practice (examples are seen for the use of all of the three denominations),[62] while the private lawyers[63] dealing with this topic do work essentially with the definition of the public administration contract.

5. The characteristics of the Hungarian public administration contract

A consensus in the professional literature have created in respect of the below attributes:[64]

a) One of the parties of the contract shall always be a public administration organ, or a legal personality governed by public law;
b) The content of the contract may only be defined by a public administration organ, in accordance with the statutes (mainly cogent) of public law;
c) The objective of the contract is the providing- and the ensuring of a public service, the fulfilment of a public duty, the delivering of a public goal;
d) With its one-sided action, the public administration organ may modify, or terminate the contract, and sanction the other party's breaching of the contract (pre-/excess rights);
e) The legal disputes to originate from the contract shall fall under the jurisdiction of the public administration court.[65]

Further, non-consensus attribute-additives (only viewpoints of the minority of the public law researchers):

- The prevalence of regular legal supervision in respect of the public administration contract;[66]

Magyar közigazgatási jog, Általános rész (Budapest: Osiris Kiadó, 2006), 304-309.; Bencsik András, „A közigazgatási szerződésekről, különös tekintettel a hatósági szerződésekre," *Jura* 15, no. 2 (2009): 191-198.; Horváth M. Tamás, „A közigazgatási szerződések szabályozási koncepciója," *Magyar Közigazgatás* 55, no. 3 (2005): 142-147.

[62] Public law contract: EBH 2005. 1231. (Decision of Curia), BH 2005. 295. (Court Order); public contract: KGD 1997. 15. (Administrative and Economic Law Report), BH 1997. 208. (Court Order); public administration contract: KGD 2015. 90. (Administrative and Economic Law Report).

[63] Harmathy Attila, *Szerződés, közigazgatás, gazdaságirányítás* (Budapest: Akadémiai Kiadó, 1989); Strihó Krisztina, „Nem magánjogi (közjogi) szerződések: a közigazgatási szerződés és a hatósági szerződés," in *Atipikus szerződések,* ed. Papp Tekla (Budapest: Opten Informatikai Kft., 2015), 461-467.; Papp Tekla, „A közbeszerzési szerződés tipizálása," *Közbeszerzési Értesítő Plusz* 2, no. 2 (2020): 47-58.

[64] Also see: Marie Grace Seif, *The administrative contract.* https://www.tamimi.com/law-update-articles/the-administrative-contract/ (12 January 2021).

[65] The denotational attributes have been compiled on the basis of the above mentioned law materials from footnote 56 until footnote 60.

[66] Strihó, „Nem magánjogi (közjogi) szerződések: a közigazgatási szerződés és a hatósági szerződés," 462.; Petrik, „A közgazgatási aktus alakváltozása, a közszerződés," 8.

- The disappearance of the sub-, superordination between the contracting parties (co-ordination),[67] (with which criterion I indeed disagree, for in my concept those viewpoints are correct, as per which there is no total equality of the rights for the subjects of the contract, however, yes, there is one special, primitive partnership relation between them what derives from the co-operative feature);[68]
- The equivalence of the service and the counter-service (synallagma) is not typical of the public administration contract;[69]
- The providing for publicity and excess-guarantee to the non-public law contracting party (without determining any concretions);[70] (in regard to these attributes I do argue the existence of the first one in relation to this contract - type, and as for the second one, it is to be pointed out that the availability of the right for judicial control – as excess-guarantee - does not qualify as an excess-guarantee from a private law aspect, since it is a specific means of the enforcement of rights, bearing the relevance of a fundamental principle, being declared by the provisions of the Introduction of the Hungarian Civil Code).[71]

From the above synthetic summary, it can be concluded unambiguously that the described attributes of the public administration contract fall far away from the characteristics of the private law contract.[72]

6. The types of the Hungarian public administration contract

Regarding the contracts that can be and must be classified into the category of the public administration contract, there is a quite huge disorder reigning within the professional literature of public law. The groupings of the public administration contract are created without systematizing of more explanation, only as enumerations with references to the legal norms. Some categorizations can be discovered, having been prepared with the demand for a systematization, and besides these, some listing type of descriptions as well as some fragmented approaches,[73] likewise.

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[67] Olajos, *A közjogi szerződés mint a támogatásokkal kapcsolatos jogalkalmazás egy útja,* 511; Horváth, „A közigazgatási szerződések szabályozási koncepciója," 142.

[68] Patyi and Varga, *Általános közigazgatási jog (az Alaptörvény rendszerében),* 249.

[69] Petrik, „Közszerződés a közjog és a polgári jog határán," 7.

[70] Horváth, „A közigazgatási szerződések szabályozási koncepciója," 143.; Olajos, *A közjogi szerződés mint a támogatásokkal kapcsolatos jogalkalmazás egy útja,* 511.

[71] Section 1:6.

[72] Section 6:58 [The contract]: The contract is the parties' mutual and concordant legal statement, from which the obligation for the performance of the service and the entitlement to claim the service arises. Section 6:59 [Freedom of contract]: (1) The parties shall be free to enter into a contract, and shall be free to choose the other contracting party. (2) The parties shall be free to determine the content of the contract. With their concordant intent, they may depart from the rules of contracts concerning the rights and obligations of the parties, if such derogations are not prohibited by this Act.

[73] Olajos, *A közjogi szerződés mint a támogatásokkal kapcsolatos jogalkalmazás egy útja,* 512-513.

In respect of the definition on the comprehensive and systematic tipical content, no overlappings can be detected between the individual standpoints:

- the agreements of state-governance organs are distinguished in the matter of their asset property, others in the matter of their non-pecuniary property, and the contracts grounded upon amicable agreements signed by public administration authorities;[74]
- the public contracts substituting any provisions of the authorities are distinguished from one another based upon such provisions of development, subvention, and reorganization;
- the public administration contract is considered as a co-ordinative type of a legal relationship within the domain of the legal relationships of public administration, with that it is the cooperation agrements, furthermore, the contracts signed by and between the organs of public administration, and those between a public administration organ and a different organ that belong here;[75]
- the voluntary agreements of the public administration are divided into regulative-, abiding by the law-, standardizing-, preceeding the occurrence of legal debates-, and code of conduct subtypes;[76]
- contracts are replacing the acts of public authority, preconditioning/complementing of public authority task, performing of public duties, connecting with property acquisition, belonging to the economic activities[77] (I find this categorization the best among detailed ones).

The contract of the narrowest category, being a peculiar contract of public administration is held to be the authority contract,[78] which, in a private law sense does not qualify as a contract at all (for instance, there is no balance between the powers of the contracting parties in terms of stating the contractual content, nor between their rights, obligations, and remedies), this is justified by the few published ad hoc decisions of the courts in relation to this.[79]

The ReNEUAL Model Rules on EU Administrative Procedure shall recognize those contracts as public administration contracts, that result from the

[74] Szamel, „A közigazgatás fejlesztésének komplex tudományos vizsgálata, Az államigazgatási szerződés," 537.

[75] Patyi and Varga, *Általános közigazgatási jog (az Alaptörvény rendszerében)*, 248.

[76] Bándi Gyula, „Az együttműködés elve a környezetvédelemben és a közigazgatási szerződés," in *Közjogi tanulmányok Lőrincz Lajos 70. születésnapja tiszteletére,* ed. Imre Miklós and Lamm Vanda and Máthé Gábor (Budapest: Aula, 2006), 31.

[77] Nagy Marianna, „Közigazgatási szerződés az európai uniós eljárásjogban, avagy szabályozás Szkülla és Kharübdisz között," *Jogtudományi Közlöny* 72, no. 9 (2017): 389.; F. Rozsnyai Krisztina, *Közigazgatási bíráskodás Prokrusztész-ágyban* (Budapest: ELTE Eötvös Kiadó, 2010), 90.

[78] Bencsik, „A közigazgatási szerződésekről, különös tekintettel a hatósági szerződésekre," 193-196.; Tilk Péter, „A hatóság döntései és a hatósági szerződés az új eljárási törvény alapján," *Magyar Jog* 53, no. 2 (2006): 85-94.

[79] BDT 2013. 2870. (Casebook of the Courts); KGD 2014. 15. (Administrative and Economic Law Reports); KGD 2015. 90. (Administrative and Economic Law Reports); KGD 2017. 76. (Administrative and Economic Law Reports); BDT 2017. 3631. (Casebook of the Courts).

agreements between the authorities of the union/EU organs and legal subjects at private law, by the governance of the member state pursuing such type of activities.[80]

Examining the regulative background of the public administration contract, I assert that it is Act I of 2017 on the procedural law to the litigations of public administration (a procedural law norm and not a substantive law). A such, this law decrees under point 2. of Section 4 (7): a public administration contract is such agreement, which is made and entered by and between the Hungarian organs of public administration upon the fulfilment of public duties, furthermore, that contract, which shall be declared as qualified accordingly by either an Act of Law or a Government Ordainment. Only the first half of the definition is to be taken as a defining description, it is identical with one of public administration contract categories of Zoltán Magyary (see: under point 2.). It excludes the contractual relations between the public administration organ and the subject at law of private law from the definition (see: public procurement, subvention, public services, and concession contracts). Yet the second phrase of the statutory decree is lacking any defining elements, when it simply is a legal technicality tool enabling the qualification of the legal branch reserved for the legislator, by the utilization of which it shall become questionnable, if at all they are taking into account the above disclosed features of the public administration contract elaborated under point 3.

The majority of the normative decrees in relation to the public administration contract is focussing on the authority contracts, we can only meet other, denominated types of a public administration contract in an irrelevant number.[81]

Act CL of 2016 on the general administration order shall tackle the bases of the authority contract in a degree of within the force of its § 92-93., qualifying it as a typical public administration contract. By virtue of its indirect object, the authority contract can be varied in type:

a) improvement of settlement scenery,[82]

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[80] *Book IV Introduction* http://www.reneual.eu/images/Home/ReNEUAL-Model_Rules-Compilation_BooksI_VI_2014-09-03.pdf. (25 June 2020).

[81] Act CLXXXIX of 2011 on the local governments of Hungary, Section 10 (3): the agreement concluded between the state and the local government on performing certain duties of the state (detailed in Sections 17 (2), 85 (3), 98 (8), (9), (11), 102 (1)); Act CLXXIX of 2011 on the rights of the nationalities, Sections 38 (1), 80 (1), 84 (3): the agreements concluded by the gentilitial local government; Act XXXIV of 1994 on the police, Section 9 (2): the agreement concluded between the local government and the police; Act I of 1988 on public road traffic, Section 9/D (4): a public administration contract may be concluded on the purpose of providing for public services; Act LXXVIII of 1997 on the shaping and the protection of the constructed environment, Section 30/A (1): settlement arrangement contract; Section 49/A (1) to Act CXCV of 2011 on public finances does not prescribe the classification, but that the provisions on the subvention contract shall also be appicable for any public administration type of a contract concluded on purpose of a subvention agreement (see also: Government Ordainment 368/2011. (XII. 31.) on the execution of the Act on public finances); Government Ordainment 12/2020. (II. 7.) on the execution of the Act on vocational training, Section 150 (3): the agreement concluded between the law enforcement vocational training institution and the student.

[82] Section 29 (3) to Act LXXVIII of 1997 on the shaping and the protection of the constructed environment.

b) media services,[83]
c) the obtaining of the right of use for the utilization of the frequencies divided up for broadcasting purposes,[84]
d) the measures and the procedure in relation to subventions assigned to agriculture, agro-rural development and fishing,[85]
e) electronic news communication,[86]
f) environmental protection,[87]
g) subvention assigned to the enhancement of (public)employment,[88]
h) subvention conducing the employment,[89]
i) job creating subvention,[90]
j) the supervision procedure of the Hungarian National Bank for the protection of the consumers,[91]
k) postal services,[92]
l) installation of water utilities,[93]
m) the proceeding of the motion picture professional authority,[94]
n) the proceeding of the National Media and Infocommunications Authority in connection to electronic advertisements,[95]
o) the granting of a loan by a Consular official in order to assist someone in returning to the homeland,[96]
p) the preliminary examinations of a vehicle on its authenticity and type,[97]

[83] Section 22 (2) to Act CLXXXV of 2010 on media services and mass media communications.
[84] Section 14 (1) to Act LXXIV of 2007 on the rules of broadcasting and the shifting to digital platform.
[85] Section 71 (1) to Act XVII of 2007 on particular questions on the proceeding in connection to the subventions assigned to agriculture, agro-rural development and fishing, and other measures.
[86] Section 41 (1) of Act C of 2003 on electronic news communication.
[87] Section 12 (8) to Act LIII of 1995 on the general rules of the protection of the environment.
[88] Section 1 (2b) to Act CVI of 2011 on public employment and the modifications of the Acts relating to public employment, and also of other Acts; Government Ordainment 327/2012. (XI. 16.) on the accreditation of the employers employing workers with challenged working capacity, and the budgetary subventions to be allocated for the employment of workers with challenged working capacity; Government Ordainment 39/1998. (III. 4.) on the subventions aiming at the diminishing of costs deriving from going to work, and the subventions for the recruitment of workforce.
[89] Section 6 (1) to Act CXXXV of 2020 on the services and subventions provided in order to enhance the rate of employment, and the supervision over the employment conditions.
[90] Section 38 (5), (6) to Act LVIII of 2020 on the interim rules in connection to the cessation of the state-of-emergency, and the epidemiologic preparedness.
[91] Section 95 (1) to Act CXXXIX of 2013 on the Hungarian National Bank.
[92] Section 67 (3) to Act CLIX of 2012 on the postal services.
[93] Section 55 (8) to Act CCIX of 2011 on the water utility services.
[94] Section 19/O (1) to Act II of 2004 on motion pictures.
[95] Section 16/D (1) c) to Act CVIII of 2001 on specific question in regard to the electronic commercial services, and the services in connection to information society.
[96] Section 5 (3) to Act XLVI of 2001 on the consular protection.
[97] Section 33/A (2) to Act LXXXIV of 1999 on the public road traffic register; Government Ordainment 301/2009. (XII. 22.) on the detailed rules of the proceeding of the preliminary authenticity examinations of vehicles; Government Ordainment 303/2009. (XII. 22.) on the detailed procedural

q) the elimination of an injury of right by the consumers' protection authority,[98]
r) the obligation of settlement arrangement,[99]
s) social-, children's welfare- and children's protection services activity,[100]
t) retirement benefits and health care in the framework of social insurance,[101]
u) electronic card issuance,[102]
v) cases of the administrative authority with primary jurisdiction,[103] etc.[104]

Various functions of the authority contract can be grasped in the processed legal rules: it shall appear either as an opportunity for avoiding the delivering of a provision,[105] or as part of the procedural order,[106] or as the boundaries of imposing sanctions.[107] Even the normative examination shows that both the role and the dimension of the establishment of the authority contract are falling far away from those of the contracts of private law.

7. Conclusions: how about the battle of public and private law in view of the public administration contract? Is it only goose-stepping?

The ad hoc decisions of the judicial practice having been published are serving as clear examples to that it is not possible to unequivocally classify them:

rules of the permissioning proceeding of the type-examiner, and the content of the authority contract to be made with the type-examiner.

98 Section 47 (6) to Act CLV of 1997 on the protection of consumers.

99 Point 16 Section 17 (1) to Act CXLI of 1997 on the real estate register.

100 Points b) and c) in Section 92/K (8) to Act III of 1993 on social governance and social assistance; Section 98 (11) to Act XXXI of 1997 on the protection of children and guardianship governance; Government Ordainment 369/2013. (X. 24.) on the authoritative registration and inspection of social-, children's welfare-, and child protection service providers, institutions and networks.

101 Sections 48, 49, 51 to Act CXXII of 2019 on the persons entitled for social security benefits and the coverage provided thereof.

102 Section 14 (6) to Act LXXXIII of 2014 on frame system of electronic card issue.

103 Sections 76, 77 to Act CXL of 2004 on the general rules of the proceeding and the services of the administrative authority.

104 Government Ordainment 50/2017. (III. 20.) on the subventions deriving from the European Globalisation Adjustment Fund, and the rules in respect of the application for, and the utlilization of funds; Government Ordainment 302/2016. (X. 13.) on the detailed rules of using the public areas and real estates owned by the State on purpose of film-making; Government Ordainment 332/2007. (XII. 13.) on the opening of a border passage and a temporary border passage, their operation, and the border crossing point.

105 For instance, Act LXXVIII of 1997 on the shaping and the protection of the contructed environment; Act LXXXIV of 1999 on the public road traffic register.

106 For instance, Act CXLI of 1997. on the real estate register; Act CLXXXV of 2010 on the services of the media, and mass communication.

107 For instance, Act XVII of 2007 on particular questions on the proceeding in connection to the subventions assigned to agriculture, agro-rural development and fishing, and other measures; Act CXXXIX of 2013 on the Hungarian National Bank.

they shall become qualified therein as private law - natured[108] and also as integral to public administration law.[109]

The professonal literature on public law is fairly heterogeneous:

- a monist concept represents one view (the public contract, as a standard legal transaction may only be an integral constituent of public administration law);[110]
- from another perspective, public law shall assimilate private law, and the individual institutions of the contracts likewise (without recognizing their private law nature or origins);[111]
- yet the next view asserts that the public administration contract is still standing at an unrefined stage (conceptual uncertainty, incomplete dogmatic groundwork, lack of a contractual typology);[112]
- however, according to a further view, the rights and obligations comprising the content of the public administration contract are considered as being the part of a mixed legal relationship.[113]

The anomalies indicated in my abstract are clearly interpreted by my manifold analysis presented above, on purpose of eliminating these anomalies, one must determined, how the public administration contract might be qualified. Shall it be labeled as a collective category for the agreements of public law, or under a different name for the authority contract (the two legal institutions shall somewhat interdependently align with each other due to the legal rules in the background), or as an independent contract type possessing its own (to be constructed) concept, subject and content.

If we should accept this last qualification, then in our view it shall fall under the objective scope of the legal rules governed by public law to specify what is it that they qualify as a public administration contract. Nevertheless, the contract still being a „product" of private law: defining the contract, constructing the principles (freedom of concluding contracts, the equality of the rights, the co-ordination, synallagma etc.) linked with the contract as a legal institution, unfolding the dynamics of the contract (preparation, signing, validity, effectivity, modification, termination), correcting any disfunctions of the dynamics (emergence of any contract law legal issues, such as nullity, voidness, breach of contract) are all forming the assets to the prevailing Hungarian Civil Code,[114] and the legislation of public law may also only operate in compliance with this, or else the current situation shall become preserved.

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[108] EBH 2015. K.22. (Decision of Curia); BH 2002. 142. (Court Order); BDT 2010. 2250. (Casebook of the Courts); KGD 1997. 15. (Administrative and Economic Law Reports); BH 1997. 208. (Court Order).

[109] BH 2010. 124. (Court Order); EBH 2005. 1231. (Decision of Curia); BH 2005. 295. (Court Order); BDT 2010. 2251. (Casebook of the Courts); KGD 2012. 150. (Administrative and Economic Law Reports); Curia P. VI. 5779/1937.

[110] Petrik, „Közszerződés a közjog és a polgári jog határán," 8.

[111] Olajos, *A közjogi szerződés mint a támogatásokkal kapcsolatos jogalkalmazás egy útja,* 509.

[112] Patyi and Varga, *Általános közigazgatási jog (az Alaptörvény rendszerében),* 250.

[113] Horváth, „A közigazgatási szerződések szabályozási koncepciója," 142.

[114] Act V of 2013. Book Six, Obligation Law, Part Two: The general rules of the contract.

With respect to this, I cannot agree with the concept of public law as monist, and assimilating the contract law. Since without the dogmas, the terminology, and the taxonomy of private law no contract can be interpreted. It has not yet been manageable to establish a coherent public law system or a typology without or, even together with these items in terms of the public administration contract, either. Based on this, I propose two alternative approaches:

- the recognition of the agreements made from mixed legal branches by adopting the hypothesis of the legal relationships to be growing even more complex continually, in terms of the legal branches;
- upon normative grounding, the creation of an intermediate legal space in relation to the public administration contract,[115] in accordance with the model of the German Verwaltungsprivatrecht,[116] as a sample.

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[115] Beck, „Szerződés, mint közigazgatási jogviszony," 252.: „A public administration legal relationship is hidden within a contract having a private law content."

[116] See about it: Ulrich Stelkens, *Verwaltungsprivatrecht, Zur Privatrechtsbindung der Verwaltung, deren Reichweite und Konsequenzen* (Berlin: Duncker & Humblot, 2020)

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