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Kiadja

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Kiadványunk rövidítése

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I.

1. Social importance of the system of quality protection

Formulated in the most general manner, the system of quality protection is an institution which — taking into account the situation and possibilities of the given economic system — guarantees mainly through economic means (acting directly or indirectly) as well as through legal rules (or recommendations appearing in some legal form) an objective set by the economic policy, i. e. to turn out (produce) and put into circulation products suitable for satisfying various needs, and to provide such services. This means that to provide unobjectionable quality is the very centre of the quality-protection system. In economic sense, quality is the totality of the essential and useful properties of the product, which renders it suitable for satisfying needs. Consequently the basic requirement is that the product should meet any requirements which satisfy the purpose of proper use. Formal (legal) criteria promoting judgment on these requirements are the following:

a) the product must meet the quality requirements stipulated by contract;

b) the product must satisfy the quality requirements specified by official regulations (e. g. compulsory standards);

c) the product must be classified according to regulations.

The system of quality protection is complex in several respects, and is a category that has essential bearing, and acts upon several fields of social activity, including economic activities first of all. To mention but the most essential features of this manifold importance:

a) The system of quality protection operates with economic and legal means alike making use of them in a direct and indirect form. These means can be successful only in their interaction, even combined action, hence their efficiency has to be studied only on that basis of reciprocity.

b) As concerns economic activities, the system of quality protection equally affects the productive and marketing sphere, as well as the connected economic branches. Hence it exerts effect on industrial products and agricultural produce, and on the activities turning out these; essentially, it fully embraces the trading activity and the trading system, including the field of wholesale and retail trade alike.

c) The system of quality control necessarily influences in essence all economic units, both in state and cooperative sector. At the same time, this effect is felt in most respects primarily by the consumer (including here the producer-consumer). In the last analysis, reason and purpose of the quality control system are embodied in the consumer.

d) It is exactly because of the comprehensive nature and effect of this system that quality protection is of exceptional economic-political and general social-political importance. Consequently state intervention in this field — on a

specified level and in a special extension — is inevitably necessary, not only in the proper choice of economic and legal means, but also by employing direct state (official) means as need may be and to a periodically changing extent.

2. *Chief components of the quality protection system*

The quality protection system is made up of the following components, and/or is embodied in the forms enumerated below:

(1) *Specification of the quality requirements of products.*

a) *Specification by the state*

aa) The principal means is specification through *standards.* Types, forms, fields of application, etc. of standards need not be discussed in particular details. The fact, however, of the greatest importance for oursubject-matter is that standards are the most general and economically most efficient means of quality specification (and quality certification as well); this circumstance has its self-evident importance for the legal regulations which concern faulty performance. A fundamental grouping of standards is important for our purpose for the same reason. As concerns *the level of standardization,* there are national standards and trade ones. As to *the effect of standards,* they might be of compulsory or permissive character, or standards of recommended nature. As to *the contents of standards,* there is to be distinguished between product standards, classification standards and acceptance (testing) standards.

ab) Further forms of quality requirement specification by the state appear as other *official orders or central regulations* (instructions of ministers, measures of supervisory bodies, etc.).

In cases under aa) and ab), quality requirements are prescribed centrally. But standardization must at the same time promote not only improvement of quality and protection of the consumer, but also the realization of conceptions of technical development, the efficiency of production, and the national implementation of recommendations and decisions accepted in the framework of international cooperation.

b) *Specification of quality requirements through the contractual system*

Theoretically, the natural content element of any contract aimed at the delivery of a product is an accurate specification of the quality requirements of the same. This is of fundamental importance for satisfying the contract-making interests of the obligee, and also for the enforceability of legal consequences in cases of breach of contract. The pertinent agreement of the parties has the same effect as the compulsory specifications in respect of the legal effect in the given legal relationship. That specification by the parties is often effected by making reference to specification by the state, is another matter.

Non-compulsory, permissible or recommended stipulations connected with quality specification included in the general terms and conditions of delivery of products serve to influence the contractual will or to render the same more definite. (Terms and conditions of delivery of products are regarded here — and will be regarded hereinafter — as forms of regulation having no legal force, nevertheless, claiming actually to be generally applied.)

c) Cases of central *price fixing* must be interpreted as one kind of the governmental means of quality requirement specification. Quality usually plays a role in price-fixing. A detailed study of quality requirements connected with

the price is beyond the scope of this paper; but a given aspect of this question is to be dealt, namely the correlations between claims arising from faulty performance and the price of the product, or the possible effects of such correlations on the legal regulations.

(2) *Certification of quality*

The basic principles connected with the certification of quality are laid down in Resolution No. 43/1967. GB; Decree No. 47/1968. (XII. 18.) Korm., containing provisions on the basic questions of quality certification, was issued on this basis. This legal rule enumerates the various main forms of certification such as a) the quality certificate, b) the technical specification, c) the quality mark, d) certification of quality through data shown on the product, e) certification of quality in the consignment note.

(3) *Liability for defective performance; system of sanctions*

a) Amid our economic conditions, it is a basic requirement to shape an economic environment in which observance of quality requirements and improvement of quality is of economic advantage to the economic units concerned, and, vice versa, their non-observance involves financial disadvantage over a shorter or longer term. In other words, effects are felt in the economic background which — mainly through the proper determination of incentives, and as the objective effect of market conditions — render the producer and distributor of the product actually interested in the observance of the quality requirements in the given period and over a longer term.

b) In addition to the economic factors, and inseparably connected to them, legal means sanctioning defective performance are of special importance; formally they differ from the disadvantages mentioned under a) in that they are usually attached to a concrete violation of law, a given breach of contract, etc. There are trends in recent legislation that the whole of the law-violating conduct, its continuous nature and repetition, should entail legal sanctions (e. g. economic fine), in addition to those applied because of *ad hoc* violations of the law.

As concerns legal sanctions, we may distinguish here the following basic types:

— legal sanctions under civil law first of all warranty of specified quality, guaranty and compensation of damages
— other legal sanctions which do not affect the economic unit as a whole (as a legal entity) but are of personal nature.

These are the penal sanctions (Sections 232 to 234 of the Criminal Code), the petty offence sanctions (Section 6 of Act I of 1968), the sanctions of labour law which involve disciplinary liability in given cases. Economic fines are of special importance in the sphere of sanctions for definite reasons already touched upon in part.

(4) *Controlling the observance of quality parameters*

Control over the observance of quality parameters is realized basically in two fields.

a) *Official control*

Kinds of quality control employed in aa) manufacturing, ab) putting on the market (or prior to it), and ac) in the circulation, may be regarded as belonging here.

b) Non-official ways and methods of control

Essentially, this sphere includes control over the observance of quality

parameters and requirements in fields and forms where such control is motivated *by direct interests.*

Here belong: ba) first of all internal quality control, quality control departments, etc. employed by production units; bb) control (so-called quality acceptance control) employed between economic units on the basis of contracts or other regulations; bc) control employed by economic units on the basis of contracts of agency or — in certain cases — prescribed by legal provisions.

Of the forms of control enumerated under b), those under bb) and bc) are of special importance for our purpose because these are essential means of consumer interest protection.

Within the sphere of controlling observance of quality requirements, we have intentionally not spoken here of *control of the product by the consumer,* i. e. of the examination obligation of the buyer, user, etc. Apart from the fact that such examination has substantially nothing in common with the foregoing enumeration, from a legal point of view our most important reason therefore is the fact that, although examination by the consumer is an interest deserving appreciation by the legal system it will, however, appear from the legal construction to be presented further in detail that failure to carry out such examination is not qualified as neglect of duty.

(5) *Means influencing efficiency of the quality control system in indirect ways*

Amid the circumstances of our economic system, these are to be understood as means of greatly increasing importance which are in the closest correlation with indirect market-influencing activities.

These are: a) the system of distinctive classification of products, b) the informative labelling system, c) setting up showrooms, arranging displays, d) trade marks, labels, copyright in design, e) quality marks (we mention the latter despite the fact that the respective legal rules have been annulled). Or, more exactly, what has been anulled is Decree No. 121/1950 (IV. 25) MT, but quality mark protection still exists under special legal provisions in respect of certain goods.

3. Some questions of economic policy connected with the quality protection system

(1) It is a commonly known view that economic policy forms part of the general policy of any state and is concerned with the principal aims of economic development and the means serving the realization thereof. Determinants of economic policy are — in addition to long-term target — the economic situation, internal and external circumstances of economic activity, the interests and the will of society, of the working masses.

From the foregoing conclusion, the following must be pointed out for the purpose of our theme:

a) One determinant of economic policy is the economic situation. The targets of economic policy act towards improving the „economic environment" through aiming at a better exploitation and increased use of given potentials in order to realize the optimal economic system.

b) One principal target of economic policy is a substantial improvement of the living standards of the working population, and this is closely correlated with the protection of consumer interests.

The new economic system introduced in Hungary on January 1, 1968, brought substantial changes partly as concerns the targets of economic policy, but mainly in respect of means and ways. For the purpose of our theme, the most important characteristics of the former system were:

a) Centrally issued plan instructions determined the production of industrial units basically; this meant not only a compulsory determination of the quantities to be manufactured, of the materials to be used, etc., but — in view of quality specifications, — also of assortments in many cases.

b) The user units — which were determined, too — were usually under the legal obligation to take over the product from the producer even if the quality was defective. In absence of such legal obligation, the same situation was the result of economic necessity.

c) The price system was fixed, and thus it was theoretically presumed that the quality of products was kept on unchanged standards.

d) Market commodity conditions were pushed in the background, the market had practically no effect on improving quality standards.

e) Owing to the circumstances mentioned, enterprises were hardly interested economically in improving the standards of products.

f) The cogency of legal regulation was a regulatory system characteristic of nearly all fields of the quality protection system, and the role of parties in shaping the contents of contracts was practically negligible. Official intervention by state organs for the sake of quality protection was of an extremely wide range and direct as concerns forms.

g) The regulatory system was fundamentally based on holding out the prospect of sanctionable requirements and hardly applied the granting of favours for the production and marketing of products of better quality.

The foregoing were intended only to present some general characteristics, or just to give an idea of them; the differences resulting from the principles of the former and the new system are to be exposed while discussing the details.

(2) It's easy to see from all this why numerous legal provisions framed in the former economic environment have been set aside. It is a commonly known fact, however, that quite a number of legal provisions — and not unimportant ones as a matter of fact — framed in the past era are still valid in an unchanged or amended form.

Provisions of law — correct in their principal conception — are opposed in respect of certain not unessential details to the economic-political targets of the new system; others need modernization for considerations of a new legal practice, possibly of legal dogmatics. This is the case particularly as to the *Civil Code,* especially its part dealing with faulty performance. Finally, an evaluating revision of the valid legal material is required to place the new and amended provisions of law issued meanwhile on a consolidated basis in order to vindicate consistently the demands of the new economic system. The most important points of view for asserting targets of economic policy in legal regulation are contained in the following statements of Decision no. 43/1967 GB:

a) Through increasing the number of indirect economic incentives, and through enhancing their efficiency, an economic environment shall be created in which the quality of the product ensured by *the interest* of enterprises. To activate an attitude of taking into account enterprisal interests over a longer range (for a longer period of time), is of particular importance.

b) The principle shall be asserted, even more precisely realized, that economic units assume responsibility for their functional activity in a wider sphere than the actual one. In other words, *enterprises shall be responsible for their productive activity, and those putting products in circulation shall be responsible for organizing their trading activity efficiently.* Hence the producer shall be responsible for making products of good quality, the one putting them in circulation for circulating such good products well. The Decision of the Economic Comission (GB) mentioned above reflects the producer's direct and stringent responsibility for the quality of products clearly.

c) A natural concomitant implication of the new economic system is to replace direct, central intervention by the state by the enforcement of economic incentives. At the same time, with regard to general social interests connected with quality protection, *intervention of state agencies through official means* might remain justified in specified spheres, moreover their intensification might be advisable in given cases.

d) A question connected with the former, though independent, is to make the system of responsibility more rigorous in the sphere of regulation by the state, to modernize sanctionable facts in specified cases mainly through an *uniformly principled and at the same time differentiated regulation* of warranty and guaranty, and further, to expand the application sphere of sanctions known at present (e. g. economic fine).

II.

1. Cases belonging to the sphere of faulty performance qualified as breach of contract

For the purposes of the research in civil law problems of the quality protection system, it is primary importance to delimit the sphere of *cases which may be regarded as faulty performance,* or, in terms of law, to determine the cases which materialize breach of contract to be qualified as faulty performance. As regards actual Hungarian law, the starting-point is constituted first of all by Chapter XXV of the Civil Code which contains the provisions relating to faulty performance (Sections 305 to 308) under the title „Breach of Contract" in a special subtitle. Connected with this are the further rules which are normative for faulty performance in the sphere of common regulations on breach of contract (Sections 314 to 318), as well as certain further rules in the general and special parts of the Civil Code dealing with contracts.

(1) The Civil Code gives no general definitions in the conceptual description of faulty performance: it follows the codification principle — employed in the entire Code consistently — that the definition of legal concepts is not a task in the drafting of laws.

Notwithstanding this, regulations as a whole expresses — in respect to the sphere of principal cases at least — adequately those kinds of breach of contract to which the rules of faulty performance must be applied. As the basic case, the law pays regard to the delivery of things and extends this logically to cases where the obligation is not aimed at the delivery of a thing (Civil Code Section 308). Consequently, this means from the outset a delimitation from what is called the warranty of right, and besides there is a difference — in a specially regulated way — for the case of faulty delivery of animals in the sphere of delivery of things (warranty in case of selling animals, Civil Code Sections 383—385). Various special provisions of law differ from the rules of the Civil Code *in defining the sphere of faulty performance* only in respect of details or certain approaches; *from this point of view*, there is no essential departure in principle, at least as concerns the principal questions.

Delimitation of faulty performance is necessary both as concerns legislation and enforcement *of law,* and must be based, as a matter of course, on generally accepted maxima of legal dogmatics.

Such delimitation is possible in several respects, *we employ mainly two of these.* The grouping to be presented first *pays attention basically to legislative* requirements, and comprises accordingly, and essentially, cases belonging to, or to be drawn into, the sphere of faulty performance (under A). The grouping to be discussed secondly takes into account rather the needs of *legal practice,* and is based on the formal-objective criteria of the presence or ascertainability of a defect (under B). It goes without saying that practically all important cases are included in both groupings alike, if only by different approaches.

A.) (1) Defective delivery owing to lack or defect of properties ensuring proper use, or prescribed, or otherwise required (defective delivery defective as to quality or properties taken in the most general sense and handled as basic case).

(2) Insufficient quantity (e. g. there are fewer dice in the box).

(3) So-called *aliud* delivery, when delivery in itself is faultless, but — in view of the contractual *causa* (intention) — does not fulfil the same (e. g. a camera making black-and-white photographs instead of being able to make colour ones).

(4) Breach of administrative obligations certifying quality, ensuring quality protection, or better usability of the product (failure to present a quality certificate, instructions for handling and use, etc., or defects of these).

(5) So-called incomplete delivery (lack of an essential part indispensable to fulfil the proper contractual intention in case of indivisible delivery).

Today legal literature and legal practice includes 1. and 2. in the sphere of faulty performance unequivocally; the situation is essentially the same in respect of sphere 3. too (although there are instances in certain marginal cases of regarding this as „non-performance"); practice is uncertain in cases coming under 4.; nor is judgement unequivocal in respect of 5. (Foreign laws handle this as faulty performance, while the decision of the Central Court of Arbitration No. KDB 338. EH regards the same in respect of *penalty* as default.)

b) The second grouping resulting from the delimitation of faulty performance, and taking into account requirements of law-enforcement, starts *from the formal-objective possibilities* of the factual ascertainment of fault; the latter is regarded as the defect of the thing — and performance is included in the sphere of faulty performance accordingly — if delivery (delivery of a thing first of all) does not meet the quality, requirements and properties specified by a) provision of law, b) other compulsory prescription, instruction, especially a standard, including prescriptions which are of compulsory effect not formally, but actually; c) the agreement of the parties when entering into the contract; d) the fact that such quality etc. is otherwise necessary (even without compulsory prescription or contractual agreement) for the proper use of the thing, or for its use for a definite length of time.

The basic point of view for delimitation in this grouping is the lack of the so-called *statuatory* and/or *stipulated* properties. Contrary to certain opposite views, *it is further necessary to emphasize this distinction and duality for the purpose of future legislation*, since replacement of compulsory prescriptions by contractual stipulations is a tendency asserting itself in a widening sphere. It must be recognized invariably, too, that the sphere of statutory properties includes not only requirements defined by law, but also properties of quality which are necessary for the proper use of a thing according to public opinion accepted by society. Moreover, owing to the increased demands of the consumer as to quality, statuatory properties taken in the former sense are of increased importance; this is expressed by the first situation of paragraph d); the second situation in d) on the other hand hints at the problem — to be discussed in detail in the following — that a requirement to be met by the product is usability for a definite length of time, even without special rules or specifications, hence usability for a definite length of time is not only a „guaranty" requirement, but also a requirement of „warranty". That its degree and extent

may depend in given cases on certain factors, e. g. the price of the product in our opinion, is another question.

C) Taking as the basis *the degree of the defect* may be a further criterion arising from considerations of law enforcement and law-making for the delimination of faulty performance. Both the Civil Code and the statuatory provision on contracts of product-supply use the distinction between „unfit" and „property-deficient" delivery. This distinction will be needed — in our view — in the future, too, and the consequences resulting from it must also be asserted through legislation; moreover, we might say *vice versa* that this distinction is made justified by the very requirements of law-making. *Yet as concerns the „conceptual" definition of faulty performance, the degree of the defect is not a matter of principle,* and is therefore of no decisive importance; it might be taken into account for working out details, similarly to differentiation possibly made on the basis of apparent and hidden defects.

2. *Questions of the legal basis of responsibility for faulty performance; relief of such responsibility.*

(1) Most legal systems regard guaranty and warranty as belonging to the system of responsibility under civil law being an intensified, highly rigorous form of objective responsitiblity independent of imputability; this is expressed even more impressively when „almost unconditional" responsibility is mentioned in such cases. The latter formulation indicates that the possibility of being relieved of such responsibility is rather limited, is practically exceptional, particularly in cases of guaranty. For the sake of accuracy we must mention here that what has been said above applies to the „classical" (traditional) claims arising form faulty performance; true, responsibility for *expenses* connected with faulty performance has an objective basis as a rule, but as concerns responsibility for *damages* resulting therefrom this is often based on imputability. In view of this, we shall in the following *examine the questions of the legal basis of responsibility for warranty and guaranty as projected on traditional warranty (guaranty) claims;* questions of bearing expenses *and compensation for damages* will be dealt with in another context.

(2) As concerns *relief,* the Civil Code contains the following precepts:

In respect of *warranty,* paragraph (4) of Section 305 provides that the obligor shall be relieved of warranty if the obliges was aware of the defect when entering into the contract;

in respect of *guaranty,* Section 248 provides that the person undertaking guaranty shall be relieved thereof only if he can prove that the cause of the fault did not originate until after tradition had been effected.

These two rules contain the cause resulting in relief from two different approaches; and, as regards the real situation, neither of them seems to be complete.

It is obvious also on the basis of the Civil Code (and the ministerial motivation to the Bill refers thereto) that since delivery must be faultless *upon tradition* — as follows from the nature of warranty —, the obligor is not responsible for defects arising subsequently, similarly to the rule in Section 248 on relief of obligations under guaranty. And as to the other „reason for relief", it seems probable that — in connection with relief of responsibility — the Civile Code makes express reference to defects *known* at the time of contract-making because it wished to emphasize a difference, substantial in comparison to former law: namely that *there* shall be a responsibility of war-

ranty in the future in respect of defects even when they could have been ascertained by the obligee when making the contract.

In respect of *guaranty,* the laconic wording followed from the then dominating view that — the guaranty being a kind of responsibility undertaken by agreement — any further question relating to the legal basis of responsibility must be settled by the parties contractually.

Finally, in connection with this theme, we must quote Section 316 of the Civil Code, belonging to the common rules on breach of contract: „Where the obligee accepts performance being aware of the breach, such obligee may thereafter raise claims resulting from breach of contract only if he has reserved for himself the right thereto. This rule shall not apply to contracts of socialist organizations *inter se.*"

(3) As concerns relief at responsibility for faulty performance, there are consequently two phases of the contractual relation which are of equal importance, but *must be evaluated separately:* one is *the coming into existence of the contract,* the other is the performance thereof (and the subsequent period, respectively). For the sake of simpleness, let us first discuss the latter theme.

The distinction which determines the essence of warranty as reflected upon the actual state of the delivered thing *at tradition,* while it determines *guaranty reflected on the full duration of use,* is nowadays usually regarded as obsolete. In both cases, the requirement is the faultlessness of the product, at tradition in such sense that it must not have any deficiency — left hidden, or „latent" — which, as a source of defect, results in a breakdown, or leads to the emergence of some defect, later on. Consequently, according *to our present views, the wording of guaranty in the Civil Code* fully and correctly covers the case of warranty, too.

In this sense, therefore, both cases of responsibility for faulty performance mean that the obligor commits breach of contract if the cause of the defect was inherent in the thing upon tradition, irrespective of the chronological emergence of the consequences thereof. On the other hand, it follows from this logically that if it is a case of breakdown resulting from a cause subsequent to tradition, this is, in essence, not a case of „relief responsibility" neither, more exactly, of „relieving oneself" thereof. The fact is that *no breach of contract has actually been committed,* the *conduct of the obligor was not unlawful;* thus, *the primary condition of setting the mechanism of responsibility into motion* is not present, let alone the fact that even the lack of causal nexus could be called upon which would neutralize any investigation into unlawfulness.

(4) Relatively more doubtful questions arise in connection with defects *known* at the time of contract-making, at the time of performance, or, more accurately, *at the time of acceptance.* The difficulty arises mainly from the circumstance that the state at contract-making often coincides with the date of performance; in such a case the two phases can be separated only dogmatically, nor even so in certain cases. This is especially the case with mass pruchases in trade, which we have chosen as our basic model.

In cases where *the making of the contract does not coincide with performance,* the problem can be reduced; the quoted rule of the Civil Code actually relates to such cases. It is not the *difference in time* which renders the separation of the two phases important; it may happen that the making of the

contract is followed by performance immediately in such cases, too. What is of importance here is the circumstance that there is a clearly delimitable *negotiation of contract-making* between the parties which *extended,* among others, *to the qualitative specification of the product.* If, as a result of such negotiation, agreement is reached on the part of the obligee for a product of known defect, responsibility under warranty may not be called upon, not as the obligee actually wished to purchase such product; there exists — projected on the *causa* of contract — no „fault" on the part of the obligor; breach of contract, „faulty" performance are out of question. Consequently, in that sense there is no „relief of responsibility", in the mentioned case, but it is the *unlawfulness,* the fundamental element of breach of contract *what fails.*

(5) In respect of legal valuation, further problems arise when the thing delivered has some defect that can be *ascertained at acceptance,* or if you like, when such defect is *quite conspicuous;* anyway, *when the defect* is of such nature as *can be ascertained even by the non-expert buyer beyond any doubt, and* be perceived immediately. It must be stuned most emphatically that the legal questions to be discussed now will be discussed in connection with defects taken *in this sense.* We shall discuss only defects where it is not only the *cause* of the defect that exists upon acceptance, but where the fact of faultiness is already given; we may speak about the „ascertainability" of the defect in the sense of a circumstance which may be, and/or is, perceived by the obligee objectively and *„prima vista".* The question is this: what significance do the defects have in respect of responsibility under warranty (guaranty), or, more exactly in respect of relief of responsibility, if they *exist already* upon *acceptance* and can be recognized without taking any further measures and making any investigation, i. e. they are given defects.

To narrow down the sphere of defects *to fully* obvious defects, is necessary for two reasons, at least for the sake of the construction we shall follow hereinafter. First of all because of the fact that — based on practical considerations — *the provision of the Civil Code [paragraph (1) of Section 283] prescriving examination by the obligee as his legal obligation is to be dismissed.* True, this rule is seemingly justified and in accord with the cooperation principle binding the parties; but, in reality, it is provision which provokes perhaps the largest number of problems, difficulties and legal disputes in the sphere of faulty performance. The obligation to examine can be prescribed by provision of law as a matter of course; but legal rules in most cases cannot approach its ways, and especially its duration, but through references and circumscriptions. *This situation prevails especially in cases* of purchase on the mass basis, i. e. usually in respect of the obligee *of the model we are discussing.* It is a commonly known fact, too, that the consumer-buyer does not have the knowledge, nor the possibly necessary means, to examine the article in such manner that could be regarded as competent and essential. But the problem becomes acute legally in that sense that if examination *is prescribed as an obligation under the law, the same law* has to sanction its non-observance.

And in the sphere of faulty performance, any such sanction becomes automatically extremely severe: it might affect the enforceability of claims arising from faulty performance. *Obligation* to examine determines, or at least affects, the starting-date of the enforceability of the warranty claim. The Civil Code follows this solution, and it was exactly the difficulties arising from this that judicial practice was not able to overcome; and XXXI. PED (Civil Law Prin-

cipled Decision of the Supreme Court) tried to solve the problem by resolving *the duration* of examination completely whereby *the obligation of examination itself* was, in essence, rendered problematical. We must reach this conclusion also if we take into account the reasons given for this principled decision: "... examination of the thing delivered is to decisive importance ..." Also the following place is formally conform with the sense of the law: the time required for examination „shall be determined by taking into account the type and nature of delivery as well as all circumstances". Thus the principled decision — quite understandably — tries to bring itself in its *wording* in conformity with the examination system of the Civil Code: but as mentioned loosening of the duration of examination — otherwise necessary for practical reasons — has, in the last analysis, degraded the sense and the legal importance of the obligation to examine.

We are of the opinion that examination as a legal obligation must be discontinued, and that the resulting conclusions must be drawn in future legislation. From this standpoint our view to regard the regulative distinction between apparent defect — taken in the traditional sense — and latent defect as unnecessary, resp. obsolete seems quite consistent.

It is exactly for eliminating any undesirable comparison or confusion with „apparent defects" that we deem it necessary to speak of *evident* defects in the sphere of cases mentioned. This terminological difference indicates that — as opposed to „apparent defects in the sphere of cases mentioned. This terminological difference indicates that — as opposed to "apparent defects" — *evident defects* mean deficiencies which can be appraised, seen, etc. at once without any examination whatsoever.

It may be termed as striking that our present, statutory rules in force contain no provisions — not express ones at least — on the discussed question. This may probably be explained by the fact that this problem was considered solvable on the basis of, or by comparison with, the provision on the defects known at the time of contract-making, with due regard to the frequent coincidence of the date of contract-making and the date of performance. In the sphere of guaranty again — covering in typical cases new products — this problem has been thought to be of almost negligible importance.

(6) In connection with the problem discussed, it is justified to raise the question of the *seller's information obligation,* and of the pertinent expectations. As known there were in the past certain requirements — thought-provoking as to their foundation, but to be regarded as exaggerated in their practical effects nevertheless — which made it the duty of the seller merchant, etc. to call the buyer's attention to the defects, deficiencies of the product expressly.

It seems quite natural even today — and this demand increases as the standards of civilized trade improve — that the seller should inform the buyer about the essential properties, features, etc, of the thing adequately, including circumstances that affect or perhaps hinder, proper use. But it is obviously *not to be expected* from the seller to overemphasize defects and to dissuade thereby, so to say, the seller from purchasing. As to our present theme, this question *is of relative importance,* since there are defects which the buyer can perceive directly without any special warning or information. In case of such defects, there is no need for any particular information on the part of the seller. Moreover, if he would be required to do so, this might eventually lead to a situation in which the seller would perhaps present some defect as more

important than it is in order to deprive the buyer from the outset of the possibility to raise a warranty claim later on.

Trading attitude and the pertinent expectations are judged differently in respect of physical, etc. *non-evident deficiencies,* i. e. in respect of defects of which the seller is aware, which affect proper use, but become manifest in their effects only later on. Legal evaluation of such attitude is closely correlated with the legal effects of quality certifications, instructions for handling for use, etc.

Hence the obligor (seller, etc.) is under no warranty responsibility in respect of defects which are evident at acceptance; no warranty or guaranty claim can be based on such defects. But we would regard it proper to complete this rule with a further provision: if *an evident defect proved to be substantially more serious in its effects than* could have been reasonably reckoned with by the buyer on the basis of what he learned upon acceptance, the responsibility of the seller should materialize; as concerns the circumstance mentioned, *the burden of proof is entirely with the buyer.* Such a supplementary provision ought to be regarded as justified, if only because of the circumstance that if the validity of warranty is recognized — perhaps to a limited degree — in case of used articles, etc. bought at reduced price, a rather limited scope of warranty is likewise to be recognized in the discussed case of defects evident at acceptance when the buyer pays the full price.

Another exception may be constituted by the case when *the seller has undertaken contractual responsibility* also in respect of defects evident at acceptance. This may be of practical importance in foreign trade transactions or in connection with undertaking warranty; but, owing to the permissive nature of warranty rules, no special provision is necessary here.

From what has been explained in the foregoing we may draw the conclusion that, *as concerns the legal basis of responsibility, we see no noteworthy difference between warranty and guaranty.* But there are several circumstances which separate warranty and guaranty from each other characteristically, and, in view of these, we consider it necessary to maintain these two institutions parallel in future regulation, too.

The warranty claims (rights)

Pursuant *to the Civil Code,* the generally enforceable warranty claims are:

a) in case of delivery of an individually specified thing
- repair
- or reduction of price,
- withdrawal only if the thing is unfit for proper use at the time of tradition, cannot be repaired appropriately, or repair would take to much time, or the obligor does not undertake repair [Civil Code, paragraph (1) a) and b) of Section 305].

b) In case of delivery of goods specified in kind and quantity: — substitution, or repair, or reduction of price, but the obligor may, instead of repair or price reduction, substitute the goods, provided such substitution is practicable without such delay as would entitle the obliges to withdrawal (Civil Code Section 300).

- Substitution if the conditions prevail which would entitle to withdrawal in the case of delivery of an individually specified thing.

— Withdrawal, only if the obligee can prove loss of interest in addition to the prevalence of these conditions [Civil Code, paragraph (1) c) and d), Section 305].

Where the obligor does not undertake, or does not carry out repair of the thing within reasonable time, the obligee may repair the defect, or have it repaired by somebody else, at the expense of the obligor. [Civil Code paragraph (2) of Section 305.]

Correlation of the nature of the delivered things (individually or in kind defined) and the degree of defect (unfit-property-deficient) with warranty claims.

An important preliminary question of regulation relating to the settlement of warranty claims is whether such regulation contains a distinction *between things to be delivered/defined individually or in-kind*, further *between unfit and property-deficient* deliveries. Inclusion of these categories in codification affects the enforcement of warranty claims considerably.

A) The distinction between individual and in-kind nature consistently pervades the quality-warranty system of the Civil Code. This originates presumably from the recognition of the actual situation that the individual nature of the things delivered (at least in the original legal sense of the term) renders the raising of certain claims — especially to substitution — matterless from the outset, while the sphere of claims to be considered is wider in the case of performance of performance defined in kind. The dogmatic validity of this recognition is unquestionable; it may therefore be somewhat striking that the distinction in the Civil Code has given rise to sharp criticism for quite a time from the practical side (by this we mean now not solely legal practice).

From opinions voiced in the legal periodicals, it is commonly known today that this problem actually arises from the relationship between *individual and in-kind nature as a distinction in respect to contractual performance,* and *fungible and non-fungible things* as a grouping of things. In commercial and legal practice, these difficulties culminate in cases where the buyer — especially in cases of commercial purchase in shops — *selects (separates)* one of the fungible things, which becomes the subject-matter of individual delivery in the legal sense through the act of selection (separation), and thus the delivery itself becomes individual.

And if we take the legal dogmatic principles in their strict sense, the astounding consequence following from all this is that those shopping in commercial mass turnover have actually no possibility (or could not have it) for the substitution of defective products in the great majority of cases. The absurdity of this situation is illustrated well by the example according to which if somebody selects a thing in a shop, he has lost his claim to substitution thereby; while if he orders it per telephone, the claim for substitution persists because it was not the buyer who selected the thing. Thus it is a clear-cut demand that this anomaly must be ended or resolved by new legislation.

Possibilities of solution:

a) The most radical suggestion is to delete any *distinction between individual and in-kind delivery,* at least in the sphere of faulty performance. *We agree with this by no means.* We do not agree because in certain cases it is of importance, both for practical interests and legal regulation, whether delivery is actually of individual nature. (The question is of special significance in the

sphere of legal relations connected with contracts for work; but these questions are outside the scope of our studies.) The individual nature of delivery is of importance in cases where it is actually the intention of the buyer to obtain the selected product, where the *causa* of transaction is aimed expressly at the selected, separated product.

b) The question must, and can be, solved in another way and in a fairly obvious manner. As a matter of fact, what is needed here is nothing else but a certain loosening of the rigid, dogmatic view on separation in the relationship of individual and in-kind delivery taking into account instead whether *the object of delivery is a fungible thing or a non-fungible thing.*

B) *The distinction between property-deficient and unfit deliveries* is a basis of grouping which appears consistently in the Civil Code regulation; it leads to the differentiation of property-warranty claims by taking into account *the degree of defect.* As known, this is asserted in the regulation on contracts for product-supply in such a way that unfitness ensures a certain claim (substitution) which is not ensured primarily to the customer in case of „not unfit" deliveries [Paragraph (1) a) of Section 4 of the Guaranty Decree, too, ascribes importance to unfitness likewise in such a sense that it is one of the cases where substitution may take place instead of repair].

The departure of the Civil Code from the decrees mentioned above actually follows from the difference in the starting-point, namely that the Civil Code *recognizes in priciple no hierarchy of warranty claims,* while it is characteristically applied in the aforesaid provisions of law. On the other hand, the Civil Code takes into account realistic circumstances: the difference between property deficiency and unfitness is an objective fact, and legal regulation cannot avoid taking into account its consequences. If the thing delivered is in fact altogether unfit, it usually makes no sense to speak of repair claims (one criterion of unfitness is exactly the fact that the thing cannot be repaired properly); to make substitution primary in such cases is an inevitable consequence resulting from external — or we might as well say: physical — causes. But this does not entail in the Civil Code system that substitution should be restricted from the outset to the sphere of unfit deliveries — *and it is here that we find a considerable difference compared with social rules.*

Hence *we are of the opinion that the distinction between property-deficient and unfit deliveries must be maintained in respect of warranty claims,* since this difference becomes actually manifest even if legal regulation tries to disregard it. Otherwise legal regulation must pay attention to the circumstance that unfitness results not only from the fact that the thing is lacking the necessary physical properties, quality requirements, etc. to a degree that excludes proper use from the outset; if repair is possible in principle, but there is no hope for its realization, or this would involve disproportionate disadvantages to the obligee (repair taking long time, etc.), this situation must also be regarded as such a case.

For the sake of completeness we must mention that, as concerns the actual enforcement of warrenty claims, *the physical determinants, properties, etc. of the object of delivery* have also a realistic and natural effect. As is commonly known, repair is out of the question in case of certain products and commodities, exactly because of the nature of goods (food, highly perishable produce, etc.). *That special rules apply to such products even now,* is connected with this fact.

Types of warranty claims

(1) a) Generally enforceable warranty claims under present regulation are: *substitution, repair, and proportionate reduction of the purchase price.* Under the simultaneous influence of the so-called trading and producing views the Civil Code places warranty claims on one level, and — apart from certain exceptions — leaves the right of choice to the obligee. But the type of delivery and/or the degree of defect selects for „physical reasons" the range of realization of certain claims.

b) The case of *withdrawal* is a *secondary* claim in the system of the Civil Code (in terms of guaranty: returning of the product and repayment of the value, „compensation"). It resembles the claims enumerated in paragraph a) in that this, too, is an independent (not accessorial) claim. On the other hand, it is secondary as a result of being bound to statuatory conditions: pursuant to the Civil Code, the obligee may have resort to withdrawal only in specified cases.

c) The demand for *having a thing repaired* is a warranty claim which is not independent and is conditional at the same time. Pursuant to the Civil Code, it is a surrogate of repair, and can be applied only in cases defined by law.

d) The *claim for expenses* to be borne by the obligor for, or in connection with, removal of the defect under warranty (repair, transport, forwarding, assemblage, etc. expenses), as well as *the claim for damages* in connection with faulty performance, are not independent claims, they are *necessarily accessorial.* The Civil Code contains express provisions on the bearing of expenses, and on compensation, in the part dealing with faulty performance; moreover, as concerns compensation, it contains solutions that differ from the general rules of responsibility. It ought to be noted that, mainly owing to the accessorial nature, these claims are usually not grouped with warranty claims. In our opinion there is no doubt that up-to-date legislation should at least regard *the obligation to bear expenses,* and — to a definite degree — also compensation as warranty claims.

(2) We have mentioned before that the sphere of application of the so-called *ordinary warranty claims* is determined partly by the nature of delivery, partly by the degree of the defect, and that certain claims are realized equally and alternatively. Further, it is essential that the right of choise is with the obligee, and is restricted only in that the obligor can frustrate enforcement of the claim chosen by the obligee through substituting the defective thing by a faultless thing.

In the sphere of warranty claims, it is exactly this right of choice due to the obligee, which — at least in its complete form exercised today — has become the subject of rather widespread criticisms. The suggestions for a change demand that *a certain hierarchy should be observed also in Civil Code regulations in the future* (as already known with other statutory provisions), and mainly in such a way that repair should be possible only secondarily (usually if repair is unsuccessful). Those arguing for this solution refer to the fact that substitution often means a disproportionate economic disadvantage to the obligor; also public opinion holds that it is unfounded to demand substition in cases of minor defects which can be repaired simply and promptly. Reference is often made to what is called consumers' abuses. Finally, reference is

also made to guaranty where the consumer regards it as natural that substitution should be made conditional on reparability.

The advocates of the ideas presented above think to realize them in the following ways:

a) According to the most extreme standpoint, one must start also in the sphere of warranty from the principle that the basic claim is the right to repair; it can be exercised as long as the possibility of repair exists (with a certain limitation of the number of repairs). By and large, this *would mean transfer of the guaranty construction to the sphere of property warranty.*

b) In cases where the thing only has a *minor defect,* the claim should extend only to repair and should not include the possibility of immediate substitution.

c) According to others, settlement of this question should be made dependent on the price of the product.

Ad. a) *We do not regard this suggestion for solution as not acceptable.* It would be an extremely bad step backwards to the disadvantage of the consumer at a time when the consolidation of consumer protection is an objective of economic policy. And the rule that the undertaking of guaranty has no bearing on statutory warranty claims would become worthless at the same time.

Ad. b) It admits of no doubt that *economic considerations speak for* making the attempt at repair primary, quasi the starting-point of regulation, in case of minor defects or defects that can usually be repaired easily and promptly. But it is equally true that, according to public opinion, a thing repaired to any degree is no longer a new thing; repair degrades the buyer's subjective appraisal of the thing, may affect aesthetical and similar demands. But even so, we regard utilization of this idea as conceivable and realizable within definite limits.

Ad. c) To make the solution conditional solely on the price of the product is actually a reflection of the view which regards also warranty as a merchandize in the sense that *warranty is wider in case of a more expensive good, while ensuring to the buyer claims restricted to a narrower sphere in the case of cheaper ones.* A „mechanical" assertion of this principle can hardly be accepted; in respect of cheaper products, it would mean a general restriction of the buyer's, the consumer's rights. It is opposed to the exigencies of economic policy, and is contrary also to the legal-dogmatic sense of warranty. Nevertheless, this idea *has a utilizable element* taken into account on our suggestion for solution, to be presented in the following.

We believe that the idea raised above *could be realized* in legislation *as a combination of the conditions mentioned in paragraphs b) and c).* This would mean that the degree of the defect and a certain value limit combined could result in laying down a certain hierarchy of warranty claims. *But to take as the basis of regulation these points in themselves and separately would be wrong in any case.*

What would be wrong first of all is to pay regard solely to *the degree of the defect,* and to give always priority to repair in case of minor defects, i. e. to make the possibility of substitution always conditional on repairability. Namely it is absolutely justified to expect in case of a thing of higher value that it should not have even a reparable defect. An expensive product has the effect to arouse maximum confidence in the buyer; this subjective appraisal always exerts some influence, and may result even in the repair of a more

expensive product, and this we accept whatever the reason be. Otherwise this principle must be accepted logically also by those standing on the "more expensive thing — more rights" basis. It is only in this way that they can voice the „cheaper thing — smaller rights" thesis which *they* deem to be justified economically.

Similarly, an approach which would place the differentiation of warranty claims solely on the basis of *whether the price of the product is below or above a certain price limit, can have no absolute validity.* As we have said, a lower price in itself cannot have the effect of release from responsibility; products of lower price, too, must be suitable for satisfying a given need, and the obligation of warranty embraces such products as a matter of course. Any release from, or loosening of, responsibility for the reasons mentioned might stimulate the producer's and the merchant's irresponsibility which would gravely injure consumer interests. Yet there is no contradiction between all this and the regulation *that in case of cheaper products — and in respect of minor defects — the satisfaction of needs can be realized not only by recognizing the primariness of substitution, but also by priority of repairing the defect.*

On the basis of what has been said, *we would regard as well-founded* the provision of law according to which *in case of a minor defect of the thing the buyer may request substitution only if the obligor has tried (once or possibly twice) to remove the defect through repair unsuccessfully, provided that the price of the product does not exceed the value defined in special statutory provisions.*

The question whether substitution should be ensured to the buyer after one or after two repairs is to be decided by *economic considerations.* (It is irrelevant in this connexion whether the same defect occurs repeatedly, or there are different defects, provided as a matter of course that decision is reached for two repairs.)

Determination of the *value limit,* which is of fundamental importance as concerns the construction, is also *subject to economic decision.*

It is not easy to define in the statutory way what is to be regarded as minor defect. Much may depend here on wording, since reference to, say, small, unessential, etc. defects might have a further degrading effect. The following may be conceived for solving the question:

a) circumscription of the defect in words, thus making an interpretative rule;

b) taking as basis to what extent the defect reduces usability of the product (10%—20%);

c) finally, judgment on a basis which takes into account the percentual ratio of the defect compared to the price of the product (e. g. the defect can be removed by repair costs of x forints).

Finally, *a requirement to be emphasized as a matter of course* is that through repair the product *must become faultless as concerns proper use,* with recognizing, however, that repair in itself involves a certain decrease in value. Further, it is just as well obvious that has been said now is out of the question in case of so-called unfitness.

(3) Certain authors mention in the sphere of warranty rights the case of so-called *replacement;* but this is actually a special form of repair and requires no statutory regulation of its own.

(4) The Civil Code *restricts the buyer's right of choice* in the manner mentioned before through authorizing the seller to answer in the form of substitution even if the buyer wishes to enforce some other claim. Needless to say, *the seller is not supposed to abuse this statutory right.* In particular, it may be regarded as abuse if the seller wishes to substitute — *against the will of* the buyer — a thing of another type, construction, etc, even if it is the same kind of product. The buyer's protest must be granted in such cases even if the thing to be substituted is cheaper than the one given for it; thus in such cases the identity of kind must be interpreted in the strictest sense. The situation is obviously different if the buyer consents; but in legal terms this is a case where an accessorial yet newly created legal relationship realised.

(5) As concerns *repair* by others, paragraph (2) of Section 305 of the Civil Code provides at present as follows: "Where the obligor does not undertake or does not carry out the repair of the thing within a reasonable time, the obligee, too, may repair the defect, or have it repaired by some other person, at the expense of the obligor." Hence it is a relevant element in the Civil Code rule that the obligor does not undertake or carry out the repair; it is assumed from the outset that the obligee has contacted the obligor for realizing this claim.

But in the course of preparatory work on the Civil Code reform a suggestion has compe up wishing to have the right to repair by others recognized from a different point of view. Accordingly, the possibility of having the thing repaired (or own repair) for removing the defect promptly and simply would be ensured to the obligee even if he does not inform the obligor beforehand on the necessity of repair. Yet it is evident *prima facie* that this solution *contains the danger of abuse in two directions at least:*

a) The obligee requests reimbursement of "repair costs" from his obligor even when no repair has taken place at all,

b) the obligor is practically unable to ascertain whether the demanded amount of costs of repair is well founded.

As concerns abuse under a), defence is relatively easy since it can be ascertained whether the thing has undergone some repair or not. True, the obligor would have to take steps for this purpose, and this would weaken the possible advantages inherent in the simpleness of this solution.

On the other hand, to avert the danger of abuse in case under b) is extremely problematical. This is aggravated by the possibility of collusion whereby the invoice given by the otherwise authorized person (e. g. craftsman) may be of a substantially higher sum than the actual costs of repair. True, the obligor may contest the invoice, but his possibility of proving is rather restricted.

In view of this, we can conceive the practical realization of this solution only if the *burden of proof rests entirely with the buyer.* So it is he who must prove that a breakdown has actually occurred, and of what degree it was; that repair was justified because of promptness, it even served the "convenience" of the obligor, etc. But even in such a case we would regard direct repair — by the obligee or somebody else — to be permissible *only below a certain value limit of repair costs.* The fact is that the danger of abuse is small in case of repairs of minor value. Low sums hardly stimulate unfair practice; nor is the seller likely to make a problem of „petty causes". But a possible adoption of the solution discussed here would not render the provision in

paragraph (2) of Section 305 of the Civil Code unnecessary, where preliminary notification is a factual condition to apply the same provision, therefore it means a different case.

(6) In connection with *withdrawal* the conditions of exercising this right *under the Civil Code* are the following:

— unfitness for proper use,
— impossibility of proper repair or exceedingly,
— long duration thereof, or refusal of repair by the obligor,
— loss of interest in case of delivery of a thing specified in kind and quantity.

As commonly known, the regulative attitude of the Civil Code wished to serve much- (and over-) emphasized principle of real performance *in natura* by allowing withdrawal rescinding the contract without such performance only exceptionally, in cases strictly delimited by law. The Code provided in the same manner also in the sphere of faulty performance, and this resulted in withdrawal becoming a secondary warranty claim.

No special explanation is needed here as to why overstressing of performance *in natura* has become obsolete in the circumstances of the new economic system. It is a demand voiced in wide circles — especially by legal practice — that withdrawal must be elevated (resp. re-elevated) to the group of primary warranty claims. There is an additional point of view to permit a „more generous" attitude: by employing the so-called covering purchase, the obligee may, in certain cases, have the possibility to obtain the product from another source, consequently restriction of withdrawal today would mean an unwarranted limitation on the obligee's position.

After all, practically everybody agrees with the gradual liquidation of the limitations of the right of withdrawal and regards this a tendency to be asserted. *Yet as concerns immediate and complete* deletion, *there are certain reservations* even if they originate in considerations that differ substantially from those resulting the limitations found in the Civil Code.

Those voicing these reservations refer first of all to the contingency *that unlimited recognition of withdrawal would amount to disproportionate economic disadvantages to producers and sellers.* Especially in case of individual delivery, this would result for the seller in remainders of products which usually cannot be realized elsewhere. They also refer to consumer abuses, etc. and, by and large, we are faced with the same arguments here as mentioned in connection with repair and substitution.

In our view, *protection of consumer interests is no unequivocal argument either for an unlimited recognition of withdrawal.* Namely if the consumer has purchased a product to satisfy his needs, this indicates that his needs exist objectively; hence it is not unfair towards him that his needs should be satisfied — even if with some delay — by the „most radical" removal of the defect, i. e. substitution (or possibly repair). This view is, however, opposed by the buyer's subjective, negative appraisal arising out of the defect not only in connection with the given thing, but often also in connection with the entire category of product, and this may discourage him from satisfying his needs with a product of this kind.

The somewhat contradictory conceptions outlined here can — in our view — be resolved and reconciled by the following legal solution:

1. To include the right of withdrawal in the group of general (ordinary) property warranty claims should be accepted as starting and principal rule.

2. Exercise of the right of withdrawal should be limited in two directions:

a) *The obligor has the right to substitute the product even if withdrawal is chosen,* i. e. substitution invalidates the right of withdrawal in every case (it should be emphasized here, too, that substitution must take place in due time, in proper ways, and by a really faultless product of the same type).

b) *Certain binding conditions could mean further limitation, similarly to the possibility of substitution being restricted to the priority of repair.*

In constructing the limitation under b), we start essentially from the same points of view as we have taken into account in the repair-substitution relation. Needless to say, *this means only that these points of view have to be taken into account,* as we have seen, they require legal solutions of clearly opposite nature in many a respect in the field of practical realization. What is essential here is that adoption of the degree of defect and of a certain value limit as a principle of regulation may help us in to settle questions connected with withdrawal in the same way as this seemed suitable in the repair-substituting relation; the reasons for adopting them as a principle of regulation are the same in both cases.

A suggestion in accordance with the limitation under b) and giving expression to it:

ba) *Above a definite value limit, the buyer may withdraw from the contract without any restriction, that means irrespective of the degree of defect.* But withdrawal can be repudiated by substitution also in this case.

bb) *If the price of the product is below the fixed value limit, but the defect is serious or substantial — even if it does not reach the level of unfitness — the obligee may withdraw.* Withdrawal may be repudiated by substitution also in this case.

bc) *If the price of the product is below the fixed value limit and the defect is of minor importance, there is no possibility for withdrawal.* Only repair may be requested in such a case, according to what has been said above. Naturally, the possibility of removing the defect through substitution by the obligor is given also in this sphere if he does not wish to, or cannot, meet the claim for repair for any reason.

As concerns the delimitation of the relevant *value limit, or the serious or minor nature of the defect,* all what we have presented in the repair-substitution relation is valid also here respectively. It is an essential point of view of ours that objective criteria must be taken as the basis first of all to establish the seriousness of the defect; the buyer's subjective judgment may *not* be taken into account in this respect, all the less since we tried to comply with it in another form.

(7) *Costs incurred in connection with faulty performance and claimed by the obligee under warranty.* The right to get refunded the expenses due to the obligee because of faulty performance is usually not grouped with the warranty claims. The main reason for this may presumably be their accessorial nature. The fact is that expenditure connected with the removal of defects is usually incurred by the obligor, in his sphere of interest, from the very beginning. It is usually not contested that the obligor cannot claim reimbursement of wages,

value of the material used, etc. in case of repair burdening him; these expenses are incurred while he discharges his obligation resulting from statutory provisions.

A legal regulation concerning expenses is therefore *needed practically only if these are incurred by the obligee because they are necessary for removing the defect.* Paragraph (2) of Section 305 of the Civil Code provides accordingly by charging the obligor expressly with the expenses of repair carried out *not by the same.*

Provisions on expenses in general are contained in paragraph (1) of Section 358 of the Civil Code, providing that expenditure necessary for eliminating or reducing the prejudice suffered by the injured person must be included in the compensation. Following from Section 318 on the common rules of breach of contract, this precept is governing also faulty performance. From a merely formal comparison of the statutory provisions in question it would therefore follow that the precondition of bearing costs is imputability as generally required in the sphere of compensation. *But it goes without saying that such interpretation would be seriously detrimental to the consumer.*

In order to avoid any ambiguousity, we consider it indispensable to declare that the expenses incurred by the obligor in connection with faulty performance must be charged to the obligor and may not be refunded by the consumer. Conversely, the expenses incurred by the obligee buyer or consumer in connection with defect and aimed at removal of the defect may be claimed by the obligee under warranty. (In practice, this means first of all expenses of transport, forwarding, repairs carried out by the obligee, or for him by others, etc.)

By elevating *the claim to expenses to the rank of a warranty claim,* there emerges a natural concomitant, i. e. that the general solutions relating to the legal basis of obligations under warranty, to the burden of proof, to the manner and terms of claim enforcement, apply also to this warranty claim.

(8) As concerns *compensation connected with* faulty performance, it is sufficient to state here that settlement of damage occurring in the consumer-seller relation requires special regulation and is a question *to be separated from the bearing of expenses.* (This is not necessarily the same situation as in case of so-called linked-up relations — retail trade — wholesale trade — producer — where expenses appear, or may appear as part of damages.)

Different situations require regulations on partly different principles. Thus the claim for compensation cannot be grouped simply with the warranty claims as was possible in respect of expenses.

IV.

Manner and terms of asserting warranty claims

A) Pursuant to provisions contained is Section 306 of the Civil Code, the rules of claim assertion differ according to whether the defect is recognizable or is not recognizable (latent defect). Terms and manner of claim assertion:

a) in case of a recognizable defect, by means of a declaration within eight days from the termination of examination;

b) in case of a latent defect, by means of a declaration within eight days from the date of discovering the defect, but not later than within six months from the examination of the thing delivered;

c) in case of any defect, by means of action brought within six months from making the declaration (expect if the parties have agreed upon warranty of longer duration);

d) in case of any defect, by means of exception against claims deriving from the same legal title, provided that the obligee has made the declaration in due time.

B) Civil Law Principled Decision XXXI of the Supreme Court provides in this connection that

— if, owing to the nature of the defect or to the nature of delivery, the defect of the thing delivered can be recognized only after longer examination, the term of six months fixed for making the declaration needed for the assertion of warranty rights shall — unless otherwise agreed upon — be reckoned from the date when the defect might have been discovered by thorough examination;

— if the parties have conducted negotiations promising of success in settling warranty claims, but no agreement has been reached, from this it shall be concluded with good reason in given cases that there exists concordant will of the parties to have wished to reckon the term of six months fixed for bringing action from the date when it became evident from the circumstances of the case that there is no prospect any more of settling their legal dispute through agreement.

— Paragraph d) of the Principled Decision provides, too, that if the obligor repairs the defective thing on the basis of warranty, the period of prescription is prolonged with the perios of time, beginning from notification about the defect, during which the obligee was not able to use the thing properly on account of the defect; if the thing, or some part of it, has been substituted, the period of prescription shall begin anew in respect of the thing (part of thing) substituted.

Some important questions of the legislation reform

There seems to be an overwhelming public opinion of legal experts which estimates the Civil Code rules relating to the ways of enforcing warranty claims in the sphere of faulty performance as failed in practice; and, among

others, exactly because they give preference to the position of the seller (producer i. e. of the obligor, over the position of the buyer (consumer, user), i. e. the obligee. Civil Law Principled Decision XXXI tried to solve, resp. resolve, the greatest problems posed to legal practice.

For truth's sake we must conclude that *the passing of the P. D. was timely and served the purposes of legal practice*, despite the problems of sources of law resulting from the principled decision.

A) *Starting date of claim assertion; obligation to examine on the part of the consumer; distinction between apparent and latent defects*

The question connected with the starting date of claim assertion must sharply be separated dogmatically from the problem at what date the object of delivery, or the performance, must be faultless; in practice, the probability of a coincidence of the two dates is very high. But there may be differences in given cases, such as in case of the obligee's delay. Faultlessness must exist also in such cases at the date when performance according to the contract is offered, although it is evident that the starting date in respect of claim assertion can only be the date of actual acceptance by the obligee even so.

1. *As concerns legal regulation,* the following alternatives can be considered in respect of the starting date: a) date of tradition, resp. acceptance; b) date of contractual offer on the part of the obligor, or the date of devolution of the risk; c) completion of the examination of the accepted product on the part of the obligee; d) date of putting into service (resetting); e) the date of commencement of putting to use.

Ad. a) There is an opinion which may be termed fairly widespread, and is supported mainly by practical considerations at the same time, namely that the simplest and therefore most practicable thing to do for the proper functioning of the warranty system is to fix the starting date of warranty claim assertion as *the date when acceptance takes place.*

Considerable advantage are attached to such solution: in the great majority of cases, no major difficulties are involved in ascertaining the date of acceptance; the rule is comprehensible and clear to everybody, and, above all, is clear-cut enough to avoid uncertainties appearing in connection with other solutions. All this facilitates claim assertion, and is therefore in good agreement with consumer interest protection.

There are actually two *objections* that can be raised to this solution. One is that recognition of acceptance as the starting date involves a certain shortening of the claim assertion term in comparison to present law. At present, the term of assertion does not yet begin to run during the time required for examination, while according to the suggested solution it does. But, in our view, this is of no essential consequence. Not only because a negligible period of time is involved, but also because the prescription construction to be outlined in the following puts the entire problem in a different light.

The second objection is of practical nature and argues that ascertainment of the date of acceptance is not always a simple task; for instance, if purchase takes place in a shop it is sometimes problematical whether the article for which the buyer wishes to assert a warranty claim was purchased actually at a certain time, in a given shop, and whether it is actually the same article.

But it may be taken for almost sure that the difficulties arising in connection with "identification", or their frequency, are substantially smaller than with any other solution, and that the difficulties of proving are also easier to solve.

A further argument to "fight down" the objection discussed now is the fact that the date when the buyer has taken over the thing must be known even if the claim assertion system tied with the terminating date of examination is applied.

Ad. b) *The contractual offer made by the obligor, and the devolution of risk* may (or at least might) govern the date at which the cause of defect should, or should not exist in the thing; this may be of great importance as concerns „relief" from liability under warranty. We have indicated before that a different view must be applied to the choice of the starting date of claim assertion; no time fixing mentioned above is suited for *starting dates*. Apart from dogmatical considerations, it would not be proper to employ these because their intelligibility, their accurate content, is highly doubtful to the consumer.

Ad. c) As concerns the fixing of the starting date, the Civil Code regards *the termination of examination* as decisive; the various legal declarations must be made within a certain time counted from this date. Also in the case of so-called latent defects, the starting date of the objective terms is the termination of the examination of the thing delivered. The quoted Principled Desision XXXI gives an interpretation, among others, of when the examination can be regarded as terminated.

It is perhaps the aforementioned solution that aroused the keenest criticism among the warrenty rules of the Civil Code. It was argued — and rightly — that quality examination cannot be expected from the buyer, from the consumer, at least not in the way and to the extent that could ensure objectively the disclosure of the defect in every case. It goes without saying that the expectations of society towards socialist organizations in such cases are altogether different from the requirements the ordinary buyer and consumer is expected to meet.

A practical problem connected with the former, but perhaps still more difficult, is the duration of time required for examination. By statutory provision, this can only be prescribed in outline, within limits; experience has shown that any kind of strict rule causes extreme difficulties of proving, forces courts to give far-fetched explanations. Such terms as „at once", „without delay", „within the shortest time possible" used in statutory provisions are perhaps required by the nature of a given delivery; but *for legal practice in concreto* they present almost unsurmountable difficulties.

It need not be argued that any legal construction which is ambigous, moreover, rather vague in one of the most decisive questions, namely in respect of the starting date of claim assertion, has a deterimental effect on consumer interest protection. The arguments we have adduced are certainly weighty enough to enforce the giving up of the said Civil Code construction.

To place examination in the centre for fixing the starting date must be given up, if only for the reason that — according to our conception mentioned before — examination should cease to be a legal obligation on the part of the consumer. We do not consider this to be an inconsistency of principle, even in view of the idea of the obligation to cooperate as asserted in the Civil Code. Consumer protection is such an important requirement of legal and economic policy that it must be met by legal regulation, and the consumer, the buyer

must not be burdened with the discharge of an obligation — not to be expected reasonably from him — only for serving the cooperation principle formally. (The text of the GB decision is „tuning" toward this.)

Ad. d) Paragraph (2) of Section 6 of the Guaranty Decree regards the fact of *putting into operation (re-setting)* as the starting date of claim assertion in certain cases. This view can, and must be, asserted also in the sphere of warranty. It is clear, however, that this is not the principal rule (also the said decree regards tradition as the principal rule), it is only a supplementary provision. The prescription construction suggested for the sphere of warranty solves the problem satisfactorily, owing to the rules suspension thereof.

Ad. e) Taking the date of *putting to use* as the starting date is in conformity with public opinion, and seemingly serves consumer protection well at the same time. Decree 1/1964 of the Minister of Home Trade mentions this possibility expressly, but only as concerns goods of lasting use, and if putting to use can be proved not to have taken place at the date of purchase. This rule in paragraph (2) of Section 5 *aims perceptibly at the correction of the rigidity of the solution in the Civil Code.* But to tie the starting date to the date of putting to use would perhaps result in a still worse uncertainty than taking examination as base. It would be difficult to elevate the said solution to the rank of a principal rule also because of the fact that putting to use in the ordinary sense is not the case with every product. And *the most serious opposing view* is that a possible dispute would now be focussed not on the time required for examination, but on the question of when the putting to use has taken place, or should have taken place.

But all this does not exclude utilization of the said construction in the form of a supplementary rule. This will be the correct solution if things and circumstances are involved from which it is evident (or may be rendered highly probable on the basis of average cases) that putting to use takes place at a certain date, and this date is a *substantially later* one than the date of acceptance (e. g. in case of summer-season articles purchased in winter). As a matter of fact, there already exists a tendency in business practice to pay regard to this point of view.

(2) As we have mentioned, termination of examination must not be construed as the starting date of claim assertion, all the less since we do not consider examination to be the consumer's obligation in the legal sense whose breach would entail loss of rights.

On the basis of what we have said, our conclusion is unambigous: *acceptance must be stated as the starting date of claim assertion; the circumstances described in paragraph (1) under ad d) and ad e) must be utilized supplementary rules.*

(3) Adoption of the mentioned solution would in effect give a logical sense to our standpoint concerning the other principal question which is connected with this theme, namely how *the distinction between apparent and latent defects* should be handled in future regulation. It ought to be emphasized that this question may be raised only from the point of view *whether such distinction is necessary in respect of the starting date of claim assertion.* Namely it is not open to any dispute in the technical sense whether the things delivered have apparent defects in some cases, and latent ones in others, and this difference may be of importance — in other instances — as concerns legal judgment (so-called evident defects).

Yet as concerns *the starting date of claim assertion, there is usually no need for this distinction.* It has become obsolete first of all because a) examination by the consumer is not regarded as a legal obligation; b) the date *when* the defect manifests itself (at once, or only after a certain length of use) is of no delimiting importance as concerns claim assertion, at least not within the general period of warranty. Assertion of claims must be ensured unconditionally up to a definite date (warranty period), irrespective of when the defect has become manifest, when it has become known, ascertainable, etc. within the statutory period. *It is only such a solution that can serve the highly desirable simplification of regulation,* and, thereby, the protection of consumer interests.

B) *Questions of legislation connected with the period and manner of claim assertion*

Ba. *The period fixed for asserting claims*

Fixing the concrete duration of warranty period is basically not a question of principle and dogmatics; it is much rather a practical question usually decided on the basis of considerations of legal policy and expediency. The present period — which may be termed as general — for asserting claims is 6 months. This may be prolonged practically to a year in certain cases without, however, the division according to 6-month terms being given up by the Civil Code.

We are of the opinion that also *future regulation should fix a 6-month period as principal rule for asserting claims* under warranty. That as a result of the constructional changes suggested here (mainly to establish prescription instead of loss of right) the effects and importance of the 6-month period differ from the effects of the period contained in the Civil Code, is another matter.

The most important considerations supporting maintenance of the 6-month period are these:

a) A generally accepted requirement — asserted in legal regulation — is that the period during which warranty claims are to be asserted should be relatively short; and, especially, that it should be substantially shorter than the general period of prescription. This is justified by a stricter responsibility, by problems of proving, etc.

b) The warranty period of 6 months is commonly known, familiar, and is increasingly realized by wide circles of citizens — if such a statement may come up at all in this field.

c) The attempts at consolidation desirable in regulation under civil law take a stand for maintaining the 6-month period; also the statutory provisions on contracts of product-supply use this period (apart from the case of unfitness).

d) Protection of consumer interests does not require by all means a general lengthening of the period of warranty liability. It rather requires the the consumer should be given the possibility of asserting his claim even after 6 months if this is really necessary and justified. (This requirement is best served by the prescription construction.)

Bb. *The nature of the period of claim assertion*

If, as we have said, the length of warranty periods is decided first of all by practical considerations, this is certainly not the case with determining *the nature* of such periods. The principal question is this: should expiry of the fixed period *entail loss of rights, or should it be a so-called period of prescription?* There is no need here for proving the highly important practical effects of this difference in nature; the fact is that this is again a sensitive point in the regulation of the Civil Code which has given rise to extremely hot debates, and was attacked fiercely from the angle of practice. In this connection it has to be mentioned again that the aforesaid principled decision of the Supreme Court has greatly limited the actual applicability of the pertinent Civil Code rules, has even rendered them effectless by transforming in certain cases the loos-of-right periods essentially into periods of prescription, and not even in a covert manner.

Numerous arguments are known for and against the loss-of-right and the prescription constructions. *Of these we shall deal only with the most fundamental ones;* they are of such a weight in themselves that they will — in our opinion — *decide the question of choice.*

It is a known fact that the chief advantage of periods entailing loss of rights is strict determination and that, as a result, they prevent any considerable protraction of legal disputes; after expiration of a certain time, they not only result in a non-enforceability of claims, but also in the extinguishment of title. Such periods are cogent in principle, hence they cannot be modified through agreement. (The fact is, however, that this characteristic of the loss of rights is not taken into account consistently even by the Civil Code, and could not be taken into account especially by judicial practice.)

At the same time, the greatest disadvantage of such periods is what we have presented as an advantage in the foregoing. Owing to their definiteness and rigour, they have proved in practice extremely rigid and cumbersome; in several cases, they have not made possible for the obligee to assert his claim when this sould have been justified according to the consideration of the judge, and — we may add — according to legal public opinion as well, especially because there was nothing that could have been imputed to the obligee. It admits of no doubt that the loss of rights, too, serves social-economic interests formally and in a definite sense; it ensures forcefully that, after a certain time, it should not be possible to raise claims against producers, makers, etc. and to impair their economic activities in this way.

But, as concerns consumer protection, we can agree with these considerations only to the extent that it is a case of *unfounded* claims. The modern system of quality protection *involves necessarily* the possibility of raising a claim — even if at a later date — if this is *justified and well founded.* And this for the simple reason that the obligor has delivered a thing of inadequate quality, and that the obligee was able to perceive or feel the resulting effects only after a longer time through no fault of his own. This expectation is expressed by a passage in the decision of the Economic Committee according to which "it shall be ensured that the customer, the buyer, be able, up to a reasonable ultimate time limit, to enforce his rights resulting from faulty performance even after the general period of warranty in case of such a defect

as was not ascertainable, owing to its nature, whithin the normal period of warranty."

Thus both the quality potection system and consumer protection argue against the periods of loss of rights. Judicial practice mentioned before resulted actually from the realization of this situation.

The advantage of the prescription system over the loss of rights actually follows from what we have said: this system is elastic, gives larger room for movement to the courts in problematical cases, and serves consumer interests much better.

However, just as the advantages inherent in the loss of rights can become their greatest disadvantage in given cases, this is valid *conversely* also for the prescription construction. Compared to the advantages we have outlined, the very disadvantage of prescription may be the fact that it can become too "elastic"; it may offer opportunity to the judge to apply the rules of warranty even in unjustified cases: the consumer may enjoy legal protection in cases where this is no longer justified economically and this may afflict the producer, the maker badly.

Dangers of other nature. which accompany these two solutions, are of different import. Loss of rights pays regard to the interests of the producer, of the obligor, *institutionally* and permits no exception to the advantage of the consumer; one legal expression of this is, e. g., the extinguishment of the substantive right. On the other hand, elasticity that accompanies prescription is not aimed at any one-sided protection of the consumer beyond reasonable limits. The danger that consumers may try to exploit this elasticity for abuses can be eliminated, or restricted to a minimum, through legal regulation and concordant judicial practice, and the guiding activity of the Supreme Court first of all.

Hence we suggest that the general time limit for asserting claims resulting from warranty should be fixed as a short period (6 months) to be counted from acceptance. This period should be established as prescription.

Bf. *The time limit fixed for asserting claims under warranty, and the degree of the defect*

It is a requirement in law making often voiced that statutory regulation should take into account the degree of the defect, its seriousness, *in determining the time limit for asserting claims.* The frequently heard argument of those holding this view is that a more serious defect requires a more serious sanction, and that this must be manifest in a longer term for claim assertion. This idea is expressed positively in the statutory provision on contracts of product-supply: it contains a 3-year period for claim assertion in cases of unfitness, and only a period of 6 months in other cases.

The difference between unfitness and property-deficient deliveries which do not result in unfitness appears also in the Civil Code; it is, however, *not applied in respect of time limits,* only in respect of the claims to be asserted. A distinction of defects *for this purpose* is necessary as before, as we have tried to show. What follows from this in turn is this: *we do not accept that such distinction* should be given importance for shaping *the warranty period.*

The first argument for abandoning this distinction is that the transition between the poles of unfit and property-deficient deliveries is rather manifold,

that judgment depends on objective and subjective factors alike, and that this complexity only causes difficulties in the practical application of the law.

Reference is often made in the second place to circumstance that it makes no difference whether the thing delivered is unfit or just property-deficient, because the obligor has not met his obligation to deliver a faultless thing in either case, and has committed breach of contract in both cases. And to sanction property deficiency less seriously than unfitness, is not justified by the interests of property protection from the standpoint of legal policy either.

The mentioned argumentation seems us hardly convincing. Should the establishing of unfitness and/or deficiency cause inappropriate difficulties for legal practice what has been one of the arguments dealt with above: this distinction must be dismissed from the point of view of choice between claims under warranty, too; however, such distinction is already contained in the Civil Code without having raised substantial difficulties in its application in practice.

The weak point of the argument mentioned second is that its consistend assertion would actually exclude differentiation *from any point of view* within the warranty system. This would eventually lead to a situation where only the objective materialization of breach of contract would be seen one-sidedly in every faulty performance, and an *entirely identically* and mechanically working system of sanctions would be constructed by disregarding all considerations of legal policy, economics, etc. Another weak point of the above argument is that it poses the question like this: why should the property-deficient by sanctioned less seriously than the unfit? in our view, the case is the opposite: the property-deficient is sanctioned according to general rules, and the unfit is judged more strictly by a possible prolongation of the claim assertion period.

We feel that the question should be decided while making use of the ideas analysed, yet *from another approach* in a certain sense. That all forms of faulty performance must be sanctioned is an incontestable requirement which needs no detailed explanation. But from the angle of legal policy, the requirement of sanctioning *alike* is not identical with sanctioning in the *same manner*.

Sanctioning „not in the same manner" can be realized in two ways, as follows from what has been said:

a) with a differentiated fixing of the period of answerability (claim assertion),

b) by weighting the warranty claims.

As concerns consumer interests, b) is obviously more advantageous. Namely this would actually mean for the buyers, etc. that if an „unfit" thing is delivered to them (and, consequently, repair in the physical sense is out of the question), they have the unconditional choice of the two strongest and most efficient warranty claims, i. e. substitution or withdrawal. At the side of the obligor, this is a serious sanction which is a powerful "negative stimulation", has a restraining effect.

If, however, we accept this (our earlier suggestion is aimed at this; it would restrict the right of withdrawal only in case of *minor defects* of products *below the value limit*, i. e. *ensures this right* in case of unfitness, even in case of serious defect not amounting to unfitness) then it is *really unjustified to sanction unfitness with a „surplus" by extending the period of claim assertion.* Grave breach of contract entails vindication of the most weighty claims of warranty; consequently *it would be unfounded* in principle *to make possible*

the assertion of the most serious sanctions within a substantially longer period at the same time.

Be it said incidentally by way of conclusion that realistic considerations do not require a special, long period in respect of unfitness; the complete unfitness of the thing delivered usually becomes manifest already in the initial period of use.

Bg. *Assertion period of warranty claims according to the types of delivery*

Various provisions of law sometimes bring into connection the period of assertion with *the types of delivery*, in other cases *with the types of contract.* The possibility of grouping on *the latter* basis is not worth *of being considered seriously;* the subject matters of delivery contained in identical types of contract show such a great variety that differentiation on this basis is practically altogether excluded.

Grouping based on the diverseness of the types of delivery (actually of the kinds of product forming the subject matter of delivery) is possible in theory. The distinction between goods for single use and durable goods seems best suited for this purpose; the difference according to the nature of these goods is, *in the last analysis, the economic basis of the differences between warranty and guaranty.*

Nevertheless, *based on practical considerations,* we do not think that differentiation *of general validity should be justified on the basis of the types of delivery.* It cannot be disregarded that the transitional variations coming up here would cause really serious problems, first of all on the level of law-making, and then even worse in legal practice. Reference in the wording of statutes to goods of single use and durable goods would, in itself, evidently be insufficient for a firm legal practice. The situation is different in the sphere of regulation relating to guaranty where the appendix to the statutory provision contains *an itemized enumeration* of the durable goods (not all of them, to be sure) to which the rules of guaranty apply. Yet such an itemization is inconceivable on the level of an act or in connection with it.

Hence the actually existing difference between types of delivery is not suited for serving as a basis of a *generally valid* differentiation of the periods of claim assertion. On the other hand, it raises the idea of *making certain distinctions* as *to some clearly circumscribed types of product.* Realities of life call for such a distinction in certain cases, they are known to a lesser or greater extent even now, and invove no special difficulties of regulation. Such cases are:

a) Owing to their nature, foodstuffs and the so-called *perishable* goods are judged specially; the "warranty system" relating to these shows considerable departures from general regulation in respect of time limits and warranty rights.

b) Although this is not within the scope of the basic model we have chosen, we mention that a longer period of claim assertion relating to *buildings* (real property) is a provision asserted fairly generally in statutory regulation.

c) For the sake of completeness we should like to mention that, in our opinion, the warranty system connected with the sale of animals, and showing certain departures from general rules, should be maintained.

Bh. *Effect of statutorily (officially) determined quality requirements on the period of claim assertion*

A problem often discussed in legal literature, and kept current also by legal practice, is whether the quality specifications determined compulsorily by statutory provisions (or by authorities in given cases) are of importance, or have any effect in respect of the periods of warranty claim assertion.

As concerns the theme we are discussing, this question may be formulated like this: *whether the time limits specified in standards for durability resp. keeping* as (one) quality requirement *have any influence on the claim assertion period available to the consumer.*

The quoted decision of the Economic Committee contains the following in this connection: „For the period of durability determined compulsorily in standards, a statutory obligation of warranty shall come into existence." From all this it follows, both for the assertion of the quality protection system and for the protection of consumer interests that if the period of durability specified in a standard *exceeds* the general time limit for asserting property warranty claims, then this time limit is automatically *extended* up to the limit (but not longer) of durability or keeping determined in the pertinent standard.

It should be emphasized, however, that such a claim is well-founded only if it is *expressly based on the circumstance* that the product does not meet the durability or keeping specifications determined in the standard, i. e. that the defect is in causal nexus with this circumstance. As concerns defects ascribable to other causes, the general period of claim assertion will apply in the future, too, as a matter of course. *We do not suggest,* however, to declare *the reverse of this rule,* namely for the case when the period of keeping specified in a standard is shorter than the period of prescription (6 months according to our suggestion). The edge of this question is greatly blunted by the circumstance that standard specifications of keeping, consumability, etc. shorter than 6 months relate for the most part to types of product (food, etc.) which are governed by special rules anyway.

Bi. *Correlation of the claim assertion period with the price of the product*

(1) Doubtless, one of the most problematical — or thrilling, of you like it — questions is to decide whether it is justified to bring into connection the warranty claims and the periods for their assertion with the price of the product. (We have discussed this question in other connexions several times.)

It is a demand of many practical (legal and economic) *experts* to assert the aforesaid principle in legal regulation in the future. They refer in this connection to so-called consumer abuses whose sphere could be restricted if only a short period of claim assertion were available in respect of articles below a certain value limit of price. It is often said, too, that even public opinion shows understanding for a regulation where smaller rights are due to the buyer in case of a cheap product than in case of an expensive one.

Needless to say, these arguments have their „wrong side". True, it is a fact that protection against consumer abuses is necessary also through the means of legal regulation; it must be asked, however, whether the proportion of such abuses is great enough to justify a fundamental effect on the entire

regulation system. The proportion of consumer complaints is low in itself, and the abuse of rights amounts to a small fraction of these. And insistence on the argument that smaller rights should be due to the buyer in case of cheaper products is aimed much more at a narrowing down of the sphere of warranty claims than at restricting the periods of assertion.

It must be admitted without reservation that here we are faced with a principle which is highly problematical for economic considerations and also in that it presents a civilistic legal attitude that professes *the equivalence of performance and counter-performance.* Actually, the standpoint expressed in the background of this regards also warranty as a merchandise and correlates the degree of warranty with the value of the same.

This poblem cannot be decided simply by saying that faultlessness may be expected from a cheaper product, too, that even a cheaper product must be suited for meeting its economic purpose, i. e. proper use. Namely what can be set against this fortwith is that the ordinary consumer, too, is aware of the fact that the degree and duration of the usability of a cheaper product is smaller than that of an expensive product. A lower price level obviously means a lower level of serviceableness, meets needs on a lower level. The principal question here is whether *a shorter period of usability* is linked with a *lower level of usability.* It is here that, in our opinion, we find the core of the question and the starting-point of the solution as well. What must be accepted here is that the *level of serviceableness is lower as a result of the lower price; but the period of use to be expected reasonably is not necessarily shorter in case of such a lower level of serviceableness.* Consequently we have to take our start from the notion *that the price of the product may not in itself and directly result in any automatic modification of the period (of 6 months) laid down with general validity for asserting claims under warranty;* assertion of the contractual interest must be ensured also in such cases.

Yet as concerns the principle discussed now, we hold it to be utilizable *from another point of view* in the following manner:

a) If *compulsory quality specifications* for a given product fix a period shorter than 6 months in respect of durability, keeping, serviceableness, etc., shortening of the period for claim assertion may be employed *as the first condition.*

b) A further connected point of view is that the price of the product should be below the price fixed in special provisions of law, or, more exactly should not touch it. Hence application of this principle depends on *two conditions,* which are — most emphatically — *in a relationship of conjunction.* The simultaneous prevalance of these two conditions must be insisted upon because:

a) compulsory provisions connected merely with the quality requirement are not enough for shortening the period of claim assertion as these usually have only an indirect effect on the price (the price of articles intended for short use may be high, too, e. g. in case of fancy-articles),

b) the price of the article may not be decisive in itself either, because usability of 6 months at least may usually be expected even from products of lower price.

We are aware of the fact that practical assertion of this principle *in this sphere* (i. e. the period of claim assertion) will be of a relatively negligible volume. Namely quality specifications require durability, etc. shorter than 6

months only exceptionally. And where this is the practice (food, highly perishable products), special rules are governing. But the possibility of a practical realization of this principle had to be left open nevertheless; and *if it is realized in a limited sphere, this must only regarded as favourable for the protection of consumer interests.*

Summing up: if a compulsory specification relating to the usability of a product lays down a period shorter than 6 months for such usability, and if the consumer price does not exceed the limit fixed by provision of law, then the period fixed for asserting warranty claims should be according to a special rule in the pertinent provision of law; in lack of such special rule, it should be according to the compulsory specification mentioned above.

Presenting the simultaneous application of these dual conditions would practically exclude the possibility of any misuse of this rule by the seller. On the other hand, the consumers' interests would be served only semmingly if reduction of the period of claim assertion were linked *exclusively* with a lower level of the consumer price. It might be that this would result a lowering in prices in respect of certain products; but a rather serious countereffect for the consumer would be the resulting short period of liability to the advantage of the seller, let alone the fact that the new price fixed through such price reduction would usually hardly be lower than the value limit fixed for the given case.

Finally,, we regard it as self-evident that no attention need be paid to very cheap mass products in elaborating the principles of legal regulation. In principle, a certain answerability for quality may be expected also for these; but this question is negligible in practice.

C. *Notification on the warranty claim; filing of action*

The present legal regulation connected with the obligation *to give notification* on the presence of a defect is *in the focus of the third main set of problems* involved in the assertion of warranty claims. Valid Hungarian law demands in every case that *notification* by the obligee on the presence of a defect towards the obligor (possibly his agent) must *precede enforcement* of claims through action. As known, *the Civil Code employs the so-called two-phase solution:* it lays down separate time limits for notification, and for the enforcement of claims through action in case of unsuccessful notification. Regulations dealing with contracts of product-supply require preliminary notification, too, but contain no separate phases for notifications and filing of action, i. e. follow the so-called single-phase system.

The arguments *for the obligation to give notification* are usually based on considerations to avoid actions, to employ them economically. Since, as a result of notification, the dispute of the parties can be, and usually is, settled out of court, the obligee must try to settle the dispute in this way — this is what the defenders of the notification obligation say. This is a remarkable point of view, but is *not void of a certain one-sidedness.* It must be admitted, too, that among the various comments connected with the rules on faulty performance in the Civil Code, the obligation to give notification is usually not a matter of criticism. What *is contested* in fact is not the expediency of *an obligation to notificate,* but rather more whether it is proper to set a time limit for giving notification under the sanction of losing the warranty right (this they consider

as a breach of principle if the prescription period would be adopted). It is contested, too, whether it is expedient to determine subsequent separate time limits for notification and for filing the action. As concerns pertinent suggestions, it is felt that the majority standpoint is for the single-time-limit system known in the sphere of contracts of product-supply. Given these circumstances, it has actually not been suggested that the obligation of notification should be removed from the system of property warranty. *Notification* is, *in general,* regarded as *an obligation to be continued,* and debates, if any, are centered on the nature of notification and the time limit to be fixed for it.

However, according to our conviction, it is justified to ask, for the reasons to be discussed, whether it is necessary also in the future to maintain notification *as a legal obligation,* i. e. to continue to assert the construction in which notification is a necessary precondition of action at law. Namely any construction which qualifies notification as a legal obligation invests it — intentionally or not — actually with the force of forfeiture because it regards it as the precondition of filing an action. In other words: *if there exists the obligation* to give notification, then an action brought immedaitely without having given notification entails failure of action from the outset, because the court cannot but dismiss the action without hearing the case on its merits since the party concerned failed to give notification. Starting from this basis, *we are of the opinion that to interpret notification as a legal obligation is obsolete;* regulation insisting on notification causes unnecessary practical difficulties which are contestable dogmatically; and such a regulation makes no sense especially in view of the construction which does not qualify examination as a legal obligation *either.*

The most substantial arguments for our standpoint are these:

a) The situation is which failure of the consumer (buyer) to give notification which in given cases may be a neglect of administrative nature on his part renders the assertion of his claim at court hopeless from the outset, is a solution which gives rise to misgivings beyond doubt. And making notification compulsory entails such an effect almost inevitably.

b) However desirable it be to influence the parties concerned through legal regulation to try to settle their disputes out of court, this may not be the decisive point of view. This argument could be accepted as decisive for our case only if both substantive and procedural law would require *an attempt at preliminary settlement out of court in every legal dispute.* We do know that this is not so; hence it is clearly unjustified to insist on such a rigorous obligation in the sphere of warranty which is of great concern to the citizens.

c) Although in other connexions, it is an often voiced view that the rules connected with notification, the special time limits relating to it, the rules relating to the manner and form of notification, involve an unnecessary burdening of the legal knowledge of citizens. Making notification compulsory inevitably requires inclusion of regulative details in the statutes; therefore, and in this sense, *abandonment of notification would absolutely act in the direction of simplification.*

By taking into account what we have presented, we deem it expedient to shape a legal construction in which notification is *not qualified as an obligation in the legal sense, and, consequently, is not to be sanctioned specially.* But we would abandon reality, and would close our eyes to obvious facts, if we disregarded, or were not expressly aware of, the circumstance that *despite*

removal of notification from the sphere of obligations, it would remain a natural manifestation on the part of the obligee in a considerable number of cases, or probably in their majority. It should be noted in parentheses that this is the very argument often heard for maintaining notification; but, in our view, this equally speaks for abandoning the same; if notification continues to be general practice, there is certainly no need for formulating it *as an obligation.* Our suggestion for abandoning the obligation to give notification means in no way that regulation *should not take into account cases* where such a notification is given by the buyer. But it means a difference of attitude whether we regard notification as an obligation and sanction the failure to give it (and acutally with the loss of rights according to what we have said), or *reward the fact of notification with certain advantages.* These advantages are:

a) Notification given within the general period of warranty should be vested with an effect that interrupts prescription.

b) In harmony with the general principles of procedural law, the idea may be raised that if the obligee — trying no settlement out of court — has given cause to action at law unnecessarily, he must bear certain disadvantageous consequences of the rules of procedure (e. g. costs).

It follows from what has been said that *in the sphere of warranty* a number of further rules on notification become matterless, at least as concerns regulation on the level of act. *What becomes matterless first of all is the question of the singleand two-phase system,* as well as several suggestions for the general introduction of the gross time limit.

It is likewise unnecessary to concern ourselves on the level of act with formal questions connected with notification (verbal or written), and with questions of content (e. g. whether the cause eliciting the defect must be indicated in addition to the defect proper, etc.). If the solution suggested by us is adopted, it must be decided really on the level of interpretation by legal practice which the formal and content criteria of notification are in order that notification could be ascribed the force to interrupt prescription (see the pertinent maxims in Civil Law Principled Decision XXXI).

Based on the foregoing, the principal maxims of the construction of the claim assertion system outlined by us are the following:

1. The starting date for the period of claim assertion is acceptance.

2. The general period of claim assertion is 6 months.

3. This time limit has the nature of prescription.

4. Suspension is possible for various reasons. The most important case is if no claim assertion took place until the expiry of 6 months because the defect manifested itself for the obligee later than 6 months. The burden of proof is on the obligee in that he must prove that assertion of the claim has not taken place earlier for a reason that is really excusable. The period of prescription is prolonged by 3 months counted from the cessation of the excucable reason.

5. Notification given within the general period of warranty interrupts prescription, notification given later than 6 months indicates; in essence, the end of the situation of suspension, or the cessation of the circumstance resulting therein.

6. Suspension and interruption may come about for other reasons as well.

7. Within the period of warranty, assertion of the claim may take place even by filing directly action; notification is no necessary precondition thereof.

8. Relevant steps for claim assertion may be taken at any time within the 6 months. This means that no special time limits exist within this period, not even in cases where it is obvious that a relatively considerable time has elapsed between the manifestation of the defect and the assertion of the claim.

9. For reasons already discussed — if only for a definite exclusion of marginal abuses — *it is necessary to determine objective time limits for the assertion of warranty claims. This time may be 18 months, possibly 2 years.* Following this, *claims under warranty may not be raised any more, whatever the circumstances be.*