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PRIVATE LAW

Abstract:

The National Report brings a general overview of legislation on private law in the Czech Republic, notably with respect to the Civil Code, Commercial Code, Labour Code, Family Act, and Private International Law Act. Attention has been paid not only to the legal history and current situation, but also to the upcoming complete re-codification of the private law, in particular to the new Civil Code.

Keywords:

Private Law; Czech Republic; Codification; Re-codification of private law; International Academy of Comparative Law

Brief Introduction

Czech law, that is, the law applicable within today's Czech Republic, once belonged to the so-called Austrian family of continental law.[1]) Austrian law, primarily the General Civil Code of 1811 (ABGB) and the Commercial Code of 1863, was incorporated into the Czechoslovak legal order after the establishment of independent Czechoslovakia in 1918; as such, it applied in its essence until 1950 when the new Civil Code No. 141/1950 Sb. (Collection of Laws) came into effect. That Civil Code was soon replaced by the Civil Code No. 40/1964 Sb. as a result of an extensive socialist codification pursued in the mid-sixties; the latter Code is still in effect. Although the Civil Code of 1964 has been amended on many occasions, it has been significantly stigmatised because of its socialist origin; today's text is lacking any concept whatsoever and appears to be completely unsatisfactory.

Apparently, the whole field of private law, including those areas omitted by the existing Civil Code but which logically relate to it - in particular family law and commercial law, is in rather urgent need of new codification which has been

[1]) KNAPP, V. *Velké právní systémy* (Great Legal Systems), Prague: C.H.th Beck 1996, p. 118. Sometimes the Austrian and Swiss families of law are even conceived to be part of the German legal family, see, for example, KOCH, H., MAGNUS, U., WINKLER von MOHRENFELS, P., *Internationales Privatrecht und Rechtsvergleichung*, Munich: C.H. Beck 1989, p. 196.

discussed in the Czech Republic since the early nineties.[2]) Currently, the drafts of complete re-codification of Czech private law are under discussion in the Czech Parliament. As the sources for the new legislation are rather mixed and sometimes look back in the past instead of looking towards the future, the prospect of the whole re-codification is rather unclear for the moment. In any case, however, we may arrive to the conclusion that the drafts of the new Czech private law shall contribute to the formation of new European Private Law, in particular if we observe the "respect for … the different legal systems and traditions", as declared by the Treaty on the Functioning of the European Union.[3])

1. A General Overview of Legislation on Private Law in the Czech Republic

1.1 A general overview of private law in the Czech Republic

In the Czech Republic, the law is divided into two main branches in the same way as in other countries belonging to the continental legal system. These branches are private law and public law. However, this division is not absolute and should not be overemphasized particularly for two reasons. Firstly, there is an influence of *acquis* of the European Union law on legislation in the Czech Republic, which results in that elements and methods of private and public law are influencing each other more than in the past.[4]) This phenomenon is more general, it can be traced also in other countries of Europe. The second reason is specific for the Czech Republic as a post-communist country. Legal theory based on Marxism-Leninism denied the distinction between these two main branches of law. Although that theory was rejected after political, social and economic changes of November 1989, relics of that era and theory can be traced till today.

Describing private law legislation in the Czech Republic, it is necessary to distinguish legislation from the perspective of its legal force:

a) Constitutional acts, which are the source of law of the highest level of legal force, namely the Constitution of the Czech Republic, No. 1/1993 Sb., as

[2]) For details see, in English, PAUKNEROVÁ, M., *Codification of Czech Private Law in the Middle and on the Outskirts of Europe*, Liber Amicorum Valentinas Mikelenas, Justitia, Vilnius 2008 (2009), p. 239.

[3]) See Art. 67(1) of the Treaty on the Functioning of the European Union.

[4]) Compare the decision of the Constitutional Court of the Czech Republic, published under No. 78/2001 Sb.: "*Even though the legal system of the Czech Republic is based on the dualism of public and private law, this division of laws in two large areas, proceeding from classical Roman law, cannot be treated as a dogma, but with taking account of modern tendencies of development in laws and also the laws of the European Communities. Private and public law are not separated by "the Great Wall of China" in the presence. The elements of private and public law are blending more often and in a narrower way, they combine together mutually and intensively.*"

amended (C) and the Charter of Fundamental Rights and Freedoms, No. 2/1993 Sb., as amended (Ch).

They contain provisions which have fundamental significance for the branch of private law. This is the reason why C and Ch are taken as a source of private law.

b) Acts, which are sometimes referred to as "ordinary acts".[5]) Codes are also comprised in this category in the Czech Republic. The reason is that the legal force of a Code is at the same level as that of other acts. The difference between a Code and other acts does not subsist in its legal force, but in the scope of regulation. Codes regulate comprehensive and complex parts of the legal system (or its particular sub-systems),[6]) whereas other acts focus on particular issues.[7])

The core of private law legislation is as follows: The Civil Code (CC) is described in details below; in addition, the Commercial Code (ComC), and the Labour Code (LC), both briefly described below. The area of family law is covered by the Family Act, No. 94/1963 Sb. (FA).

The area of intellectual property rights is covered by several acts. The Copyright Act, No. 121/2000 Sb., as amended, implements the relevant legislation of the European Union and regulates the right of an author to his or her work and rights related to copyright.[8]) Industrial property rights as the other part of IP are governed by several acts.[9])

The rules of private international law are included in the Act Concerning Private International Law and the Rules of Procedure Relating Thereto (Private International Law Act).

There are other laws regulating particular issues, which are taken as a source of private law. The following laws should be mentioned in this context: the Act on Ownership of Flats, No. 72/1994 Sb., as amended; the Act on Lease and Sub-lease of Non-Residential Premises, No. 116/1990 Sb., as amended; the Act on Liability for Damage Caused by a Defective Product, No. 59/1998 Sb., as amended, and the Act on Bills of Exchange, Promissory Notes and Cheques (ABCh).

c) Legislation of legal force lower than acts is adopted within limits set out by relevant acts. The purpose of this legislation is only to implement and exe-

[5]) This concept is not used in legislation, it is used only in theory and sometimes also in the reasoning of decisions of the Constitutional Court of the Czech Republic. The purpose of this concept is to underline the difference between constitutional acts and acts with a lower level of legal force.

[6]) See ŠVESTKA, J. – DVOŘÁK, J., *Občanské právo hmotné 1* [Substantive Civil Law 1]. 5th ed. Prague: Wolters Kluwer ČR, a.s., 2009, p. 98.

[7]) E. g. the Consumers protection Act, No. 634/1992 Sb., as amended (CPA).

[8]) E. g. the rights of a performer to his artistic performance, the right of a producer of an audiovisual fixation to his fixation, etc.

[9]) No. 527/1990 Sb., 207/2000 Sb., 478/1992 Sb., 529/1991 Sb., 408/2000 Sb. and 441/2003 Sb.

cute acts, not to enact and regulate rights and duties of persons. It is recognized that the Government of the Czech Republic may adopt government decrees based upon acts adopted and does not need express authorization stated in the text of an act. Ministries and other state and local authorities are allowed to adopt implementing legislation only when expressly authorized to do so in particular acts.

d) In addition, legal rules are included in international treaties; should there be a conflict between an international treaty and a concrete act, the international treaty takes preference.[10]) International treaties are important in private international law, commercial law and family law, while their role is rather limited in the sphere of public law.[11])

1.2 The Civil Code, the Commercial Code, the Labour Code and the Family Act

As mentioned above, the area of private law is covered by more than one code. These are: the Civil Code (CC), the Commercial Code (ComC) and the Labour Code (LC). The area of family law is governed by the Family Act (FA); this act is not labelled as a code, despite the fact that the regulation is quite complex.

The Civil Code, adopted in 1964, is still in force and effect. It was amended many times, particularly after 1989. CC is composed of nine parts:

1. Part One: General Provisions. This part encompasses provisions with the highest level of universality.

First, the definition of "civil law relationship" is provided. It includes every relationship, which is of proprietary nature. More precisely, CC regulates *"property relationships between natural persons and legal entities, property relationships between these persons and the state, as well as relationships arising from the protection of personal rights, unless these relationships are regulated by other acts."*[12])

Secondly, there are provisions for parties to civil law relationships, i.e. provisions for natural persons (their legal capacity;[13]) competence to perform legal acts[14]) and legal entities. In general, CC is based on the fiction theory of legal entities, which means that legal entities (bodies with legal capacity) are only

[10]) Art. No. 10 of the Constitution of the Czech Republic.

[11]) See ŠVESTKA, J. – DVOŘÁK, J., *Občanské právo hmotné 1* [Substantive Civil Law 1]. 5th ed. Prague: Wolters Kluwer ČR, a.s., 2009, p. 97.

[12]) Sec. 1 par. 2 CC.

[13]) The capacity to be a holder of rights and duties.

[14]) The competence to cause legal consequences (acquire rights, assume duties) by one´s own behaviour.

entities declared as legal entities by the law.[15]) Sec. 18 (2) of CC considers as legal entities: associations of individuals and/or legal entities; associations accumulating property for a given purpose; territorial self-governing units; and other entities specified by the law.

The nature of the state has been quite a controversial issue and subject to intense debates in Czech jurisprudence.[16])

Thirdly, other general issues are enacted: legal acts, representation, provisions protecting consumers,[17]) statutory limitation and definitions of some general concepts (household, close persons, division of things – movable and immovable, computation of time – the beginning and end of time-limits).

2. Part Two: Rights Related to Things (Rights in Rem). This part starts with provisions for ownership rights and possession, followed by provisions for co-ownership and community property of spouses.[18]) It contains provisions for rights to another person's thing (*iura in re aliena*). This includes easements (restriction of the owner of real estate in favour of another person), lien, sublien and the right of retention.

3. Part Three: Repealed.

4. Part Four: Repealed.

5. Part Five: Repealed.

6. Part Six: Liability for damage and unjust enrichment. General liability and individual cases of liability for damage are distinguished. In general, each is liable for damage caused by his or her culpable unlawful conduct (Sec. 420 CC). This general rule is supplemented by other provisions dealing with special cases of liability for damage, such as liability for damage caused by those incapable of recognizing the consequences of their behaviour, liability for damage caused by the operation of means of transport, etc.

7. Part Seven: Inheritance law. This part deals with general succession of

[15]) For more details se e.g. FRINTA, O.: *Právnické osoby* [Legal entities]. Praha: Univerzita Karlova, Právnická fakulta, 2008 and FRINTA, O.: *Moderní trendy ve vývoji institutu právnické osoby* [Modern Trends in the Development of the Concept of Legal Entity], In: Pauknerová, M. – Tomášek, M.: Nové jevy v právu na počátku 21. století (New Phenomena in Law at the Beginning of the 21st Century). IV. Proměny soukromého práva. 1. vydání. Praha: UK Praha, Karolinum, 2009, pp. 163-176.

[16]) The controversy subsists in two opinions: Is the state a legal entity, or it is not, but it is necessary to consider it as a legal entity. For more details see e. g. ELIÁŠ, K., *Stát a občanský zákoník* [The State and the Civil Code], In: Právní rozhledy č. 3/2008, p. 81 and following.

[17]) Obvious influence of EU legislation. The chapter is entitled "Consumer Contracts". This means provisions, which will apply typically to seller-purchase contracts, contracts for work done, contracts for carriage, etc., where one party is a consumer and an entrepreneur is the other party.

[18]) There are crucial differences between the institution of co-ownership and community property of spouses. Firstly, the community property can arise only between spouses. Secondly, the co-owner is an owner of an "ideal" share in a thing (co-ownership), however, each spouse is an owner of the whole thing (there is no share), but is restricted with the same right of the second spouse.

rights and duties after the death of a person. As a basic rule, inheritance is acquired at the moment of the death of an heir's predecessor. The CC distinguishes only two legal titles to become an heir – a) last will, and b) the operation of law (intestate succession). The combination of both titles is possible.

8. Part Eight: The law of obligations. In this part, there are two large groups of provisions. In the first group, there are general provisions for obligations dealing with their formation,[19]) modification, securing and discharge. The second large group of provisions deals with individual types of contracts (purchase contract, donation contract, contract for work done, loan, borrowing, lease, mandate, bailment, lodging, on carriage, etc.).

9. Part Nine: Final, transitional, and repealing provisions.

As mentioned above, apart from CC, the Czech Republic has also the Commercial Code and the Labour Code. ComC regulates the legal position of entrepreneurs, commercial obligations, as well as some other relationships concerning business activities (Sec. 1(1) ComC). LC enacts primarily legal relationships arising from carrying out the dependent work by employees with respect to their employers (Sec. 1 LC). The area of family law is governed by FA.

There are interlinks among the codes. ComC stipulates in its Sec. 1(2), that if some issue cannot be solved under ComC, then CC shall be used.

The relationship between LC and CC was formerly based on the principle of delegation. This meant that CC would be used only in cases when expressly permitted in provisions of LC. This was strongly criticized as a really inadequate solution, which had not been used or tried in any other legal system, and could have triggered a lot of problems. It was the Constitutional Court of the Czech Republic, which repealed that provision (Sec. 4 LC).[20]) The consequence is that the relationship between LC and CC will be treated as is usual, i.e. CC will play a subsidiary role in all situations, when the provisions of LC are insufficient to solve an issue.

To sum it up, the law of the Czech Republic does not encompass separate bodies like "Contract Codes" or "Obligations Codes" or "Books" covering particular branches of private law. It is just CC (as a single act), which is taken as a general (universal) code for the whole of private law, despite the fact, that some parts of it (commercial law, family law, labour law, ownership of some flats) are not included in it and are enacted by separate codes and acts.

[19]) It should be mentioned that the concept of the "formation of obligations" is necessary to distinguish from the concept of the "formation of a contract". The latter means an offer and its acceptance, which together give rise to a contract, but this is only one of more ways how to form or create an obligation. As CC stipulates, obligations arise from legal acts, as well as from damage, unjust enrichment or from other facts stipulated by the law. It should be added that provisions for entering into a contract (offer, acceptance and their effects) are not enacted in this part of CC, but in Part One: General provisions – among provisions for legal acts.

[20]) The decision was published under No. 116/2008 Sb.

2. The Civil Code

2.1 Political, sociological and economic context of enactment of the Civil Code

Current CC was enacted in 1964. It is crucial to know that it happened under conditions, which were totally different from those applicable today in all mentioned aspects – political, sociological and economic. After WWII, Czechoslovakia found itself in the zone of influence of the Union of Soviet Socialist Republics (USSR). After 1948, Czechoslovakia changed its political orientation from liberal democracy to the Communist totalitarian ideology, based on the principles of Marxism-Leninism. The main goal of that ideology – creation of a totalitarian single party state,[21]) came true in Czechoslovakia after elections and coup d'état in 1948. This historical development naturally influenced the development of law and jurisprudence. The impact upon law culminated just in the 1960s. The most obvious demonstration of ideological orientation was the adopting of new Constitution (No. 100/1960 Sb.), which proclaimed, that the "*socialism in our country has vanquished*". That idea had an impact upon the area of private law in three respects.

The first aspect was a total change of conception of how to regulate the branch of private law.[22]) The intention was to deconstruct the complex system of private law, to repudiate the idea of central and universal Code, which should have been replaced by a number of specialized Codes and acts.[23])

Second aspect was to manipulate the parties (persons) to private law relationships with a large number of mandatory rules, without a possibility to use autonomy of their will in individual circumstances. This allowed for numerous irruptions of public law into private relationships.

Third aspect is the change of terminology. The original wording of CC in 1964 used concepts different from both national and European tradition.[24]) The

[21]) ADAMS, I., *Political Ideology Today*. Manchester: Manchester University Press, 1993, p. 201.

[22]) To be more precise - how to regulate the area of law, which was called private law before WWII.

[23]) Family law was taken out even from the Civil Code adopted in 1950 (which is significant for totalitarian ideologies, that they focus first on the most private area of life inside family).

[24]) Just a few examples for demonstration: the term „natural person" was replaced by the term „citizen", the term "legal entity" by the term "socialist organisation" and even the part of CC "Particular types of contracts" was replaced with the term "Services". The last change is not only the change of terminology, but the change of the whole concept. The citizen does not contact socialist organisation, s/he receives services in order to satisfy his/her material needs. For more details see e.g. DVOŘÁK, J.: *Nové jevy v oblasti občanského práva* [New Phenomena in the Branch of Private Law]. In: Tomášek, M. – Pauknerová, M. et al.: Nové jevy v právu na počátstku 21. století (New Phenomena in Law at the Beginning of the 21st Century). Praha: Univerzita Karlova, Karolinum, 2009, pp. 87-88.

purpose was to demonstrate that this Code had nothing in common with previous era.[25])

In fact, CC was reduced to be a consumers' protection Code.[26]) This was in accordance with the economic context of that era. The most significant characteristic for economy in that kind of states was the central planning for all branches of economy, there were no (private) undertakings. The regulation of ownership was strongly affected by this fact. Three kinds of ownership were distinguished: 1) socialist social ownership (persons were the state and cooperatives), 2) personal ownership (objects were things for personal use of citizens), and 3) private ownership, which was treated as a relic of previous era and was restricted. The most protected ownership was the first one.

To sum it up, CC in its original wording was adopted in a totally different political situation of the totalitarian state, which affected all aspects of life – social and economic.

In November 1989 the totalitarian regime collapsed. Czechoslovakia claimed allegiance to the democratic legacy of the Czechoslovak Republic founded in 1918, totalitarian ideology was rejected and replaced by ideas of liberal democracy. It was clear that the law as a whole needs a thorough depuration of totalitarian relics. This was also the case of CC, the amendment, abolishing the most apparent relics, was adopted in 1991 (Act No. 509/1991 Sb.).

2.2 Prior Civil Codes

There were two Civil Codes prior to that of 1964. In a chronological order, the first was the General Civil Code of Austria, No. 946/1811 Sb., enacted in 1811[27]) (CC-1811). The geographical region of so called "Czech Lands"[28]) was a part of the Austro-Hungarian Empire until 1918. In that year,[29]) Czechoslovakia declared its independence of the Austro-Hungarian Empire and started its independent existence as a sovereign state composed of two main nations – the Czechs and Slovaks.[30]) Despite the fact there was an effort of Czechs to become

[25]) ELIÁŠ, K. – ZUKLÍNOVÁ, M.: *Principy a východiska pro nový kodex soukromého práva* [Principles and Background of a New Code of Private Law]. Praha: Linde Praha, a. s., 2001, pp. 91-94.

[26]) KNAPPOVÁ, M. et al.: *Občanské právo hmotné* [Substantive Civil Law]. Díl prvý. Obecná část. 4th ed. Praha: ASPI, a. s., 2005, p. 70.

[27]) ABGB is an abbreviation of the German appellation „Allgemeines Bürgerliches Gesetzbuch" (ABGB); it can be translated as the "Universal Civil Code".

[28]) This includes Bohemia, Moravia and Czech Silesia. In the middle ages, those areas were more or less extensive when compared to the borders of the modern age Czechoslovakia.

[29]) On 28th of October 1918.

[30]) The newly born state was composed of historical regions of Bohemia, Moravia, Czech Silesia, Slovakia and the eastern part of Carpathian Ruthenia. This is the reason why that state was really multinational: apart from Czechs and Slovaks, there were other nations as well, namely Germans (the western part of the new state), Hungarians (the southern part of Slovakia), Ruthenians (the eastern part of the new state), Jews and Poles (Czech Silesia).

independent of the Empire as early as before WWI, the creation of a new state was the consequence of a total collapse of the Austro-Hungarian Empire after WWI and as such, it was not methodically planned and prepared long before it happened. The point is that, at the moment of the creation of a new state, there was no individual legal system prepared and available. As a solution, the legal system of the Austro-Hungarian Empire was resumed as a legal order of the newly created Czechoslovakia.[31]) From the point of private laws, it meant that in one state there were two systems of private law in force. In the Czech part of the Republic (Bohemia, Moravia and Czech Silesia), CC-1811 was in force even after 1918. In the Slovak part (Slovakia), private law was not codified.[32]) It was clear, that such situation should be changed. As Czechoslovakia stabilized, first amendments of CC-1811 were made and those amending Acts were in force also in the Slovak part of the Republic.

It was clear that such a method was only provisional. There were two opinions on the further development of private law: to enact a new Civil Code, or revise CC-1811. Eventually, the second opinion prevailed and a proposal of the revised Civil Code was submitted into the Parliament in 1937.[33]) However, the draft was not enacted because of the invasion of Nazi Germany and WWII.

As was mentioned before, after WWII Czechoslovakia changed its political orientation from liberal democracy to the Communist totalitarian ideology. After 1948, the Communist Party pronounced so called "Two-year Plan for Law" (1949-1950) intending to codify and adapt the legal system to the new political and economic situation and to approximate it to the legal system of the USSR. The goal was to simplify the legal system. This simplification had two ideological reasons: the first was that the society developing itself to socialism does not need a detailed legal system; the second premise was that simplified law will be more understandable for people.[34])

The first outcome of this "Two-year Plan" was the codification of family law, enacted as the Family Law Act, No. 265/1949 Sb. (FA-1949), followed by the Civil Code, No. 141/1950 Sb. (CC-1950), in force from 1st January 1951. Despite the idea of simplification and despite the inspiration by the law of the USSR (namely the conception of ownership), the system and terminology of that Civil Code was not so pulled away from traditional European Civil

[31]) This happened by so called "Reception Act": (No. 11/1918 Sb.), the resumption had, of course, some exceptions.

[32]) In that part of Czechoslovakia, the main source of private law were legal customs (which were written down in *Tripartitum opus iuris consuetudinarii inlycti Regni Hungariae partiumque adnexarium* by a land judge Štefan Verböci in 1514). In addition, there were also some acts regulating particular private law issues.

[33]) For more details see e.g. KRČMÁŘ, J., *Právo občanské. I. – výklady úvodní a část všeobecná* [Civil Law I – introductory explanations and general part].4rd ed. Praha: 1946, pp. 37-39.

[34]) KNAPP, V. et al.: *Občanské právo hmotné* [Substantive Civil Law]. Vol. I. 3rd ed. Praha: ASPI Publishing, s. r. o., 2002, pp. 60-61.

Codes, as was the later CC of 1964. That Civil Code was in force until 31st March 1964; 1st April 1964 was the date of force of the existing CC.

In order to make the explanation complete, it should be added that Czechoslovakia was turned into a federation of the Czech Socialist Republic and Slovak Socialist Republic in 1968-69. However, CC was in force in both parts of the newly created federation, the private law remaining uniform. Czechoslovakia as a federal state ended its existence on 31st December 1992. The Czech Republic and the Slovak Republic continued their existence as separate sovereign states from 1st January 1993.[35]) In both republics CC remained in force till today.

2.3 The Civil Code of the Czech Republic and legal families

It is advisable to start the answer by excluding families of laws, which have nothing in common with the Czech CC. In accordance with the classification created by René David these are Chinese law, Hindu law, Muslim law and the Anglo-Saxon subgroup of Western law.

It emerges from the presentation of CC-1811 that real roots of Czechoslovak jurisprudence and law are very strongly subject to the influence of Austrian private law. It means, in accordance with the above classification, that the Czech CC belongs to the Roman-Germanic subgroup of Western legal systems. The influence of the law of the USSR has also been mentioned. This influence was strong during the Communist era of the Czechoslovak state (1948-1989). As suggested earlier, although most apparent relics were abolished after 1989, some of them can be traced even today.[36]) Generally speaking, amendments made after 1989 have shifted CC back to the traditional Roman-Germanic subgroup of Western law, without interrupting links with Austrian private law.

2.4 Sources in the Civil Code of the Czech Republic

In the Czech Republic, CC does not recognize any parallel sources of law regulating the same matters as those governed by CC. There are no legal customs as a source of private law in the Czech Republic. However, CC often

[35]) It is often said that Czechoslovakia were "split" into two new states. As was demonstrated above, this is simplified and not precise because both the Czech and the Slovak Republics existed as states inside the Czechoslovak federation; it was only the federal state that ceased to exist on 31st December of 1992. Being it so, the Czech and the Slovak Republics commenced their existence as sovereign states on 1st January 1993.

[36]) E.g. the definition of ownership in Sec. 123 CC: "The owner may, within the statutory limits, to possess, use, enjoy its fruits and benefits and to handle with the object of his ownership." On a first sight, nothing seems to be Soviet or totalitarian in this provision. But this is not a traditional definition of ownership (when compared to ABGB or the French Code Civil). The relic is hidden in fact that the owner is not recognized as a master (*dominus*) allowed to exercise his dominion over his property; there is only enumeration of what he is allowed to do. Cf. the reasoning for the Proposal of a new Civil Code (http://obcanskyzakonik.justice.cz/cz/uvodni-stranka.html, retrieved 1st August 2011).

refers to "good morals" (proper morality).[37]) This is a set of ethical rules applied in the exercise of rights and performance of duties. But the system of good morals is not a source of law existing independently of CC. This system of ethical rules is only referred to by CC to be used in relevant situation anticipated by the law.[38])

2.5 Question of legislation in different Provinces or States

In the Czech Republic, there are no Provinces or States with different laws. There are no other legal bodies to partially or fully regulate the same matters as those governed by CC.

3. Relationship between the Civil Code, the National Constitution, Public and Private International Law

3.1 Relationship between the National Constitution and the Civil Code

According to the Constitution of the Czech Republic,[39]) the Czech Republic is a sovereign, unified, democratic, and law-abiding state, founded upon the principles of respect for the rights and freedoms of the individual and citizen (Article 1). The power of the state can be exercised only in cases and within the limits described by law, and by the means set out by the law (Article 3). Part of the constitutional order of the Czech Republic is the Charter of Fundamental Rights and Freedoms[40]) (Article 3). Fundamental rights and freedoms are under the protection of the judiciary (Article 4).

It follows from what has been mentioned that the Constitution is the basis and the cornerstone for the scope of the whole Czech legislation. The bases of rights of individuals are laid down in the Charter of Fundamental Rights and Freedoms. Of particular importance is the principle that all citizens may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon her by law (Article 2 paragraph 4 of the Constitution). The judicial body responsible for the protection of constitutionality is the Constitutional Court (Article 83); the Court ensures that the "common" legislation is in conformity with the Constitution.

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[37]) Namely in Sec. 3(1) CC, under which the exercise of rights and performance of duties arising from civil relationships may not, without legal grounds, interfere with the rights and justified interests of others, and may not be inconsistent with the principles of good morals. See HRSTKOVÁ, J., *Fundamentals of Czech Civil Law.* Praha: Univerzita Karlova v Praze, Právnická Fakulta, 2005, p. 12. For details of the concept of good morals see e.g. JEHLIČKA, O. – ŠVESTKA, J. – ŠKÁROVÁ, M. et al.: *Občanský zákoník. Komentář* [The Commentary on the Civil Code]. 9. vydání. Praha: C. H. Beck, 2004, pp. 233-234.

[38]) ŠVESTKA, J. – DVOŘÁK, J.: *Občanské právo hmotné 1* [Substantive Civil Law 1]. 5th ed. Prague: Wolters Kluwer ČR, a.s., 2009, p. 104.

[39]) Constitutional Act No. 1/1993 Sb., the Constitution of the Czech Republic.

[40]) Constitutional Act No. 23/1991 Sb., the Charter of Fundamental Rights and Freedoms.

3.2 Private Law and International Treaties

The Czech Republic participates in a number of international treaties, both multilateral and bilateral. Apart from treaties of a public law nature, the Czech Republic is a contracting party to international conventions aimed at the unification of private law, such as conventions on the international sale of goods, international transport, intellectual property, conventions adopted by the Hague Conference on Private International Law, as well as conventions concerning international procedure law, especially international arbitration.

The general solution to the preferential application of international treaties is laid down in the amended Article 10 of the Constitution, under which promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply. This means that an international convention complying with the prerequisites of Article 10 of the Czech Constitution, that is, consent of the Parliament and ratification and official promulgation of the convention in the Collection of international treaties, takes precedence over respective provisions of the Czech domestic law. The requirement of the publication of conventions in the Collection of International Treaties applies in general.[41])

Czech constitutional law, as amended by Constitutional Act No. 395/2001 Sb., is based on the rule that the Czech Republic shall observe its obligations resulting from international law (see Article 1 paragraph 2 of the Constitution, as amended). It means that, in conformity with Article 10 of the Constitution, as amended, the relationship between international treaties and domestic law in general rather corresponds to the monistic scheme (interrelationship of national and international law).[42]) This represents a significant change indicating the general preference in application of all fully ratified international treaties which are officially promulgated, that is, published in the Collection of International Treaties.

The relationship between provisions contained in international treaties and national law, as well as potential conflicts between international treaties, is quite complicated itself; but the complexity may be multiplied in cases where European Union law is involved. What is particularly meant here are two articles of the Czech Constitution: Art 10 stipulating the primacy of ratified and promulgated international treaties over Czech law and Art 10a, so-called "integration clause", under which treaties may transfer certain powers and competences of

[41]) For details with respect to Hague Conventions see PAUKNEROVÁ, M. ,*Conflict of laws conventions and their reception – Czech Republic*, in Jorge Sánchez Cordero (ed.), The Impact of Uniform Law in National Law. Limits and Possibilities, Instítuto de investigaciones jurídicas, México 2010, p. 299-304.

[42]) See ČEPELKA, Č. & ŠTURMA, P., *Mezinárodní právo veřejné* [Public International Law, in Czech], (Prague: C.H.Beck, 2008), p. 199 with further references.

Czech authorities to international institutions and organisations. These two provisions and their interrelationship, particularly the scope of applicability of Art 10a, are not uniformly understood in Czech legal literature.[43])

3.3. Civil Code and Private International Law

Private international law is traditionally regulated autonomously, by a special legal act – the Act Concerning Private International Law and the Rules of Procedure Relating Thereto (PILA) of 1963. It is a follow-up to the first Act Concerning Private International and Interregional Law and the Legal Status of Aliens in the Sphere of Private Law of 1948, inspired by the so-called Vienna Draft of 1913, widely recognized as an outstanding work.[44]) The first part of the current PILA covers provisions dealing with conflict of laws and the legal status of aliens, the second part of the PILA covers international procedural law. Despite the fact that some private international law rules are also incorporated in other acts (e.g., the Commercial Code, the Act on Bills of Exchange, Promissory Notes and Cheques, etc.), PILA is the main source of regulation in this respect.

The scope of private international law includes: (a) conflict rules, which are the nucleus of private international law; (b) the direct rules of substantive law, the sources of which are mostly international conventions (i.e., uniform substantive rules); exceptionally such rules form a part of domestic law; these rules are directly applicable to relations with an international element, that is they shall be used without the previous application of conflict rules; (c) rules governing the legal status of aliens; and (d) rules of international procedure law. Obviously, the concept of private international law, both in legislation, and in academic approach, has been traditionally broad.[45])

4. Contents of the Civil Code

4.1 The original contents of the Civil Code

Introductory note – legal context

In its recent history the Czech Republic has experienced principally two Civil Codes (the so-called Middle Code of 1950 and the Socialist Code of 1964). The

[43]) For details see PAUKNEROVÁ, M., *International Conventions and Community Law: Harmony and Conflicts*, in Nuovi strumenti del diritto internazionale privato. New instruments of private international law – Liber Fausto Pocar – Giuffrè Editore, Milano 2009, p. 793.

[44]) See in particular F. KORKISCH, *'Das neue internationale Privatrecht der Tschechoslowakei'*, *RabelsZ* (1952): pp. 410–450 with further references.

[45]) For details cf. PAUKNEROVÁ, M., *Private International Law*, Czech Republic, International Encyclopaedia of Laws, 2nd ed., Kluwer Law International 2011, p. 23 et seq., with further references.

Czech Civil Code 1950 applied for quite a short time.[46]) Only 10 years after its passage, a new Czechoslovak constitution 1960 was adopted, which was subsisted in a theoretically wrong opinion that socialism in Czechoslovakia was already reached. In view of such constitutionally expressed idea new re-codification of main branches of Czechoslovak law started. As a result, a new Civil Code, No. 40/1964 Sb., was adopted and came into force on 1st April 1964, and remains – with many amendments – still effective.

Generally speaking, the main problem of the existing Czech Civil Code is that it stems from the circumstances and political and ideological basis applicable at the moment of its adoption. The Czech Civil Code broadly reflected the idea of the "winning socialism" and consequently differed very much from similar codifications not only within the continental European legal family, but it was special even within the socialist countries in Central and Eastern Europe.[47]) One of the main goals of the socialist legal doctrine – besides others – was to completely deny the private and public law duality by the systematic contesting of the existence of private law.[48]) During that period, the distinction private/public law was abolished as a "bourgeois anachronism" not only in the practical sense but also theoretically; it was replaced with the single socialist law. That law was actually public law leaning towards public law methods of regulation, which facilitated state intervention in the private sphere of citizens. The most important legal institutions of civil law were state socialist ownership (in the domain of rights in rem), and the central economic plan (in the domain of obligations). It should be reminded that there was a strict hierarchy among the different forms of ownerships and only the state socialist ownership was the most protected under the former legal system.[49])

The above mentioned debate on legal systems suggests that the new Civil Code was built on a narrow conception of civil law which reduced civil law to mere consumer law. At that time, it was predominantly influenced by the Soviet legal doctrine stating that each part of private law, such as family law, labour law, commercial law, private international law, etc. should be codified separa-

[46]) In early 1950s there is a beginning of a gigantic revision of Czech civil legislation, which was motivated by the decision of the Czech Communist party Central Committee in 1948.

[47]) In comparison with the Hungarian and Polish civil codes, the Czech Code seemed to be the most orthodox in the way how it applied the principles of new socialist law. The Polish and Hungarian civil codes, in the sphere of the law of obligations, were much more tolerant vis-à-vis private ownership and small business activities.

[48]) The motivation is evident and results from the following thesis: if we acknowledge the original existence of private law it would be the same as if we acknowledged the existence of private interest worthy to be protected, what was impossible because of the immanent conflict with the interest of the working class as a whole.

[49]) One of the earliest changes made in the very beginning of the whole legal transformation process was abolishing such differentiation among several forms of ownership. The Czech Constitution proclaimed the unity of property law, restored the equality among the different owners and introduced the principle of equal protection of property law, no matter who the owner is.

tely. The Czech legislature proceeded to this premise even more deeply and consistently than the Soviet model itself did. The Czech family law and later all the other parts of private law have been codified autonomously and independently of the Civil Code. As a result, the Czech Republic is still lacking general and standard codification of private law, which would be comparable with its European counterparts.

Legislation concerning economic relationships was removed from the Civil Code and incorporated into a special "Economic Code" No. 109/1964 Sb. The Czech Civil Code was thus conceived purely and simply as a code of consumer law in the socialist context. Civil legislation focused only on proprietary relationships and largely neglected other aspects of private life. The accent upon material sides resulted in obvious underestimation of personal rights and things related to the personal status.[50]) For instance, the modern Civil Code of Québec contains about 300 provisions concerning personal rights and 250 provisions regulating family law, which is definitely its integral part. The Czech Civil Code contains only 9 clauses relevant to personal rights; family law, which is codified separately, has approximately 100 sections.

Another very negative trend was the idea of simplification of the most of traditional legal institutions. That effort led to the abolition of many classical legal concepts and institutions such as "possession", "positive prescription", "easements", "purchase", "rent", "tenancy", "neighbourhood rights", "legacy", "disinheritance", etc. Even the classical term "obligation" was replaced by the expression "service"[51]) so as to be allegedly closer to the popular understanding of such institutions. This tendency was part of a generally shared idea of law to decline and to finally extinguish, based on the thesis that law will not be needed at all in a developed socialist society. Shortly after its conception, this idea revealed completely mistaken and erroneous, but unfortunately it irreversibly damaged Czech civil law and private law as such.

Czech civil law – with regard to all political and ideological resources – shifted away from the European conventional tradition of civil codification and became a simple instrument for the direction of the society. Not only from the substantial point of view but also from the terminological perspective, all traditional legal expressions were replaced with new terms and denominations allegedly much closer to the people's comprehension, as mentioned above.[52])

[50]) See ŠVESTKA, J., DVOŘÁK, J., *Občanské právo hmotné I.* [Substantive Civil Law 1]. 5th ed., ASPI 2009.

[51]) See also PLANK, K., *Neplatnost právnych ukonov a možnosti odstúpenia od zmluvy v občianskom práve* [Invalidity of legal acts and possibility of contract withdrawal in civil law], Acta Facultatis Iuridicae, SPN Bratislava 1981.

[52]) "Person" was replaced with "participant or citizen"; "proper morals" were replaced by "the rules of socialist common life"; "obligation" by "service" and "legal entity" by "organisation", etc.

The original structure of CC 1964 is as follows:

1. Part One: General Provisions (see also 1.2). This part defined particularly civil relationships and its parties. Parties were citizens (not natural persons) and socialist organisations (not legal entities as is generally accepted). The general part traditionally encompassed provisions concerning legal representation (legal in the strict sense of the word, or contractual one), and legal acts. The socialist legislature incorporated provisions related to the formation, modification and extinction of rights and duties into the first part of CC, which are generally treated in parts of CC dealing with obligations. The first part was finished by several provisions for statutory limitation and explanatory definitions of some general concepts (such as household, close persons, etc.).
2. Part Two: Common Socialist Property and Personal Ownership. The socialist CC tried to outline the border line between common socialist property and personal ownership by enumerating things which could be considered as part of the personal property of citizens (such as income and savings coming from work and the social security system, things of domestic or personal use, family houses and recreation cottages). The institution of common personal ownership was treated within the scope of provisions related to personal ownership.
3. Part Three: Personal Use of Apartments, Other Premises and Land. Socialist organisations holding apartments were obliged, according to those provisions, to create necessary conditions to satisfy the needs of citizens in apartments so that the level of living could constantly grow. For this purpose, the state, cooperatives and other socialist organisations left apartments to citizens' personal use for payment without fixing the period of using. The right to personal use of land served citizens as a title to build family houses, recreation cottages or garages or just for having a garden on the land. That right was not limited in time and was transferable to heirs.
4. Part Four: Services. Services were provided by socialist organisations to citizens and could have a form of real or material fulfilment, performance or any other satisfaction of citizens' material or cultural needs. Services were provided for payments or for free if the law provided so. Particular provisions regulated the buying of goods in shops and stipulated obligations of socialist organisations to be followed in the course of supplying that special service.[53])
5. Part Five: Rights and Duties Resulting from Other Legal Acts. This part tried to regulate civil relationships exceeding the scope of CC, for example, if one citizen executed some work for another citizen upon the latter's demand, or

[53]) For more information see ELISCHER, D.: *Zvláštní ustanovení o prodeji zboží v obchodě* [Special provisions on the sale of goods in shop], Občanský zákoník (Civil Code), in Eliáš a kol., Velký akademický komentář 1. vyd., Linde 2008.

provided him/her with a loan, or helped him/her in any other way. These situations were considered as civic assistance and, as such, had to be in accordance with the rules of socialist common life.

6. Part Six: Liability for Damage and for Unlawful Property Benefit. This part is *grosso modo* the same as it was in the original wording of CC 1964. Liability for damage is characterized as an obligation arising to a party who breached the primary legal obligation, resulting for him/her either from the law or a contract. Such an obligation, subsisting in providing compensation for damage, can be defined as a sanctioning obligation arising from liability. The Czech tort system is based on one general liability clause and different individual cases of liability for damage as set down in tort provisions. Prevention plays an important role in the Czech CC, be it the general prevention duty[54]) or a special one. According to general liability clause (sec. 420 CC), everyone is liable for damage caused by his/her culpable unlawful conduct. This general rule was followed by other tort provisions defining different cases of liability for damage (for example, liability for damage caused within an existing obligation, caused by those incapable of recognizing the consequences of their conduct, by intentional contravention of the rules of socialist common life, by operation of the means of transport, by particularly hazardous operation, caused to things brought in or deposited and caused by an unlawful decision or incorrect administrative procedure. As for compensation or reparation, CC distinguishes material and immaterial harm[55]) (particularly personal injury and the damage assessment of its all non-pecuniary aspects – such as pain and suffering or the weakening of someone's social position). Particular attention is paid to the issue of standardization of immaterial damage assessment.
7. Part Seven: Inheritance of Property in Personal Ownership (see point 1.2 and 9)
8. Part Eight: Final Provisions.

[54]) More on the role and function of general prevention duty under the Czech tort system see ELISCHER, D., *Nové i staronové jevy v deliktním právu: vybrané aktuální otázky v právu odpovědnosti za škodu ve 3. tisíciletí* [New and restored phenomena in tort law: topical issues in the law of damage in 3rd millennium]. In: Pauknerová, M. – Tomášek, M.: Nové jevy v právu na počátku 21. století (New Phenomena in Law at the Beginning of the 21st Century). IV. Proměny soukromého práva. 1. vydání. Praha: UK Praha, Karolinum, 2009; PSUTKA, J., *Obecná prevenční povinnost - současný stav a návrh občanského zákoníku* [General prevention duty – current status and the proposal of a new Civil Code]. In Soukromé právo na cestě: eseje a jiné texty k jubileu Karla Eliáše. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, 2010, s. 257-273.

[55]) For more information on the compensation of immaterial harm see ELISCHER, D.: *Náhrada nemateriální újmy de lege ferenda s ohledem na současné trendy deliktního práva* [Compensation of non-pecuniary loss de lege ferenda in view of modern trends in tort law]. Právník 10/2008.

4.2 New contents incorporated into the Civil Code

After the restoration of pluralistic democracy and market economy in Czechoslovakia, the Civil Code, No. 40/1964 Sb., revealed to be completely unfit and unusable for the forthcoming period in spite of several modifications (namely the modification introduced by Act No. 131/1982 Sb.) trying to resume traditional civil law institution, which were eliminated in the original wording of the Civil Code. It was necessary to prepare and adopt a new Civil Code, but because of the shortage of time it was decided to incorporate only fundamental provisional amendments to the original Civil Code so that basic systemic and material deformations of valid civil law legislation could be removed.

To summarize the approach, the aim was to clear away ideological aspects and to restore the private law method of regulation in all spheres of personal and property relationships. The fundamental amendment – Act No. 509/1991 Sb., stroke deeply the civil law corpus since it changed its very conception by cancelling the International Trade Code and the Economic Code. Another principal change followed immediately with the adoption of a new Commercial Code. During the application of both new laws it emerged that the legislative work on the new Commercial Code and the new amendment of the Civil Code were insufficiently coordinated to such an extent that a lot of duplication appeared and complications to the private law sphere can be seen even today. This was the crucial modification of the Czech Civil Code after the revolutionary changes in 1989.

In order to form a comprehensive view of the new contents incorporated to CC, different parts of the Civil Code should be examined. The first part (the General Part of CC), the part related to civil liability and unjust enrichment (Part VI) and the part concerning succession (Part VII) remain valid with only minor modifications. The other parts were rebuilt essentially, particularly Part II dealing with *iura in rem* (property rights) – especially the institution of ownership. Part III dealing with so-called personal use of an apartment, other premises and land, Part IV concerning "services", and Part V regarding the rights and duties resulting from other legal acts, were completely repealed; instead of "services", the restored concept of "obligation" was re-introduced and incorporated into new and more extensive Part VIII, which was rather unsystematically put at the very end of the amended Civil Code. In the following period several amendments were adopted to modify the Civil Code, but the fact remained obvious that even the amended Civil Code could be nothing more than merely a temporary solution.

4.3 Process of "decodification"

The Czech Republic has experienced a significant process of decodification. The biggest inconvenience of Czech private law subsists in the existence of so-

called "complex regulations", which treat the institutions of private law[56]) independently of civil law. It means there are many separate legal enactments outside the Civil Code, which provide for different legal conceptions applicable to similar situations.

Nowadays, we can observe a real conflict between civil law and labour law.[57]) Traditionally, Czechoslovakia had, as a result of the Soviet doctrine's influence, an autonomous Labour Code applicable to legal relationships arising from work. After more than 40 years of its application, the Czech legislature decided to replace it by a new code. Two years ago, the Czech Republic adopted a new Labour Code.[58]) Unfortunately, it appears to be a product of rather bad legislative coordination. The new Labour Code has completely denied any reasonable link with and connection to, the Civil Code. It has closed itself up into an impenetrable barrier and tried to regulate all obligations autonomously with no regard to the Civil Code as the main enactment of private law. The Civil Code provisions may be used only exceptionally, i.e. if the Labour Code expressly provides so. The principle of pure delegation was chosen instead of the principle of general subsidiarity. One of the main deplorable consequences has been the petrification of undesirable duplicity of institutions relating to obligations. The situation with respect to labour law in the Czech Republic has been much more complicated: a group of deputies unsatisfied with the new Labour Code had applied to the Constitutional Court of the Czech Republic for re-examination of certain provisions due to their alleged constitutional inconformity. After deliberation, the Constitutional Court quite openly declared that the principle of delegation which the Labour Code is based on is contradictory to constitutionally guaranteed principle of legal certainty.[59]) After that decision, the subsidiary use of the Civil Code in employment relationships is possible but the problem of duplicities remains unsolved.[60])

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[56]) Furthemore see BEJČEK, J., *Existují tzv. "komplexní právní úpravy" v obchodním a v občanském zákoníku?* [Are there any so-called "complex regulations" in the Commercial and Civil Codes?]. Právní rozhledy, No. 11/2000, p. 492 - 497.

[57]) For more information on the conception of the Czech Labour Law and its position within the legal system see: KALENSKÁ, M., *Zachováme zákoník práce?* [Will we preserve the Labour Code?] Právník 12/1997; KOSTEČKA J., *Pracovní právo a legislativní koncepce v oblasti soukromého práva* [Labour law and legislative conceptions in the sphere of private law]. Právní praxe 1/1995; TRÖSTER, P., *Požadavky na reformu českého pracovního práva* [Requirements for the reform of Czech labour law]. Právo a zaměstnání 5/1996 ; BĚLINA, M., PICHRT, J., *Nad návrhem nového zákoníku práce* [On the proposal of a new Labour Code], Právní rozhledy, 11/2005, p. 381 – 389.

[58]) The new Czech Labour Code was adopted in 2006 after very passionate discussions, and came into force on 1st January 2007.

[59]) See the Constitutional Court's Decision no. Pl. ÚS 83/06 of 12th March 2008 which touched directly, and in a significant manner, the very conception of the new Labour Code.

[60]) According to what was finally decided on the Labour Code's position within Czech private law, the only contractual type standing outside the Civil Code is an employment contract. The same approach has been chosen by Hungarian re-codification. Needless to say, the reasons for such solution are more political than juridical.

Regrettably, that is not the end of undesirable duplicities in the law of obligations. The Commercial Code codifies obligations rather extensively and, as a result, it regulates many institutions relating to obligations. Nevertheless, considering the purpose of private law re-codification, the draft of a new Czech Civil Code opts for the monistic conception of the law of obligations as a reasonable and functional system. The monistic concept is based upon an idea of the uniform and integrated law of obligations, which should be encompassed in the Civil Code and will be used as general legal regulation in the whole of private law. The Commercial Code as well as the Labour Code will obviously co-exist with the Civil Code; they will include only justified divergences and differences, specificity and particular legal regulation, but will avoid duplicating complex regulation as can be seen now.[61])

In view of upcoming re-codification, a very tough struggle has taken place with regard to an insurance contract which is also treated by a special law.[62]) The idea that private insurance is common and frequent in a daily life insomuch that it should be an integral part of a new Civil Code has prevailed. However, even an international comparative analysis regarding an insurance contract regulation has failed to provide clear evidence on the European trend in this domain.[63])

Another domain staying outside the present Civil Code are securities. Securities are treated in a special law,[64]) which, besides general provisions, con-

[61]) To be more concrete, one example can be given here: if one causes damage to someone, there are three possible legal regimes to apply depending on one´s status. Under civil and commercial law one is obliged to compensate the actual damage caused (damnum emergens) in the same way as the lost profit (lucrum cessans), whilst under labour law one should compensate the lost profit only if the damage was caused by an intentional unlawful act. As for the manner of compensation, civil law qualifies natural restitution by its usefulness, commercial law by its habitualness and labour law ignores both criteria leaving the way of compensation entirely on the will of a tortfeasor (wrongdoer). As regards the mitigation of compensation, the Civil Code provides for the possibility of its reduction if such damage was caused unintentionally, while the Labour Code permits the reduction only if the damage was caused by an employee regardless of whether it was caused intentionally or by simple negligence. These anomalies and discrepancies enormously complicate the normal life of people and are counterproductive because they weaken the principle of legal certainty. For more details see Explanatory report, p. 16 et seq.

[62]) See the Insurance Contract Act (No. 37/2004 Sb.)

[63]) On the one hand, there are many countries within the continental legal family which have special regulation regarding insurance. For instance, France, Austria, Germany, Swiss and Denmark have traditionally the regulation of insurance contracts outside their civil codes. On the other hand, most of recent civil codifications have proceeded to incorporate insurance contracts directly into civil codes. Particularly the Italian Codice civile 1942 (articles 1887 – 1932), Code civil québeçois 1991 (articles 2389-2628), the Lithuanian Civil Code 2000 and the Russian Civil Code 2001 (articles 927-970). The fact that majority of modern civil codifications include the insurance contract was persuasive for Czech drafters.

[64]) See the Securities Act (No. 591/1992 Sb.).

tains the enactment of various special contracts related to securities. A special Czech law deals with cheques, bills of exchange and promissory notes.[65])

5. The Civil Code and Commercial Law

5.1 Brief history and current legislation

Within the Czech system of law, commercial law is a part of private law and as such it forms a subpart of civil law. It is necessary to note that many rules of commercial law are of a public law nature (regulation of entrepreneurial activities and trade law, Commercial Register, accountancy, insolvency, competition, etc.) and often create a framework for application of private law. Fundamental changes to Czechoslovak business law came about after November 1989 when the democratic system was reinstated, changes to Czechoslovak legislation connected with the transition to political pluralism and a market economy occurred, and possibilities for private business opened up. In a very short period of time, the Commercial Code No. 513/1991 Sb. was prepared and passed replacing in particular the former socialist Economic Code No. 109/1964 Sb., regulating relations between socialist organisations (i.e. enterprises), and the International Trade Code, No. 101/1963 Sb., oriented at international trade relations.

The Commercial Code (ComC) regulates the status of entrepreneurs, commercial companies, business obligations and some other relations connected with business activities. As to the sources of commercial law, what is crucial is Sec. 1 paragraph 2 of the ComC, under which legal relations falling within the scope of the Code are subject to the provisions of this Code. Should it prove impossible to resolve certain issues according to the provisions of this Code, they shall be resolved in accordance with the civil law provisions. In the event that such issues cannot be resolved in accordance with the civil law provisions, they shall be considered according to trade usage (commercial practice) and, in the absence of this, according to the principles upon which this Code is based. It follows that the main source of commercial law is the Commercial Code. If a particular issue cannot be resolved under the Code, civil law rules shall be applied, that is, in particular the Civil Code and some related acts of civil law nature, such as Act No. 72/1994 Sb., on the ownership of flats, or Act No. 116/1990 Sb., on the lease and sublease of non-residential premises. In view of this, the Civil Code is subsidiary to the Commercial Code. Where no civil law provision is applicable, trade usage must be applied. And in the absence of usages, the commercial relations shall be resolved in conformity with the principles upon which the Commercial Code is based. Such principles are, for example, autonomy of will in contractual relations, equality of the parties to commercial transactions, protection of the weaker party, etc.

[65]) See the Act on Bills of Exchange, Promissory Notes and Cheques.

5.2 The contents of the Commercial Code and other relevant commercial legislation

The Commercial Code consists of four parts: 1) Part One: General Provisions (Sec. 1 – 55) regulates fundamental provisions – basic institutions of commercial law: enterprises and their business assets, commercial name, entrepreneurial conduct, business activities of foreign persons, commercial register, business accounting, and economic competition (unfair competition is directly included in the Code while the participation in economic competition is laid down in Act No. 143/2001 Sb., on Protection of Economic Competition); 2) Part Two: Business Companies, Partnerships and Co-operatives (Sec. 56–260) regulates these corporate bodies; 3) Part Three: Business Obligations (Sec. 261-755) provides for commercial obligations, including special provisions on contractual obligations in international trade; 4) Part Four: Common, Transitory and Concluding Provisions (Sec. 756-775) lays down some important principles regarding international treaties, breach of non-contractual obligations, includes some specific provisions on prices, on assertion of rights in arbitral proceedings, state-owned property, etc., as well as classic transitory and concluding provisions. As it has been mentioned, other laws about commercial matters exist, concerning insurance (Insurance Contract Act No. 37/2004 Sb. and Insurance Act No. 277/2009 Sb.), insolvency (Insolvency Act No. 182/2006 Sb.), accountancy (Act No. 563/1991 Sb., on Accountancy), acts regulating securities (Act No. 591/1992 Sb., on Negotiable Instruments, Act No. 189/2004 Coll., on Collective Investment, Act No. 256/2004 Sb. on Transactions in the Capital Market), etc. Other important acts concern specific companies and other entities, such as state enterprises (Act. No. 77/1997 Sb., on a State Enterprise), transformation of companies (Transformation Act No. 125/2008 Sb.), as well as acts on European companies - Act No. 627/2004 Coll., on European Company, Act No. 360/2004 Coll., on the European Economic Interest Grouping, and Act No. 307/2006 Coll., on European Cooperative Society.

5.3 Relationship between the Civil Code and the Commercial Code

In general, as already mentioned, the relationship between general private law and special private law is based on the principle of subsidiarity. General Private Law – civil law – is subsidiary in relation to commercial law. In other words, if a question of private law falls within commercial law and remains unresolved, a general rule of civil law shall apply as subsidiary regulation. Thus, pursuant to Sec. 1 paragraph 2 of the Commercial Code, should it prove impossible to resolve certain issues under the provisions of this Code, then the provisions of the Civil Code shall apply. Subsidiary application comes into play mainly in two cases: first, when a special law does not intentionally provide a proper solution for a question, leaving it to general civil law regulation; and second, when a special law has a non-intended gap in legislation. A case might also occur in which a provision of a special law appears to invoke doubts which

should be removed by interpretation: such interpretation might be supported by an analogous provision of the Civil Code or another general civil law provision.

5.4 Prospects

As already mentioned, new private law legislation, including the commercial law, is currently being discussed in the Czech Parliament. Besides the Civil Code Draft, the Business Corporations Act Draft has been introduced.[66]) The Business Corporations Act Draft is composed of three parts: (1) Introductory Provisions; (2) Business Corporations (general provisions, unlimited company, limited liability company, joint-stock company, cooperative); (3) Common and Transitional Provisions.[67]) The remaining issues currently comprised in the Commercial Code shall either be included in the new Civil Code (in particular commercial obligations) or regulated separately (e.g. in the Commercial Register). Protection of economic competition shall be regulated by a special act also in the future, while unfair competition regulation shall be covered by the new Civil Code. Within the general regulation of persons, the Civil Code shall also include some common provisions on commercial companies, originally comprised in the Commercial Code.

6. Consumer Law

6.1 Consumer law and consumer contracts included in the Civil Code

Consumer protection and the legal reflection of consumer law as such have been topical and important aspects of modern private law codification. Consumer law is more and more perceived as a relatively compact subdivision of private law. The question still remains how national legislation should take this fact into consideration. Two principal approaches to consumer law have been employed within the European legal systems. The first solution is to somehow integrate consumer protection into the existing civil codifications. It is the case of Germany, the Netherlands, Slovakia and the existing Czech Civil Code.[68]) The Czech Republic, inspired by German BGB, opted for integration and implemented most European directives related to consumer protection directly into the Civil Code (with exceptions indicated below).[69])

However, the Czech legislature has not incorporated all aspects of consumer law in the Civil Code. In addition to CC, there is a special law implementing the

[66]) The third Draft Act is the new Private International Law Act.

[67]) The Governmental Draft is published in Czech on the webpage of the Parliament, at http://www.psp.cz/sqw/historie.sqw?o=6&t=363, visited 20.09.2011.

[68]) See ELIÁŠ, K., *Rekodifikace občanského práva v postmoderní době* [Re-codification of civil law in a post-modern period], in: Právní rozhledy 1/2008, p. 1-7.

[69]) The Dutch model seems more sophisticated in this context as it tries to incorporate European consumer protection directives continuously and rigorously into the Dutch Civil Code in such a way that it does not concentrate all issues in one place but amends always relevant articles and paragraphs.

public law aspects of consumer protection. The existing Czech Civil Code contains Chapter 5, entitled Consumer Contracts, placed in the General Part of the Civil Code; this Chapter deals – not very systematically – with the following questions: unfair terms in consumer contracts, consumer protection in the case of contracts negotiated outside business premises, consumer protection in the case of distant contracts, the protection of acquirers regarding certain aspects of time-share contracts. Further questions concerning certain aspects of the sale and guarantees regarding consumer goods[70]) and package travel are regulated in another place of the Civil Code, namely in its obligation part. That is what has been embodied in the Czech Civil Code. All other aspects – especially consumer credit matters, the general framework of activities in favour of consumers (consumer protection associations), deceitful advertising matters, labelling and advertising matters of food products, misleading advertising including comparative advertising, price indication matters in products offered to consumers, general safety of products and products which place health and safety of consumers in danger – are governed by a special law containing regulatory and administrative provisions so as to keep the Civil Code free from public law issues.[71])

Another possible approach that can be found in many European systems (such as France, Spain, Italy, Belgium, Luxembourg, Austria, Finland, Latvia, Lithuania, etc.) is to issue a special law which would *grosso modo* cover consumer law as a whole. Private and public aspects of consumer protection are placed altogether in one regulating act. The latter approach is apparently adopted by the draft of a new Czech Civil Code referring to the following argument, which is interesting to point out. In the first place the authors of the draft are aware of a particular character of consumer law which – despite its relevance – does not concern all persons but only a group of persons being in a given moment party to consumer relationships. General civil law, particularly the law of obligations, pursues other goals. It tends towards non-mandatory rules, i.e. to rather abstract formulations of its rules. Summarizing the issue, the Civil Code supports the stability of regulation and a certain degree of constancy in private law relationships by all means, while consumer law is characterized by its high dynamism. It prefers much more concrete formulations (sometimes we talk about its casuistic features) and mandatory rules, which describe the issue of facts in details. Finally, consumer law is, for many reasons, regularly amended or modified, which may represent a serious handicap for stable codification.[72])

[70]) Especially sections 616–620 of the existing Civil Code regulating the conformity with sale contracts and guarantees.

[71]) We are referring particularly to the following regulations: Act No. 634/1992 Sb., the Consumer Protection Act; Act No. 59/1998 Sb., the Product Liability Act; Act No. 321/2001 Sb., the Consumer Credit Act; Act No. 102/2001 Sb., the General Safety Product Act.

[72]) See ELIÁŠ, K., *Rekodifikace občanského práva v postmoderní době* [Re-codification of civil law in a post-modern period], in: Právní rozhledy 1/2008, p. 1-7.

In reference to those principal arguments, the Czech draft puts aside consumer law and does not try to incorporate it into the civil corpus. Czech legislature, choosing a waiting strategy vis-à-vis the dynamic development of consumer law, is willing to include consumer protection into the codification of private law, but not earlier than it is more or less formed, stabilized and fixed. Latest developments in consumer law appear extremely turbulent. It is not a sort of resignation, indeed, as the aim of consumer law ought to be achieved, but for the time being the main clashes in this field should operate outside the codification of civil law as part of special legal enactments. Slightly adapting the words of Professor Schulte-Nölke about the phenomenon of "consumerisation of private law"[73]) to the Czech reality, the Czech draft seems to be waiting now in order to be subsequently able to proceed to the "civilisation of consumer law" by the adoption or re-adoption of its principles into the Civil Code.

There is no general theory of consumer contracts in Czech jurisprudence. The Czech Civil Code works with the definition of a consumer contract in its section 52(1). According to this provision a consumer contract is a purchase contract, contract for work, or any other contract stipulated in Part Eight of the Civil Code provided that contracting parties are the consumer on the one hand and the supplier (provider) on the other. Generally speaking, the consumer is a person acting, buying and using services for his/her own use; his/her conduct does not have any business character. Each person could be a consumer as well as an entrepreneur; the distinctive mark between the conduct of either one is primarily the aim and purpose of their legal acting.

6.2 The relationship between the Civil Code and Consumer Law

The Civil Code fulfils the role of general legislation which is subsidiary to other special acts which may have an impact upon civil law relationships. The predominant part of consumer law is an integral part of the Civil Code so it is applied as the Civil Code itself. The other mentioned aspects of a public law nature are represented by special legislation which is primarily applied if it concerns the given situation, and CC is applied subsidiarily.

7. The Civil Code and Family Law

Family law is a specific part of private law. In jurisprudence across Europe it is treated as a relative independent part of private law, no matter if enacted in a Civil Code or in a separate Code or Act.[74]) This is also the situation in Czech jurisprudence. Having spoken about historical development, it should be

[73]) The protection of consumers in the European Civil Code. Speech pronounced at the international conference on the recodification of private law in the Czech Republic within the 8th Discussion Forum held in Prague on 4th December 2007.

[74]) ŠVESTKA, J. – DVOŘÁK, J., *Občanské právo hmotné 3* [Substantive Civil Law 3]. 5th ed. Prague: Wolters Kluwer ČR, a.s., 2009, p. 15.

mentioned that family law was (and in Austria still is) a part of CC-1811. The FA-1949 was also mentioned above.[75]) This act was replaced with the current FA, which came in force on 1st April 1964 (the same day as CC came into force).[76])

It is necessary to explain why FA in Czech law is not referred to as a "Code". The issue is connected with the scope of family law. The scope of family law is usually defined by setting three types of mutual relationships: 1) between spouses, 2) between parents and children (and other relatives), 3) arising from foster care[77]).[78]) Another perspective, also maintained by Czech jurisprudence, suggests there are other three relationships distinguished within a family (and particularly between spouses): 1) of solely a personal nature, 2) of solely a property nature, 3) of a nature combining both previous elements.[79])

After 1948, when reconstruction of law due to new political and economic circumstances started, family law was the first to focus on. Reasons were ideological: relationships within the family have been stable and traditionally developed, so that part of law would not have to be subject to many changes. The newly prepared FA-1949 was to enact family law, which would be considered to be new socialist law, remaining stable in the future and requiring no amendments. On the contrary, property law (namely the conception of ownership) had to be subject to changes as the society was officially approaching socialism and subsequently communism. These ideas resulted in the decision that corresponding parts of CC-1811 should be repealed and replaced with the new FA-1949. Such an approach was quite common in "people's democracy" states in Middle and Eastern Europe during the 1940s and 1950s.[80]) FA-1949 governed marriage (including mutual property relationships of the husband and

[75]) It is interesting, that there was an intensive international cooperation between Czechoslovakia and Poland during preparatory works. As an outcome, acts with quite identical wording were adopted in both countries. See PIATOWSKI, J. S. in Piątowski, J. S. (red.): *System prawa rodzinnego i opiekuńczego* [The System of Family and Guardianship Law]. Część 1. Wrocław: Zakład Narodowy im. Ossolińskich - Wydawnictwo, 1985, p. 8.

[76]) First intention during the codification in the 1960s was only to amend FA-1949, not to create a new act. See BĚLOVSKÝ, P., *Rodinné právo* [Family Law]. In: Bobek, M . Molek, P. – Šimíček, V. (eds.): Komunistické právo v Československu. Kapitoly z dějin bezpráví (Communist Law in Czechoslovakia. Chapters from the history of injustice). Brno: Masarykova univerzita, Mezinárodní politologický ústav, 2009, p. 466.

[77]) In a broad sense of this word, as every kind of substitute for family care.

[78]) See e. g. HRUŠÁKOVÁ, M. – KRÁLÍČKOVÁ, Z., *České rodinné právo* [Czech Family Law]. 3rd edition. Brno: Masarykova Univerzita and Jan Šabata, 2006, p. 13.

[79]) ŠVESTKA, J. – DVOŘÁK, J., [(Substantive Civil Law 1]. 5th ed. Prague: Wolters Kluwer ČR, a.s., 2009, p. 50.

[80]) RADVANOVÁ, S. – ZUKLÍNOVÁ, M., *Kurs občanského práva - Instituty rodinného práva* [The Course of Civil Law – Institutions of Family Law]. 1st edition. Praha: C. H. Beck 1999, p. 7.

wife), divorce, mutual rights and duties of parents and children and tutorship.[81]) Although this Act covered the whole scope of family law, it was not called a "Code". There was no provision for the relationship between FA-1949 and CC-1950.[82]) Despite the political situation, FA-1949 was a real milestone in the development of Czechoslovak family law. Old family patterns were replaced with new ones – husband and wife were now taken as equal in their marriage,[83]) the distinction between legitimate and illegitimate children was abolished, the only way how to enter into the marriage was before a state authority (no more before the authority of a Church).

It has been already mentioned that, during the codification of private law in the 1960s, the first intention was just to amend FA-1949. But after all, a new act (FA) was adopted. The content of FA was quite identical when compared to FA-1949. The most important change happened to provisions on property relationships between spouses. They were shifted to CC, and therefore not governed by FA. That approach resulted from the idea that all property relationships should be regulated by CC. Having this in mind, it is no surprise that the new Family Act was not also labelled a "Code" as an important issue – property – was missing. The second important change can be seen in the (re)establishing of the relationship between civil law and family law. Sec. 104 of FA stipulated (and does so even today), that the provisions of CC would apply unless something else was stipulated by FA. This means that the idea of (total) isolation of family law as a separate branch of law was overcome and the supportive role of civil law and of CC (as a universal code) was admitted.

Today, after several amendments[84]) of FA, the content of this Act is as follows:

Part One: Marriage (creation[85]), invalidity and non-existence, relationships between spouses, termination[86]), and divorce). Part Two: Relationships between

[81]) Tutorship is understood here as an institution substituting for family care, where a tutor is put in the place of parents, as a person taking care for a child (but the tutor is not obliged to provide the care personally) and primarily to act as a legal representative of the child (instead of his parents). For details see Section 78 and subs. of FA-1949.

[82]) However, this was not surprising if we bear in mind that CC-1811 ought to be repealed during few months and new CC-1950 was not yet adopted by the time of publishing FA-1949.

[83]) The husband and wife were considered equal in both their mutual relationship and in their common relationship towards their children. In other words, the ancient supremacy of father (*patria potestas*) was abolished.

[84]) The most important amendments were introduced by Acts No. 132/1982 Sb. and No. 91/1998 Sb.

[85]) Act No. 234/1992 Sb. was adopted to demonstrate the rejection of a totalitarian attitude to family law; spouses became free to decide whether they wish to enter into marriage before the authority of the state or before the authority of the Church.

[86]) By death or by divorce.

parents and children (parental responsibility[87]), measures for upbringing, foster care[88]), determination of parenthood[89]), adoption, tutorship and curatorship[90])). Part Three: maintenance duty (mutual between parents and children, mutual between other relatives, between spouses, between divorced spouses, allowance for maintenance and compensation of some costs for unmarried mothers). Part Four: Final provisions.

In conclusion it can be stated that FA plays a key role in family law; the only important issue missing is the arrangement for the property regime of spouses, which is included in CC. Even if sec. 104 of FA mentioned above refers to CC with respect to matters not enacted by FA, the application of provisions of CC in issues generally regulated by FA has been really rare.[91])

It has been decided that the branch of family law will be included in a newly prepared Code of private law and, as a result, the Family Act will be repealed.

8. Reforms of the Civil Code

Even though the main insufficiencies and defects were mitigated by the fundamental amendment in 1991, many of imperfections and inconsistencies mentioned above persist and are hardly to eradicate as they are spread all over the Civil Code. Since 1991, CC has been amended 30 times but there has been no deeper modification of its ideological basis, no rectification of its unsuitable and inappropriate conception. The first real attempt to proceed to re-codification was made very early, before 1993, at the very beginning of our social, economic and political transformation. That draft, as well as the second project in 1996, was not completed for various reasons, particularly political.[92])

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[87]) A set of legal rules and duties of parents concerning the proper upbringing of a child, his or her legal representation and administration of the child's property (Sec. 31 of FA).

[88]) Foster parents are obliged to take care of the child personally, but they are not legal representatives as tutors are.

[89]) The mother is a woman, who gave birth to the child. Paternity is based on one of three legal presumptions.

[90]) The institution of guardian was explained above, the curator is established for a particular issue (e. g. for the representation of a child when dealing with rights or duties against his or her parents, for the administration of a child's property instead of parents, etc.).

[91]) E.g. the institution of the determination of paternity by the common consent of the mother and the man stating he is the father of the child is generally regulated by FA. The provisions of CC could be used e.g. in the case, when one of the consenting parents was affected by a mental disorder at the moment of articulating his or her consent. This situation would rarely occur in practice, as the representative of a registering authority will refuse to record the consent when finding the parent in such a mental condition.

[92]) The first draft of a new Civil Code existing for a very short time was introduced for discussion in 1992. The work on its articulated version ceased soon after the termination of the Czechoslovak Federation and the splitting of both republics into independent states. The second draft published in 1996 was based upon the conception of largely concentrated private law. With regard to governmental changes operating afterwards, there was no political will to support such a draft any longer.

Recently, the Czech Republic has been passionately discussing the third draft – proposed by two professors of law[93]) – which has already reached the form of a code with individually articulated provisions. The work on the third draft started in 2000 and was submitted to expert and professional review. The reason for such procedure was to subject the draft to a critical analysis and to obtain remarks and observations which might have been finally incorporated into the Code. The academic and scientific circles have been widely included into this debate; the Law Faculty of Charles University in Prague was organizing regular seminars where colleagues from abroad were invited to come and discuss the draft and to introduce their suggestions and opinions. The Czech Government submitted the draft of a new Civil Code to Parliament and the draft came through the first reading. Several months ago, an information campaign in the leading Czech media was launched. The question remains whether the new Civil Code will be adopted *en bloc*, or whether will be subject to more extensive parliamentary debates with possible proposals, suggestions and modifications. The Draft Code itself is supplemented by two other laws, the Act on Private International Law, which regulates relations with foreign elements, and the Act on Business Corporations. As the draft legislation is now entering the formal legislative process, it could become effective on January 1, 2014.

The draft tries to return the Czech Civil Code back into the European continental tradition and to make it conform to the European Civil Code standards. The basic aim is to wholly restore the idea of private and public law duality. It implies a definite and consequent turnover from the Marxist-Leninist concept of the legal system and its functions, whose relics are still resisting, and adopts a way oriented towards the idea of private law in a sense of the European intellectual legacy.

The primary inspiring source for the new Czech Civil Code was the Government draft of a Civil Code from the pre-war period.[94]) That draft – published in 1937 – was intended to modernize and revise the Austrian ABGB which was valid on the territory of Czechoslovakia until 1950. Obviously, such inspiration – however important – had to be subject to substantial revision and critical evaluation particularly due to its age. Finally, the authors of the current draft based their work upon three main intellectual resources: 1. a critical analysis of the development of private law valid and effective in our territory since the 19th century; 2. principal national Civil Codes of European countries, particularly Austria, Switzerland, Germany, Italy, the Netherlands and Poland. Latest codification in Québec and Russia were taken into account. French, Spanish, Belgian and Portuguese Civil Codes were also considered; and 3. international treaties and EU legislation. European soft law papers and drafts, such as the

[93]) Prof. JUDr. Karel Eliáš, University of Western Bohemia in Pilsen, and Doc. JUDr. Michaela Zuklínová, Charles University in Prague.

[94]) The so-called "First Czechoslovak Republic" was created in 1918 at the very end of the First World War after the disintegration of the former Austro-Hungarian Monarchy.

Principles of European Contract Law, the Principles of European Tort Law[95]), the Common Frame of Reference, Code européen des contrats (Professor Gandolfi), etc., apparently served as inspiration. Nevertheless, it is necessary to point out that the influence of those soft law proposals was not substantial.[96])

Main principles, upon which the draft of a new Czech Civil Code is built, may be expressed by the following triad: conventionalism, discontinuity and integration.

The crucial ambition of a new Czech Civil Code is to be conventional vis-à-vis the standard European legislation originating from Roman law, but, at the same time, with respect to the legal thinking tradition of Central Europe. This point is relatively well accepted and widely shared in the Czech Republic. In this context, many legal institutions commonly known within the European legal family are introduced into CC (such as inheritance contract, privileged testament, assignment of contract[97]), purchase on trial[98]), etc.). The second point is much more controversial. The discontinuity might be considered as something inopportune, unwelcome and completely inacceptable. Such a negative opinion has been emphasized by the Czech legal practice. Judges, lawyers, notaries, executors and other legal professionals have expressed their concern regarding such a legal rupture and have been trying to push their own proposals through in order to participate in the preparation of the draft which would have a substantial impact upon their profession. However, the authors of the draft categorically insist on that what they call "the totalitarian legal thinking" must be broken up in the same way as must be what they ironically call "the golden fund of judicial practice"[99]). The last background idea subsists in a great effort to integrate all parts of private law so far codified separately. The draft wants

[95]) For more on the role and significance of PETL for Czech tort law see ELISCHER, D., *Pojetí škody, resp. újmy v aktuálních dokumentech evropského deliktního „soft law"* [Conception of loss/harm in the recent documents on European tort "soft law"], Právník, No. 4/2011, 378-399.

[96]) Eliáš (one of the authors) indicates that, however interesting all these soft law drafts are, they are not a dogma and must be subject to critical discussion. For more see: ELIÁŠ, K., *Rekodifikace občanského práva v postmoderní době* [Re-codification of civil law in a post-modern period], in: Právní rozhledy 1/2008, p. 1-7.

[97]) For more on the new institution of assignment of contract see ELISCHER, D, *Cese smlouvy jako nový institut českého soukromého práva, několik úvah k obecné úpravě postoupení smlouvy* [Assignment of contract as a new institution of Czech private law, several remarks on the general provisions related to assignment of contract]. Aspi, Právní Fórum č.5/2007,

[98]) See ELISCHER, D., *Koupě na zkoušku v mezinárodním srovnání: Návrat do civilního korpusu aneb východiska a možnosti českého zákonodárce de lege ferenda* [Purchase on trial in international comparison: Comeback to the Civil Code or the possibilities of Czech legislature de lege ferenda], Právní Fórum 6/2008.

[99]) See especially the Explanatory Report on the draft of a new Czech Civil Code serving as an ideological background and as deeper clarification of individual provisions of the draft. The Report is officially published on the website of the Czech Ministry of Justice: http://portal.justice.cz/ms/ms.aspx?j=33&o=23&k=381&d=125304

a new Civil Code to gain back the position of a common and general legal enactment which would fulfil the role of an "integrating core"[100]) of modern private law, as it is in Europe from Portugal to Russia. Its role is to overcome the totalitarian way of lawmaking and the persisting methods of separate regulations. In order to have much more independent and separate legislation, different approaches to one field of private law result in evident destabilization, chaos and, unfortunately, also weakness of private law, its functions and its synergic effect[101]).

Philosophically said, the Draft Civil Code seeks to achieve the ideals of Europeanism and humanism.[102]) The major axis of the whole draft is a human being and his or her interests which are predominantly individual in private law sphere. It is the end to preferring any kind of collectivism and to a higher protection of collective interests, which approach seems to be inappropriate for standard private law codification.

According to this anthropological approach and from the systematic point of view, the first part of the Draft Civil Code deals with the legal status of a person as an individual and with his or her personal rights. The second part focuses on the legal regulation of an individual's family and family law related questions; the third part concentrates on an individual's property during his or her life or after his or her death. The last part of the Draft concerns the law of obligations, i.e. it contains legal enactment of an individual's legal relationships with others arising either from their contractual activity or from tortuous responsibility. The human being is in the centre of the lawmaker's view either from the very beginning to the end of the Draft[103]). It can also be seen in the area of civil liability and compensation for damage where the will and interests of an aggrieved party (victim) are consistently taken into account with respect to the manner and scope of compensation[104]).

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[100]) ŠVESTKA, J., JEHLIČKA, O., ŠKÁROVÁ, M., et al.: *Občanský zákoník, Komentář* [The Commentary on the Civil Code], 10th ed., C.H.Beck, Praha 2008.

[101]) See ELIÁŠ, K., ZUKLÍNOVÁ, M., *Principy a východiska nové koncepce soukromého práva* [The Principles and Backgrounds of a New Code of Private Law], Linde, Praha 2001; BEZOUŠKA, P., *Návrh občanského zákoníku a jeho místo mezi evropskými kodexy* [The Draft of a Civil Code and its place among European codes]. Právní rozhledy, 2008, roč. 16, č. 19, p. 711-717.

[102]) See ŠVESTKA, J., JEHLIČKA, O., ŠKÁROVÁ, M., et al.: *Občanský zákoník, Komentář* [The Commentary on the Civil Code], 10th ed., C.H.Beck, Praha 2008.

[103]) See ELIÁŠ, K., *Rekodifikace občanského práva v postmoderní době* [Re-codification of civil law in a post-modern period], in: Právní rozhledy 1/2008, p. 1-7.

[104]) For more information see ELISCHER, D., *Kudy se ubírá moderní deliktní právo? Několik úvah nad posledními trendy odpovědnostního práva s ohledem na Principy evropského deliktního práva (PETL) a návrh nového občanského zákoníku* [What are the routes of modern tort law? Several remarks on the recent trends in tort law with regard to the Principles of European Tort Law (PETL) and the draft of a new Czech Civil Code], In Sborník z konference Naděje právní vědy - Býkov, Aleš Čeněk, 2008,

Legal entities and their legal regulation are, naturally, included in the draft of a new Czech Civil Code. The regulation of legal entities is relatively extensive and is conceived as general enactment applicable subsidiarily to all artificial legal persons in the Czech Republic. There are certain areas in the draft which adopt or adapt parts of the current law (e.g. legal representation, unjust enrichment and, to a certain degree, civil liability). In other areas, strong inspiration by the Czechoslovak draft of 1937 prepared within the ABGB context can be perceived[105]).

In connection with the discussion on the system of values and general legal principles which are supposed to be determinant for the new Civil Code, one of the key battles was fought about whether the principle of equality in legal relationships, or the principle of private autonomy should be the leading principle of new private law codification. The drafters strongly believe that the determinant principle of civil law is the principle of private autonomy. They argue that there can be hardly ever equality between individuals and legal entities. The latter are created by an individual and serving his or her interests; positive law can, but need not acknowledge them as holders of rights and duties. Such an opinion is not commonly accepted in the Czech legal doctrine.[106])

From the general legal point of view, the draft under consideration is based upon the above-mentioned approaches and assumes a rather critical position towards current civil law. The need for many amendments, provisional character, unsystematic layout and calls for further corrections give evidence of an unsustainable state of applicable provisions of Czech private law. The current inheritance law may serve as an illustrative example demonstrating the necessity of change. The recent Civil Code contains only 27 legal provisions for inheritance law[107]). The underestimation of the law of succession in Czech law is evident. The tendency of the socialist doctrine to simplify this subject-area is revealed here in its crystalline form. Socialist legislature strongly supported the idea that there was no real all-society interest in allowing the testator to dispose of his or her belongings after his or her death. Hence, the Czech legislation on

[105]) See also L. Tichý: Processes of Modernisation of Private Law Compared, and the CFR's Influence: http://www.juridicainternational.eu/processes-of-modernisation-of-private-law-compared-and-the-cfrs-influence

[106]) Švestka and Knappová emphasize the priority of equality principle in legal relationships, whereas Professors Fiala and Eliáš focus on the private autonomy principle.

[107]) See sections 460 – 487 of the Czech Civil Code.

succession law is based on disrespect towards the testator's will, his interests and desires[108]).

Considering the situation unsustainable, the Czech draft argues that this approach leads to the weakening of intergenerational solidarity[109]). In order to improve the legislative quality of succession law the drafters propose entirely new legislation representing real breaking through with respect to the existing provisions of CC. The draft includes over 230 sections concerning succession law which is eight times as many as in the existing one. Naturally, the quantity is not a decisive element but it shows at least the legislator's deeper interest. This domain was mostly inspired by legislation in France, Switzerland, Germany, Austria, Spain, Italy and the Netherlands; for example, the draft introduces into Czech law a particular institution of a succession contract[110]) or a privileged testament[111]).

Should we assume that the draft would be passed in the form it has been introduced to the legislative procedure, the new Civil Code would revolutionise Czech private law. As indicated above, the draft has been submitted to the general public debate as well as to the discussion among all legal professions. The draft is not being accepted unanimously; it has to face tough and severe criticism. Prevailing and principal arguments against the new Civil Code in its proposed format are given here. The first one evokes the confusion the new Civil Code will bring about in the Czech private legal sector; some professionals are even talking about an outright anarchy (Pelikán[112])) since it is impossible to predict the scope of negative impact it can produce upon economy. Another important argument emphasizes potential extra social costs which will emerge after the adoption of such codification. Not only professionals, but also the general public will have to become familiar with extensive changes otherwise the new regulation would not be of much effect. All professionals

[108]) In order to get some understanding of this weak point, we have to note that in Czech succession law there are not taken into account any conditions or dispositions the testator expressed in his or her testament. A theoretical explanation of this strange approach is that the dead person has no will so that his/her orders, reservations and conditions – however put down in the testament – have no legal relevance. It is completely up to heirs to dispose of the estate they inherited. For more on the existing Czech succession law see: MIKEŠ, J., *Dědické právo* [Inheritance Law], Panorama, Praha 1982; MIKEŠ, J., *Právo a dědictví* [Law and Successions], Informatorium, Praha 1993; HOLUB, M., FIALA, J., BIČOVSKÝ et al., *Komentář k občanskému zákoníku* [The Commentary on the Civil Code], Linde, Praha 2001; BEDNÁŘ, V., *Testamentární dědická posloupnost* [Testamentary Succession Line], Plzeň : Západočeská univerzita, 2009.

[109]) Explanatory report, p. 13 et seq.

[110]) A succession contract as a bilateral legal act providing a possibility to establish a contractual relationship between the testator and any other person concerning the testator's property is regulated in sections 1515 et seq. of the draft.

[111]) See sec. 1475 et seq. of the draft.

[112]) See PELIKÁN, R., *Criticism of the new Czech Civil Code.* To be retrieved from http://m.ceskapozice.cz/en/news/society/new-civil-code-isn%E2%80%99t-citizens

and the legal practice currently dealing with private law will not be able – at least for several years according to some opinions – to provide their clients with proper legal advice and to give them more or less exact prediction of possible outcomes of their particular civil proceedings.

What is seen as one of the most convincing arguments against the passage of the draft is enormous legal uncertainty which would necessarily accompany the adoption of such regulation. This uncertainty resulting from different and varying interpretation would undoubtedly create a great deal of controversy which could be solved only through courts until the disputed items are definitely clarified and uniformly interpreted by the Supreme Court and possibly commented on by legal scholars. It has constantly been pointed out that it might take even several decades to courts and the legal doctrine to study and to properly interpret thousands of new sections and provisions. During that time judicial decisions in the same cases would not be uniform and therefore the consequences of civil proceedings would become absolutely unpredictable for all parties concerned. Another subsequent serious disadvantage, irrespective of dramatically increasing number of litigation, is the fact that only few lawsuits would be decided and closed by the ruling of a first instance court.

From the formal point of view, another broadly criticised feature of the draft is the use of the Czech language in general and legal terminology in particular. The new Czech Civil Code would bring back many legal terms which either got totally out of use because of the socialist terminological experiment, or were used in the first half of the 20th century for the last time when the Austrian ABGB was still effective in the Czech territory.

9. Current Importance/domain of the Civil Code

The role played by Civil Code in the Czech Republic is apparent from the whole paper. To sum it up and in conclusion, CC is the basic legislative instrument of civil law, as well as a universal source of private law – despite the fact that some areas of private law are included in other codes or acts. Numerous amendments were mentioned above; it is therefore obvious that the current wording of CC is unsatisfactory. From that point of view, the adoption of a new Civil Code seems to be essential for further development of private law in the Czech Republic.

List of Abbreviations:

ABCh	–	The Act on Bills of Exchange, Promissory Notes and Cheques, No. 191/1950 Sb., as amended (*Zákon směnečný a šekový*)
FA-1949	–	The Family Law Act, No. 265/1949 Sb., repealed (*Zákon o právu rodinném*)
FA	–	The Family Act, No. 94/1963 Sb., as amended (*Zákon o rodině*)

C	–	The Constitution of the Czech Republic, No. 1/1993 Sb., as amended (*Ústava České republiky*)
CC-1811	–	The General Civil Code, No. 946/1811 Sb., repealed (*Všeobecný zákoník občanský, Allgemeines Bürgerliches Gesetzbuch*)
CC-1950	–	The Civil Code, No. 141/1950 Sb., repealed (*Občanský zákoník*)
CC	–	The Civil Code, No. 40/1964 Sb., as amended (*Občanský zákoník*)
Ch	–	The Charter of Fundamental Rights and Freedoms, No. 2/1993 Sb., as amended (*Listina základních práv a svobod*)
ComC	–	The Commercial Code, No. 513/1991 Sb., as amended (*Obchodní zákoník*)
CPA	–	The Consumers Protection Act, No. 634/1992 Sb., as amended (*Zákon o ochraně spotřebitele*)
LC	–	The Labour Code, No. 262/2006 Sb., as amended (*Zákoník práce*)
PILA	–	The Act Concerning Private International Law and the Rules of Procedure Relating Thereto (The Private International Law Act), No. 97/1963 Sb., as amended (*Zákon o mezinárodním právu* soukromém a procesním)
Sb.	–	The Collection of Laws of the Czech (Czechoslovak) Republic (*Sbírka zákonů České republiky*)
Sb. m. s.	–	The Collection of International Treaties of the Czech Republic (*Sbírka mezinárodních smluv České republiky*)
Sec.	–	Section (in Czech wording – §)

Literature and other sources used:

Adams, I.: Political Ideology Today. Manchester: Manchester University Press, 1993

Bejček, J.: Existují tzv. "komplexní právní úpravy" v obchodním a v občanském zákoníku? (Are there any so-called „c"complex regulations"" in the Commercial and Civil Codes ?). Právní rozhledy, Praha, Beck, no. 11/2000, pp. 492 - 497

Bělina, M., Pichrt, J. Nad návrhem novelizace zákoníku práce (včetně vazby na návrh nového občanského zákoníku). [Over On the proposal of a new Labour Code (including the reference to the proposal draft of a new Czech Civil Code], Právní rozhledy, no. 17/2011,

Bělina, M., Pichrt, J.: Nad návrhem nového zákoníku práce (On the proposal of a new Labour CodeOver the proposal of new Labour Code), Právní rozhledy, 2005, no 11, pp. 381 – 389

Bělovský, P.: Rodinné právo (Family Law). In: Bobek, M . Molek, P. – Šimíček, V. (eds.): Komunistické právo v Československu. Kapitoly z dějin

bezpráví (Communist Law in Czechoslovakia. Chapters from the history of injustice). Brno: Masarykova univerzita, Mezinárodní politologický ústav, 2009

Bezouška, P.: Návrh občanského zákoníku a jeho místo mezi evropskými kodexy (The Draft of a Civil Code and its place among European codes. Proposal of Civil Code and its place among the European codes). Právní rozhledy, 2008, No. 19, pp. 711-717

Dvořák, J.: Nové jevy v oblasti občanského práva (New Phenomena in the Branch of Private Law). In: Tomášek, M. – Pauknerová, M. et al.: Nové jevy v právu na počátku 21. století (New Phenomena in Law at the Beginning of the 21st Century). Svazek IV. Proměny soukromého práva. Praha: Univerzita Karlova, Karolinum, 2009, p. 86 et seq.

Editor's note: Věcný záměr občanského zákoníku (Basis of the Codification of the Civil Law). In: Právní praxe (Legal Practice) 2001, pp. 3–87.

Eliáš, K. – Zuklínová, M.: Principy a východiska pro nový kodex soukromého práva (Principles and Background of a New Code of Private LawPrinciples and Starting Points for New Code of Private Law). Praha: Linde Praha, a. s., 2001

Eliáš, K.: Charakteristika návrhu nového občanského zákoníku (Characteristics of the Czech Draft of the a Civil Code). – J. Švestka, J. Dvořák, L. Tichý (eds.). Sborník statí z diskusních fór o rekodifikaci občanského práva (Essays on the Recodification of the Civil Law). Prague 2006, p. 28 et seq.

Eliáš, K.: Rekodifikace občanského práva v postmoderní době (Re-codification of civil law in a post-modern period), in: Právní rozhledy 1/2008, p. 1-7

Eliáš, K.: Stát a občanský zákoník (The State and the Civil Code). In: Právní rozhledy č. 3/2008, p. 81 et seq.

Elischer, D.: Koupě na zkoušku v mezinárodním srovnání: Návrat do civilního korpusu aneb východiska a možnosti českého zákonodárce de lege ferenda (Purchase on test trial in an international comparison: Comeback to the Civil Code or the possibilities of Czech legislator legislature de lege ferenda), Právní Fórum 6/2008, pp. 257-262

Elischer, D.: Kudy se ubírá moderní deliktní právo? Několik úvah nad posledními trendy odpovědnostního práva s ohledem na Principy evropského deliktního práva (PETL) a návrh nového občanského zákoníku (Where do you go. What are the routes of modern tort law? Several remarks on the recent trends in tort law with regard to the Principles of European Tort Law (PETL) and the draft of a new Czech Civil Code. Several remarks over the recent trends of tort law with regard to the Principles of European Tort Law (PETL) and proposal of new Czech Civil Code), In Sborník z konference Naděje právní vědy - Býkov, Aleš Čeněk, 2008, pp. 227-233

Elischer, D.: Náhrada nemateriální újmy de lege ferenda s ohledem na současné trendy deliktního práva (Compensation of non-pecuniary loss de lege ferenda in view of modern trends in tort law). Právník 10/2008, pp. 1101-1107

Elischer, D.: Nové i staronové jevy v deliktním právu: vybrané aktuální otázky v právu odpovědnosti za škodu ve 3. tisíciletí (New and restored old-

new phenomena in tort law: actual selected topical questions issues in the law of damages in the 3rd millennium). In: Pauknerová, M. – Tomášek, M.: Nové jevy v právu na počátku 21. století (New Phenomena in Law at the Beginning of the 21st Century). IV. Proměny soukromého práva. 1. vydání. Praha: UK Praha, Karolinum, 2009, pp. 146-163

Elischer, D.: Pojetí škody, resp. újmy v aktuálních dokumentech evropského deliktního „soft law"(Conception of loss/harm in actual the recent documents of European tort "soft law"), Právník, č. 4/2011, pp. 378-399

Elischer, D.: Zvláštní ustanovení o prodeji zboží v obchodě (Special provisions on the sale of goods in shop), Občanský zákoník, in Eliáš a kol., Velký akademický komentář 1. vyd., Linde 2008, pp. 1797-1875

Elischer, D: Cese smlouvy jako nový institut českého soukromého práva, několik úvah k obecné úpravě postoupení smlouvy (Assignment of contract as a new institute institution of Czech private law; several remarks on the general provisions related to the assignement of contract). ASPI, Právní Fórum č. 5/2007, pp. 162-172

Frinta, O.: Moderní trendy ve vývoji institutu právnické osoby (Modern Trends in the Development of the Concept of Legal Entity). In: Pauknerová, M. – Tomášek, M.: Nové jevy v právu na počátku 21. století (New Phenomena in Law at the Beginning of the 21st Century). IV. Proměny soukromého práva. 1. vydání. Praha: UK Praha, Karolinum, 2009, pp. 163-176

Frinta, O.: Osvojení (nejen) v návrhu nového OZ. [Adoption (not only) in the draft of a new Civil Code]. Právník, 2007, roč. 146, č. 9, pp. 961-972

Frinta, O.: Právnická osoba v návrhu nového Kodexu soukromého práva. (The Legal entity in the draft of a new Civil Code). In: Knoll, V. – Karhanová, M. (eds.): Naděje právní vědy. Býkov 2007. Plzeň: Aleš Čeněk, 2008, pp. 234-243

Frinta, O.: Právnické osoby (Legal entities). Prameny a nové proudy právní vědy č. 40. Praha: Univerzita Karlova, Právnická fakulta, 2008

Frinta, O.: Určování rodičovství (nejen) v návrhu nového OZ. [Affiliation Determination of paternity proceedings (not only) in the draft of a new Civil Code]. In: Šínová, R. (ed.): Olomoucké právnické dny 2008. Sborník příspěvků z konference. 1. svazek. Olomouc: Iuridicum Olomoucense, o. p. s., 2008, pp. 217-223

Frinta, O.: Závěť (nejen) v návrhu nového OZ. [Last will (not only) in the draft of a new Civil Code]. Právník, 2008, No.11, pp. 1203-1216

Frintová, D. – Frinta, O.: Selected issues of the recodification of family law in the Czech Republic. In: Tomášek, M. et al.: Czech Law between Europeanization and Globalization. 1st edition. Praha: UK Praha, Karolinum, 2010, pp. 317-327

Holub, M., Fiala, J., Bičovský et al.: Komentář k občanskému zákoníku (Commentary on the Civil Code), Linde, Praha: 2001

Hrstková, J.: Fundamentals of Czech Civil Law. Praha: Univerzita Karlova v Praze, Právnická Fakulta, 2005

Hrušáková, M. – Králíčková, Z.: České rodinné právo (Czech Family Law). 3rd edition. Brno: Masarykova Univerzita and Jan Šabata, 2006

Jehlička, O. – Švestka, J. – Škárová, M. et al.: Občanský zákoník. Komentář (The Commentary on the Civil Code). 9. vydání. Praha: C. H. Beck, 2004

Knapp, V.: Velké právní systémy (Great Legal Systems, in Czech), Prague: C.H. Beck 1996

Knapp, V. et al.: Občanské právo hmotné (Substantive Civil Law). Svazek I. 3rd ed. Praha: ASPI Publishing, s. r. o., 2002

Knappová, M. et al.: Občanské právo hmotné (Substantive Civil Law). Díl prvý. Obecná část. 4. aktualizované a doplněné vydání. Praha: ASPI, a. s., 2005,

Kostečka J.: Pracovní právo a legislativní koncepce v oblasti soukromého práva (Labour law and legislative conceptions in the sphere of private law). Právní praxe 1/1995, pp. 2-16

Krčmář, J.: Právo občanské. I. – výklady úvodní a část všeobecná (Civil Law I – introductory explanations and the general part). 4rd ed. Praha: 1946

Mikeš, J.: Právo a dědictví (Law and Successions), Informatorium, Praha 1993

Pauknerová, M. Codification of Czech Private Law in the Middle and on the Outskirts of Europe, Liber Amicorum Valentinas Mikelenas, Justitia, Vilnius 2008 (2009), pp. 239-245

Pauknerová, M. Private International Law, Czech Republic, International Encyclopaedia of Laws, 2nd ed., Kluwer Law International 2011

Pauknerová, M. International Conventions and Community Law: Harmony and Conflicts, in Nuovi strumenti del diritto internazionale privato. New instruments of private international law – Liber Fausto Pocar – Giuffrè Editore, Milano 2009, pp. 793-808

Pauknerová, M. Conflict of laws conventions and their reception – Czech Republic, in Jorge Sánchez Cordero (ed.), The Impact of Uniform Law in National Law. Limits and Possibilities, 299-304, Instítuto de investigaciones jurídicas, Ciudad de México 2010

Pelikán, R.: Criticism of a new Czech civil code. Retrieved from: http://m.ceskapozice.cz/en/news/society/new-civil-code-isn%E2%80%99t-citizens

Piątowski, J. S. in Piątowski, J. S. (red.): System prawa rodzinnego i opiekuńczego (The System of Family and Guardianship Law). Część 1. Wrocław: Zakład Narodowy im. Ossolińskich - Wydawnictwo, 1985

Psutka, J.: Obecná prevenční povinnost - současný stav a návrh občanského zákoníku (General prevention duty – actual current status and the proposal of a new Civil Codestate and Proposal of New Civil Code). In Soukromé právo na cestě: eseje a jiné texty k jubileu Karla Eliáše. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2010, pp. 257-273

Radvanová, S. – Zuklínová, M.: Kurs občanského práva - Instituty rodinného práva (The Course of Civil Law – Institutions of Family Law). 1st edition. Praha: C. H. Beck 1999

Rouček, F. – J. Sedláček (eds.). Komentář k československému obecnému zákoníku občanskému (Commentary on the Czechoslovak General Civil Code). 5 volumes. Prague: 1937

Slováková, Z., Pauknerová, M. (Introduction) Czech Business Law – České obchodní právo (English-Czech), Charles University in Prague, Faculty of Law, 2007

Švestka, J. – Dvořák, J.: Občanské právo hmotné 1 (Substantive Civil Law 1). 5th ed. Prague: Wolters Kluwer ČR, a.s., 2009

Švestka, J. – Dvořák, J.: Občanské právo hmotné 3 (Substantive Civil Law 3). 5th ed. Prague: Wolters Kluwer ČR, a.s., 2009

Tichý, L.: Processes of Modernisation of Private Law Compared, and the CFR's Influence: http://www.juridicainternational.eu/processes-of-modernisation-of-private-law-compared-and-the-cfrs-influence

Tröster P. Požadavky na reformu českého pracovního práva (Requirements on for the reform of Czech labour law). Právo a zaměstnání 5/1996, pp. 1211-1139

http://obcanskyzakonik.justice.cz/cz/uvodni-stranka.html