

MANDATORY AND DIRECTORY PROVISIONS OF CIVIL CODE

TOMÁŠ HÜLLE

Právnická fakulta, Masarykova univerzita

Key words:

Mandatory provisions, Directory provisions, Civil code, Commercial code, New Civil Code, Duality of norms, Principles of Civil law, Practice of the courts, Vicariously mandatory provision, Solution of other branches of law.

Resume:

The contribution concentrates mostly on the topic of differentiation between mandatory and directory provisions in current Czech Civil code. The situation is very complicated because the criterions according which these two kinds of provisions have been differentiated are very unclear and it doesn't support the basic principles of private law. The main purpose of this work is to bring some methods how they can be distinguished and after this the opinions and ideas pro futuro. It is very interesting and important too because new Czech Civil code has been preparing by prof. Eliáš from Faculty of Law in Plzeň and it will probably share very similar concept which is used now.

First chapters of contribution are very general and their purpose is to describe as much as possible general terms of the topic. By these information I mean mostly terms like mandatory and directory provisions and the differences between them. After this description are named all relevant principles which are connected somehow to the autonomy of will in private law and to the methods of interpretations of legal texts. For this part of work is very typical mix of well known information with new knowledge which are written there. By these knowledge (or facts) I mean f.e. distinction between provisions how they are known now (legal norms) and "provisions of lower level" with which is necessary to work for better recognition of mandatory provisions. It is very practical information, especially because in current legal statutes or codes are very long and very complicated provisions where is impossible to recognize nature of this norm.

Today is only one relevant provision for differentiation § 2/1 which is very general and everybody who works with it says that this provision is very unpredictable or at least against principle of legal certainty. I established four basic kinds of provisions in my work into which

we can divide all provisions which are mandatory in current Civil code. These kinds are expressly determined provisions, vicariously mandatory provisions, temperamentally mixed provisions and purposely mandatory provisions. If it is not possible to sort the norm into one of these categories, it will be directory then. Very interesting is especially temperamentally mixed provisions because current scientific opinion is that this kind of provisions (like f.e. §51 of Civil code) are directory. Opinion presented in this contribution puts them into group of mandatory provisions and reasons for this are written there too clearly.

Very closely to the theoretical differentiation is differentiation by the courts ruling. The most relevant judgements of Supreme and Constitutional court are presented in this work like for instance judgement from March of Constitutional court of Czech republic, which decided about situation connected to the Labor code and differentiation of mandatory provisions there which were very complicate and they were changed into the form which is now in Civil code - Interesting are especially dissents of some judges of Constitutional court. According to them it has to be changed too because it is against legal certainty. The question connected to this judgement is if it wasn't be changed too much because Constitutional court was afraid of situation after so important hit or if the reason was adequate measure of certainty of this provision.

Last part of my contribution is about contemplation de lege ferenda connected to the procedure of creation of new Civil code in Czech republic. Final version will be presented probably during summer of current year and the most relevant provision will be based on the express declaration of mandatory provisions or on the four general factors again among which are for instance public order or good manners. These two indicators of mandatory provisions are very similar to the current nature of statute and the question connected to them is if there isn't better solution?

From this question is very simply understandable my position to the problem of distinguishing of provisions which is presented in my contribution. At the end of the contribution is comparison between all possibilities how is this problem solved in the codes or statutes in Czech republic. No one is the Best but there is presented which solution has which advantages and disadvantages. At the end is presented personal opinion about solution which has been chosen for future in new Civil code.

Whole problem is very complex and very complicated because it is very difficult to recognize the nature of provision in current Civil code. It is necessary to work with all codes, legal branches and principles in them. In the end it is necessary to say that the solution which is chosen for current civil law is very general and probably very good for flexibility of law like a

customization of Unfair competition and its very famous general clause against it. Unfortunately it isn't very clear which provisions can be changed and which can't be and it breaches the principle of legal certainty and principle of forethought. This is the reason why it is necessary to prepare some solution which will reflect current adjustment or to prepare modification of Civil code which will change the principle of recognition.

This article present one of solution how is possible to recognize nature of provisions. There are many different possibilities but I think that mine is very simple but not perfect. The question on which is necessary to ask now is: "Is it possible to find clear solution which will distinguish mandatory and directory provisions according to the current Civil code and civil law now?". If anybody asks me on this question, My answer to this question should be no. We can only find solution which will help us in some cases, sometimes even hard, but unfortunately it will not be probably valid or useable in all cases.

Contact information about autor – email:

T.Hulle@seznam.cz