





# **PRIVATE LAW REFORM**

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# INTRODUCTION

The European lawyers dealing with private law have had several very important topics to discuss and solve over the last years. One of the topics being discussed is the development of private law. Private law is a very dynamic part of legal system with many questions to be solved. Private law, however, is also a source of knowledge and experience for future development.

There are several European countries in which a broad reform of Civil law has been tackled. In this monograph, the authors focused on the current private law reform in the European countries, whether the reform has already been completed, e.g. in Hungary or Romania, or is still in process, e.g. Poland or the Slovak Republic.

The authors are aware of the fact that there are both similarities and differences between the particular European countries in which the reform has been carried out. On March 21, 2014, a preparatory international conference was held at the Faculty of Law of Masaryk University in Brno (Czech Republic). One of the main topics of the conference was to analyze such similarities and differences between the particular national reforms of private law.

The participants of the conference answered several poll questions asked by the project researchers. The questions addressed the following issues:

- Preparation of the private law reform and materialization thereof
- foreign and European models
- the subject matter aspects of the reform
- experience with applying new rules in the practice
- goals of the reform, i.e. whether a new civil code was passed.

The responses gave particularly the image of similar tendencies of the development of national private laws in European countries, but also the main dissimilarities relating to the conception and the practical development of the reform of national private law.

The preliminary results of the conference were used as the grounds for this monograph. The results, however, may also be used for other purposes,

e.g. finding answers to the particular questions concerning the reform or even searching for the paths towards the future European Civil Code which should express the common European values of civil society.

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## GENERAL PART

### 1 PREPARATION OF THE PRIVATE LAW REFORM AND ITS MATERIALIZATION

The selected national legal orders that we researched fall within the scope of a so-called continental system of law. There are two basic forms in which continental private law react to the changes in society and to the requirements that these changes have on law. On the one side, there are legislative changes and changes resulting from the judicial decisions and the legal doctrine which influence interpretation and preference of the existing law; these changes usually take place in the national legal orders that understand ‘codifications’ as an effusion of the particular national culture and which have tried to avoid deeper legislative interferences in their codes over long periods of time.

On the other side, most of the national legal orders of the post-communist countries lack the feeling of “civilizational steadiness” arisen from experience with the civil codes existing for a long time.<sup>1</sup>

Therefore, in this monograph, the term ‘reform’ refers to crucial legislative changes. The study, however, mentions not only the changes of the text of laws, but it also pays attention to interpretation and application of the laws which allowed the long-lasting existence of the codes (e.g. France, with its Code civil 1804 or Austria’s ABGB 1811<sup>2</sup>) and to modernization of functioning of private law. Aside from the classical judicial decisions and their influence on private law ‘in action’, one should not forget about the factors that have grown into a significant influence over the last decades, i.e. the international treaties as the catalogues of human rights, global and European factors, obvious and latent, direct and indirect factors, or

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<sup>1</sup> Many states that emerged in the Central and Eastern Europe especially during the twentieth century adapted some of the existing codes (compare the Czech Republic and the Balkans). Most of them, however, adjusted their civil codes to the political and economic standards of socialism during the second half of the twentieth century.

<sup>2</sup> General Part, “Chapter 2.

the factors of the “standard” sources of law on the one side, and ‘soft law’ on the other, but also the contracts of adhesion and general terms and conditions or public-law limits to private law, which all exist simultaneously with the legislative sources. These factors modify the sources of law, and as such, they should also be taken into account while researching the reforms.

The reason that this monograph is aimed mainly on the legislative processes of reforms is that, as for the continental system of law, the main source of law is a statute (act, law) and the core source of private is usually a civil code. The abovementioned trends of the “new continental law” or “para law” or other similar “laws” which are understood as the new sources of law, they all require a special research. Although the authors do not marginalize the influence of such “new sources of law”, they leave them to a separate research.

The editors of the monograph perceived and respected the particular different approaches of the particular national legal orders to the concept of a ‘reform of private law’ and characteristics of the reforms. In this respect, the modernization and “Europeanization” carried out in Germany, which was completed in 2000-2002, or the partial modernization of the Austrian ABGB by means of the partial steps within the agenda 200+ are also considered by the authors as reforms. This also applies to the unrealized tendency to rebuild private law, for instance, in Latvia or to the completed comprehensive recodification of the whole private law, as it was done in the Czech Republic, Hungary or Romania, or as it is being prepared in the Slovak Republic or Poland. Aside from that, the authors extended the concept of reform also to the sets of laws that have been adapted gradually, i.e. the particular (partial) laws which also bring about a crucial change of private law, e.g. in Croatia or Serbia. As we can see, legislative changes may be carried out in many different forms. The variety of the changes of private law shows the steps that the European states have taken while “filling out” the room between the tradition and innovation of private law. It has been a highly difficult process in both the traditional democracies, where it was done also by means of Europeanization of private law, and in the young democracies. The goal was to simultaneously achieve several goals: (a) trying to grasp the modern orientation of private law; (b) trying to fulfill

the political tasks of harmonization of the national legal orders with EU law connected with joining the EU; and (c) also, simultaneously, legislatively ensure the process of restoration of the civil law tradition of private law.

**For how long has the reform, including the preparatory works, been underway?**

In the classic states of Western Europe, the endurance of reform efforts was defined by two positions: reforms of private law have been discussed during the entire existence of the particular code (this is typical mainly for Austria); the particular projects of reform were instigated usually by the need of the political bodies to carry out crucial changes and they usually had to be carried out within certain time limits.<sup>3</sup>

In general, the post-communist countries stood on the same start line, i.e. the early 1990 s. However, the time was used differently and was filled with other activities although they might have had the same objective:

- Permanent efforts to have a reform, which reflected in the continuous works on a single project which was completed (Hungary); it often depended on the authority of the leaders of such projects (L.Vékás in Hungary, J. Lazar in Slovak Republic).
- Permanent efforts to have a reform; during the attempts, there were prepared several independent, and often completely different, projects; only one of them was realized. The Czech Republic is also an example of this approach. The completion of the project of recodification 2000-2012 was supported by the huge political support of the idea of recodification in 2005-2009. Another example is Romania where there were two proposals of recodification of civil code during the period researched (2004, 2009); the first proposal had not been adapted due to a lack of political support.

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<sup>3</sup> Compare the German project on law of obligations that had materialized in two stages: in discussion from 1970 s till 1994, followed as a particular legislative project between 2000 and 2002. In Austria, it appears more about surveying of revision topics and following, although rather carefully guided, discussion of the legal professionals. Politically organized projects of modernization of the Austrian law appear rather similarly careful. Their dominance in recent times has been occupied by the 200+ agenda, which was related to the two-hundred year period of ABGB influence in Austrian society. Compare also the unrealized Project Catala in France.

- Permanent efforts to have a reform expressed in a relatively continuous work on one developing project which has not been finished; yet, it is expected to be completed in 2015 (Poland); or the reform efforts were interrupted several times and accelerated only after some time (in 2007 in the Slovak Republic).
- The permanent reform efforts had only limited support of complex recodification. The development led to the passage of systematically comprehensive parts of private law, which, however, was not comprised in one code (this typically applies to Balkan states: Croatia, Slovenia).

### **What were the reasons for the reform?**

As for the classic civil codes we selected, i.e. the Austrian ABGB 1811 and the German BGB 1900, it is important to take into account the original cause which led to origination of the codes. The objective was (identically to the third large classic code, the French Code civil 1804) of integrative nature although in the particular cases there were differences which accented the national (Germany) or civic (Austria) integrity, or the efforts to expend the imperial aspirations and ideas of the Enlightenment (France).<sup>4</sup> This integrative function keeps its influence even after the decades and centuries in which the codes existed; it is a strong factor influencing changes of the codes although their conceptual and systematic parameters remain untouched.

In the states of “traditional Europe”, the projects of reform often introduce only partial changes (the Austrian government’s reform projects and the reform of law of obligation in Germany in 2002) which were initiated rather due to pragmatic than doctrinal reasons. As it is shown in the chapters on reform of the Austrian law and on reform of the German BGB, the goals of the Austrian reforms after the year of 2000 were aimed at substantial changes instigated by the pressure of modern society. However, the Austria’s ABGB is still generally understood as a sufficient foundation for everyday life and legal practice.<sup>5</sup> The main motive of the German reform of law of obligations consists of two classes of reasons: from a long term

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<sup>4</sup> Delmas-Marty, M., *Le relatif et l’universel*. Paris: Seuil, 2004, p. 32.

<sup>5</sup> See more National report, Chapter 21.



perspective, there were such goals as integration of special statutes into BGB, the incorporation of new types of contractual relationships into BGB, a reform of a number of rules on obligations already existing in BGB, concerning sales contracts, contracts for work, unjustified enrichment and delict and changes of general law of obligations in order to make it less complex and structurally more coherent, and to bring it in line with the new international developments. The German reform of late Twentieth century was accelerated especially by the urgent political requirement on harmonization of contract law with the EU law and incorporation of consumer protection into the system of law.<sup>6</sup>

None of the political or academic projects presented in the states of Western Europe we researched was complex, conceptual or systematic.<sup>7</sup>

The motives of the considerations about the reforms and projects in the countries of the former Eastern Bloc varied. Hence, they need to be researched separately. Also in this group of countries, the requirement to have reforms of private law was presented as an expression of the new political-economic direction of the particular countries. In most of these countries, the legislative principles of private law<sup>8</sup> had been more or less modified in accordance with the socialist ideology during the era of the Eastern Bloc. Therefore, after the leaving the Eastern Bloc, the reform of private law

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<sup>6</sup> The request to incorporate the European Consumer Sales Directive (1999/44/EC) by January, 1 2002.

<sup>7</sup> This form has not been present even during the Austrian “ABGB 200+” project, which emerged as the result of academic and political discussion regarding the need to make a reform of the Austrian code: it suggests a change of the code and modernization of the majority of its parts. Nevertheless, the realization is suggested by gradual steps (step by step). It should be noted that Austrian legislative interference in private law, though quite numerous in recent 15 years, are done mainly by adapting laws outside the text of the own code.

<sup>8</sup> Obviously, not every country has made its private law an active tool for anticipation of specific of social relations of a socialist type: while Czechoslovakia and the former German democratic republic embedded in the texts of their civil, economic and other a far-reaching program, which was based on socialized economy and collectivist morality and has been quite incompatible with standard civil codes, other countries, such as Poland, have kept their much higher level of universality applied under different social conditions. On the other hand, countries such as Romania kept their basic code adjustment from their deep history (Civil Code from the year 1864). This later corresponded to the promoted objective need to make a reform of the civil law of the socialist era.

became important both due to practical reasons and to demonstrate that the particular country is now on the path to the standard political-economic system of western states.

Despite all that, the requirement to have reforms was not presented in all of the former members of the Eastern Bloc immediately after the countries had returned to standard democracy. There were often just discussions on the necessity of a complex recodification or only reforms covering the practical and necessary legislative changes. In majority of the members of the former Eastern Bloc, this ideological ambivalence was manifested in preference of particular amendments,<sup>9</sup> or in suppressing the idea to have a complex (re)codification of private law,<sup>10</sup> or in hesitation or reluctance to dynamically prepare and support a complex reform of private law.<sup>11</sup> In majority of these countries, the socialist private law was “resocialized”, but some states had to deal with a requirement to have their relatively old codes modernized, i.e. the “socialist” phase of the development was not always the main reason to tackle a complex recodification.<sup>12</sup>

Comparison of the two groups of the reforms (traditional and modern) helps us understand the extent of paradigm changes in the particular national legal orders or in the abovementioned groups of states. When the traditional European democracies (Austria, Germany) had to deal (e.g. due to the political requirements of harmonization of their private law with EU law) with requirements to make changes affecting the core values and institutional principles of their civil codes (e.g. the strength of the principle of autonomy of will), they strived to respect or even keep the spirit of their codes. Nevertheless, these states also have not stopped the paradigm changes of laws or interpretation of laws although they rather tried to minimize the effects of such changes.<sup>13</sup>

<sup>9</sup> Conf. development in the Nineties in the Czech Republic or Slovak Republic (National Reports, Chapter 3 and 8).

<sup>10</sup> Conf. development in Poland (National reports, Chapter 6).

<sup>11</sup> Conf. the Slovak Republic or Poland (National reports, Chapter 6).

<sup>12</sup> Conf. the specific situation of Romania which, in the 1990 s, faced the requirement to modernize its Civil Code of 1864 (see National reports, Chapter 7).

<sup>13</sup> Conf. the historical breakthrough caused by the paradigmatic change in the liberal concept of the Austrian ABGB towards the social dimension of the Civil Law, especially its third partial amendment from the year 1916 (National reports, Chapter 1).

In the post-communist countries, the issues of paradigm changes of private law were accepted without any more intensive prejudices; they were often actively supported. The then existing private law was not considered as an expression of the national or state peculiarity and was rather willingly replaced by a complex new set of laws which included certain paradigm responses to the essence of law.<sup>14</sup>

To summarize, we may say that in general there are two most important reasons to have reforms of private law in the new democracies: firstly, it is the transition from socialism and planned economy to democracy and market economy. The transition of economy itself demanded a reform of law. The period of socialism deeply affected private law of these countries, which in many different aspects needed to be adapted to market economy. The second reason for the reform of private law was that many of these countries, earlier or later, started the process of joining the European Union. The aim to further develop and modernize private law was in some of these countries of less importance.<sup>15</sup> An archaic nature of a code as the reason for reform was rather exceptional.<sup>16</sup>

### **Have any studies been conducted which identify the most significant problems with exercising the former legal conditions in practice?**

As for the scientific and professional preparation of the process of reforms in the states we researched, the political representation (governments and ministries of justices) was the core and imminent mover of the reforms.<sup>17</sup> In majority of the states, the reform was initiated by establishing relevant commissions by the Ministry of Justice; this was followed by drafting

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<sup>14</sup> The recodification of the Civil Law in the Czech Republic could be introduced by this approach - further post-communistic states showed a greater degree of balance between tradition and innovation when dealing with paradigmatic changes (although in other states, the interference with the paradigm and the concurrent changes were distinct and often crucial).

<sup>15</sup> Typically in the Czech Republic (National reports, Chapter 3).

<sup>16</sup> Conf. the Chapter on Romania (National reports, Chapter 7); ABGB was criticized for its archaic language, however, it was not considered a reason serious enough to make a change.

<sup>17</sup> Conf. among others, Germany, Austria, or as for the post-communistic countries the Czech Republic, Slovak Republic, Croatia, Romania, Hungary and Poland (see National reports, Chapter 3, 8, 9, 5, 7, 5, 6).

of the reform intention.<sup>18</sup> These steps were accompanied by numerous academic studies or opinions of the professional lawyers.<sup>19</sup> These factors show the difference between the western and eastern states. In the western states, there was much broader discussion of the academics and practicing lawyers. This discussion helped to create the conditions and shaped the priorities and the limits to traditions and the innovative changes much more than in majority of the post-communist countries, which had significantly less time for initiating and leading discussion aimed at the issues of a conceptual reform of private law due to the often hectic and insufficiently prepared changes of the entire legal order.

On the other hand, the “new” European democracies were stimulated by the discussion of the lawyers who preferred more conceptual reforms of private law, whereas the discussion and studies in the “old” democracies often supported the requirement to respect and stick to the main systematic parameters and main content and value foundations of the existing codes; they rather aimed at the changes regulating the pragmatic daily-life needs of society.<sup>20</sup>

### **How was the reform organized?**

Comparing the steps that had been taken during the preparatory works and realization of the reforms, we may identify two crucial sets of organizational measures that tended to materialize in the process of actualizing the reform: (a) political decision about having the reform followed by an establishment of a commission for the reform of private law; such a political decision was followed by studies and opinions that accompanied the political steps; (b)

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<sup>18</sup> Conf. the material objectives of the code/reforms, which are presented as the outlet of political assignments in Czech Republic to those in the Slovak Republic and other countries.

<sup>19</sup> Conf. the conferences in Austria as part of the 200+ agenda. They deal with academic preparation of ministry or government reform projects of the Austrian Civil Law. Com. also the conferences and studies of German lawyers and their associations that were consistently supporting and assessing the reform process in Germany in the years 1981-1983, with were the base for the Committee of Ministry of Justice while preparing the final report and which were incorporated into the final report with the range of several hundred pages. Conf. the series of discussion forums and conferences in the Czech Republic and the Slovak Republic from the year 2000 till today.

<sup>20</sup> Significant research activities that preceded political decisions regarding the implementation of the reform could be found, for example, in the chapter on Romania.

in some countries, there were groups of lawyers which took particular initiative steps that resulted in political decisions; these steps might be considered as the crucial elements of the organizational process of the reform.<sup>21</sup>

Although we may identify a strong influence of the ideals and opinions of lawyers in the experience of some of the European states we researched, in practice, the lawyers' opinions were never the single dominating factor that would primarily produce or accelerate the development of a reform.

The "national" chapters of this monograph indicate also several causes:

- The generally predominant pragmatism of the lawyer's thought of the last decades over the doctrinal thought.
- Reluctance of the old democracies to interfere with the conceptual and value foundations of their codifications.
- Political nature of the sources of an assignment causing the need for reforms.<sup>22</sup>
- In some cases, late origination of the academic preparation of the reforms.<sup>23</sup>
- Small potential of the scientific community and the lawyers to spontaneously organize and form common opinions or even common goals.
- The traditional plurality of opinions of the legal theorists and less probability to agree on the positive content approaches.
- A lack of "leaders" in the field of the national civil law who would be able to integrate the representatives of civil law science into a single common reform platform.

<sup>21</sup> While the first option is more common and one can say that it appears as a standard, the second option could be found, for example, in the Austrian reform process (conf. the broad professional literature and other outputs, especially from the academic discussion, preceding and accompanying the introduction and implementation of the aims of the 200+ agenda).

<sup>22</sup> Conf. one of the stronger politically mediated assignments, which relate to the mentioned reform period, meaning a proper harmonization of the contractual Law of the EC / EU Member States and the „European“ secondary Law, especially regarding consumer protection law (for more details, see national reports of Austria and Germany, National reports, Chapter 4 and 1).

<sup>23</sup> For example, in Slovenia, the reform process including academic activity has begun in the year 2001 as far as the unsuccessful codification efforts are concerned. Elsewhere, the reforms of pre-independence legislation were heavily influenced and overwhelmingly initiated by the academic sphere (e.g. code on obligations, real property code, maritime code etc.). See more in Chapter Slovenia, National Reports, Chapter 9.

- In the conditions of the young European democracies, the above-mentioned factors shall be supplemented by another very strong factor, i.e. the reform is understood as an expression of an ideological, cultural and economic separation from the preceding stage of development, i.e. separation from the era of so-called ‘real socialism’ and its legal order.<sup>24</sup>

On the other hand, the influence of prominent persons whose authority in the field overcomes the ideological fragmentation plays an important role in organizing the other prominent representatives of the field.<sup>25</sup>

The advancement of the organizational steps during the preparation process and actualization of the reform were usually based on the general model:

- Political support and explanation of necessity of the reforms,
- Establishment of a reform commission overviewed by Ministry of Justice,
- Formulation of a reform plan by the respective reform commission,
- Discussion led by professionals,
- Presenting the draft reform (code) to legislators,
- Deliberating the draft reform in the legislative bodies,
- Certain non-standard organizational steps in some countries modified the presented model.
- The process of a reform started together with the partial reforms in certain particular areas of private law. After that the (unsuccessful) codification efforts embodied in the academic project superseded the partial reforms.<sup>26</sup>
- The process of a reform was not successful and had to be revised several times.<sup>27</sup>

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<sup>24</sup> This reason has been strongly manifested for example, in the enforcement and recodification manner of the Czech Civil law.

<sup>25</sup> Z. Radwański from Poland, L. Vékas from Hungary or J. Lazar in Slovak Republic, all had such an accelerating role.

<sup>26</sup> This is the example of Slovenia. See more National reports, Chapter 9.

<sup>27</sup> Conf. the Czech Republic, where alongside with the original federal project of the Civil Code from the years 1991-1992, there was a partial provisional recodification of commercial law and a great amendment of the Civil code in the years 1990-1991. In addition, a proposal of so called Zoulik’s draft of the Civil code was presented in 1996, but it has not been implemented due to the fall of the government in 1997. It was followed by an implemented recodification project from the years 2000-2013.

- A pressure of legal professional led to modification of the reform process in the early stages thereof.<sup>28</sup>
- The aim of the reform process was not sufficient with obtaining broad public support by the representatives of jurisprudence and practice.<sup>29</sup>
- The presented proposals of the reform have not gained the needed support by the legal professionals although the necessary steps were taken.<sup>30</sup>
- A lack of support to the reform project resulted in a consequent critical approach to the passed legislation by the legal professionals.<sup>31</sup>
- Legislative hearing failed due to certain formal legislative obstacles.<sup>32</sup>
- Foreign financial institutions financially supported the reform.<sup>33</sup>

### **To what extent were the critical remarks raised by representatives of legal theory and practice taken into account?**

The influence of the representatives of legal theory and the practicing lawyers was crucial in the traditional European democracies. The draft

<sup>28</sup> Conf. the modification of target of the codification of private law in Croatia, which has been changed into a compilation of single systemic legal steps; conf. the slow-down of the first phases of the legislative process in Poland as a result of massive criticism, especially by the younger generation of lawyers; conf. the slow-down of Civil Law recodification steps due to repeated personnel changes in the recodification committee in Slovak Republic.

<sup>29</sup> Conf. the specific organization conditions of private law recodification in the Czech Republic; a low consistency in evaluation of opponents' opinions and minimal personal concentration of key players has raised an increasing opposition already during the preparation of recodification texts. After government change in the year 2014, the opposition requires immediate and massive changes of the already effective outcome of the reform.

<sup>30</sup> Such process could be found in the finishing phases of the recodification process in the Czech Republic. Steps were taken to create a more extensive involvement of representatives of the academic sphere and the legal practice. First of all, the recodification process has been too advanced. Second of all, at this point, opinions and comments containing criticism were not taken enough into account.

<sup>31</sup> Conf. the fate of law of obligations in Germany in the years 2000-2002, conf. strong critical attitudes of legal public towards the already effective recodification of Czech private law.

<sup>32</sup> Conf. the event when Hungarian president refused to sign the recodification of the Hungarian Civil law, which led to changes of the code.

<sup>33</sup> Conf. the financial support of recodification of the Romanian private law, which was carried out after the year 2004 by the World Bank. See more national report of Romania (National reports, Chapter 7).

reforms presented by the governments or the particular ministries were presented to the academics for discussions and were based on vast discussions and studies. Also the practicing lawyers commented on the draft pieces of legislation.<sup>34</sup>

In the young European democracies, one may also detect a strong and often crucial influence of the representatives of legal theory and practice on organization, course and especially the content of the reforms of private law. Despite all that, the influence in the particular states varied and had different consequences: in some states, the legal professionals significantly influenced the final shape of the reforms. They, for example, helped with the following questions: (i) whether to carry out a complex recodification or only amend the existing laws;<sup>35</sup> (ii) whether to prepare a legislatively separate parts of the reformed private law<sup>36</sup>; (iii) whether to integrate a significant part of private law including business law into a single code or rather stick to legal dualism of having a civil code and a business (commercial) code.<sup>37</sup> There were certain contradicting approaches of the legal professionals towards the reforms.<sup>38</sup> On the other hand, in some of the countries, there were efforts to marginalize the entire area of legal theory and practice while making the political decisions about the reforms.<sup>39</sup>

**Which laws were prepared or adapted in the course of the reform? For instance, if a new civil code was adapted as a part of the reform, was it prepared separately, and were any other laws prepared together**

<sup>34</sup> Some German authors consider as a certain exception the preparation of the reform of law of obligations from the years 2000-2001. This reform has been criticized for shortcomings that resulted, among other, due to a short processing time.

<sup>35</sup> Conf. for example, in the Czech Republic or in Slovak Republic (National reports, Chapter 3 and 8).

<sup>36</sup> Conf. as example, the impact of legal practice on the form of reform of Croatian private law in the early 1990s (National reports, Chapter 2).

<sup>37</sup> This question became crucial in the discussion about the form of the Slovak recodification of private law.

<sup>38</sup> Conf. for example, the critical attitude of the Polish legal community and especially its younger generation towards the draft of the new Polish Civil Code, prepared under the competence of Z. Radwański.

<sup>39</sup> These phenomena have been observed, for example, during the preparation of the Czech Civil Code in the period between the year 2000 and before sending the bill to the parliament.



**with it? (Such “other laws” could include not only new laws, but also already existing laws which had to be amended as a result of the passage of the new civil code.)**

While researching the reforms carried out in the particular states, it is important to consider whether the reform was aimed at having a complex recodification of a civil code or whether it strived for making only partial changes during the particular phases of the reform.

Aside from that, it is important to take into account whether the reform is to replace the entire code or only amend it and make some changes to it.

In the contemporary “traditional” democracies, the reforms both tried to change the text of the codes and formally pass relatively independent new laws. Moreover, numerous changes of other laws had to be made as well.<sup>40</sup>

In the new democracies, the adoption of the new complex codes of private law often brought the need to amend some of the other existing laws. It was typical that such issues as corporate matters, registry of corporations (commercial registry), land registry and others were not included into the new civil codes; these issues were rather regulated by other laws. In some legal orders, this approach also applied to intellectual property law, certain issues of labor law and international private law. It was, however, typical for the complex recodification of private law that it was connected with a simultaneous reform of civil procedure<sup>41</sup> and sometimes even with a reform of organization of the system of judiciary.<sup>42</sup>

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<sup>40</sup> It is typical for Germany that has tremendously changed the text of law of obligations in BGB. It caused a change to the introductory law of BGB, changes to the Commercial Code, etc. Austria, which performs most of its 200+ reform without the ABGB text, published, during the reform, 13 major laws that are formally existing outside their own ABGB, including the necessary accompanying legislative changes.

<sup>41</sup> The reform of the civil procedure was accompanied with recodification of private law in the Czech Republic, Romania, Poland and Slovak Republic.

<sup>42</sup> The reform of the organization of the system of justice accompanies the recodification of the Romanian Civil Code.

### What was or has been the length of time of the period of *vacatio legis* set by the lawgiver?

If we compare the *vacatio legis* period of the particular states in which the reforms were made we learn that there are many differences often caused by the completely different conditions for setting the length of the period:

- The unavoidable political requirements were one of the significant factors leading to setting short or even very short *vacatio legis* periods; especially the requests of implementation the European directives or harmonize EU/EC law as a whole.<sup>43</sup>
- In some legal orders, there are long *vacatio legis* periods; the reason for this was that the reforms represent a significant interference in the regulated social relationships and that they establish many new legal concepts which require enough time before they should be put into practice.<sup>44</sup>
- It happens relatively often in the young democracies that the approach to the length of the *vacatio legis* periods changed over the last years. In the first years of the reconstruction of the legal order after the collapse of the socialist regimes, it was required that any changes had to be put into life fast. Nevertheless, this requirement started to cease after 2000, as it became required that society has more time to prepare before a reform takes legal effect.<sup>45</sup>

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<sup>43</sup> Conf. the criticized short *vacatio legis* period introduced by German law of obligations which was in force from November 26, 2001 till January 1, 2002, caused by the requirement to implement the Consumer Sales by the end of the year 2001.

<sup>44</sup> Conf. the approach to reform changes in Croatia (National reports, Chapter 2).

<sup>45</sup> Conf. the changes concerning *vacatio legis* period in Croatia that, in the 1990 s, we only several months long, whereas in the last decade, they are non-standardly long. Conf. also the *vacatio legis* periods in the Czech Republic where, as for civil and commercial law including the recodification of commercial law, the periods between the promulgation of a crucial (and urgent) laws and the time the laws take legal effect were usually only a couple of months, whereas the *vacatio legis* period of the new Civil code was almost two years.

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## 2 FOREIGN AND EUROPEAN MODELS

**Was the reform inspired by any foreign civil codes? Is there an obvious influence of a single foreign code, or was the inspiration taken from several sources? If there were more sources, is the final outcome consistent in both its content and terminology?**

From the historical and comparative point of view, we may identify several crucial types of inspiration by other codes and laws. The core factor is mainly the level of continuity and discontinuity with the former laws. If the given approach upholds continuity between the existing laws and the new laws,<sup>46</sup> the reform efforts aim at selecting such parts of laws that require more or less urgent changes according to the criteria chosen. On the other hand, upholding discontinuity means rejecting the existing laws.<sup>47</sup>

In connection with the accepted level of discontinuity that makes room for a choice of patterns without any limits set by the extent of the changes to be made, the following classes of models are usually used:

- Accepting a single model of legislation. This model has not been fully accepted in any of the legal orders we researched.
- Accepting plurality of the models of legislation; this is a standard for most of the reform projects concerning private law although it has not been openly mentioned by the lawgiver.<sup>48</sup>
- The historical models; here, with respect to the concurrence with the contemporary models such as ABGB or Code civil, we included only the models and patterns that do not have a legal effect anymore. Adaptation of this model may seem to be not very likely due to the standard requirement of modernization of private law. However, this model has significantly materialized in the new Czech Civil

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<sup>46</sup> This requirement has been clearly defined mostly in the German and Austrian reform of the private law.

<sup>47</sup> Undoubtedly, out of the legal orders we researched the requirement of discontinuity drafted and later implemented most carefully in the Czech recodification of the private law.

<sup>48</sup> Same applies for codifications which do not have a certain underlying form and have several inspirational influences. Conf. the national report of Hungary and to some extent also Poland (National reports, Chapters 5 and 6).

code, which, aside from modernization, grounded its concept on the requirement of “restoring” the democratic traditions of a civil code.<sup>49</sup>

- The contemporary models of the valid private law legislation. Using of this model is the most frequent: majority of the reform projects openly mention the inspiration by foreign private law legislation, especially civil codes.<sup>50</sup> The regulation or legislative solutions are copied from the following codes: the German BGB 1900, the Austrian ABGB 1811, the Italian Codice civile, Quebec Civil code, Dutch Civil code, Spanish Civil code; Swiss Civil code, Swiss Code of obligations, Brazilian Civil code.
- We should also mention inspiration by the Polish Civil code,<sup>51</sup> the new Hungarian Civil code and the new Czech Civil code.<sup>52</sup>
- The projects that are not a part of the national codifications of private law. They are mainly the „soft law“ projects, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS), the UN Convention on International Sale of Goods (CISG),<sup>53</sup> the EU principles or CESL’s proposal which do not have legal effect yet, and others.

We should also mention the traditional west European legal orders due to their relatively higher level of stability in the reform processes. The reform process in Austria was unaffected by the foreign influence for a long time. The only code that served as an inspiration was the German BGB; the only real model of the changes to the Austrian legal order was, however, only EU law. German law showed a different development: in the first phase of preparation, it did not take much inspiration from the foreign legal orders, model

<sup>49</sup> The basic form for the Czech Civil code was set by the proposal of the Czechoslovak Civil code of 1938, which has never been adapted; it was intended to be a ‘modernized’ form of the ABGB.

<sup>50</sup> This approach clearly pays less attention to the research itself, as it rather inclines to legal comparison which is often used.

<sup>51</sup> See more in the national report of the Czech Republic (National reports, Chapter 3).

<sup>52</sup> See more in the national report of the Slovak Republic (National reports, Chapter 8).

<sup>53</sup> CISG is not „soft law“, but it is an international treaty in force. Specifically compare to national reports of Croatia and the Czech Republic (National Reports, Chapters 3 and 2).

principles and “soft law” projects; after being criticized and based the proposals presented by legal professionals, the “external” sources were also used and embodied into the project.<sup>54</sup>

As for the post-communist states in which the reforms had taken place, we may observe the reaction of the newly adapted legislation to the historical roots from which it arose and either “prolongation”<sup>55</sup> or complete refusal of such roots.<sup>56</sup> In this respect, we should mention the new Czech Civil code, as the Austrian historical roots (ABGB) heavily influenced the new Czech code. The same applies to Croatia where the historical influence of the Austrian ABGB, the German BGB, and the influence of the French and Swiss civil law may be traced.<sup>57</sup> Slovakia delimited the area of its influence relatively distinctively. It linked the inspiration to the Central European legal orders via direct reference to private law of Poland, the Czech Republic, Hungary, Austria and Germany.<sup>58</sup>

**If foreign models were adopted, was the lawmaker inspired mainly by actual *law in action*, or did he merely copy and rephrase the text of such foreign models?**

By going through the national reports, it is hard to generalize the level of inspiration by the foreign laws or the adaptation thereof in the particular states. In general, it may be said that the so-called “law in action” was being considered. However, in the post-communist countries, they did not always the studies that would cover the level of modification of the text of law so that it could be incorporated into the proposed bills.<sup>59,60</sup>

<sup>54</sup> Conf. the German reform of law of obligations in 2002, where this additional impact has been very obvious.

<sup>55</sup> See the chapter on Croatia (National reports, Chapter 2).

<sup>56</sup> Typically the Czech legislator.

<sup>57</sup> See more in the chapter on Croatia (National reports, Chapter 2).

<sup>58</sup> See the chapter on the Slovak Republic (National reports, Chapter 8).

<sup>59</sup> This materialized, for instance, in the recodified Czech Civil code, which often adapted the text of the Austrian ABGB and the Swiss Civil code or the Swiss Code of law of obligations although it did not take into account properly and completely the change and the manner in which they would be “grasped” by the legal practice and the theory.

<sup>60</sup> This limiting fact is explicitly admitted, for example, by the Czech law giver. See the chapter on the Czech Republic.

It was easier for the drafters of recodification who selected less models as an inspiration for their projects; less models meant that they could study them better and deeper.<sup>61</sup>

### **Was the reform inspired by some European projects, e.g. Common Frame of Reference?**

The influence of the significant European projects of the particular segments of private law, such as PECL, DCFR, PETL and others have depended on the timeframe in which they were considered.

- The newest projects, such as the Common European Sales Law (CESL), which was approved by the European Parliament on February 26, 2014, could not inspire even the newest reform projects; nevertheless, we may expect that they will become inspiration for the ongoing projects.<sup>62</sup>
- The reforms that had been actualized before the completion of the European projects or before the legal professionals were able to become acquainted with the respective European projects were logically not influenced by such projects.<sup>63</sup>
- Some reforms proceeded and finished in one period; these reforms were influenced by the European projects only partially and only in the later stages.<sup>64</sup> The influence is thus only partial and not significant.<sup>65</sup>
- Most of the reform projects of reforms of private law considers relatively broadly the European projects concerning the particular areas of private law. They understand such projects as an expression of modernization of the respective segments of private law *par excellence* and as a contribution to the process of Europeanization of national laws. This applies especially to the areas in which it

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<sup>61</sup> See especially the chapter on the Slovak Republic (National reports, Chapter 8).

<sup>62</sup> It may be expected that they will have more significant influence, e.g. in the Slovakian or Polish process of recodification.

<sup>63</sup> Compare the German reform of law of obligations, 2002; also conf. the Romanian Civil code 2009 which was explicitly inspired only by the Lando's PECL.

<sup>64</sup> Conf. the new foreign legislative projects which were altered after having been criticized by the legal professionals (the Dutch Civil code) and the European or international projects of law of obligations embodied in the German reform of law of obligations 2002.

<sup>65</sup> Conf. typically the draft of the Czech Civil code which was presented to the legislative process in 2009, i.e. simultaneously with the publication of DCFR.

is practical to have similar legislations; this applies mainly to inspiration by the projects: PECL, DCFR, PETL, Gandolfi's European Civil code, UNIDROIT Principles – PICC.<sup>66</sup>

The Austrian law has a special position in which the other international drafts or principles like the Draft Common Frame of Reference (DCFR), the Principles of European Contract Law (PECL), the Principles of European Tort Law (PETL), the Principles of European Law on Non-Contractual Liability Arising out of Damages Caused to Another (PEL Liab. Dam.), UN-Conventions and UNIDROIT model laws or principles play a minor role. They are merely understood as some of the sources of inspiration. The same applies to the Common European Sales Law (CESL).<sup>67</sup> As for the German reform process, the Lando's Principles of European Contract Law (PECL) and the Principles UNIDROIT (PICC) were, after the pressure by the legal professionals, used in the final stage of reforming law of obligations. It happened at the end of the last century.

### **How has the reform adjusted to the EU law?**

The requirement to harmonize the national legislations with the secondary EU/ES law either directly induced<sup>68</sup> or at least stimulated some of the reforms of private law. In some cases it was rather a lack of time that influenced the final shape of the respective reform project.<sup>69</sup>

The reform projects reacted directly and imminently to the influence of the European secondary law, judicial decisions of the CJEU and the European principles of private law. The projects either embodied these

<sup>66</sup> See more in the chapters on Croatia, the Czech Republic and Hungary (National reports, Chapters 2, 3 and 5).

<sup>67</sup> See more in the chapter on Austria (National reports, Chapter 1).

<sup>68</sup> Conf. the German reform of law of obligations 2002, whose second stage was instigated by the request to implement the Directive on Rights of Consumers at the end of 2001.

<sup>69</sup> Conf. also the circumstances of the German reform of law of obligations 2002 and the criticism for its being made in hurry and not being of sufficient quality.

EU laws CJEU's decisions into the text of the reformed and recodified laws.<sup>70</sup> In some marginal cases, EU law was implemented into special laws that were not part of the civil codes or the core civil laws.<sup>71</sup>

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<sup>70</sup> This applies also in situations where the existing laws, e.g. consumer protection was embodied in a special law, e.g. in Slovak Republic.

<sup>71</sup> For example the Austrian *Konsumentenschutzgesetz* or the Slovenian Act on Consumer Protection.



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## 3 THE SUBJECT MATTER ASPECTS OF THE REFORM

### 3.1 The Crucial Subject Matter Changes

The subject matter changes of the legal orders we researched vary. It depends not only on the society's need of changes, but also on the "willingness" and resources of the lawgiver to carry out such changes. Some changes are, however, unavoidable; there are more and more of them. What we have in mind are the changes arising from the obligations towards the Union. Nevertheless, these are same for all of the states that we researched, as they are all EU member states.

Although it is very hard to generalize, one may identify certain tendencies and common features. Family law is usually not affected too much by the core subject matter changes. This is caused mainly by the statics of the family values in European society. However, there are certain changes brought about by the laws trying to put registered partnership on the same level as marriage (compare the Croatian law). Law of obligations has also not been well affected by the changes, because the respective provisions thereof were amended from time to time, which is caused by the fact that law of obligations is one of the core pillars of market society. Nevertheless, one may find the efforts to reform tort law. This applies especially to non-contractual obligations. 'Rights in things' (real rights) are also very static although their dynamic elements are manifested more and more. This applies mainly to security interest (liens) which are often affected by the reforms due to their importance for functioning of credit market.

In the text below, we will try to generally outline the core subject matter changes, i.e. both the ones that had taken place and the ones that are still being contemplated, which were brought (or will be brought if the reform laws are adapted) as part of the reform of the particular legal orders.

As for Austria, in the national report, G. Saria differentiated the changes which had already been carried out and the ones that are still being

contemplated. From the year of 2000, the changes of ABGB encompassed family law, law of succession; these changes had actually taken place already six times.<sup>72</sup> In 2001, in order to implement the directive 1999/44/EC on certain aspects of the sale of consumer goods and associated Guarantees, the Austrian legislators adapted an amendment changing the provisions on liability for damage. The changes that have taken place since 2000 also affected the so-called “neighbors law” (§ 364 and § 422 ABGB) and the provisions on guardians (tutors). In connection with implementation of the directive of the European Parliament and of the Council 2008/48/EC on credit agreements for consumer, the respective reform of the ABGB covered the provisions on loans and extension of credit. Further, the change also affected the provisions on late payments (compare: the Directive 2011/7/EU on combating late payments in commercial transactions). It is obvious that the changes made in the civil code were limited to the areas that had to be amended; the respective special laws were affected much less by the changes (compare: Konsumentenschutzgesetz – KSchG).

The need to specify the changes to be made were introduced by the Austrian government after the general election to the House of Representatives in 2013. According to the program announced by the government, the government was to try to prepare the reform of ABGB in certain areas. Firstly, the changes should apply to tort law although the fundamental principles were to remain untouched. Secondly, the changes should affect the provisions on statutory period, especially regarding the claims by the victims of sexual violence. Thirdly, a revision of the provisions on guardians (Sachwalter) is considered so that better protection of the mentally ill persons would be achieved. Fourthly, the reform should also affect consumer law; the goal was to strengthen consumer protection. Next, a reform of law of associations is also being considered. Moreover, the area of law of succession will not be missed; especially an obligatory share, improvement of the status of a childless spouse, etc. Based on the intolerable housing situation, they

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<sup>72</sup> Kindschaftsrechts-Änderungsgesetz 2001, BGBl I 2000/135, Familien- und Erbrechts-Änderungsgesetz 2004, BGBl I 2004/58, Familienrechts-Änderungsgesetz 2009, BGBl I 2009/75, Eingetragene Partnerschaft-Gesetz, BGBl I 2009/135, Kindschafts- und Namensrechts-Änderungsgesetz 2013, BGBl I 2013/15, Adoptionsrechts-Änderungsgesetz 2013, BGBl I 2013/179.

also contemplate a reform of residential and lease law.<sup>73</sup> The introduced reform, however, was not very positively accepted by the legal theorists who would rather have a complex reform. The opinions of the legal theorists are, in this respect, fully justifiable and understandable just by looking at large number of areas that are supposed to be reformed. It is obvious that the contemplated changes lack a unifying element.

On the other side, the Croatian reform of private law was carried out gradually in several stages. The Act on ownership and other rights in rem took legal effect in 1997, the Act on succession in 2003 and the Act on obligations in 2006. Croatian civil law was not codified in a single civil code, which is not very common in Europe.

As for property rights and real estate rights, there were many changes concerning the fundamental concepts including the concept of ‘rights in things’ in 1997. One of the changes was that the term “thing” was defined in legislation: things are only tangible things, e.g. tangible parts of nature – the art. 2/2 of the Croatian Act on Ownership and other rights in rem.<sup>74</sup> There are, however, exceptions that extend application of this concept also to intangible things. Aside from that, there is a category of “legal entities equal to things”, which means, for instance, controllable natural forces. Another significant change is that the principle *superficies solo cedit* now applies (compare also Czech and Slovakian law). It means that buildings are no longer understood as independent things, but rather a part of land. Nonetheless, there are several specific instruments that make it possible to separate the legal status of a building and land, e.g. right to construction. Croatian law recognizes five types of rights in rem concerning a thing, i.e. ownership, personal and land easements, real burdens, right to build and liens. Law considers possession as an actual state protected by law. As for rights in rem, Croatian law was also affected by the binding instruments of the European Union, especially the directives 2009/44/EC and 2002/47/EC.

<sup>73</sup> Conf. Saria, G. the National report of Austria (National Reports, Chapter 1).

<sup>74</sup> For more, conf. e.g. German law which considers things to be the substantive objects and the Austrian and Czech law which promotes the broad concept of a thing (§ 489 Civil code and § 285 ABGB).

The reform of Croatian law of obligations took place in 2006. As for the subject matter of the reform, Croatian law drew inspiration from the foreign legal orders. Another significant change was in concept of compensation for non-pecuniary loss; such a loss is now connected with interference in personality right. Legal principles are another source of law of obligations; some of them are even set forth by law, e.g. a ban on abuse of law. Moreover, the EU directives also affected law of obligations. This applies especially to responsibility for damage caused by a defected product, responsibility for defects, tours and representation in business matters. The Act on obligations is, however, not the only act setting the rules of law of obligations, as there are numerous special laws on this matter.

The reform of Croatian law of succession took place in 2003. One of the significant changes was that partners (cohabitantes) have been recognized as intestate heirs. On the other hand, brothers and sisters are not entitled to an obligatory share, i.e. the so-called unavoidable heirs. Next, the reform also brought emancipation of partners of same sex who also became intestate heirs on the basis of special legislation.

In the Czech Republic, the core content changes included in the new Civil code is that man and man's freedom are made the center of attention. The fundamental idea of the new code is that "everything that is not banned by law is allowed".

The approach to the concept of a thing changed significantly. "Thing" is now everything that is not a person and which may be used by people. This broad definition of a thing was inspired by the § 285 of the Austrian ABGB.<sup>75</sup> Therefore, things are not only material objects, but also the immaterial ones (intangible). Civil code also restored the principle *superficies solo cedit* (as it was also done in Croatia in 1997). Buildings are a part of land, i.e. they are not independent things; there are, however, exceptions to this rule, e.g. sewerage systems, underground constructions designed for a special purpose.

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<sup>75</sup> The definition of 'a thing' has remained untouched as from January 1, 1812. Nevertheless, the theory believes that the rights in things apply only to substantive things: conf. Bydliński, P. Grundzüge des Privatrechts. Wien: Manz, 2002, p. 94.

The Czech Civil Code also places emphasis on the will of a person acting. Therefore, as opposed to the former rules, the code abandoned the former requirements on the form of a juridical act. According to the code, the defects of the juridical act only cause so-called ‘relative’ invalidity. This does not apply to certain acts that are ‘absolutely’ invalid, e.g. juridical act that contradicts good manners.<sup>76</sup>

As for personal rights, the fundamental principle of respect to human being and his or her personality remained untouched. The reformed code, however, limited the powers to declare an individual dead. Aside from that, the code also introduced several supplement institutes for people with limited ability to act. The particular changes also affected other issues of the legal status of man, e.g. there are more conditions to be met before man may be declared dead, or the court may now grant legal capacity the minors even before they reach the age of majority.

As for family law, the Civil code has built upon the traditional institutes and introduced not major changes.

As for rights in things, the Civil code altered the concept of possession and acquisition of ownership, e.g. one may now acquire ownership by appropriation or by means of so-called extraordinary usucaption (prescription). The rights in things now better reflect protection of ‘good faith’ (bona fide) of third parties, e.g. it is newly stated that one may acquire a thing from an unauthorized person. The emphasis placed on autonomy of will of man is also reflected in the field of the rights in things. The Civil code now regulates also the concept of trust.

The changes in law of succession are oriented to the will of the testator. There were introduced new types of the last will and rights of the ‘unavoidable heirs’. The changes also tightened the regulation of transferring debt to the heirs and deepened protection of creditors.<sup>77</sup>

The reform of law of obligations significantly affected the non-contractual obligations. On the other side, the contractual relationships were not substantially influenced by the reform.

<sup>76</sup> Conf. Hulmák, M. the national report of the Czech Republic (National reports, Chapter 3).

<sup>77</sup> Ibid.

A crucial reform of German law took place in 2002. It was based on the Act on modernization of law of obligations (Schuldrechtsmodernisierungsgesetz). As explained by J. Schmidt in the national report, the German reform brought both formal and material changes to German law. The formal changes are, for instance, “embodiment” of several special laws (especially concerning consumer protection) into BGB. Next, several new concepts that had already been recognized by the German legal theory and the practice of courts (for instance, *culpa in contrabendo* or change of circumstances – Wegfall der Geschäftsgrundlage) were included into the code. According to J. Schmidt, the material changes are, for example, the changes in the statutory period, because the original statutory periods had been considered too long. The amendment introduced a general three-year period. Next, the amendment reconstructed the consequences of ‘a faulty performance’: from then on, there is a single concept based on breach of duty.<sup>78</sup>

The new Hungarian Civil code regulated several new areas and reflected several new conceptual approaches into them. This approach applies, for instance, to the personality rights where one may now openly claim financial compensation according to the rules of unjust enrichment. The changes also affected the rules concerning business organizations.

As for family law, there were also several changes made; the code specifically defines the principles of family law. The rights in things are now regulated in much more detail; this applies mainly to the concept of possession and limits to property rights. The Civil code also sets the bases of regulation of land registry (cadastral)<sup>79</sup> and mortgage security. As opposed to the former rules, the code now introduces several common rules applying to all obligations, i.e. both contractual and non-contractual.<sup>80</sup>

Contract law is based on the fundamental idea that contracts are connected with a risk; it is up to civil law to distribute the risk among the parties. The new code is ‘monistic’, i.e. it also covers rights and obligations of businesses. There are, however, also special rules ensuring protection

<sup>78</sup> Dobrovolná, E. In Selucká, M. Koupě a prodej. Nový občanský zákoník. Společná právní úprava prodeje. Praha: C. H. Beck, 2013, p. 85 - 122.

<sup>79</sup> Conf. the Czech Civil code § 980 -986.

<sup>80</sup> Czirfusz, G., Keserű, B.A. the national report of Hungary (National reports, Chapter 5).

of consumers. The general rules states that the special rules ensuring consumer protection should only be set if it is really necessary; the new code has very liberal spirit and has significant limits to the social dimension.

The Hungarian Civil code differentiates between the contractual and non-contractual responsibility for damage; it sets new rules and conditions of the responsibility.

Certain partial changes were also made in law of succession, e.g. if the testator did not have any descendants, the parents of the deceased person inherit his or her property together with the surviving spouse.<sup>81</sup>

The reform of Polish private law has set a goal to cover both protection of consumers and regulation of legal relationships among businesses.

Some of the proposed changes are, for example, a new definition of a legal person and unification of rules for all legal persons.

Another significant change is also regulation of interpretation of juridical acts; these provisions should be based on the findings made by the legal theory and jurisprudence.<sup>82</sup>

There are also proposed changes in the provisions on defects and invalidity of juridical acts. These changes should bring more detailed regulation. The highest principle of civil law is 'free will'. It is even being considered that some of the limitations to free will should be eliminated, e.g. the rules requiring that the goal and content of a contract comply with the nature of the obligation. The proposal of the reform also plans on loosening the required form of a juridical act and establishing a unified regulation of a form of other juridical acts than expressions of will, e.g. provision of information. The proposal should also affect the provisions on statutory limitation and non-economic receivables.<sup>83</sup>

Many changes are also planned for the general provisions of law of obligation, especially in the field of contractual obligations. As for tort law,

<sup>81</sup> Czirfusz, G., Keserű, B.A. the national report of Hungary (National reports, Chapter 5).

<sup>82</sup> Machnikowski, P. the national report of Poland (National reports, Chapter 6).

<sup>83</sup> Machnikowski, P. the national report of Poland (National reports, Chapter 6).

no significant changes are expected. A general 'clause of responsibility' is understood as a foundation from which other specific provision on all kinds of special liability derive.

The reformed Romanian Civil code brought many significant changes in law of obligations. As the former commercial code was canceled, the contracts that used to be understood as commercial are now regulated by the Civil code, e.g. the contracts about representation in business relations, brokerage contracts, banking contracts, etc. Contract law now includes a special chapter on law of obligations. The existing provisions on the particular types of contracts with no unifying feature are not very common in comparison with other European states. One of the things that make the Hungarian code distinctive is that the code also contains provisions concerning private international law, which makes is a comprehensive codification hardly found in Europe (it is not similar to any of the legal orders we researched).

The Romanian Civil code introduced changes also in family law, which is now included in the Civil code. Aside from that, the Civil code also regulates the issues concerning rights in things and public ownership. The concept of public property has been given a new definition. In comparison with the other legal orders that we researched, regulation of public property in a civil code does not seem to be conceptual.

The new Romanian law also covers tort law and defines the concept of unjust enrichment. The law differentiates between contractual liability and tort liability.

As for the contemplated Slovakian reform, the main change should bring unification of commercial and civil law and include 'commercial law' aspects into civil law. Significant changes should affect the concept of legal persons (juridical persons); the juridical acts of the authorized persons shall be replaced by a new concept of acting on behalf of a legal person. The reform should also touch invalidity of legal acts, as so-called 'relative invalidity' shall be preferred now. There are going to be certain partial changes that will influence family law and rights in things, e.g. establishing the principle *superficies solo cedit*. It is clear that the reform that is being contemplated in the Slovak Republic will be similar to the one that took place in the Czech Republic recently.



In Slovenia, there are many particular laws applying to the particular components of private law. The reform efforts have striven – although not with success, yet – to establish a single civil code.

The contemplated Slovenian reform was said to introduce a general part of civil law that would set forth, for instance, the principles of civil law. Next, it should include provisions on persons, i.e. especially legal capability, property rights and family law.

### 3.2 Continuity and Discontinuity

As for Austria, both the reform intentions that are still being contemplated and the ones that have already been carried out, aim at achieving a maximum level of continuity. The provisions of ABGB were “interfered with” by the reform efforts minimally. They rather reflect in special laws, e.g. the Act on Consumer Protection – Konsumentenschutzgesetz. The Austrian approach protects integrity of the fundamental law, which includes the fundamental general provisions of private law. It may be said that if the reforms have taken place and if it led to continuity with the existing state, there were only partial reforms which were usually adapted as a result of the requirements of EU law, e.g. responsibility for defects, the provisions on loans and extension of credit or the provision on late payments.

As for the language used, the reforms strove to achieve as much continuity as possible. This intention remains to apply to the future reforms as well. As the Austrian national report says, it does not mean that the lawgiver intended to use the language of the Nineteenth century, but they have tried to stick to the ABGB’s concepts of regulation and terminology.

In Croatia, the reform shows a different level of discontinuity according to the particular branches of law. Especially the rights in things show most discontinuity if compared to the existing laws. There were many significant changes that have taken place as a result of transition from socialism to market economy, e.g. embodiment of the principle *superficies solo cedit*. In law of obligations, continuity is usually kept, for the pre-reform laws were inspired by the treaties negotiated under the influence of UNIDROIT (Uniform Law on the Formation of Contracts for the International Sale

of Goods and Uniform Law on the International Sale of Goods) and the Vienna Convention on International Sale of Goods. Family law was not changed significantly, i.e. there is a complete continuity in this branch of law. As for the new Czech laws, there is not much continuity between the existing and the former laws. The largest degree of discontinuity may be found in both rights in things and law of succession. There were certain conceptual changes also in the area of compensation for injury or unjust enrichment. The lowest degree of discontinuity is in family law, in which the reform only affected several partial concepts, e.g. adoption of an adult and contract law. There is discontinuity also in the language used in Czech private law. The new code frequently uses obsolete language. There is also problem with the different terms used, as it is often not clear whether they have different meaning.<sup>84</sup>

A high degree of continuity is typical for German law. In some cases, the discontinuity is rather ostensive.

German law, especially law of obligations (mainly in the area of compensation for damage) shows higher degree of discontinuity, because the changes did not only affect the legislative-technical concept of regulation, but also the general principles. The Hungarian Civil code is ‘monistic’, i.e. its provisions shall apply also to businesses. The new code has very liberal spirit.

Continuity is the principle of all the work on recodification of Polish private law. The changes that have been designed shall follow the approaches of Polish Civil law included in the Civil code of 1964. As for the language used, the Polish reform efforts prefer clear and accurate definitions. The goal was to stick to the terminology that was used in the law on obligations of 1933 and the Civil code of 1964. This applies also to linguistic interpretation. The national report included in this monograph shows that while changing legal terminology, one should be very careful and should make sure that the term that was only intended to be edited was not changed substantially.<sup>85</sup>

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<sup>84</sup> Conf. Hulmák, M. the national report of the Czech Republic (National reports, Chapter 3).

<sup>85</sup> Conf. Machnikowski, P. the national report of Poland (National reports, Chapter 6).

In Romanian law, the structure of the Romanian private law shows certain level of continuity. As for the content, there is a high degree of discontinuity. From the linguistic point of view, we may say that the lawgiver did not avoid the problems connected with the new legal terminology, e.g. one term was used in three different meanings.

As mentioned in the national report of the Slovak Republic, the Slovakian reform shall aim to achieve highest continuity. It was proclaimed that legal terminology should not be heavily affected by the reform.

It may be deduced from the abovementioned facts that the goal of the legal orders we researched is to observe the highest level of continuity. On the other side, the states in which the reform has already been carried out rather show a higher degree of discontinuity (the Czech Republic, Hungary and Germany).

### **3.3 Original or Unprecedented Concepts**

None of the researched legal orders has established the concepts (institutes) that were not known in Europe. Although German law has not introduced any completely original concepts that would not be known in other countries, it is unique due to its difficulty.

### **3.4 The Relationship between Autonomy of Will and Consumer Protection; Mandatory and Non-mandatory Effects of the Provisions**

Although ABGB is a broadly liberal code based on contractual freedom, the existing Austrian reforms have significantly affected the principle of autonomy of will and protection of the weaker party. On the other hand, one of the important goals of ABGB is now protection of the weaker party. Further strengthening the protection of consumer is being considered for the future reforms of ABGB. However, we should say that most of the provisions on consumer protection (except for responsibility for product defects) is regulated by special laws, i.e. it is not included in ABGB. In connection with implementation of the directive 2011/83/EU on consumer rights, some believed that a separate consumer code should be passed. This

idea was, nevertheless, rejected due to political reasons.<sup>86</sup> After the reform the concept of protection of the weaker party reflected in the provisions on the function, status and tasks of guardians. In Austria, autonomy of will is limited mainly by the institutes of consumer law which are set forth by a special law (Konsumentenschutzgesetz), but also in ABGB (the provision on responsibility for defects).

Croatian law openly regulates autonomy of will in the art. 2 of the Act on obligations. Protection of the weaker party, as the expression of limits on autonomy of will, is reflected mainly in consumer law which is regulated by a special act (Act on consumer protection), which was last amended in 2014. Some of the consumer protection provisions are also included in the Act on consumer loans. The only element of the Act on obligations concerning consumer protection is the directive 1999/44/EC. In Croatian law, the provisions of contract law (law of obligations) are usually non-mandatory, i.e. the parties are entitled to regulate their rights differently or even exclude application of the non-mandatory provisions; this may be done either explicitly or implicitly. On the other hand, it is not allowed to exclude or avoid mandatory laws, i.e. mainly the consumer protection provisions. The mandatory provisions may be found in all sources of private law. As for the Act on obligations, it is sometimes difficult to determine whether a provision is mandatory or not.

The provisions of the Czech Civil code are primarily non-mandatory. The Civil code does not set a list of mandatory provisions, but it rather sets forth a general rule which helps to determine whether certain provisions are mandatory.<sup>87</sup> Provisions are mandatory if (i) the law openly defines them as mandatory, e.g. rights in things, or (ii) the law implicitly understands them as mandatory although it is not explicitly stated in the law. The law bans contract terms that would breach good mores, public order or change personality rights, including protection of personality. The reform also heavily affected the relationship of autonomy of will and protection of the weaker party, as the reform established several other institutes that protect the weaker party, e.g. *lesio enormis*, contracts of adhesion, loan-sharking, etc.

<sup>86</sup> Conf. Saria, G. the national report of Austria and the source cited in the report (National reports, Chapter 1).

<sup>87</sup> Hulmák, M. the national report of the Czech Republic (National reports, Chapter 3).

The German reform has not significantly affected the relation between autonomy of will and protection of the weaker party. Nevertheless, there is a tendency to limit autonomy of will to the benefit of the weaker party, especially the consumer; in some cases, the level of the protection even exceeds the framework required by the EU directives.<sup>88</sup> As for differentiating between the mandatory and non-mandatory rules, the German law usually states openly which provisions are mandatory.

In Hungarian law, autonomy of will is limited by unilateral mandatory norms of consumer law.<sup>89</sup>

The reform intentions from Poland purport autonomy of will to be the highest principle; limitation of this principle are likely to be adapted only in the necessary extent (implementation of the EU directives on consumer protection).

Under the influence of the EU law, the Romanian Civil code limits autonomy of will by means of consumer protection. There are also some new provisions limiting autonomy of will which were not embodied in the Romanian law before the reform; it is especially the pre-contractual liability. Protection of the weaker party materialized mainly in the parties' duty to inform one another.<sup>90</sup> The reform also affected the approach to 'change of circumstances' (*clausula rebus sic stantibus*). Until the reform, it was possible for a court to alter contract terms while dealing with a change of circumstances, which was criticized; it was argued that a court should not interfere with a contract, as only the parties have this right.<sup>91</sup>

The Romanian legal theory also supports the idea favoring the limits to autonomy of will. According to the new Romanian Civil code, the weaker party is protected by the article 1531 para 3 which states that a creditor is entitled to receive a moral compensation for (not consisting of property) loss if a contract was breached.

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<sup>88</sup> Schmidt, J. P. the national report of Germany (National reports, Chapter 4).

<sup>89</sup> Czirfusz, G., Keserű, B.A. the national report of Hungary (National reports, Chapter 5).

<sup>90</sup> The national report of Romania (National reports, Chapter 7).

<sup>91</sup> Ibid.

The Slovenian reform efforts have striven to incorporate consumer law, which they understand as autonomy of will, into a single private law code (Civil code).

This comparison shows that autonomy of will is the leading principle of private law in the countries we researched. In some countries, this principle is manifested very strongly (especially Poland), whereas in other legal orders, the limits to autonomy of will are represented by strong protection of the weaker party (compare Germany). However, we may summarize that all legal orders refer to autonomy of will although they support the limits to autonomy of will represented by protection of the weaker party. The EU directives concerning consumer protection (especially the directive 2011/83/EU on consumer rights) play an important role in this regard.

In general, while considering whether a particular provision is mandatory or non-mandatory, one should consider the following general principle: if a law does not openly state otherwise or if the nature of the particular provision does not rule it out, the parties may deviate from such a provision based on their agreement. The national reports also admit that it may be difficult in the particular cases to determine whether some provisions are mandatory or not.

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## 4 EXPERIENCE WITH EXERCISING THE NEW REGULATION IN PRACTICE

Napoleon Bonaparte is believed to say when he was exiled on the island of St. Helena: “*My real fame is not in the victory in forty battles. Waterloo will erase the recollections of too many victories. What will, however, remain immortal is my Civil code.*”<sup>92</sup> The persistence of the large private-law codes of Europe, e.g. the French *Code civil*, the Austrian *ABGB*, the German *BGB*, the Italian *Codice Civile* or the Spanish *Código Civil*, shows that private law in general is conservative and resists changes.<sup>93</sup>

The codification processes of the Nineteenth century were strongly influenced by the philosophy of the Enlightenment and the Roman or Canon law.<sup>94</sup> The recodifications of the Twentieth century are, at least as for the post-communist countries of the Central Europe, impacted with certain renaissance, i.e. return to the original sources of inspiration<sup>95</sup> and with eclecticism<sup>96</sup> or diversity of the sources of inspiration.<sup>97</sup>

As for the practical impact of regulation, the recodification processes may not be analyzed only from an abstract point of view, i.e. just with regard to the change of the text of laws. In the continental system, law is not only a set of legal norms, but it is rather a live normative system which, next to text of laws contains also the findings of legal theory, legal practice

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<sup>92</sup> „*Ma vraie gloire n'est pas d'avoir gagné quarante batailles; Waterloo effacera le souvenir de tant de victoires; ce que rien n'effacera, ce qui vivra éternellement, c'est mon Code Civil*”. Conf. Delplanque, C. *Origine, signification et portée du Code civil en France* [online]. Available at: <http://www.afhj.fr/ressources/code-civil.pdf> (cited on 22. 10. 2014).

<sup>93</sup> Conf., e.g. the national report of Austria 1.3.1.2 (National reports, Chapter 1). See also: STEIN, P. *Roman Law in European History*. Cambridge: Cambridge University Press, 2003. p. 115.

<sup>94</sup> Conf. KNAPP, V. Comparative Law and the Fall of Communism. *Parker School Journal of East European Law No. 2/1995*. p. 526. RIVERA, J.C. The Scope and Structure of Civil Codes. Dordrecht: Springer, 2013. p. 4-5.

<sup>95</sup> Conf. HAMZA, G. Continuity and Discontinuity of Private Law in Eastern Europe After World War II. *Fundamina* č. 12/2006. p. 49.

<sup>96</sup> Conf. MURILLO, M.L. The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification. *Journal of Transnational Law & Policy* č. 11/2001. p. 177.

<sup>97</sup> Conf. the national report of Romania 7.2, the national report of Hungary 5.2, the national report of the Czech Republic 3.2 (National reports, Chapters 7, 5 and 3)..

and especially the decisions of courts.<sup>98</sup> The relationship between the *law in books* and *law in action* evolves and relates, for both of the spheres of law develop simultaneously and influence one another. Law may not be narrowed to a mere text of laws („*ius is not reductible to lex*“).<sup>99</sup>

All the European recodifications of private law which had taken place in the Twentieth century changed the interpretation paradigms for the legal practice.<sup>100</sup> We have learned from the story about the Tower of Babel that one of the fundamental communication problems of mankind is assigning different meanings to different concepts and assigning different meanings to different messages. Interpretation (in our case interpretation of legal texts) is used in order to overcome the natural darkness of a language and to bring light into the communication.

The courts play an important role in interpretation. This applies also to the countries in which the lawgiver originally tried to limit the court's role in shaping (completing) of law.<sup>101</sup> The courts are called upon to shape (complete) (*Rechtsfortbildung*) the law in books.<sup>102</sup>

We may deduce from the national reports that recodifications will put the practicing legal professionals and especially the courts to a difficult

<sup>98</sup> Conf. ZIPPELIUS, R. *Rechtsphilosophie*, 3<sup>rd</sup> edition, München: C.H.Beck Verlag, 1994. § 11. BIDLINSKI, F. *Grundzüge der juristischen Methodenlehre*. Wien: Facultas, 2005. p. 56, 99.

<sup>99</sup> Conf. LEGRAND, P. Against a European Civil Code, *Modern Law Review* No. 1/1997. s. 59. For more on the difference between *ius* and *lex* see the decision of the German Bundesverfassungsgericht I BvR 112/65 [34 (1973) BVerfGE 269].

<sup>100</sup> Conf., e.g. the national report of Germany 4.4, the national report of Romania 7.4; the national report of Hungary 5.4; the national report of the Czech Republic 3.4. Similar findings are in MADALIN-SAVU, T. Fundamentele filosofice ale codului civil român. *Revista de științe juridice* 2/2006. p. 88. SNIDJERS, W. Lessons from St. Petersburg: Commerce and Civil Law. *Review of Central and East European Law* No. 34/2009. S. 114.

<sup>101</sup> „*Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises*“ (art. 5 of the French Code Civil). „*Urteile haben nie die Kraft eines Gesetzes, sie können auf andere Fälle oder auf andere Personen nicht ausgedehnt werden*“ (§ 12 ABGB).

<sup>102</sup> It may be deduced from most of the modern private law codes, the courts in the continental system of law shall shape (finish) the law with support of interpretative sources (natural legal principles, general legal principles, etc.). Conf. § 7 ABGB, art. 6 of the Spanish Código civile, § 16 Código Civil de la República Argentina, the art. 1 of the Swiss Ziwilgesetzbuch, § 12 of the Italian Codice civile. Conf. also the national report of Hungary (National reports, Chapter 5). For more on the issue of ‘shaping’ law, conf. LARENZ, K., CANARIS C, W. *Methodenlehre der Rechtswissenschaft*. 3<sup>rd</sup> edition. Heidelberg: Springer, 1995. p. 134 et seq.



position, for recodifications have changed the interpretation approaches of courts and evoked certain tension between the conservatism of the practice of courts and the requirements of the lawgiver. The first generation of commentators is usually more critical towards the new regulations,<sup>103</sup> which even deepens the tension between the new laws and the legal practice. Analyzing the findings concerning the reform of contract law in Germany, we may say that almost every provision of the reform may bring about interpretation and application problems, which leads to a decrease of legal certainty.<sup>104</sup>

It is interesting to see that the different legal traditions may lead to different interpretation of certain legal concepts.<sup>105</sup> As an example, we may refer to the different theoretical concept of intangible things in the legal sense<sup>106</sup> in Romanian and Czech law.

<sup>103</sup> Conf. e.g. GIERKE, O. *Die soziale Aufgabe des Privatrechts*. Berlin, 1889. GIERKE, O. *Der Entwurf eines bürgerlichen Gesetzbuchs und das deutsche Recht*. Leipzig: Dunker & Humblot, 1889. p. 2, 80. LORENZ, S. *Schadensersatz wegen Pflichtverletzung - ein Beispiel für die Überhastung der Kritik an der Schuldrechtsreform*, *Juristen Zeitung* 2/2001. p. 742. SACHE, N. *A Critical View over the Legal Terminology of the New Civil Code* [online]. Available at: <http://www.juridicaljournal.univagora.ro/download/pdf/5-2010-40-A-CRITICAL-VIEW.pdf>. (cited on 24. 10. 2014). PELIKÁNOVÁ, I., PELIKÁN, R. In Švestka/Dvořák/Fiala. *Občanský zákoník - Komentář - Svazek I*. Praha: Wolters Kluwer, 2014. p. XXXIII - LXV.

<sup>104</sup> Conf. the German national report, (National reports, Chapter 4). Similarly in BÜLOW, W. WÄLZHOLZ, E. *Schuldrechtsreform in der notariellen Praxis - ein Überblick mit Checklisten und Formulierungsvorschlägen*. *Mitteilungen des Bayerischen Notarvereins* No. 6/2001. p. 525. The conclusion about 'a decrease of legal certainty' is supported also by the finding of the Romanian national report, 7.4. or the Hungarian national report, (National reports, Chapter 7 and 5).

<sup>105</sup> For more on the issue of different interpretation of the same concepts of private law, see: LEGRAND, P. *European Legal Systems are not Converging*. *International and Comparative Law Quarterly* No. 1/1996. p. 52-81.

<sup>106</sup> Differentiation between 'tangibles' and 'intangibles' has a traditions reaching all the way to the ancient Rome. Differentiation of things as 'tangible' or 'intangible' may be found in the second book of the Gaius's *Institutions* (GAI INST II, 12-14). According to Gaius, the tangible things are things that one can touch, such as ground, man (slave), clothing, gold, silver and many other things („*Corporales hae sunt, quae tangi possunt, velut fundus, homo, nestis, aurum, argentum et denique aliae res innumerabiles*“). Intangible things are things that one cannot touch, such as rights in general, right to inheritance, easement or a receivable („*Incorporales sunt, quae tangi non possunt, qualia sunt ea, quae in iure consistunt, sicut hereditas, ususfructus, obligationes quoquo modo contractae*“).

The Romanian Civil code (*Codul civil român*) of 1865 was heavily influenced by the French Code civil.<sup>107</sup> In the Czech lands, there was originally the Austrian ABGB, then the Civil code of 1950, which was followed by the Civil code of 1964, which was very close to the German BGB or the Polish KC by setting forth a very narrow concept of a thing.<sup>108</sup>

Both of the new codes, i.e. the new Czech Civil code of 2012 and the Romanian Civil code of 2009 have introduced a broad concept of a thing. Both of these codes state that the concept of a thing covers both the tangible and intangible things.<sup>109</sup> Both these codes have also embodied a broader concept of property rights which shall apply also to intangible things.<sup>110</sup>

<sup>107</sup> Although the Code civil does not openly differentiate between ‘tangible things’ (*res corporales/biens corporels*) and ‘intangible things’ (*res uncorporeales/biens incorporels*), the difference between the two categories is clearly visible on the classification as things (*choses*) and rights (*droits*). The particular consequences of this division may be found mainly in the Art. 518-525, 526 a 528 Code civil. Both of these categories fall under the concept of property (*biens*). Conf. also CARON, CH., HERVÉ, L. *Le droit des biens*. Paris: Dalloz, 2002. s. 18. VOIRIN, P. *Droit civil*. 25<sup>th</sup> edition L.G.D.J.: Paris, 1995. p. 231, 235. CHEVALLIER, J.; BACH, L. *Droit civil. Introduction à l'étude du droit. Les personnes physiques. La famille. Les biens. Les obligations. Les sûretés*. 11<sup>th</sup> edition. Paris: Sirey, 1993. p. 327-328.

<sup>108</sup> In Germany and in the countries that have been influenced by the German civil law (Poland, Italy), we may find ‘a narrow’ concept of a thing in the legal sense, as only the tangible objects are considered to be things. („*Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände*“, § 90 BGB; „*Rzeczami w rozumieniu niniejszego kodeksu są tylko przedmioty materialne*“, „*Sono beni le cose che possono formare oggetto di diritti*“, čl. 810 Codice Civile). The ‘narrow’ approach to things relates to the issue of acquiring property rights bases on an agreement which is connected with physical dominion over the thing. Hence, it does not suffice for a ‘thing’ to be conveyed to conclude a contract, but the things need to be handed over (*tradition*). For the ‘narrow’ concept of a thing (Germany, Poland, Italy, the Czech Republic until December 31, 2013) the lawgiver uses a more general term ‘object of rights’ (object of legal relationships) which covers the intangible objects (*unkörperliche Gegenstände, unkörperliche Rechtsobjekte; dóbra niematerialna*) and things (*körperliche Gegenstände, Sachen, przedmioty materialne*) to which the rights in things (especially the property rights) traditionally belong. Comp. also MACHANIEWSKI, P. Podmiotowe prawa rzeczowe. In. DYBOWSKI, T. (Hrsg.) *System prawa Prywatnego III - Prawo rzeczowe*. 2<sup>nd</sup> edition. Warszawa: Wydawnictwo C.H.Beck, 2007. p. 28-30.

<sup>109</sup> „*Sunt bunuri lucrurile, corporale sau necorporale, care constituie obiectul unui drept patrimonial*“ (the art. 535 of the Romanian Codul civil of 2009); „*Intangible things are the rights whose nature makes it possible and other things having no substance*” (§ 496 para 2 of the Czech Civil code of 2012). As for the ‘broad’ concept of a thing, both of the codes were inspired by the same source, i.e. the Quebec Civil Code („*Les biens, tant corporels qu’incorporels, se divisent en immeubles et en meubles*“, čl. 899 Code civil du Québec).

<sup>110</sup> „*Sunt bunuri lucrurile, corporale sau necorporale, care constituie obiectul unui drept patrimonial*“ (the art. 535 of the Romanian Codul civil of 2009); „*Nehmotné věci jsou práva, jejichž povaha to připouští, a jiné věci vez hmotné podstaty*.” (§ 1011 of the Czech Civil code of 2012; it resembles to § 353 ABGB: „*Vše, co někomu patří, všechny jeho věci hmotné i nehmotné, je jeho vlastnictvím*.“).

Although the Romanian legal theory, which is influenced by the French approach to a thing,<sup>111</sup> does not have a problem with application of property rights to intangible things,<sup>112</sup> the Czech legal doctrine, which is influenced by the Austrian ‘teleological-reduction’ approach,<sup>113</sup> rather hampers the property approach to the intangible things.<sup>114</sup>

Both of these codes were, however, inspired by the same source, i.e. the article 899 Code civil du Québec. The explanatory report to the Czech Civil code of 2012 openly states: “*The doctrine teaching that tangible things may be the only object of ownership originated in the Nineteenth century based on the teachings of the German pandectists. This approach which is based on the conceptual difference between Eigentum (ownership) and Vermögen (property) was later reflected in BGB and some other European codes, e.g. the Dutch or Swiss codes, which were influenced by this*

<sup>111</sup> Conf. footnote No. 107.

<sup>112</sup> Conf. for instance JORA, C. Certain Considerations regarding the Classification of Assets under the Provisions of the New Civil Code. *Cogito* 4/2012 [online]. Available at: [http://cogito.ucdc.ro/2012/vol4n1/en/10\\_certainconsiderationregardingtheclassificationofassetsundertheprovisionsofthenewcivilcodecristianjora.pdf](http://cogito.ucdc.ro/2012/vol4n1/en/10_certainconsiderationregardingtheclassificationofassetsundertheprovisionsofthenewcivilcodecristianjora.pdf) (cited on 27. 10. 2014). ANGHENI, S. The Importance and the Usefulness of the Concept of Stock and Trade Within the Current Legislative Framework. In *Conferința Internațională Educație și Creativitate pentru o Societate Bazată pe Cunoaștere - DREPT*, București, Universitatea Titu Maiorescu, 2012 [online]. Available at: [http://www.bursedoctorat.ro/Documente/Biblioteca%20virtuala/9783950314533\\_utm\\_orav\\_law\\_2012.pdf](http://www.bursedoctorat.ro/Documente/Biblioteca%20virtuala/9783950314533_utm_orav_law_2012.pdf) (cited on 27. 10. 2014).

<sup>113</sup> Austrian law differentiates between ownership in broad sense („*Eigentum im weiteren Sinne*“; § 353 ABGB: „*Alles was jemandem zugehört, alle seine körperlichen und unkörperlichen Sachen, heißen sein Eigentum*“) and ownership in narrow sense („*Eigentum im engeren Sinne*“; § 354 ABGB: „*Als ein Recht betrachtet, ist Eigentum das Befugnis, mit der Substanz und den Nutzungen einer Sache nach Willkür zu schalten, und jeden anderen davon auszuschließen*“). Based on the teleological reduction (*teleologische Reduktion*) the Austrian legal theory came to a conclusion that ownership in narrow sense applies only to tangible things and that application of ownership in narrow sense to intangible things leads to impractical conclusions. Conf. JAEGER, T. *System einer Europäischen Gerichtsbarkeit für Immaterialgüterrechte*. Springer: Heidelberg, 2013. p. 37. BARTA, H. *Zivilrecht: Grundriss und Einführung in das Rechtsdenken* [online]. Available at: <http://www.uibk.ac.at/zivilrecht/buch/> p. 730. KOZIOL, H., WELSER, R. *Grundriss des bürgerlichen Rechts. Band I. Allgemeiner Teil, Sachenrecht, Familienrecht*. 12<sup>th</sup> edition Wien: Manzsche Verlag, 2002. p. 84.

<sup>114</sup> Conf. TÉGL, P. In *Melzer/Tégl. Občanský zákoník - velký komentář. Svazek III. § 419-654*. Praha: Leges, 2014. p. 199-203. HORÁK, O., DOSTALÍK, P. Věc v právním smyslu v novém občanském zákoníku z právněhistorické perspektivy. *Časopis pro právní vědu a praxi* No. 1/2013. p. 19. KOUKAL, P. In *LAVICKÝ a kol. Občanský zákoník I. Obecná část (§ 1-654). Komentář*. Praha: C.H.Beck, 2014. p. 1729, 1757. BOHÁČEK, M. In *Jakl a kol. Nový občanský zákoník a práva k duševnímu vlastnictví*. Praha: Metropolitan university Prague Press, 2014. p. 29 et seq.

*ideological concept. Even the Austrian Civil code, which (in § 355) intentionally emphasized that ownership applies both to tangible and intangible things, was later interpreted – under the influence of Unger and Randa – in favor of the narrow concept of property rights (...). A receivable is, as a certain property, according to the intention of the schema, a thing in the legal sense (intangible), as it is also a part of the creditor's property and assets, i.e. the creditor owns the receivable. Therefore, the creditor is protected from any interference by the third parties and he may file a proprietor's action. The rights in things, e.g. lien or easement, are also protected by a special action against the owner of the respective thing (that is subject to a lien or an easement) and by his proprietor's action against the prohibited interference by other persons. The proposal (...) returns to the Roman law civil concept which is reflected also in other legal orders (French, Quebec) and leaves the doctrine of terminological differentiation of the objects which are either owned or "only" a part of assets, because there is no real difference between the owner and holder of the assets.*<sup>415</sup> Despite all that, the Czech doctrine (see the ref. 114) following the traditional approaches<sup>116</sup> rather disapproves of the broad concept of a thing as an object of property right and inclines to reinterpretation of § 1011 of the Czech Civil code of 2012 as it was carried out by the Austrian doctrine (see the ref. 113).

We can see that even the codes with common sources of inspiration may lead the legal doctrine to different solutions. In some cases, even the will of the lawgiver may not change the traditional interpretation paradigm. Legal tradition is also a material source of law, therefore it provides important leads for interpretation by the legal practice. Goethe once said of Roman law: *"Roman law still lives. It is like a duck under water. Never disappearing completely, a duck sinks for a while so that it could appear on the surface live again."*<sup>117</sup> The same may be said about legal traditions.

<sup>115</sup> See, the consolidated version of the explanatory report to the government's proposal of the new Czech Civil code [online]. Available at: <http://obcanskyzakonik.justice.cz/file-admin/Duvodova-zprava-NOZ-konsolidovana-verze.pdf> (cited on 28. 10. 2014). p. 259.

<sup>116</sup> The 'narrow' concept of a thing was mentioned already by Randa in the Nineteenth century. Conf. RANDA, A. *Das Eigentumsrecht nach österreichischem Rechte mit Berücksichtigung des gemeinen Rechtes und der neueren Gesetzbücher*. Vol 1. Breitkopf und Härtel: Lipsko, 1893. p. 1.

<sup>117</sup> „Auch das römische Recht, als ein fortlebendes, das gleich einer untertauchenden Ente sich zwar von Zeit zu Zeit verbirgt, aber nie ganz verloren geht und immer einmal wieder lebendig hervortritt“. Conf. ECKERMANN, J.P. *Gespräche mit Goethe in den letzten Jahren seines Lebens*. Vol III. 1848 [online]. Available at: <http://guttenberg.spiegel.de/buch/gespr-1912/123> (cited on 28. 10. 2014).

While analyzing the impacts of the recodification that took place in the Central Europe, it shall be taken into account that revolution and innovation of private law meets the natural limits of the particular area of law; these limits are conservatism of private law.<sup>118</sup>

We may deduce from the national reports (except for the Croatian report)<sup>119</sup> that courts of the former post-communist countries gradually adopt also other types of interpretation than only the grammar approach. For example, the teleological approach is becoming more and more important. This finding is very important because the teleological interpretation may help to overcome the legal gaps that may occur in private law due to the recodifications.

Although there are not enough relevant court decisions allowing a detailed evaluation of the direct impacts of recodification on legal practice in most of the post-communist countries in which the recodification took place (the Czech Republic, Hungary, Romania),<sup>120</sup> we may expect that the supreme courts in the post-communist countries will prove their importance<sup>121</sup> and will influence legal practice by means of their decisions and unifying opinions as it was in other countries (Quebec, Russia, the Netherlands). Aside from that, they should proactively interpret the provisions of the new codes so that the legal uncertainty was eliminated and the conceptual and well-considered decisions supported permanence and stability of the new codes.

Professor Damaska explained that as for the recodifications the *“old law has to put up with the fate of being a drone that fertilizes the queen bee.”*<sup>122</sup> The legal traditions we mentioned play an important role while interpreting the new provisions. Although they may contribute to a partial resuscitation of the drone, it is clear that a queen bee is always stronger than a drone. The old law may,

<sup>118</sup> Conf. also the Austrian national report, 1.3.1.3, 1.3.2.1, 1.4. See, also HURDÍK, J., LAVICKÝ, P. *Systém zásad soukromého práva*. Brno: Masaryk University, 2010. p. 156.

<sup>119</sup> The Croatian national report, (National reports, Chapter 2).

<sup>120</sup> Conf. the Romanian national report, (National reports, Chapter 7); the Hungarian national report, (National reports, Chapter 5), and the Czech national report, (National reports, Chapter 3).

<sup>121</sup> Conf. DAMASKA, M. *On Circumstances Favoring Codification*, 1983 [online]. Available at: [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2588&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2588&context=fss_papers) (cited on 28. 10. 2014). p. 363-364.

<sup>122</sup> DAMASKA, M. *op. cit.* p. 363.

therefore, again “*appear on the surface as a duck*” (due to its natural conservatism), but “*the drone died for good*” and reincarnation is not possible. Although it may persist to certain extent in the fertilized queen bee, it is no longer a drone. The queen bee lives her own life and we should search for the solution of the unclear cases within the context of the new laws.

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## 5 THE NEW CIVIL CODES

### 5.1 The Role of a Civil Code Among Private Law Legislation

As for the position of a civil code within the system of private law, we may identify a universal tendency to anchoring it as the *initial fundamental foothold* of private law regulation. All of the codification projects we researched either preserve or restore the (from some point of view) privileged position of a civil code.

As for the relationship to other laws of private law, civil codes usually provide regulation of the common general ground; they define a common denominator (in light of the core building stones of private law, the fundamental institutes and concepts, such as the addressees of law, legal actions, things, *rights in things*, etc.). This base is, however, secondary for the other laws of private law, i.e. the general rules of base provided by the civil codes is used if the special laws do not state otherwise.

The rules included in the civil codes are, however, not always limited only to this common ground. In many cases, the civil codes are more extensive and cover also numerous specific areas.

As for the relationship of the abovementioned common general ground and the specific areas regulated by civil codes, we identified three different approaches in the legal orders that we researched.

#### 1.

In some cases, the civil code is really just a relatively limited ‘*common denominator*’; it provides primarily *stable and enduring* regulation. Such a code is often accompanied with numerous special laws which add to the complexity of private law.

This approach is typical, for instance, for the Austrian law which openly mentions a so-called “satellite principle”.<sup>123</sup> According to this approach,

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<sup>123</sup> Dobrovolná, E. Evropská a národní dimenze rakouského ABGB. In Gabriela Urbanská, Eva Dobrovolná, Marián Rozbora (editors). *Európske a národné rozmery civilného práva, etický rozmer a zodpovednosť právnických profesií*. Pezinok: Justičná akadémia Slovenskej republiky, 2011. p. 24.

the areas of regulation such as consumer law, business corporations, labor law, international private law or even some types of contracts are not included in a civil code. “*Civil code is only focused on the fundamental norms of civil law. Many important areas of private law are regulated by the special subsequent laws.*”<sup>124</sup>

Such civil codes are the initial, general private-law statutes of secondary application; they are not, however, really private law ‘codifications’.<sup>125</sup> They are not comprehensive normative regulations of private-law relationships. Neither the reform projects that are being prepared nor the ones that are still being contemplated intend to change this approach.<sup>126</sup> It is very likely that the abovementioned position of the Austrian Civil code will remain unchanged for a long time, yet (if not forever).

Stability and constancy of the fundamental norms of private law are believed to be the advantages of this approach. The areas of legal order that are frequently amended or are often influenced by the development or the EU laws remain beyond the borders of a civil “code”. The code, however, may represent a stabilizing element of a legal order; an element with long-lasting traditions with the court decisions that may be still used, i.e. an element that is not affected by precipitous deviations. On the other hand, such a ‘stability’ may cause rigidity which prevents the changes from being absorbed by law, which has to be done anyway. Moreover, it is more likely that inner inconsistency or legal order occurs, as the constant civil code has to be interpreted in accordance with the new rules included in special laws; such a concept is much more difficult for a developed practice of courts.

## 2.

The second approach is represented by a concept of a *complex, cohesively designed code with broad application*. In some of the new codification projects (especially in Hungary and Romania, but also in some of the other states of the former Eastern Bloc), we may identify the efforts to embody not only the common general ground, but principally all the important elements of private law.

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<sup>124</sup> Saria, G. Reforming the AGBG. Old Ideas and New Attempts. Private Law Reform. National reports, Chapter 1.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.



Apart from the traditional concepts, such as the provisions on persons, family, juridical acts, things and contracts, the new Romanian Civil code also covers business contracts, certain provisions applying also to business corporations and even the provisions on private international law.<sup>127</sup>

The same applies to the new Hungarian Civil code, which, as for the extent of application, is very broad, as it has also covered family law and large areas of commercial law (including regulation of business corporations).<sup>128</sup> These codes are very vast as for the extent of application.

The integration tendencies are traceable in all the post-communist jurisdictions where the codification projects also help to overcome the artificial barriers (often resulting from history), which had been built among the particular areas of private law during the previous political regimes. Typically, this applies to family law which is now being included back to the civil codes where it standardly belongs. The same thing applies to elimination of duality of the civil and business obligations. In this respect, the integration tendencies are very broadly reflected in the new Czech Civil code, but also in the contemplated Slovakian, Polish and Slovenian codifications.

In connection with these approaches, it may seem difficult to achieve a sufficient level of stability of law in the future, apart from the extensiveness and complexity. There are fears that such codes might be amended very often, especially due to its provisions on consumer protection.

On the other hand, the advantages of the complex approach are elimination of parallel regulations, unnecessary dealing with borders of application of the particular laws, unnecessary overlaps or explicit contradictions.

The largest level of the integrating complex conception of the civil codes may be found in family law and also in commercial law (especially as for business obligations); the labor law obligations are usually not included. None of the codification projects we researched shows complete absorption of labor law into a civil code. Regulation of private international law is also usually not included in civil code; nevertheless, it has been included in the Romanian Civil code (book VII).

<sup>127</sup> Alunaru, Ch., Bojin, L. Romania. Private Law Reform. National reports, Chapter 7.

<sup>128</sup> Czirfusz, G., Keserű, B.A. Private Law Reform in Hungary. National reports, Chapter 5. Part 3. III/2, p. 80.

### 3.

The third concept is a *mixed concept*; it is a certain compromise between the complex broad structure and the minimalistic solution of the highest common denominator. It is a '*ad hoc*' approach which respects the local and historical conditions and actual political interests. This approach may be to certain extent identified in all of the codifications we researched; it is mainly influenced by the consequences of these factors, i.e. whether there is an obstacle to achieving the contemplated broad extent. For example, due to political reasons, the Czech Civil code does not include the provisions on registered partnership which is still in a separate law although this situation does not correspond with the complex conception. The same may apply to the politically sensitive area of labor law. This often applies also to the abovementioned consumer law, which may be caused by many reasons. Despite the fact that the Czech Civil code also covers the general issues of consumer contracts – including several special areas like, for example, timesharing, regulation of consumer loans is not included in the code. As opposed to the Czech Civil code, the draft of the Slovakian Civil code also regulates this topic.

Regardless of the extent of application which was mentioned in the classification into the three categories, Civil code is always in some kind of application relationship to the other private-law statutes. It is typical to distinguish between general and special application. Civil code is applied *secondarily* to the other laws. It also includes the fundamental principles which apply also to other laws. Therefore, such civil codes affect the other private-law statutes as well.

As for an open regulation of the relationship between a civil code and other private-law statutes, we refer to the Hungarian code, which includes a so-called Quebec clause (in § 2 part 1:2); this clause states that other laws of private law have to be interpreted in accordance with the Civil code.<sup>129</sup>

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<sup>129</sup> Czirfusz, G., Keserű, B.A. Private Law Reform in Hungary. National reports, Chapter 5. Part. V. 1., p. 87.

This establishes the interpretation priority of the Civil code even over the statutes of the same legal force (degree). Civil code is understood there as a so-called “constitution of private law”.<sup>130</sup>

With regard to the position of a civil code within private law, the Croatian law is extraordinary. Croatian law has neither a civil code nor any common general part. Private law is distributed among many partial codes of the particular areas and special laws. This applies also to the areas which are typically included into a civil code; in Croatia, they have, for instance, a special Act on property rights, a special Act on inheritance and a special law on obligations. There is no unified statute that would cover all these areas; hence, all these laws are on the same level.

## 5.2 Civil Code, Codification of Commercial Law and Special Provisions on Suppliers

There is a one thing common for all the codification projects we researched; it is the effort to eliminate and overcome the unnecessary duality between civil and commercial law concerning law of obligations. As for obligations, civil codes are now *‘commercialized’*. The contemporary codification projects do not prefer to keep a parallel special commercial code. This tendency is obvious especially in the codifications that occurred in the countries of the former Eastern Bloc.

The goal is to achieve as high level of consistency as possible. Civil codes sometimes regulate the areas that not specific as for the object of regulation; they often cover both commercial issues on the one side and consumer law on the other. None of the legal orders we researched has an independent code of commercial contracts or code regulating only the whole area of commercial law.

This approach aims at eliminating the unnecessary problems that arise from having a separate law on commercial issues; such a separate regulation evokes a need of differentiation; it is connected with unnecessary shattering of judicial decisions, etc. It is sufficient for the special features of the business relationships to have special provisions within a civil code; no special codified parallel law is needed.

<sup>130</sup> Ibid.

The question of incorporating the business relationships into a civil code is connected with a relating issue of embodying *new (not traditional) commercial concepts and relationships*, such as, for instance, franchising, factoring, forfeiting, leasing, and others. They are usually not included in the traditional laws. The topic of business or non-business relationships is connected with their still nature which is only now stabilizing and which is rather special. Some civil codes, however, do not cover these issues (including the Czech Civil code), some even reject to regulate these issues as a part of a civil code (for instance, the codification of Slovenian<sup>131</sup> private law that was prepared), but some regulate them explicitly (for example, the new Hungarian Civil code).<sup>132</sup> Some codification projects selectively cover at least some of these relationships, e.g. the structure of the new Slovakian Civil code plans on regulating leasing contract.<sup>133</sup>

Another significantly important area is regulation of business corporations (especially companies). In spite of the general tendency to commercialize the civil codes in the area of business obligations (contracts), law of corporations is usually not regulated by a civil code. Civil codes usually cover just the general issues concerning legal persons or corporations in general; the detailed regulation of company law and especially the provisions on shares (stock) remain to be regulated by special laws (this applies to the Czech law, but also for the contemplated law in Slovakia; the same thing is emphasized in the considerations about the Slovenian code; law of corporations shall not be included in the Polish Civil code as well).

The nature of a civil code, however, does not make it impossible to regulate business corporations. From this point of view, the Hungarian Civil code might seem extraordinary, as it openly adheres to commercialization of civil law and also regulates business corporations. Nevertheless, this approach is rather unique.

<sup>131</sup> The codification project took place from 2001-2003 and ended without actual implementation. In the present time, there are no discussions of potential future codifications of Slovenian private law. Vlahek, A., Podobnik, K. Chronology of Development of Private Law in Slovenia. National reports, Chapter 9. p. 181. Some mentioned in connection with the Slovenian codification project (that took place between 2001 and 2003 and was never implemented) that these types of relationships should not be included, as they do not represent stable matter whose future development could be predicted (ibid, p. 191).

<sup>132</sup> Czirfusz, G., Keserű, B.A. National report of Hungary. National reports, Chapter 5 p. 82

<sup>133</sup> Dulak, A. The Reform of Private Law in Europe National report of Slovakia. National reports, Chapter 8. p. 154.

Certain provisions of the new Romanian Civil code apply to business corporations although the detailed regulation of the particular business corporations is not included in the Civil code.

Both the ‘integrating’ and the ‘special’ approach bring respective benefits and difficulties. The integration efforts may lead to more unified consistent regulation that would not have to be dealing with conflicts of application, looking for borders of secondary application, gaps in law and contradictions. Consistency and a well-thought-out content are more important than the legislative-technical question whether to include it into one code (statute) or not. The business corporations are a very specific subject that always requires special regulation which is put together independently and often by other authors. Inclusion of the subject into a single code does not have to help to get rid of the abovementioned problems. Nonetheless, having several special laws does not have to cause any problems if the regulation is prepared comprehensively with the secondary application in mind. As we can see on the selected European codifications, business corporations are usually not regulated by a civil code. With regard to the general role of the civil code and the principle of secondary application, the links between them and continuity of application may be dealt with on the same level and with the same quality as if it was not an independent law, but rather one of the books of a civil code. From the legislation’s point of view, it is rather a substantive question than a technical one. With respect to the nature of regulation of business corporations, we will always have to be dealt with the relationship between the general and the special. In many codifications, it is done throughout the particular laws; only exceptionally are the application links limited to a civil code itself; they, however, have to be dealt with as well.

### **5.3 Family Law**

Family law is usually a part of the new civil codes; there are almost no exceptions. It has either already been a part of a civil code or it has been restored as a part of it in the codification process. It is one of the private law areas that is understood to naturally belong civil code.

Polish codification is, however, an exception to this rule. Although the contemporary plan of the structure of the new Polish Civil code includes family law (it is supposed to be in the section four), it was emphasized that the decision is not final and may be changed after discussion.<sup>134</sup> According to the Polish authors, the reason for this is the growing discrepancy between the core principles of property relationships regulated by civil law and the family law principles. These differences may be support the arguments for leaving family law regulation out of the Civil code so that the unwanted “infection” of family-law issues with the concepts and partial solutions applying to the property relationships are avoided.<sup>135</sup>

In context with the contemporary codification tendencies, such an exclusion of family law from the Civil code would be rather unusual. Family law is a part of a civil code in all the other legal orders we researched.

There is no doubt that the object of regulation of family law relationships is very specific. Nonetheless, these specifics are not manifested by excluding this subject of regulation from a civil code in the contemporary codifications.

Apart from the traditional position of family law as one of the fundamental cornerstones of civil codes, we may identify a tendency to overcome the artificial particularization of the legal orders of the countries of the former Soviet Bloc. As the explanatory report to the Czech new Civil Code says: *“one of the deepest and most significant ideological differences between the socialist and the bourgeois system of law is that family law had been separated from civil law as a legislatively independent branch of law.”*<sup>136</sup>

The special laws on family issues are now being incorporated back into civil codes, usually as special books (chapters) or parts. Within the civil codes, they are usually in the “separate” units of the highest level (often ‘books’ or ‘parts’). Family law is often granted one of the first positions in the codes; in this regard, we should mention the structure of the contemplated Polish code which, as opposed to all the other new codes, intends to put family

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<sup>134</sup> Machnikowski, P. Reform of Private Law in Poland. National reports, Chapter 6, p. 102.

<sup>135</sup> Ibid, p. 102.

<sup>136</sup> Knapp, V., Systém československého socialistického práva v historii čtyřiceti let, Právník, 1985, p. 445 et seq.

law provision to the part four, i.e. after the provisions on *rights in things*; this approach might have been influenced by the German BGB which has similar structure.

As for the new Czech Civil code, family law is regulated in the part two; this is similar to the Romanian Civil code, in which the family law provisions are in the Book II. Similar approach is laid down in the draft of the Slovakian code (part two). The Hungarian code regulates family law issues in the book four; division of the family law provisions is, however, made in more detail and some of the family law provisions are also right after the provisions on persons, which corresponds with the other above mentioned approaches.

In Slovenia there are no views or ideas of potential future codification of Slovenian private law. Nevertheless, inclusion of family law into the code is expected. The Austrian Civil code also covers the area of family law.

#### 5.4 The Structure of Civil Codes

The structure of the particular codes is not completely unified. The codes differ in certain aspects – they have a different number of the main parts (‘parts’ or ‘books’), they have different structure and system. We may, however, identify *numerous unifying features* – this applies to both *similarity of the structure* and *order* of the particular structures. Majority of the new or contemplated codes (the Czech Republic, Hungary, Romania, the Slovak Republic) show *similar features*.

As for the order of the particular structures, the *Polish* draft is probably the only one that differs; it sticks to the German model which, however, is not followed by the other states.

The priority question aims at the *structure of the codes at the highest level*, i.e. structuring of the codes into the highest units which are then divided. These units are either called ‘parts’ (in the Czech or Slovakian terminology) or ‘books’ (chapters) (in Hungarian, Romanian or Polish codes).

The number of the parts (or chapters, books) is often between *five and seven*; attention is paid mainly to the parts of regulation which form the core of the laws; the parts on temporary or final provisions is not so important for the purpose of the comparison study.

The new *Hungarian* and *Romanian* Civil codes are structured in a very detail. Apart from the final provisions, they both have seven large units (the Romanian code has also an extra independent introductory part). On the other side, the Slovakian and Polish codes are not structured in such a detail, as they have less units (five). The new Czech Civil code only has four larger units.

These new codifications differ only slightly; the higher number of parts of the Romanian code is given by a broader subject-matter (as we mentioned above, the code also covers international private law).

The new *Czech* Civil code has the least number of parts. If we skip the temporary and final provisions (which are, of course, in all codes), the code only has the following four larger parts:

- General part
- Family law
- Absolute property rights
- Relative property rights

The *Slovakian* code that is currently being prepared follows similar approach. At the highest level, it has almost identical structure; only law of succession is stressed as an independent ‘part’:

- General part
- Family law
- Rights in things
- Law of succession
- Law of obligations

The same applies also to the *Polish* draft which having regard to the number and extent of the particular parts is identical to the Slovakian proposal. The only difference is in the order of the particular ‘chapters’ (books) which has been inspired by the German BGB:

- General provisions
- Law of obligations
- Rights in things
- Family law
- Law of succession



As for the structure, the new *Romanian* Civil code is in principle identical to the Polish and Slovakian drafts. There is, however, one part that goes beyond the original structure: *international private law* which has not been included by the other countries (therefore, this structure is hard to compare). However, what may be compared is the level of similarity of the other parts. In this respect, we should mention that the rules concerning limitation period, preclusion period counting of time (book six) are regulated in more detail. Moreover, the most general introductory provisions are not a part of the system of the chapters (books). The structure of the Romanian code is as follows:

- Persons
- Family
- Things
- Law of succession
- Law of obligations
- Limitation period, preclusion period, counting of time
- International private law

The *Hungarian* Civil code is structured in the most detail. It is divided into seven basic ‘books’. The area of law of succession has been included in a special part (which is identical to the Polish and Slovakian approach). As opposed to all the other new codes, physical and legal persons are each given a special part. It should be, however, mentioned that the Hungarian Civil code is broadly commercialized and contains regulation of business corporations to a larger extent than the other codes. The new Hungarian Civil code, therefore, has to following seven ‘books’ (in the eighth book, there are the final provisions):

- Introductory provisions
- Physical persons
- Legal persons
- Family law
- Rights in things
- Law of obligations
- Law of succession

From a structural point of view, we can see that the *differences* between the particular new codifications of civil law are *not crucial*. All the codification projects we researched have a general part; they always have a part on family law, rights in things, law of obligations and a special part on law of succession (which, however, is not the case in the Czech Civil code). Almost identical approach has been taken to the parts on persons (only the Hungarian code divided this part into two sections, i.e. a section of physical persons and legal persons). The Romanian special part (book) on limitation period, preclusion period and counting of time is rather exceptional.

In general, from the structural point of view, we may say that the legal orders we researched are *relatively similar*. There are no distinctive fundamental conceptual differences of the new codifications. Therefore, the usual structure of the codes may be understood as relatively *universal and uniformly accepted*.

This is even more true if we consider the distinctive level of homogeneity concerning the *order* of the particular parts.

Except for the Polish draft law, the order of the parts (or books) in all of the new codes follows the basic concept: persons – family – things – contracts. This order is the base for most of the codifications we researched; explicitly for the Czech law. The Slovakian draft and the Hungarian and Romanian codes also have a special part on law of succession. The Slovakian and Romanian drafts put the part on law of succession between the parts on rights in things and contracts. The Hungarian lawgiver decided to have the part on law of succession as the final part, i.e. after regulation of obligations. The Romanian Civil code has two extra ‘books’ in the final provisions which make this codification very specific, i.e. (i) a book on limitation period, preclusion period and counting of time, which is common for all of the respective “branches” regulated in the preceding books; and (ii) a book on international private law which, from this point of view, also applies to all the potentially affected private-law relationships. Broadly speaking, those two books cover the cross-section horizontal topics whose were appropriately placed at the end of the code.

As for the order of the books, the Polish draft law may seem exceptional in comparison with the other newly adapted or contemplated codes. The Polish draft law has the following order: general part – law

of obligations – rights in things – family – law of succession. As the structure corresponds with the German BGB, it is probably not a special Polish legislative approach, but it is rather follows or respects the German model. However, the contemplated Polish code is only a draft so the final structure might still change.

Some of the parts are structured in more detail. The principle of going from the general to the special and from the simple to the more difficult is usually adhered to. Nevertheless, regulation of obligations or the special parts thereof also show concurring approaches. Whereas the Czech Civil code regulates this area in a relatively dogmatic manner also as for the types of contracts (it first starts with the simple and more general contracts so that it could later outline the more difficult and special contracts), the Slovakian draft law also considers the importance or *practical economic significance*. As opposed to the Czech law, the Slovakian code regulates ‘sales contract’ before ‘deed of donation’; the second book of contracts (following conveyance of ownership) regulates ‘contracts for work’, etc. On the other hand, the general part on law of obligations has similar structure throughout the particular codes. The same applies to the regulation of family issues and rights in things. The differences in these areas are not crucial.

The detailed structure in the particular sections and subsections, of course, varies. However, it is usually structured according to generality and specificity, practical significance or logical interconnection.

We should also mention that the particular chapters of the new codes usually have special titles, which makes the structure of the codes more transparent and understandable. Some codes set forth special titles for each particular section (§) (compare, for instance, the Hungarian Civil code).<sup>137</sup>

Analyzing the structure of the new codes of the Central Europe from a general point of view, we may compare it to the structure of the Austrian and German Civil codes.

<sup>137</sup> Czírfusz, G., Keserű, B.A. National report of Hungary. National reports, Chapter 5), p. 88.

The *Austrian* Civil code (ABGB) starts with introductory general provision followed by three ‘parts’:

- On personal rights (this part also covers family law)
- On property rights (rights to things) (this part is subdivided into the particular parts on (i) rights in things including law of succession and (ii) parts on law of obligations, which covers most of contract relationships)
- On provisions common for personal rights and rights in things

The *German* BGB calls the units at the highest level traditionally as ‘books’; it has the following provisions:

- General provisions
- Law of obligations
- Rights in things
- Family law
- Law of succession

As the above analysis showed, the structure of the new codes already adapted or being contemplated in the Central European region rather follows the more modern way and the historical models of this region (the structure of the German and the Austrian codes) are not blindly taken over.

As for the core values influencing the order of the books, it rather corresponds with the Austrian model than BGB. This, however, only applies to the fundamental bases; from the point of view of the drafters of the new codes, the structure of the ABGB (three parts) does not probably seem appropriate, as none of the states followed this model. On the other hand, the German model is reflected in the structure of the Polish draft law. In general, we can say that the new codes are relatively homogeneous. Having distinctive common features, they either follow the models of some other codes or follow their own path; as it was described above, they do so in a relatively similar and compatible way.

## **5.5 Relations between Private and Public Law**

In all legal orders, civil code is a foundation of private law. It is a general private-law code which is followed by many special statutes regulating

particular areas. These special laws were, for some reason, excluded from the civil code. This, however, does not mean that they do not belong to private law. Civil code is an important integrative factor that is not used only for solving the issues not regulated by a special law. Civil code also (either openly or implicitly) expresses certain fundamental values and principles that shall be respected in private law as a whole; it also influences interpretation and application of the laws regulating the so-called private rights.

Apart from the role that civil a code plays in private law, we should also consider the relationship of the a civil code to public law, i.e. whether there is any relationship between private law on the one side and public law on the other. We will not focus here on the basic criteria for distinguishing between private and public law (interest theory, subordination theory, power theory, organic theory, and theory of a special right). We presume that differentiation between private and public law is typical for the continental system of law although daily life brings situations in which the division between private and public law might be difficult. Public law usually involves constitutional law, administrative law, financial law, criminal law and law of civil proceedings.

Civil codes usually do not set the relationship between private and public law so that this issue could be solved by the theory and practice. Their approach to this issue may be deduced from some of their provisions in which they try to characterize civil law, as it is done, for example, by § 1 ABGB. Another example may be the first sentence of § 1 para 1 of the Czech Civil code, which, probably influenced by the Austrian code, tries to define private law. What is even more interesting is, however, the second sentence of § 1 para 1 of the Czech Civil code, which states that application of private law is independent from application of public law. The explanatory report – identically to the Czech national report – refers in this regard to the article 7 of the French Code civil. The original wording of this article made exercising of civil rights independent from whether an individual is a citizen or not („*L'exercice des droits civils est indépendant de la qualité de Citoyen, laquelle s'acquièrent et ne se conserve que conformément a lá lois constitutionnelle.*“). The contemporary wording declares that exercising of civil rights is independent from exercising of political rights; the latter are gained and preserved in accordance with

the constitutional and election acts (*„L'exercice des droits civils est indépendant de l'exercice des droits politiques, lesquels s'acquièrent et se conservent conformément aux lois constitutionnelles et électorales.“*). The alleged inspiration of the Czech Civil code, therefore, regulates something different from independence of application of private law from public law. Completely different view at the relationship between private and public law may be found in the article 3:14, third book, of the Dutch Civil code. The code states that any entitlement or powers that an individual has under civil law cannot be exercised in disagreement with the written or unwritten rules of public law (*„Een bevoegdheid die iemand krachtens het burgerlijk recht toekomt, mag niet worden uitgeoefend in strijd met geschreven of ongeschreven regels van publiekrecht.“*).

There is no doubt that § 1 para 1 of the Czech Civil code cannot be interpreted literally, which proves even the following § 2 para 1 that requests that interpretation of the Civil code should comply with constitution; there are no doubts that this particular provision is of a public-law nature. This provision expresses especially the indirect effects of the fundamental rights and freedoms, i.e. their “shining” through the private-law statutes. If the Civil code and other private-law statutes shall be interpreted in accordance with the constitutionally guaranteed fundamental rights and freedoms, one can hardly assert that private law and public law are exercised independently from one another. Similarly, we can find there links to other branches of public law, e.g. civil procedure: a court may only declare a person missing in a special procedure, i.e. certain provisions of private law may not be ‘*exercised independently*’ from the provisions of public law.

As the national report of the Czech Republic explains, the abovementioned clause is rather a reaction to the former doubtful part of the practice of courts. It only means that the terms included in the public law cannot be automatically transferred to the sphere of private law; moreover, it means that breaching of a duty stated by public law does not automatically call forth invalidity of a legal act or a right to compensation for damage.

The inaccurate wording of the Czech § 1 para 1 and the critical comments to it were some of the factors that, according to the Slovakian explanatory report, led the Slovakian lawgiver not to set forth the links of the Slovakian Civil code to public law. This is surely a correct approach, as the fundamental

rules of a code that is to be in force for decades cannot be shaped only as a reaction to clearly wrong judicial decisions that would be eventually overcome by the natural development of ideas.

According to the Hungarian national report, the Hungarian Civil code expresses the relationship between the private and public law openly in 1:2. § (1). This provision includes a rule that is very similar to the Czech § 2 para 1; it states that all the provisions of the Civil code shall be interpreted in accordance with the Hungarian constitutional order (constitutional laws). The constitutional order is also one of the sources of private law principles, which, however, are not mentioned by the Civil code. This approach reflects the fact that the constitutional order binds not only the lawgiver, but also those who interpret and apply the Civil code. This means that, for example, a judge shall not interpret the Civil code in disagreement with the constitutional order, i.e. especially the fundamental rights and freedoms. If there are several alternatives of interpretation, we should choose the one that suits the constitutional order the best. In practice, we can see that the fundamental rights and freedoms that are behind some provision of the Civil code may collide. For example, the right on privacy on the one side, and the right to information and freedom of expression on the other, may be all in collision in a dispute concerning personality protection. Such a collision may be solved with help of a so-called proportionality test that has been shaped by the constitutional court. Even this shows us that interpretation and application of private law is not independent from public law. Subordination of private law to constitutional law may be seen especially the areas affecting the fundamental rights and freedoms.

Another example of projection of a public law element in private law is shown in the Romanian national report. It explains that despite the private law nature of the Civil code, the lawgiver decided to regulate the area of public ownership there. The nature of these clauses is, however, significantly different from private law regulation. These provisions apply only to a particular partial issue; they are not to become a general rule setting the mutual links between private and public law.

## 5.6 Procedural Rules in Civil Code

In Savigny's teachings from the mid-Nineteenth century, procedural law coincided with substantive law.<sup>138</sup> This was manifested in almost all the concepts of civil proceedings, e.g. a right to file an action was not of procedural nature, but under the Roman law influence it was rather understood as a 'subjective' substantive private right in the state of action, metamorphosis of subjective material right, i.e. one of its developmental stages. There was a long path from the Savigny's teachings before there was achieved a definite recognition of procedural law as an independent branch of law whose purpose is to protect private right. Therefore, protection is not just a feature of a subjective substantive right, as civil procedural law now provides the protection. The important thing is that the institutes (concepts), rules and principles of civil procedure are understood procedurally; they no longer include substantive elements. This nature of procedural law may be clearly identified on, e.g. the right to file an action, procedural acts of the parties, the object of litigation, procedural conditions, burden of proof, or enforceability of a court decision.<sup>139</sup>

The object of regulation makes the difference between substantive and procedural law.<sup>140</sup> In order to classify a particular legal norm as a substantive or procedural, we do not need to know in which code it the norm is included, but rather what it regulates. It is a procedural norm if it regulates especially the issues of how and at which authority the subjective private rights shall be claimed (the rules of jurisdiction, etc.) and the requirements that have to be met so that a court could consider the action (procedural conditions). Procedural norms also regulate the court's steps and which procedural rights,

<sup>138</sup> See, the Savigny's *System des ordentlichen Zivilprozesses* of 1854, and *System des heutigen römischen Rechts* of 1841.

<sup>139</sup> For more, see especially Macur, J. *Právo procesní a právo hmotné*. Brno: MU, 1993.

<sup>140</sup> For more on this approach, see Macur, J. *Právo procesní a právo hmotné*. Brno: MU, 1993, p. 108, 146. See, the earlier volumes by this author, Macur, J. *Občanské právo procesní v systému práva*. Brno: UJEP, 1975, e.g. p. 81. Henckel, W. *Prozessrecht und materielles Recht*. Göttingen: Verlag Otto Schwartz & Co, 1970, p. 5-26, p. 407-408. Maier, I. *Schweizerisches Zivilprozessrecht*. Zürich – Basel – Genf: Schulthess Juristische Medien AG, 2010, p. 24. Knapp, V. *Teorie práva*. Praha: C. H. Beck, 1995, p. 67,68. Fasching, H. *Zivilprozeßrecht*. Wien: Manzsche Verlags und Universitätsbuchhandlung, 1984, p. 31, 32. See also, Kodek, E. G. – Mayr, P. G. *Zivilprozessrecht*. Wien: Facultas, 2011, p. 31.



obligations and burdens the parties to litigation have, the consequences of a failure to prove some things, etc. They also set the rules concerning the outcome of litigation, the effects of a decision and settling of any costs connected with the litigation, appeals or enforcement of court decisions.

If the gradual development of modern private law and civil procedural law arrived at the stage where we are able to differentiate between the substantial and procedural rules, it is clear that the lawgiver should also respect this fact. Each legislative accomplishment reflects the level of knowledge of the certain era. Hence, we should not be surprised that some of the old civil codes that are still in force do not respect the clarity of the system and they set certain rules that we now consider to be procedural. It may be requested that the new civil codes cover only the rules of substantive nature, whereas the procedural rules should be included in a code of civil procedure or in other laws belonging to the area of civil procedures. There may be some exceptions to this strict separation of the two spheres, e.g. certain exceptions caused by the request for transparency or laws and understandability for the addresses of legal norms, etc. Legislative arrangement of the legal order cannot only strive to achieve the pure systematic clarity, but it also has to respect the practical issues.

Both the gradual development and the contemporary approach to distinguishing between substantive and procedural law have been reflected in the today's civil codes. If the codes contain more procedural rules, it may be caused by the fact that the division of substantive and procedural law was not at today's level in the era in which they were drafted. In this regard, we may refer to the Romanian national report, which explains that the old civil code included also several procedural rules. These rules were, however, transferred to the new code of civil procedure, which was passed at the same time. The new civil codes often try to minimize the number of procedural rules; compare the Hungarian, Slovenian and Slovakian national reports. If there are any procedural rules in the new codes, they are usually somehow connected with a certain substantive provision, e.g. a list of persons who are entitled to file a petition in a particular situation.

The Czech lawgiver has chosen a different path; there are relatively many procedural provisions in the Czech Civil code. Moreover, these provisions

are often not well coordinated with the rules included in the Czech Code of Civil Procedure. The Czech Civil code, for example, sets rules about ‘access’ to a court, predictability of court’s decisions, or a rule that a court shall properly explain its decision if such a decision deviates from the stabilized decision practice. Apart from that, the code also lays down some rules about the requirements of an action (petition), the court’s being ‘bound’ by the action or several aspects connected with presenting evidence (presumption connected with private and public documents, division of a burden of proof in some situations), etc. These rules often collide with the Code of civil procedure. For example, the provisions about the private and public documents are regulated by both of these codes; the same thing applies also to the rules about the court’s being ‘bound’ by the action. Thus, the fears against which the literature on civil procedure had warned when the Civil code was being prepared came true.<sup>141</sup> It will now be up to the practice and theory to deal with these problems. Although they will probably succeed in it after overcoming some obstacles, we may say that interpretation and application of the Civil code and the laws on civil procedure would be much easier and more transparent if the law respected the nature of the provisions.<sup>142</sup>

The situation of the Czech civil law became reality also because the recodification work was aimed only at substantive law and rather ignored the civil procedures. For over ten years of preparation of the Civil code, there was nothing done concerning the conceptual changes of law of civil procedures

<sup>141</sup> See, e.g. Winterová, A. Úvahy o civilním procesu nad kodexem soukromého práva. In Švestka, J. (ed.) *Otázky rekodifikace soukromého práva*. Praha: AUC-Iuridica, 2004, p. 193 et seq. Lavický, P. *Civilní soudnictví a nový občanský zákoník*. Soudec, 2011, No. 9.

<sup>142</sup> On the issue of procedural rules in the Civil code, see Lavický, P. Několik úvah o procesním právu z podnětu díla prof. V. Knappa. In Viktor Knapp – vědecké dílo v proměnách času. 2013. The paper is to be published soon (already sent to a publisher). Králík, M. – Lavický, P. Označení vindikovaných věcí ve vlastnické žalobě. *Soudní rozhledy*, Praha, C. H. Beck. ISSN 1210-6410, 2013, vol. 19, no. 11-12, p. 438-439. Lavický, P. *Procesněprávní pravidla v novém občanském zákoníku*. In *Reforma soukromého práva a Slovensku a v Čechách*. Brno - Pezinok: Masarykova univerzita - Justičná akadémia Slovenskej Republiky, 2013, p. 82-99.

or the amendments needed as a result of recodification of substantive law. The lawgiver had not started paying attention to law of civil procedures until the new Civil code was published in the Collection of laws.<sup>143</sup>

On the contrary, the Slovenian national report explains that the recodification group has been aware of the importance of consistence of substantive and procedural norms from the very beginning. This is definitely the correct approach, for this is the only way of how to avoid a situation that both practical interpretation and application of a civil code and a code of civil procedure or other laws are prevented from unnecessary collisions.

### 5.7 The ‘Style-Shaping’ Elements

The traditional civil codes always contain certain clauses that are typical for them. These clauses may express, for instance, the philosophic approach of the drafters; they may show the core values on which the codes are based, the basic principles, and so on. The theory considers such clauses to be the ‘style-shaping elements’.<sup>144</sup> For example, as for the Austrian Civil code, these elements are included in § 7 and § 16, which express adherence to natural law rationalism. The article 1 of the Swiss Civil code grants the judges the power to span the gaps in law according to the principle that they would set if they were the lawgiver. This represents a completely different approach from the French Civil code whose article 5 bans the judges to make a normative decision of general application. The principle ‘*Treu und Glauben*’, which is laid down in § 242 BGB, is believed by some to be the ‘style-shaping’ element of German civil law.<sup>145</sup>

It shall be mentioned that the practical relevance of the abovementioned ‘style-shaping’ elements may differ. For example, although the French Civil code prevents the judge to make a normative decision of general application,

<sup>143</sup> This is openly admitted also by the explanatory report to the Act on special procedures: *“as from a certain point, harmonization of the fundamental procedural law, i.e. the Code of civil procedure, should be advance together. The certain point is understood here as a moment when regulation of substantive law is ‘stable and consolidated’, such as publishing of the laws regulating the introduced spectrum of substantive law in the Collection of laws. Such substantive laws may be effectively accompanied with the respective procedural rules.”*

<sup>144</sup> Knapp, V. *Velké právní systémy. Úvod do srovnávací právní vědy*. Praha: C. H. Beck, 1996, e.g. p. 114 et seq.

<sup>145</sup> For more on this, see Knapp, V. *Ibid.* p. 114-116.

the courts have had to shape the needed rules because the untouchable position of the Civil code. This approach is obvious, for instance, on the concept of unjust enrichment. Code Civil, which was influenced by the Roman tradition, applied this concept (included in the articles 1376-1381) only to ‘paying a non-existing debt’; moreover, only in a very narrow meaning, as it only applies to accidental paying money or giving a thing; not to claiming compensation for providing services based on a null contract. As the narrow meaning of this concept could not be changed by amending the code, which was rather “sacredly untouchable”, the concept of unjust enrichment had to be shaped (completed) by the practice of courts. The courts first based their efforts on the broad interpretation of the provision on *negotiorum gestio*. Today, the judicial decision refer to the article 1371 of the Code Civil, which is the introductory provision to so-called ‘quasi’ contracts to which the code classifies only ‘paying of a non-existing debt’ and *negotiorum gestio*.<sup>146</sup>

As for the German Civil code, the principle *Treu und Glauben* has made it possible for the courts to “shape” law. The general clause in which the principle of righteousness is especially expressed, is included in § 242 BGB. Under this provision, the debtor is obliged to perform, as it is required by honesty and custom. Based on this provision, the practice of courts shaped (or completed the shape of) several important legal institutes (concepts) that became a part of the Civil code at the beginning of this millennium, e.g. pre-contractual liability or change of circumstances; compare the German national report). Aside from that, the practice of courts concluded numerous duties that are to ensure a loyal performance of obligations, e.g. the duty to collaboration or the information duty. The principle of righteousness also helps to interpret contracts; compare § 157 BGB.

Although the principle *Treu und Glauben* can be understood as a ‘style-shaping’ element of the German Civil code, German law is not the only law in which this principle may be found. For example, the Swiss Civil code emphasizes the honesty in the article 2. The general clause of the first section binds everyone to act honestly while exercising their rights and fulfilling obligations. The second section deprives ‘misuse of law’ of protection.

<sup>146</sup> Beatson, J. – Schrage, E. (ed.). Casebooks on the Common Law of Europe. Unjustified Enrichment. 1<sup>st</sup> edition. Oxford and Portland, Oregon: Hart Publishing, 2003; see, p. 4, 36-39, 115, 251, 332-337, 493-497.

The Dutch Civil code has expressed honesty by the term *'redelijkheid en billijkheid'*. The first section of the article 6:2 makes it possible to avoid application of a statutory, customary or contractual rule, which would otherwise bind the parties, to the extent in which it is unacceptable due to its contradiction with the principles of honesty. The first section of the article 6:248 understands honesty as a source of rights and obligations of the parties: a contract has not only the effects on which the parties agreed, but also those that derive from legislation, custom or standards of honesty. On the contrary, the second paragraph excludes application of a rule on which the parties agreed, but may not be acceptable for it contradicts the standards of honesty. Next, we may refer, for example, to the article 1134 of the French Code Civil, the articles 1175, 1337, 1366 and 1375 of the Italian Codice Civile, or the Portuguese (the article 762 para 2) or the Greek code (especially the article 288).

The principle of honesty is also taken into account by the European and transnational projects which deals with unification of private law or some of the areas of private law. This principle may be identified in the Principles of European Contract Law (PECL) or in UNIDROIT Principles of International Commercial Contracts. They are also in the most significant, most extensive and the newest work: Common Frame of Reference (DCFR). The article 1:201 of the Principles of European Contract Law states that each party shall act honestly. In the similar way as DCFR, PECL understands honesty as *good faith and fair dealing*. The main drafter even proclaims this provision to be the central general clause of the Principles of European Contract Law.<sup>147</sup> Similar approach may be identified in the article 1:7 of UNIDROIT Principles of International Commercial Contracts which states that each party must act in accordance with good faith and fair dealing in international trade. The Common Frame of Reference focused on this principle, e.g. in the following articles: I.-1:103, I.-1:102, II.-1:106, II.-3:301, II.-8:102, II.-9:101, II.-9:403, 404 a 405, III.-1:103 and many others.

<sup>147</sup> Lando, O. Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law? *European Review of Private Law*, 2007, No. 6, p. 853.

The paths of the principle of honesty that we have just described point out that it is not so clear with the ‘style-shaping’ elements. What seemed to be typical for a particular legal order may become typical for numerous other states or even transnational projects.

The new civil codes have different approach to adapting the ‘style-shaping’ elements of other civil codes and to creating their own. The Slovakian national report explains that the Slovakian draft of the civil code does not include any rule similar to, for example, § 7 or § 16 or the article 1 para 2 of the Swiss Civil code. On the other side, the Romanian national report points out that a ‘consensual’ principle of acquiring ownership is one of the concepts typical for Romanian law which makes it different from Austrian law or German law. According to the Czech national report, such a ‘style-shaping’ element is included in § 3 para 1 of the Czech Civil code, which states that private law protects also the natural right of men to pursue their happiness and happiness of their family or close persons in a way that does not cause injury to other people for no reason. It should be mentioned that the Czech lawgiver adapted some of the abovementioned ‘style-shaping’ elements from other civil codes, e.g. the principle of righteousness or the pattern set by § 16 ABGB, which was, however, modified: according to the Czech code, men has not only the natural rights identifiable by reason, but also by feeling. The original versions of the draft of the Code also expected that the Swiss approach to shaping (finishing) law by a judge ‘*modo legislaoris*’ would be adapted. Nevertheless, this approach was later abandoned and the model of spanning the gaps in law is rather similar to the Austrian § 7 ABGB.

## 5.8 The Principles of Private Law

One of the favorite topics of jurisprudence is the role of legal principles.<sup>148</sup> The opinions on this topic differ according to the era in which originated and to the social and political circumstances. It is also important whether the author was a theorist of ‘legal positivism’ or ‘natural law’. The proponents of the pure positivist approach to law have a clear opinion about

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<sup>148</sup> Some authors between tenets and principles. In this text, we understand these terms identically.

the role of the principles: the principles may only apply if the law refers to them and only because the law refers to them. They have no positive-legal value without such a reference, not even for interpretation of laws. A sad example of this approach may be found in a relative young (less than ten years old) decision of the Supreme Court in which the Supreme Court ruled that ‘good faith’ is only relevant if the law refers to it;<sup>149</sup> this decision was criticized by the legal theory. This approach is also reflected in a relatively recent opinion that since the Czech Republic is a country of ‘written law’ (law in books), the non-written sources of law shall apply only if the law refers to them.<sup>150</sup> This is contradicted by the belief that not only ‘written law’, but also non-written sources of law such as custom or principles are sources of law in the legal orders of the continental tradition. They are sources of law naturally “legal force” with no need to be referred to in a civil code. Therefore, they may be understood as a component of law even if not explicitly mentioned in a civil code.

Civil codes have different approaches to the principles. Some civil codes do not mention the principles very often, as they rather leave it to the legal theory and practice to consider their importance. Other codes only name several partial principles, whereas some civil codes refer to them in general, i.e. they recognize their interpretative and normative function and define their position within the sources of law.

As an example of an obliging and general approach to legal principles, we may mention the Austrian or Romanian Civil codes. ABGB explicitly refers to the natural principles in § 7. The Romanian Civil code, in the article 1, recognizes the legal principles as sources of law together with laws and custom; compare the Romanian national report.

The Czech Civil code has enumerated several principles in the introductory provisions. Aside from that, it may be deduced from § 3 para 3 and § 10 para 2 that there are other principles which have not been openly mentioned which are of interpretative and normative importance. Also the Hungarian

<sup>149</sup> The opinion was published in the Collection of decisions and opinions of the Supreme Court, No R 40/2006. The Constitutional Court opposed this opinion in the finding No Pl. ÚS 78/06.

<sup>150</sup> Salač, J. in Dvořák, J. – Švestka, J. – Zuklínová, M. *Občanské právo hmotné*. Praha: Wolters Kluwer ČR, 2013, p. 112, 120.

code presents very obliging approach to the principles; as for their role, the principles are differentiated into two groups: (i) those that are not explicitly stated in law, but they may be deduced from law (justice, reasonability, legal certainty), and (ii) those explicitly stated by in the law, e.g. fairness, prohibition of misuse of law. The first group of the principles does not have such a strong position, for a court decision cannot be based solely upon these principles. More about this is in the Hungarian national report. The Romanian Civil code also contains an enumeration of principles. Aside from those, other principles that are not directly expressed in legislation are also recognized. The proposed Slovakian Civil code is to express the fundamental principles on which it is based, e.g. the principle of autonomy of will or the principle of equality.

Therefore, we may say that this era is favorable towards the legal principles. In general, we may summarize that they may be used for interpretation or they may even have normative effects, e.g. while spanning the gaps in law. The list of the principles is not limited only to those that are explicitly enumerated in the civil codes, but there are other principles which are also considered to be a part of the legal order due to their 'legal force'. In some legal orders, this fact may result in a different importance of the two groups of principles.

## **5.9 The Role of Courts' Decisions**

The role of civil procedure is mainly to provide protection to the subjective 'substantive' rights that were either breached or endangered. The goal of court proceedings is not to reshape the legal substantive facts, but rather to recognize the reality and issue a court decision based upon in. Naturally, it is required that the reality be given a proper legal consideration and especially that the role of a court and the parties would be regulated in such a way that the considered fact is properly and completely clarified. The social concept of civil procedure, which first appeared in the Austrian Code of civil procedure and which was later adapted by many other countries is the best



example of it.<sup>151</sup> According to this approach, the ‘dominion’ of the parties over the factual material, which is typical for the liberal approach, is rather limited. The factual statements of the parties have to be truthful and complete; the court is granted an active role by the so-called material leading of the proceedings.

Aside from the situations in which a court decision is based upon a substantive reality which had occurred prior to the proceedings and is independent of it, the courts are sometimes called on by an explicit provision of the law to establish, alter or cancel the subjective substantive rights and obligations. For example, the courts may be called upon to cancel and settle joint ownership if the parties are not able to come to such a solution by themselves. However, the ‘constitutive’ decision-making of the court should be rather exceptional, as the nature of private law prefers an agreement of the parties as the basis for establishing, modifying or canceling legal relationships. The explicit provisions of the law that give the courts power to make ‘constitutive’ decisions should be applied only to the rights and obligations that cannot be freely managed by the parties, or if the parties are not able to come consensus and there is no other solution possible.

In both of these situations, the court decision has ‘*inter partes*’ effects, i.e. it either deals with a dispute or (exceptionally) establishes, alters or cancels the subjective rights and obligations of the parties. Nevertheless, it is a question whether a court decision may be understood as a source of law, i.e.

<sup>151</sup> For more, see: Klein, F. Pro Futuro. Betrachtungen über Probleme der Civilproceßreform in Oesterreich. Leipzig und Wien, 1891. Rechberger, W. H. Die Ideen Franz Kleins und Ihre Bedeutung für die Entwicklung des Zivilprozessrechts in Europa. *Ritsumeikan Law Review*, 2008, No. 25, p. 101. Van Rhee, C. H. The Development of Civil Procedural Law in Twentieth-Century Europe: From party Autonomy to Judicial Case Management and Efficiency, in: C. H. van Rhee (ed.), *Judicial Case Management and Efficiency in Civil Litigation*. Antwerpen, 2008. Oberhammer, P. Party Autonomy and Procedural Law: A Few Comments from an Austrian Perspective. In Dahlberg, M. (ed.) *Party Autonomy – Civil Procedural Views on Party Autonomy*, Franz Klein EU Law and More. Uppsala, 2011. Fasching, H. *Lehrbuch des österreichischen Zivilprozessrechts*. Wien, 1984, p. 22. Brehm, W. Die Bindung des Richters an den Parteivortrag und Grenzen freier Verhandlungswürdigung. Tübingen: J. C. B. Mohr (Paul Siebeck), 1982, p. 10-13. Macur, J. *Zásada projednací v civilním řízení soudním*. Brno: MU, 1997, p. 82. Macur, J. *Základní teoretické otázky legislativní koncepce civilního procesu*. *Bulletin advokacie*, 1998, No. 9, p. 7. Kuderna, F. Soziale Funktion und soziale Elemente des Zivilprozesses. *RdA* 1986, p. 182.

whether binding legal norms may originate upon such decisions.<sup>152</sup> Civil codes have different approaches to this issue. Some of them do not answer it directly; some even prevent the court decision from having such normative effects (compare the abovementioned article 4 of the French Code Civile or § 12 ABGB according to which the court decisions do not have the force of law and may not apply to other cases or persons). Nevertheless, we may find also opposite approach: for example, the Swiss Civil code grants power to the judges to create law as if they were the lawgiver and make a decision according to such law while dealing with a gap of law. Nonetheless, the approach of the civil codes itself is not determinative, as the practice and theory may present a different approach.

It is often mentioned that the court decisions are not a source of law, but especially because they actually reflect law of the particular era, they may be understood as the necessary source of learning the law.<sup>153</sup> Similar idea may be found in the Croatian national report: in Croatia, a court decision is not understood as a source of law. Although the theory of civil procedure emphasizes that some decisions are law, they only have effects the parties. The Czech and Slovakian national reports state that a court decision cannot be understood as a source of law, which, however, does not mean that the decisions would be irrelevant.

On the other side, the P. Bydlinsky considers judicial decisions to be 'secondary source of law'. This role is, however, limited only if the judge feels that he or she should deviate from the existing practice, but if they do not have enough arguments for deviating from the existing solution. In these cases, the faith in continuity of judicial decisions rather sticks to the existing legal opinion if it is not only a rare opinion or if it is not properly justified (explained). Koziol and Welser mentioned an idea that the secondary application of judicial law applies only if it may not be convincingly proven that other solution complies obviously better with the legal order.<sup>154</sup>

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<sup>152</sup> Larenz, K. Allgemeiner Teil des deutschen bürgerlichen Rechts. 7<sup>th</sup> edition. München: C. H. Beck, 1989, p. 7.

<sup>153</sup> Larenz, K. Ibid, p. 12.

<sup>154</sup> Koziol, H. – Welser, R. Grundriß des bürgerlichen Rechts. Band I. Allgemeiner Teil und Schuldrecht. 10th edition. Wien : Manz, 1995, p. 35.

The Hungarian national report does not consider the court decision to be a source of law in the exact meaning. With regard to their importance for shaping (completing) private law, it, however, understands them as “quasi” sources of law. The same approach is applied to the findings of the constitutional court, especially if the Constitutional court acts as a ‘negative’ lawgiver.

The new Czech Civil code has two provisions that significantly influence the effects of court decisions within private law. § 13 states that everyone who calls for legal protection may reasonably expect that his case will be decided in a similar way as other already decided cases which resemble his case in the significant features. If a case was decided in a different way, everyone who calls for legal protection has a right to be given a convincing explanation of this deviation. This provision is sometimes understood as implementing of case law into the Czech legal order although, as it is emphasized in the Czech national report, it is not case law. This provision only reflects the principle of legal certainty (and especially predictability) and equality: if there is a constant court practice, everyone may be sure that the court will decide in accordance with such a practice in similar cases. It, however, does not prevent the judges to deviate from such a practice, i.e. it does not elevate the court decision to the level of law. If, however, the judge deviates from a constant practice, he shall explain why he did so. The other provision is § 10 para 2, which covers so-called ‘*re-analogy juris*’, i.e. the “principles of justice” on which the Civil code rests. It is interesting that the court shall take into account legal theory and the constant practice of courts. Hence, this provision basically considers legal theory and the practice of courts as a secondary source of law. Nevertheless, it is done in a little bit different position than what was mentioned above. Nevertheless, the court practice and legal theory are not ‘binding’ in the same way as the ‘binding’ force of law is. The court only has to ‘take them into account’, i.e. the court has to make clear whether a similar case was already dealt with by the courts or whether the opinions of legal theory and practice correspond with one another or disagree.

One of the requirements arising from the principle of legal certainty is predictability of the courts’ decisions. It is desirable that one may determine

with high probability how a particular case would be considered by the court if the parties decide to submit the case to the court. This brings advantages not only to the parties who can weight their chances to succeed, but the whole society, because if the parties may weight their chances to win, there are less cases to be solved by the courts which means that other cases may be solved more quickly.

The presumption for reaching such a state is having a stable and consistent decisions. In this regard, it is especially the role of the courts which are at the top of the system of courts in each particular country to ensure the unity of the practice of courts. This is usually done by means of making decision about appeals and publishing these decision in a collection of decisions or via other means of communication (nowadays, e.g. by making the decisions available on the website of the court).

Apart from this procedural tool, some legal orders have another tool for unifying the practice of courts (the decisions). This tool is not of procedural nature, as it consists of the opinions which the supreme courts may adopt in order to unify the decision practice concerning a particular issue if the practice has not been consistent. As it was with the court decisions, there is a question of the binding effect.

The opinions are also mentioned in the Hungarian national report. Although these opinions are not understood as formally binding, their actual binding effect may be statistically proved according to the national report. Similar tool is also mentioned in the Romanian national report; it also does not consider the opinions to be a source of law but rather interpretation of law. Nonetheless, Hungary and Romania are not the only countries in which such opinions are used. As for the former socialist states, we may also mention the Czech Republic or Slovak Republic.

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## NATIONAL REPORTS

# 1 AUSTRIA: REFORMING THE ABGB (OLD IDEAS AND NEW ATTEMPTS)

*Gerhard Saria*

### 1.1 Introductory Remarks

The following article gives a short survey of the *most important features* of reforming the ABGB (“Allgemeines bürgerliches Gesetzbuch”), the Austrian Civil Law Code. Therefore not each and every reform of the ABGB within the last ten to fifteen years is dealt with. Only reforms with an impact on fundamental provisions or on important parts of the ABGB are subject to the following considerations. The importance of any reform being mentioned in this article derives either from her influence on the system of Austrian civil law or from the number of provisions touched by the relevant reform. Very often both requirements are met by the reforms selected in the course of this analysis. Although there are *no plans* for developing a new Austrian Civil Law Code replacing the ABGB or even for a complete modernisation of the ABGB, taking a glance at the reforms of the past few years will allow to recognize the common principles of reforming Austrian private law. But before dealing with these principles I will start with an overview on the brand new developments in reforming Austrian civil law. By this, it will be easy to identify the current topics and needs of private law reforms in Austria on the one hand. On the other hand, and almost more important, this approach will give a good impression on the ways private law reforms are carried out nowadays.

### 1.2 Current Plans for Private Law Reforms in Austria

After the last elections to the National Council (Nationalrat) in autumn 2013 the new Austrian Federal Government (Bundesregierung) published

her *working programme* for the new legislative period.<sup>155</sup> The chapter “Justiz” (Justice) identifies with reference to civil law in general and to the ABGB in particular inter alia the following tasks for the new government:

- a reform of tort law leaving unchanged the basic principles of existing tort law;<sup>156</sup>
- an adjustment of the provisions governing the limitation of claims especially in connection with sexual abuse;<sup>157</sup>
- a reform of the provisions for special guardians (for the protection of mentally handicapped persons; “Sachwalter”);<sup>158</sup>
- the strengthening of consumer protection;<sup>159</sup>
- the modernisation of company law and the law of the civil law company (“ABGB 200+”);<sup>160</sup>
- a reform of inheritance law.<sup>161</sup>

All these measures are justified by the sentence: “*Modern rules for a modern society.*” taking reference to the fact that some of the already existing rules date back to the 19<sup>th</sup> century and are – at least in the opinion of the authors of the working programme – inadequate for modern challenges.<sup>162</sup>

In another chapter dealing with *landlord and tenant law* a fundamental reform of this field of law is announced. In addition, a modernisation of the building

<sup>155</sup> “Erfolgreich. Österreich. Arbeitsprogramm der österreichischen Bundesregierung für die Jahre 2013 bis 2018.”

<sup>156</sup> Arbeitsprogramm der österreichischen Bundesregierung für die Jahre 2013 bis 2018 p 94: “Überarbeitung des Schadenersatzrechtes unter Beibehaltung seiner Grundprinzipien”.

<sup>157</sup> Arbeitsprogramm der österreichischen Bundesregierung für die Jahre 2013 bis 2018 p 94: “Anpassung der zivilrechtlichen Verjährungsbestimmungen, insbesondere für Opfer von Missbrauch und sexueller Gewalt”.

<sup>158</sup> Arbeitsprogramm der österreichischen Bundesregierung für die Jahre 2013 bis 2018 p 94: “Förderung der unterstützten Entscheidungsfindung (Betreutes Konto als erste Stufe, Sachwalterbestellung als ultima ratio)”.

<sup>159</sup> Arbeitsprogramm der österreichischen Bundesregierung für die Jahre 2013 bis 2018 p 94: “Stärkung der Verbraucherrechte”.

<sup>160</sup> Arbeitsprogramm der österreichischen Bundesregierung für die Jahre 2013 bis 2018 p 94: “Modernisierungen im Gesellschaftsrecht sowie der Gesellschaft bürgerlichen Rechts („ABGB 200+“).”.

<sup>161</sup> Arbeitsprogramm der österreichischen Bundesregierung für die Jahre 2013 bis 2018 p 95: “Weiterentwicklung des Erbrechts (Pflichtteilsrecht, Verbesserung der Stellung von (kinderlosen) EhegattInnen und LebensgefährteInnen, Unternehmensnachfolge)”.

<sup>162</sup> Compare Arbeitsprogramm der österreichischen Bundesregierung für die Jahre 2013 bis 2018 p 94.

law of the ABGB is on the agenda.<sup>163</sup> All these measures aim at making renting of flats more transparent, fair and comprehensible and – above all – less expensive. So the Austrian government tries to fight the growing shortage of flats in Vienna and in the vicinity of the city by changing the legal environment for the building and the renting of flats.

The first *reactions of legal scholarship* state that these plans are not detailed enough and are mere headlines.<sup>164</sup> Besides this lack of contents it is criticized that there seems to be no political will for a complete renewal of the ABGB although the necessity of such a step is widely recognised by legal doctrine.<sup>165</sup> Last but not least: It is stressed that the proposals of the working programme are not presented in a systematic way.<sup>166</sup> Taking into account the last two points it seems that some academics are discontent not only with the way of presenting the tasks of the intended civil law reforms in the working programme but primarily with the absence of any legislative master plan for a reform of the ABGB.

## 1.3 Characteristics of Austrian Private Law Reforms

### 1.3.1 Small Steps versus Recodification

#### 1.3.1.1 *It all started in Brno...*

Talking about the ABGB means talking about a civil law code that was first officially published in 1811 at the morning dawn of the 19<sup>th</sup> century. But the roots of the ABGB are much older. It was and is common sense among Austrian academics that the history of the ABGB starts in 1753,<sup>167</sup> when empress Maria Theresia established the so called “Compilations-

<sup>163</sup> Arbeitsprogramm der österreichischen Bundesregierung für die Jahre 2013 bis 2018 p 66: “Modernisierung des Baurechts im Sinne des ABGB”.

<sup>164</sup> Compare *Hopf*, Justizpolitik in der 25. Gesetzgebungsperiode – Aus dem Regierungsprogramm für 2013 bis 2018, ÖJZ 2014, 1; *Lehofer*, Rechtspolitische Vorgaben im Regierungsprogramm 2013 - 2018 (Teil 2), ÖJZ 2014, 49.

<sup>165</sup> *Krejci*, „Mutig in die neuen Zeiten.“? – Das Regierungsübereinkommen und das Zivilrecht, GES 2013, 485 - 486 (485).

<sup>166</sup> *Krejci*, „Mutig in die neuen Zeiten.“? – Das Regierungsübereinkommen und das Zivilrecht, GES 2013, 485 - 486 (485).

<sup>167</sup> Since *Zeiller*, Commentar I (1811) V, 6 - 7; this way also *Harras von Harrasonsky*, Der Codex Theresianus und seine Umarbeitungen I (1883) 13; compare also ann 16 of this article.

Commission”. The task of the Compilations-Commission was the gathering and structuring of the statutes, acts and laws of all the kingdoms and countries of the Habsburgian monarchy except for the Hungarian part of the monarchy. The result of her work was the “*Codex Theresianus*”, which was presented to the empress in 1766. The “*Codex Theresianus*” never went into force.<sup>168</sup> However, this code was the earliest ancestor of the ABGB being the basis for all other drafts and codes leading to the ABGB in the end.<sup>169</sup> Since the “Compilations-Commission” was seated in the beginning in Brno you might as well say that *the cradle of the ABGB stood in Brno*.

***For our topic the following facts are of importance:***

- It took *58 years of preparation* to enact the ABGB. This means that statistically each and every year not more than about 26 §§ were “produced”.
- The ABGB is now *203 years* old. Taking into account the 58 years of preparation the ABGB covers a period of *261 years* of legal history.

<sup>168</sup> For details compare *Harras von Harrasowsky*, *Der Codex Theresianus und seine Umarbeitungen I* (1883) 2 et seq.

<sup>169</sup> Compare for details *Zeiller*, *Commentar I* (1811) 6 et seq; *Harras von Harrasowsky*, *Geschichte der Codification des österreichischen Civilrechtes* (1868); *Pfaff*, *Zur Entstehungsgeschichte des westgalizischen Gesetzbuchs*. – Separatabdruck aus den Nr. 34 - 37 der „Juristischen Blätter“ vom Jahre 1890 (1890); *Brauneder*, *Europäische Privatrechtsgeschichte* 115 - 116; *Floßmann*, *Österreichische Privatrechtsgeschichte*, 6<sup>th</sup> ed (2008) 14 - 15; *Rainer*, *Zur Entstehung des ABGB*, in *Geistlinger/Harrer/Mosler/Rainer* (eds), *200 Jahre ABGB – Ausstrahlungen – Die Bedeutung der Kodifikation für andere Staaten und andere Rechtskulturen* (2011) 25 et seq; *Rainer*, *Die Entstehung des ABGB*, in *Welser* (ed), *Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa* (2012) 23 et seq; *Rainer*, *Die Entstehung des ABGB*, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 19 et seq; *Kodek*, *200 Jahre Allgemeines Bürgerliches Gesetzbuch – Das ABGB im Wandel der Zeit*, in *Kodek* (ed), *200 Jahre Allgemeines Bürgerliches Gesetzbuch (ABGB) und Europäisches Vertragsrecht* (2012) 15 et seq (16 et seq); *Yanovyt'ska*, *Die Erprobung des ABGB im Gebiet Galiziens und sein Einfluss auf die heutige Zivilgesetzgebung in der Ukraine*, in *Geistlinger/Harrer/Mosler/Rainer* (eds), *200 Jahre ABGB – Ausstrahlungen – Die Bedeutung der Kodifikation für andere Staaten und andere Rechtskulturen* (2011) 149 et seq; *Deutsch*, „Billig streitet die Vermuthung, daß ein Gesetz bedachtsam abgefaßt“ – Zu Wortwahl und Gesetzessprache im ABGB, in *Dölemeyer/Mohnhaupt*, *200 Jahre ABGB (1811 - 2011) – Die österreichische Kodifikation im internationalen Kontext* (2012) 375 et seq (380 et seq).



- The political aim of the ABGB as well as of all other previous attempts of codification of private law was *political integration by legal unification*.<sup>170</sup>

### 1.3.1.2 The Need for a Refurbishment of the ABGB

Within the last 203 years several parts of the ABGB have been changed. Nevertheless, important parts of the code still have remained unchanged. Besides political reasons this surprising survival throughout history is owed without doubt to the solid preparation of and to the skills of the lawyers involved in the legislation. Men like *Azzoni*, *Horten*, *Martini*, *Pratobevera*, *Sonnenfels* and *Zeiller* were among the best lawyers of their times, and they did their best in contributing to what in the end became the ABGB.

Anyhow, after more than 200 years the ABGB obviously needs a thorough renewal in many parts. This fact is almost undisputed recognized not only by legal scholarship but also by leading representatives of the Austrian Federal Ministry of Justice.<sup>171</sup> Changes in law and progress in legal sciences as well as new social challenges and the economic changes of the past 200 years make a complete reform of the ABGB inevitable in the eyes of most scientists and of the representatives of the Austrian Federal Ministry of Justice. This general belief was confirmed by *two conferences*. The first was held in 2002 in Vienna and the second in 2007 also in Vienna. On the eve of the 200<sup>th</sup> birthday of the ABGB the needs and the chances of reforming the ABGB

<sup>170</sup> *Harras von Harrasowsky*, *Der Codex Theresianus und seine Umarbeitungen I* (1883) 1 et seq, 13 and the materials printed there at p 14 et seq; compare also *Ogris*, *Der Entwicklungsgang der österreichischen Privatrechtswissenschaft im 19. Jahrhundert* (1968) 3 - 4; *Didovic*, *Kodifikation oder Nebengesetz in der deutschen und in der österreichischen Privatrechtsordnung – Ausgewählte Beispiele* (2009) 13 et seq, especially 18.

<sup>171</sup> Compare *Graf*, *ABGB forever?*, in *Fischer-Czermak/Hopf/Schauer* (eds), *Das ABGB auf dem Weg in das 3. Jahrtausend* (2003) 1 et seq, especially 8 et seq; *Schauer*, *Schuldrecht – Reformbedarf oder Kontinuität*, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 183 et seq (185 - 186); *Fenyves*, *Alles Gute zum Geburtstag!*, in *Welser* (ed), *Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa* (2012) 109; *Stabentheiner*, *Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht*, in *Fenyves/Kerschner/Vonkühl* (eds), *200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode* (2012) 61 et seq (62); *Krejić*, „Mutig in die neuen Zeiten.“? – Das Regierungsübereinkommen und das Zivilrecht, *GES* 2013, 485 - 486 (485).

were discussed. The results of these two conferences were published<sup>172</sup> and by this a wide participation of the scientific community and the legal professions ensured. Especially the second conference showed once again by various detailed studies<sup>173</sup> that actually all parts of the ABGB need to be modernised. At the latest with these two conferences legal scholarship on the one hand and the Austrian Federal Ministry of Justice on the other hand seem to agree on two facts:

- There is a need for a *complete refurbishment* of the ABGB.<sup>174</sup>
- The aim is *adapting* the ABGB *to modern times*.<sup>175</sup>

<sup>172</sup> *Fischer-Czermak/Hopf/Schauer* (eds), *Das ABGB auf dem Weg in das 3. Jahrtausend* (2003); *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform* (2008).

<sup>173</sup> Compare especially *Schauer*, *Reformbedarf im Allgemeinen Teil und im Schuldrecht Allgemeiner Teil*, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform* (2008) 51 et seq; *Riedler*, *Modernisierungsbedarf des ABGB in den besonderen Bestimmungen über vertragliche Schuldverhältnisse*, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform* (2008) 73 et seq; *Escher*, *Reformbedarf im Sachenrecht*, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform* (2008) 153 et seq; *Hinteregger*, *Das Recht der dinglichen Sicherheiten – Reformbedarf vor dem Hintergrund europäischer Rechtsentwicklungen*, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform* (2008) 167 et seq; *Kodek*, *Reformbedarf im Besitzrecht*, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform* (2008) 177 et seq; *Krejci*, *Zur Reform der Gesellschaft bürgerlichen Rechts und ihrer Auswirkungen auf das Miteigentum*, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform* (2008) 201 et seq; *Fischer-Czermak*, *Reformbedarf im Familienrecht*, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform* (2008) 215 et seq; *Kerschner*, *Reformbedarf im Familienrecht*, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform* (2008) 231 et seq; *B. Jud*, *Reformbedarf im Erbrecht*, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform* (2008) 241 et seq.

<sup>174</sup> This way *Kathrein*, *Reformen im ABGB*, in *Welser* (ed), *Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa* (2012) 69 et seq (71); *Stabentheiner*, *Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht*, in *Fenyves/Kerschner/Vonkölch* (eds), *200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode* (2012) 61 et seq (63 et seq).

<sup>175</sup> *Kathrein*, *Reformen im ABGB*, in *Welser* (ed), *Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa* (2012) 69 et seq (73); *Stabentheiner*, *Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht*, in *Fenyves/Kerschner/Vonkölch* (eds), *200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode* (2012) 61 et seq (62).

### 1.3.1.3 Main Features of Reforming the ABGB

Despite these plans for a complete review of the ABGB aiming at a modernisation of the code and sometimes being called “ABGB 200plus” or “ABGB 200+” it became clear quite soon that the ABGB will not be replaced by any kind of a new civil law code. There will also be no recodification of the ABGB with fundamental changes in structure or style of the code.<sup>176</sup> So modernising the ABGB will be done by the way of a so called “Revision”.<sup>177</sup> What is more: Leading representatives of the Austrian Federal Ministry of Justice emphasize the unity between legal scholarship and them that reforming the ABGB will be a *step-by-step process*.<sup>178</sup> Although some academics probably accept this approach but do not welcome it preferring rather a Big-Bang solution than such a cautious step-by-step process the reasons for such a procedure are quite convincing. First of all, it is said that the lack of capacities does not allow any other way of reforming the ABGB. Especially because of the never ending need for the implementation of EU-directives into Austrian law it is widely accepted that the Austrian Federal Ministry of Justice has no capacities left for a different solution. Secondly, such an approach allows all stakeholders to adapt to a new legal regime without any problems usually linked to “revolutionary” changes. Maybe there is also a third reason: It is not unlikely that there is some kind of respect for a code surviving such a long period and still working quite

<sup>176</sup> *Stabentheiner*, Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht, in *Fenyves/Kerschner/Vonkölch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 61 et seq (62); *Schauer*, Schuldrecht – Reformbedarf oder Kontinuität, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 183 et seq (187); *Schauer*, „200 Jahre und immer noch weise? – Von der Lebenskraft des ABGB heute“, in *ÖJT* (ed), Festveranstaltung 200 Jahre ABGB – 10. November 2011 (2012) 70 et seq (78 et seq).

<sup>177</sup> *Schauer*, Schuldrecht – Reformbedarf oder Kontinuität, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 183 et seq (187); *Schauer*, „200 Jahre und immer noch weise? – Von der Lebenskraft des ABGB heute“, in *ÖJT* (ed), Festveranstaltung 200 Jahre ABGB – 10. November 2011 (2012) 70 et seq (78 et seq).

<sup>178</sup> *Kathrein*, Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (71 et seq); *Stabentheiner*, Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht, in *Fenyves/Kerschner/Vonkölch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 61 et seq (62 - 63); this way already *Kathrein*, Das neue Nachbarrecht, in *Österreichische Notariatskammer* (ed), Festschrift Nikolaus Michalek (2005) 175 et seq (179).

sufficient that prevents hasty changes. Anyway, politicians are also favouring such a cautious approach supporting changes “mit Augenmaß” meaning: Do what is necessary but be aware of the fact that usually not too many things are necessary at all.<sup>179</sup>

After deciding to keep the ABGB as such the next problem arising is the question of the extent of the intended modernisation. With respect to fundamental principles it is clearly expressed that the “*liberal spirit*” of the ABGB is to be preserved. On the one hand this means that there shall be no changes concerning the freedom of contract (“Vertragsfreiheit”) and the autonomy of the contractual parties in settling their relations themselves (“Privatautonomie”). On the other hand the protection of the weaker party shall remain an important aim of the ABGB. Last but not least, it is not intended that any changes of the ABGB shall restrict the courts’ role in developing future law.<sup>180</sup>

In modernising the ABGB there may be some fundamental changes with reference to the contents of the code. But there are no plans in altering the *structure of the ABGB*<sup>181</sup> that because of its age still follows in an old fashioned way the “institutiones” of the ancient Roman lawyer *Gaius* and not the pandectistic system. Anyway, this is not very surprising for changing the structure will lead to a recodification in the end – something that explicitly is not intended. In addition, *the wording and the style of the ABGB* shall be preserved as far as possible.<sup>182</sup> Of course, this does not mean imitating the language and orthography of 1800 but sticking to the legal terminol-

<sup>179</sup> Compare *Kathrein*, Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (71 – 72).

<sup>180</sup> *Kathrein*, Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (73); *Stabentheiner*, Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht, in *Fenyves/Kerschner/Vonkälch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 61 et seq (63).

<sup>181</sup> *Stabentheiner*, Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht, in *Fenyves/Kerschner/Vonkälch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 61 et seq (62).

<sup>182</sup> Compare *Kathrein*, Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (73) for the Austrian federal ministry of justice; this way for legal scholarship *Welser*, Verdienste und Stärken des ABGB, in *ÖJT* (ed), Festveranstaltung 200 Jahre ABGB – 10. November 2011 (2012) 19 et seq (25).

ogy and to the original regulatory concepts of the ABGB. Good examples for a successful application of this approach are the modernisation of warranty law (“Gewährleistungsrecht”; §§ 922 et seq ABGB; no implementation of the non-performance and breach of contract-concept but preserving the existing system of the ABGB for contractual misconduct),<sup>183</sup> of neighbour law (“Nachbarrecht”; especially § 364 and § 422 ABGB)<sup>184</sup> and of the law of loan agreements (“Darlehens- und Kreditrecht”; §§ 983 et seq ABGB).<sup>185</sup> If the Austrian tort law will ever be renewed this objective will also be pursued in the course of this reform.<sup>186</sup> It is not the respect for the ABGB and for the age of this code that leads to such an attitude. Once again the reason is to show consideration for the needs of an application of changed provisions. By maintaining the original legal terminology of the ABGB and its regulatory concepts it is possible to avoid some questions arising from the use of a complete new wording and of regulatory concepts unfamiliar to the Austrian lawyers so far.

Although this approach preferred by the representatives of the Austrian Federal Ministry of Justice and – at least to some extent – also by the scientific community doubtless has many advantages there are clearly some weaknesses linked to such a master plan of reforming a code. Obviously it takes *a lot of time* refurbishing a code with once approximately 1500 §§ this way. Nevertheless, the Austrian Federal Ministry of Justice is willing to accept

<sup>183</sup> *Welser/B. Jud.*, Zur Reform des Gewährleistungsrechts (2000) 36 et seq; *Faber*, Handbuch zum neuen Gewährleistungsrecht (2001) 25 et seq; *Kathrein*, Das neue Gewährleistungsrecht, in *Pirker-Hörmann/Hammerl* (eds), Das neue Gewährleistungsrecht – Wilhelminenberggespräche 2002 (2004) 9 et seq (14, 16); *Welser*, Braucht Österreich ein neues Schuldrecht?, in *Österreichische Notariatskammer* (ed), Festschrift Nikolaus Michalek (2005) 391 et seq (394, 395).

<sup>184</sup> This way explicitly *Kathrein*, Das neue Nachbarrecht, in *Österreichische Notariatskammer* (ed), Festschrift Nikolaus Michalek (2005) 175 et seq (179).

<sup>185</sup> *Fischer-Czermak*, Aktuelle Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 111.

<sup>186</sup> *Hopf*, Motive und Felder einer Reform des Schadenersatzrechts, in *Bundesministerium für Justiz* (ed), Aktuelle Entwicklungen im Schadenersatzrecht (2002) 391 et seq (413); *Kathrein*, Zur Reform des Schadenersatzrechts – Eine Skizze aus dem Schattenreich, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 237 et seq (244 et seq); *Kathrein*, Zur Reform des Schadenersatzrechts, in *Jarolim*, Reform des Schadenersatzrechts – Dialog im Parlament (2012) 2 et seq (5 et seq).

the fact that it will last years and decades before work is finished.<sup>187</sup> So it is almost unpredictable how long it really will take to reform the ABGB. Including the necessary preparatory works each and every step may therefore last from now to never. It is also unpredictable what the *outcome* will be. A revision step-by-step creates the danger that the steps are too small or because of the lack of a legislative master plan or of changes in the regulatory intentions go astray. Of course, it is possible to correct such mistakes later. But history shows that out of various reasons the necessary steps are quite often not taken. Last but not least: The ABGB concentrates on fundamental rules of civil law. Many important parts of private law are subject to ancillary statutes. So landlord and tenant law is regulated by the MRG (“Mietrechtsgesetz”) and consumer protection law by the KSchG (“Konsumentenschutzgesetz”) and several other acts. Although there are some provisions related to aspects of commercial law in the ABGB commercial law as a whole was never part of the ABGB. It is now regulated by the UGB (“Unternehmensgesetzbuch”), the former Austrian HGB (“Handelsgesetzbuch”). The UGB itself is a code with a lot of important ancillary statutes. The same applies to labour law being subject to a great number of separate acts. So the ABGB has lost one of the functions of a codification<sup>188</sup> being no longer a clear and comprehensive regulation of civil law. By choosing a step-by-step approach the chance is given away to *reunite important parts of civil law in one code*. But at least for commercial and business law such attempts have already been rejected anyhow.<sup>189</sup>

<sup>187</sup> *Kathrein*, Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (72); *Stabentheiner*, Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht, in *Fenyves/Kerschner/Vonkilch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 61 et seq (63).

<sup>188</sup> For the various functions of a codification compare *Wendeborst*, Ist der Kodifikationsstreit entschieden?, in *Fenyves/Kerschner/Vonkilch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 9 et seq (13 et seq).

<sup>189</sup> Compare *Schauer*, Integration des Handels- und Unternehmensrechts in das ABGB, in *Fischer-Czermak/Hopf/Schauer* (eds), Das ABGB auf dem Weg in das 3. Jahrtausend (2003) 137 et seq (147, 154).

### 1.3.1.4 Results of the Refurbishment of the ABGB So Far

Since 2000 there have been more changes of the ABGB than from 1812 to 1945.<sup>190</sup> Not all of them are part of the project “ABGB 200+”. The most important steps for a modernisation of the ABGB until now are:

- Family law and inheritance law have been modernised fundamentally for six times not including minor changes (KindRÄG 2001;<sup>191</sup> FamErbRÄG 2004;<sup>192</sup> FamRÄG 2009;<sup>193</sup> EPG;<sup>194</sup> KindNamRÄG 2013;<sup>195</sup> AdRÄG 2013<sup>196</sup>);
- a reform of warranty law in the year 2001 (GewRÄG<sup>197</sup>);
- a reform of neighbour law by the ZivRÄG 2004;<sup>198</sup>
- a small reform of the law governing the transfer of contractual rights (ZessRÄG<sup>199</sup>);
- besides other minor changes in this field of law a reform of the provisions for special guardians (SWRÄG 2006<sup>200</sup>);
- a modernisation of the law of loan agreements (DaKRÄG<sup>201</sup>);
- two reforms of provisions related to late payment (ZinsRÄG;<sup>202</sup> ZVG<sup>203</sup>).

This seems to be a rather long list but – if at all – *two of these steps* for a modernisation of the ABGB were part of the programme “ABGB 200+”. The Austrian Federal Ministry of Justice and the scientific community agree upon the fact, that the modernisation of the law of loan agreements was

<sup>190</sup> *Apathy*, 200 Jahre ABGB – ein Rückblick, in *Fényes/Kerschner/Vonkälch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 47 et seq (54).

<sup>191</sup> Kindschaftsrechts-Änderungsgesetz 2001, BGBl I 2000/135.

<sup>192</sup> Familien- und Erbrechts-Änderungsgesetz 2004, BGBl I 2004/58.

<sup>193</sup> Familienrechts-Änderungsgesetz 2009, BGBl I 2009/75.

<sup>194</sup> Eingetragene Partnerschaft-Gesetz, BGBl I 2009/135.

<sup>195</sup> Kindschafts- und Namensrechts-Änderungsgesetz 2013, BGBl I 2013/15.

<sup>196</sup> Adoptionsrechts-Änderungsgesetz 2013, BGBl I 2013/179.

<sup>197</sup> Gewährleistungsrechts-Änderungsgesetz, BGBl I 2001/48.

<sup>198</sup> Zivilrechts-Änderungsgesetz 2004, BGBl I 2003/91.

<sup>199</sup> Zessionsrechts-Änderungsgesetz, BGBl I 2005/51.

<sup>200</sup> Sachwalterrechts-Änderungsgesetz 2006, BGBl I 2006/92.

<sup>201</sup> Darlehens- und Kreditrechts-Änderungsgesetz, BGBl I 2010/28.

<sup>202</sup> Zinsenrechts-Änderungsgesetz, BGBl I 2002/118.

<sup>203</sup> Zahlungsverzugsgesetz, BGBl I 2013/50.



the first successfully finished part of the programme “ABGB 200+”.<sup>204</sup> In addition it might also be said that the changes related to the provisions governing late payment especially by the ZVG are another example for a successful step forward on the agenda “ABGB 200+”.<sup>205</sup> Anything else including fields of law like family law and inheritance law, property law, the law of obligations and tort law is still left undone.<sup>206</sup>

In this context the plan of modernising the law of the *civil law company of the ABGB* (*GesBR*; §§ 1175 et seq ABGB) is a very typical case for the fate of the programme “ABGB 200+”. The *GesBR* is a company deriving from the latin *societas*, having the structure of a partnership and is because of historical reasons the only kind of company with detailed provisions in the ABGB. Today she is inter alia widely used for forming consortiums in the construction business and therefore of great practical importance. Although some questions related to the *GesBR* have been recently regulated by the UGB<sup>207</sup> the law of the *GesBR* needs a thorough modernisation. So a refurbishment of the *GesBR* was undisputed part of the reform agenda “ABGB 200+”<sup>208</sup> to be started after the modernisation of the law of loan

<sup>204</sup> *Stabentheiner*, Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht, in *Fenyves/Kerschner/Vonkilch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 61 et seq (63 - 64); *Wendeborst/Zöchling-Jud* in *Wendeborst/Zöchling-Jud*, Verbraucherkreditrecht – VerbraucherkreditG und ABGB-Darlehensbestimmungen (2010) Vorbem ann 15; *Schauer*, Schuldrecht – Reformbedarf oder Kontinuität, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 183 et seq (197).

<sup>205</sup> Compare *Stabentheiner*, Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht, in *Fenyves/Kerschner/Vonkilch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 61 et seq (66).

<sup>206</sup> Compare for a full overview *Stabentheiner*, Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht, in *Fenyves/Kerschner/Vonkilch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 61 et seq (64 et seq).

<sup>207</sup> Compare §§ 8 par 3, 178 UGB.

<sup>208</sup> Compare *Stabentheiner*, Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht, in *Fenyves/Kerschner/Vonkilch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 61 et seq (64); *Krejci*, *Gesbr – lost in mission?*, GES 2012, 485 - 486 (485).



agreements by the DaKRÄG.<sup>209</sup> Some called the recast of the GesBR even an example for reforming the ABGB.<sup>210</sup> Despite several studies on reforming the GesBR provided by various scientists and detailed drafts of the new provisions<sup>211</sup> the work was officially started in November 2010<sup>212</sup> but until now it has not been finished.<sup>213</sup> Even an official draft has not been issued yet by the Austrian Federal Ministry of Justice. Still there is hope: As already mentioned the new working programme of the Austrian government states as one of the tasks for the new legislative period among other plans the modernisation of the law of the civil law company.

It is far from surprising that because of these facts and because of the missing explicit confirmation of the agenda “ABGB 200+” in the new working

<sup>209</sup> *Schauer*, Schuldrecht – Reformbedarf oder Kontinuität, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 183 et seq (197); *Schauer*, „200 Jahre und immer noch weise? – Von der Lebenskraft des ABGB heute“, in *ÖJT* (ed), Festveranstaltung 200 Jahre ABGB – 10. November 2011 (2012) 70 et seq (98 et seq); *Debn*, Die Umsetzung von EU-Richtlinien und das ABGB, in *Fischer-Czermak/Hopff/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1667 et seq (1678 - 1679).

<sup>210</sup> *Kathrein*, Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (72): “Modellprojekt”.

<sup>211</sup> Compare *Krejić*, Zur Reform der Gesellschaft bürgerlichen Rechts, in *Bundesministerium für Justiz* (ed), *Zivilrechtsgesetzgebung heute – Festschrift Gerhard Hopf zum 65. Geburtstag* (2007) 115 et seq; *Krejić*, Zur Reform der Gesellschaft bürgerlichen Rechts und ihrer Auswirkungen auf das Miteigentum, in *Fischer-Czermak/Hopff/Kathrein/Schauer* (eds), ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform (2008) 201 et seq; *Told*, Grundfragen der Gesellschaft bürgerlichen Rechts – Ein Beitrag zur Reformdiskussion (2011) especially 284 et seq; *Kals*, Die Entwicklung der Gesellschaft bürgerlichen Rechts, in *Fischer-Czermak/Hopff/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 441 et seq (457 et seq); *Krejić*, Miteigentum und Vermögensordnung der Gesellschaft bürgerlichen Rechts de lege ferenda, in *Fischer-Czermak/Hopff/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1191 et seq; *Krejić*, Neuere Entwicklungen im österreichischen Gesellschaftsrecht – speziell zur GmbH- und GesBR-Reform, in *Grünwald/Schummer/Zollner* (eds), Unternehmensrecht in Wissenschaft und Praxis – Festschrift für Waldemar Jud (2012) 377 et seq (391 et seq); *Krejić*, Die neue Gesellschaft bürgerlichen Rechts ante portas!?, *GES* 2012, 1 - 2 (1); *Krejić*, GesBR-Reform: Zum ministeriellen Diskussionsentwurf, *GES* 2012, 4 et seq (5 et seq); *Krejić*, GesBR – lost in mission?, *GES* 2012, 485 - 486 (485); *Krejić*, „Mutig in die neuen Zeiten.“? – Das Regierungsübereinkommen und das Zivilrecht, *GES* 2013, 485 - 486 (486).

<sup>212</sup> Compare *Stabentheiner*, Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht, in *Fenyves/Kerschner/Vonkilech* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 61 et seq (64); *Krejić*, GesBR – lost in mission?, *GES* 2012, 485 - 486 (485).

<sup>213</sup> Compare *Jabornegg/Resch/Slezak*, GesBR – Gesellschaft bürgerlichen Rechts – Praxiskommentar (2012) § 1175 ann 1, 39.

programme of the Austrian Federal Government some scholars suspect that this project has been given up.<sup>214</sup> However, this might be too pessimistic: It is true that the working programme does not refer to a complete refurbishment of the ABGB. But it uses the abbreviation “ABGB 200+” in connection with the task of modernising the GesBR. What is more: There are now reliable reports that the work on the recast of the law of the GesBR will soon lead to visible results.<sup>215</sup> This would mean *continuing* with the reform of the GesBR and with the agenda “ABGB 200+” as well.

### 1.3.2 Key Success Factors for Reforming the ABGB

#### 1.3.2.1 Political Issues

Consisting of true political decisions legislation is always depending on political issues. At least in some areas of civil law changing majorities will almost inevitably lead to a changing of legal provisions. With reference to the ABGB this is especially true for *family law* and for *inheritance law*.<sup>216</sup> Shaping the rules in these fields of law obviously means shaping society. The political importance of these rules is confirmed by the fact that since the year 2000 the Austrian Constitutional Court (Verfassungsgerichtshof) has annulled relevant provisions of the ABGB two times.<sup>217</sup> By this, it is no longer surprising that despite of six fundamental changes of family and – to some extent – also inheritance law since the year 2000 there are new plans of modernising inheritance law laid down in the new working programme

<sup>214</sup> *Krejci*, „Mutig in die neuen Zeiten.“? – Das Regierungsbereinkommen und das Zivilrecht, GES 2013, 485 - 486 (485).

<sup>215</sup> Compare *Hopf/Fucik*, Pläne des Justizressorts, ÖJZ 2014, 193` the reform was now enacted by the GesBR-RG, BGBl I 2014/83.

<sup>216</sup> Compare *Welser*, Die Bestrebungen zur Reform des ABGB, in *Welser* (ed), Reformen im österreichischen und im türkischen Recht (2010) 17 et seq (20); *Kathrein*, Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (70 - 71); *Aichhorn/Marschall*, Die Rolle der Frau im ABGB – ausgewählte Aspekte, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 201 et seq; compare also *Hopf*, Eherechts-Änderungsgesetz 1999 im Überblick, in *Ferrari/Hopf* (eds), Eherechtsreform in Österreich (2000) 1 et seq (2).

<sup>217</sup> Compare the decisions VfGH 28. 06. 2003, G 78/00-13; VfGH 28. 06. 2012, G 114/11-12.

of the Austrian Federal Government. It is reported that first official drafts of the Austrian Federal Ministry of Justice will be published during the second half of 2014.<sup>218</sup>

The same applies to the *provisions for special guardians*.<sup>219</sup> In addition, the rules for this field of law are believed to be not sufficient enough for solving the practical problems. This became clear immediately after or even before the enactment of the last reform by the SWRÄG 2006.<sup>220</sup> By this, the provisions for special guardians are not only an example for the role of political issues in legislation but also for the disadvantages of a step-by-step approach. So it is consistent that the working programme of the new government mentions a reform of these provisions. According to mass media reports the necessary adjustments shall be finished until 2016.

Another field of law that is beyond doubt highly politically influenced is *consumer protection*. According to the current working programme this will be once again on the agenda. Like in the case of the provisions for special guardians the main task of consumer protection law is the protection of the weaker party. Although consumer protection law is in general not part of the ABGB being usually subject to various ancillary statutes it is mentioned here because there were plans for creating a consumer code (“Verbrauchergesetzbuch”) in connection with the implementation

<sup>218</sup> Hopf/Fucik, Pläne des Justizressorts, ÖJZ 2014, 193.

<sup>219</sup> Compare Hopf, 20 Jahre Sachwalterrecht – Rückblick und Ausblick, in Österreichische Notariatskammer (ed), Festschrift Nikolaus Michalek (2005) 161 et seq (164 et seq); Kathrein, Reformen im ABGB, in Welser (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (70 - 71).

<sup>220</sup> Compare Hopf, 20 Jahre Sachwalterrecht – Rückblick und Ausblick, in Österreichische Notariatskammer (ed), Festschrift Nikolaus Michalek (2005) 161 et seq, especially 168 et seq; Schauer, Entwicklungstendenzen im Sachwalterrecht, in Bundesministerium für Justiz (ed), Zivilrechtsgesetzgebung heute – Festschrift Gerhard Hopf zum 65. Geburtstag (2007) 161 et seq; Ganner, Entwicklung und Status quo des Sachwalterrechts und seiner Alternativen in Österreich, in Fischer-Czermak/Hopf/Kathrein/Schauer (eds), Festschrift „200 Jahre ABGB“ (2011) 357 et seq (378 et seq).

of the directive 2011/83/EU on consumer rights.<sup>221</sup> Out of political reasons – it was feared that the drafting of such a code could provoke new wishes especially of the consumer lobby – these plans were given up in the end.<sup>222</sup>

One more mere political issue is the adjustment of the provisions governing the *limitation of claims* announced in the current working programme of the new Austrian Federal Government. Although this field of law needs some refurbishment, too, and although there is already at least one study on its needs of modernisation<sup>223</sup> the connection of this reform agenda with sexual abuse in the working programme makes clear that this point is a political response to previous scandals.<sup>224</sup>

Political issues, scientific disputes and the possible effects of the recast of the relevant provisions on legal practice<sup>225</sup> were successfully mastered when reforming *neighbour law*. However, this was achieved at a high price. Despite of a good preparation of the reform by legal scholarship<sup>226</sup> it took

<sup>221</sup> *Wendehorst*, Auf dem Weg zu einem zeitgemäßen Verbraucherprivatrecht: Umsetzungskonzepte, in *B. Jud/Wendehorst* (eds), Neuordnung des Verbraucherprivatrechts in Europa? (2009) 153 et seq (160 - 161, 182 et seq); *Zöchling-Jud*, Europäische Rahmenbedingungen für ein modernes Verbraucherschutzrecht, in *Welser* (ed), Konsumentenschutz in Zentral- und Osteuropa (2010) 231 et seq (243); *Wendehorst*, Verbraucherprivatrecht in Österreich – Plädoyer für eine Reform, in *Welser* (ed), Reformen im österreichischen und im türkischen Recht (2010) 101 et seq (111 - 112, 115 - 116); *Dehn*, Die Umsetzung von EU-Richtlinien und das ABGB, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1667 et seq (1676).

<sup>222</sup> Compare *Stabentheiner*, Zur Umsetzung der Verbraucherrechte-Richtlinie in Österreich, in *P. Bydliński/Lurger* (eds), Die Richtlinie über die Rechte der Verbraucher (2012) 127 et seq (128 - 129); *Krejčí*, „Mutig in die neuen Zeiten.“? – Das Regierungsübereinkommen und das Zivilrecht, GES 2013, 485 - 486 (486); already opposing such plans *Lurger*, Integration des Verbraucherrechts in das ABGB?, in *Fischer-Czermak/Hopf/Schauer* (eds), Das ABGB auf dem Weg in das 3. Jahrtausend (2003) 111 et seq (126 et seq).

<sup>223</sup> Compare *Mader*, Grundprobleme des Verjährungsrechts, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1273 et seq (1278 et seq).

<sup>224</sup> Compare *Krejčí*, „Mutig in die neuen Zeiten.“? – Das Regierungsübereinkommen und das Zivilrecht, GES 2013, 485 - 486 (485).

<sup>225</sup> Compare for details *Kathrein*, Das neue Nachbarrecht, in Österreichische Notariatskammer (ed), Festschrift Nikolaus Michalek (2005) 175 et seq (175 et seq).

<sup>226</sup> Compare *Kathrein*, Das neue Nachbarrecht, in Österreichische Notariatskammer (ed), Festschrift Nikolaus Michalek (2005) 175 et seq (175 et seq); *Gründler/Hammerschall/Kissich/Neubauer/Stefula*, Der Schutz vor negativen Immissionen durch das Zivilrecht (1999).

more than seven years for more or less three changes.<sup>227</sup> Statistically this makes more than two years for one change. As already mentioned the original output in creating the ABGB was 26 §§ per year.

### 1.3.2.2 Foreign Examples?

Talking about foreign examples for Austrian private law reforms has to start with *EU law* because it is usually the *main trigger* for actually reforming the ABGB. This is common sense within the Austrian scientific community.<sup>228</sup> It is especially stated for the modernisation of the law of loan agreements,<sup>229</sup> for the first of the two reforms of the provisions related to late payment<sup>230</sup> and for the reform of warranty law.<sup>231</sup> The history of the reform of *warranty law* is not only a good example for the trigger effect of EU law on Austrian private law reforms but also for the fact that sometimes EU law may delay a modernisation of the ABGB. The struggle for a new Austrian warranty law goes back at least to 1994 when profound studies and drafts

<sup>227</sup> For contents compare *Kathrein*, Das neue Nachbarrecht, in Österreichische Notariatskammer (ed), Festschrift Nikolaus Michalek (2005) 175 et seq (179 et seq).

<sup>228</sup> Compare for instance *Kathrein*, Kodifikationsproblematik und -bedarf am Beispiel des Kreditvertrages, in *Fischer-Czermak/Hopf/Schauer* (eds), Das ABGB auf dem Weg in das 3. Jahrtausend (2003) 171 et seq (179); *Hopf*, 20 Jahre Sachwalterrecht – Rückblick und Ausblick, in Österreichische Notariatskammer (ed), Festschrift Nikolaus Michalek (2005) 161 et seq (161, 162); *Welser*, Braucht Österreich ein neues Schuldrecht?, in Österreichische Notariatskammer (ed), Festschrift Nikolaus Michalek (2005) 391 et seq (391 - 392); *Kathrein*, Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (71); compare also *Didovic*, Kodifikation oder Nebengesetz in der deutschen und in der österreichischen Privatrechtsordnung – Ausgewählte Beispiele (2009) 261.

<sup>229</sup> *Wendehorst/Zöchling-Jud* in *Wendehorst/Zöchling-Jud*, Verbraucher kreditrecht – Verbraucher kreditG und ABGB-Darlehensbestimmungen (2010) Vorbem ann 1, 6.

<sup>230</sup> *Dehn*, Die Umsetzung von EU-Richtlinien und das ABGB, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1667 et seq (1674).

<sup>231</sup> *Welser/B. Jud*, Die neue Gewährleistung (2001) Vorbem ann 4; *B. Jud*, Referat, in ÖJT (ed), 14. ÖJT 2000, Band II/2 Zivilrecht – Zur Reform des Gewährleistungsrechts (2002) 13 et seq (13); *Kathrein*, Kodifikationsproblematik und -bedarf am Beispiel des Kreditvertrages, in *Fischer-Czermak/Hopf/Schauer* (eds), Das ABGB auf dem Weg in das 3. Jahrtausend (2003) 171 et seq (179); *Karollus*, Das neue Gewährleistungsrecht – Offene Rechtsfragen und Unsicherheitsfaktoren für die Praxis, in *Pirker-Hörmann/Hammerl* (eds), Das neue Gewährleistungsrecht – Wilhelminenberggespräche 2002 (2004) 105 et seq (106 - 107); *Dehn*, Die Umsetzung von EU-Richtlinien und das ABGB, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1667 et seq (1676).

on that subject were published first.<sup>232</sup> Anyhow, because of the draft works on the directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees the reform of the Austrian provisions was postponed until work at the European level was finished.<sup>233</sup> Another important aspect with reference to EU law is that usually EU law itself leads only to modest changes of the ABGB. Most of the EU-directives touching Austrian private law are implemented by ancillary statutes. So EU law usually triggers the modernisation of the ABGB but in general *influences only slightly the contents* of the ABGB.<sup>234</sup>

In comparison to EU law other *international drafts or principles* like the Draft Common Frame of Reference (DCFR), the Principles of European Contract Law (PECL), the Principles of European Tort Law (PETL), the Principles of European Law on Non-Contractual Liability Arising out of Damages Caused to Another (PEL Liab.Dam.), UN-Conventions and UNIDROIT model laws or principles play a minor role. They are merely regarded as a kind of a *source of inspiration* among other things because scientific research usually shows that Austrian private law already provides at least as good solutions as they do.<sup>235</sup> Therefore their influence on Austrian

<sup>232</sup> *Krejci*, Reform des Gewährleistungsrechts (1994) especially 161 et seq; *Welser*, Schadenersatz statt Gewährleistung – Konsequenzen aus der neuen Judikatur (1994) especially 98 et seq; compare for details also *Welser/B. Jud.*, Zur Reform des Gewährleistungsrechts (2000) 20 et seq; *Welser/B. Jud.*, Die neue Gewährleistung (2001) Vorbem ann 3; *Faber*, Handbuch zum neuen Gewährleistungsrecht (2001) 24 et seq, 53; *Kletečka*, Gewährleistung neu (2001) Einl ann 2; *B. Jud.*, Referat, in *ÖJT* (ed), 14. ÖJT 2000, Band II/2 Zivilrecht – Zur Reform des Gewährleistungsrechts (2002) 13 et seq (13); *Kathrein*, Referat, in *ÖJT* (ed), 14. ÖJT 2000, Band II/2 Zivilrecht – Zur Reform des Gewährleistungsrechts (2002) 73 et seq (73).

<sup>233</sup> *Faber*, Handbuch zum neuen Gewährleistungsrecht (2001) 53.

<sup>234</sup> Compare for the DaKRÄG this way *Wendeborst/Zöchling-Jud* in *Wendeborst/Zöchling-Jud*, Verbraucherkreditrecht – VerbraucherkreditG und ABGB-Darlehensbestimmungen (2010) Vorbem ann 1, 2, 5, 15; *Debn*, Die Umsetzung von EU-Richtlinien und das ABGB, in *Fischer-Czermak/Hopff/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1667 et seq (1678 - 1679); *Fischer-Czermak*, Aktuelle Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 111; for the ZinsRÄG *Debn*, Die Umsetzung von EU-Richtlinien und das ABGB, in *Fischer-Czermak/Hopff/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1667 et seq (1674).

<sup>235</sup> Compare this way for the DCFR *Koch*, Die österreichische Rechtsgeschäftslehre im Lichte des DCFR, in *Fischer-Czermak/Hopff/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1703 et seq (1723 et seq); *Rudolf*, Die negotiorum gestio im Entwurf des Gemeinsamen Referenzrahmens (DCFR) im Vergleich zum ABGB, in *Fischer-Czermak/Hopff/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1727 et seq (1755); for the PETL and the PEL Liab.Dam. compare *Schmidt-Kessel*, Reform des Schadenersatzrechts I – Europäische Vorgaben und Vorbilder (2006) especially 188 et seq.

private law reforms is quite limited. The same applies to the Common European Sales Law (CESL) that was given approval by the European Parliament in the first reading on 26<sup>th</sup> February 2014 and to *foreign civil law codes*. The only exceptions are – at least to a certain extent – the German codes. So the modernisation of the former *Austrian commercial code*, the HGB, leading to the UGB was inspired by the relevant German reform of their commercial code<sup>236</sup> that was of the same origin as the Austrian commercial code and because of this was very similar to the Austrian commercial code even after about 60 years. However, the Austrian and the German approaches of reforming commercial law differed from each other quite a lot. So in the end there are rather significant differences between these two commercial codes nowadays. By this, the UGB is also a good example for an effect contrary to the original political intentions linked with codifications. It has already been stated that one of the reasons for enacting the ABGB and other private law codifications like the A(D)HGB (“Allgemeines [deutsches] Handelsgesetzbuch”), a forefather of the German HGB and the Austrian HGB, was reaching political integration by legal unification. EU-directives aim at approximation and harmonization of the law of the Member States. Because of the enactment of refurbished or completely new national private law codes and because of the different ways of implementing EU-directives in the various Member States the statutes of the Member States develop in various directions. In the end there is *less legal unification than before*. So in connection with the UGB it is not only stated that the ever growing gap between the UGB and the German HGB is caused inter alia by EU law.<sup>237</sup> It is also stressed that the Austrian and the German commercial and business law codified by the Austrian UGB on the one hand and by the German HGB on the other hand have never been more separated since the enactment of the A(D)HGB in the 1860ies than they are today.<sup>238</sup>

<sup>236</sup> *Krejci* in *Krejci* (ed), Reform-Kommentar UGB ABGB (2007) Einf ann 14.

<sup>237</sup> *Krejci* in *Krejci* (ed), Reform-Kommentar UGB ABGB (2007) Einf ann 21.

<sup>238</sup> *Krejci* in *Krejci* (ed), Reform-Kommentar UGB ABGB (2007) Einf ann 21.



### 1.3.2.3 *The Influence of Legal Scholarship*

As already mentioned one of the reasons for the Austrian step-by-step approach of reforming the ABGB is the lack of capacities.<sup>239</sup> The Austrian Federal Ministry of Justice declares that it is usually occupied by implementing EU law and that it therefore needs the help of scholarly doctrine for the modernisation of the ABGB.<sup>240</sup> Because of this fact legal scholarship usually accompanies *all stages of legislation* from triggering reforms to drafting proposals, from participation in ministerial and parliamentary committees to critical reviewing official drafts and commenting on statutes after work has been finished.<sup>241</sup> So a careful scholarly preparation of legislative initiatives is the rule for civil law but of course also for other fields of private law like for the successful reform of the Austrian commercial code leading to the UGB<sup>242</sup> and for reforming company

<sup>239</sup> Compare *Kathrein*, Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (72 - 73); *Schauer*, „200 Jahre und immer noch weise? – Von der Lebenskraft des ABGB heute“, in *ÖJT* (ed), Festveranstaltung 200 Jahre ABGB – 10. November 2011 (2012) 70 et seq (78 et seq); *Schauer*, Schuldrecht – Reformbedarf oder Kontinuität, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 183 et seq (198); *Krejci*, Der Österreichische Juristentag als Spiegel des Privatrechts, in *ÖJT* (ed), Festschrift 50 Jahre Österreichischer Juristentag 1959 - 2009 (2009) 37 et seq (46).

<sup>240</sup> *Kathrein*, Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (72); compare in general *Vonkölch*, Die Rolle der Rechtswissenschaft: Katalysator der Rechtsentwicklung oder antiker Tragödienchor?, in *Fenyves/Kerschner/Vonkölch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 147 et seq (148 et seq).

<sup>241</sup> *Stabentheiner*, Das Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und das Europäische Vertragsrecht, in *Fenyves/Kerschner/Vonkölch* (eds), 200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode (2012) 61 et seq (62); compare for instance for the UGB the monograph of *U. Torggler*, Abschied vom Handelsrecht? – Zum Entwurf eines Unternehmensgesetzbuches (2005) and *Harrer/Mader*, Die HGB-Reform in Österreich (2005) with seven contributions; compare also the overview of the relevant activities of the Österreichischen Juristentag given by *Krejci*, Der Österreichische Juristentag als Spiegel des Privatrechts, in *ÖJT* (ed), Festschrift 50 Jahre Österreichischer Juristentag 1959 - 2009 (2009) 37 et seq.

<sup>242</sup> Compare *Krejci*, Handelsrechtsreform – Stand Herbst 2004 (2004) 8 et seq; *Krejci/Dehn*, Einführung, in *Dehn/Krejci* (eds), Das neue UGB – SWK-Sonderheft, 2<sup>nd</sup> ed (2007) 16 et seq (16 - 17); *Krejci* in *Krejci* (ed), Reform-Kommentar UGB ABGB (2007) Einf ann 15 et seq.



law<sup>243</sup> that is also on the agenda of the working programme of the new Austrian Federal Government. It has already been shown in this article that such an approach was chosen for reforming warranty law, neighbour law and the provisions for special guardians. Of course, the same applies to the modernisation of the law of loan agreements,<sup>244</sup> of family law<sup>245</sup> and of the provisions related to late payment.<sup>246</sup> There is also a lot of preparatory work already done by academics in other fields of law that have not been focussed on by legislation so far.<sup>247</sup>

<sup>243</sup> Compare for instance *Bachner* (ed), *GmbH-Reform – Erleichterte Gründung, Gläubigerschutz, Insolvenzprophylaxe* (2008); *Kalss/Schauer*, *Die Reform des Österreichischen Kapitalgesellschaftsrechts* (2006); ÖJT (ed), 16. ÖJT 2006, Band II/2 *Zivilrecht – Die Reform des Österreichischen Kapitalgesellschaftsrechts* (2008) including the contributions of *H. Torggler/Konwitschka*, *Die Reform des Österreichischen Kapitalgesellschaftsrechts – Ausgewählte Themen* 13 et seq; *Roth*, *Reform des Österreichischen Kapitalgesellschaftsrechts: Kapitalverfassung* 100 et seq and *W. Jud*, *Rechtspolitische Überlegungen zum Schwerpunktthema „Umgründungen und Konzernrecht“* 165 et seq.

<sup>244</sup> Compare *Kathrein*, *Kodifikationsproblematik und -bedarf am Beispiel des Kreditvertrages*, in *Fischer-Czermak/Hopf/Schauer* (eds), *Das ABGB auf dem Weg in das 3. Jahrtausend* (2003) 171 et seq, especially 180 et seq; *Riedler*, *Modernisierungsbedarf des ABGB in den besonderen Bestimmungen über vertragliche Schuldverhältnisse*, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform* (2008) 73 et seq (90 et seq).

<sup>245</sup> Compare *Fischer-Czermak/Beclin*, *Neue Regelungen für nichteheliche Lebensgemeinschaften?* (2012) especially 161 et seq (including a draft at 184 et seq); *Aichhorn/Marschall*, *Die Rolle der Frau im ABGB – ausgewählte Aspekte*, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 201 et seq; ÖJT (ed), *Verhandlungen des 18. ÖJT – Band II/2 Zivilrecht – Neue Regelungen für nichteheliche Lebensgemeinschaften? – Referate und Diskussionsbeiträge* (2013) including four contributions.

<sup>246</sup> Compare the official materials to the ZVG ErlRV 2111 BgNR XXIV. GP 4 - 5.

<sup>247</sup> Compare for some aspects related to property law *Kodek*, *Reformüberlegungen im Besitzrecht – Diskussionsstand und Bewertung*, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 111 et seq; *Metzler*, *Entlastung der Gerichte von Massenverfahren wie Besitzstörung*, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 140 et seq; *Haller*, *Sachenrecht – Entlastung der Gerichte von Massenverfahren wie Besitzstörung*, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 145 et seq; *Straganz-Schröfl*, *Entlastung der Gerichte von Massenverfahren wie Besitzstörung – Besitzstörung im städtischen Bereich*, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 138 et seq; for „Glücksverträge“ being the legal basis of the ABGB for insurance contracts *Palten*, *Ist die Regelung der Glücksverträge im ABGB noch zeitgemäß?*, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), *Festschrift „200 Jahre ABGB“* (2011) 1291 et seq (1315 et seq).

As shown before in fulfilling the current working programme the Austrian Federal Ministry of Justice will be able to rely on studies on modernising the provisions governing the limitation of claims. Reforming inheritance law should also be an easy task because there are a lot of studies and other contributions dealing with the needs and ways of such a refurbishment going back almost ten years and including even drafts.<sup>248</sup>

Besides the necessary political will this careful preparation will lead to successful reforms of the relevant provisions most of the times showing a high standard of legislation. But sometimes the needs of a refurbishment and the ways of such a necessary recast are *highly disputed*.<sup>249</sup> That is true for instance for the general provisions of the law of obligations. Some academics think that there is a necessity of reforming this field of law preparing

<sup>248</sup> Compare *Krejci*, Unternehmensnachfolge und Pflichtteilsrecht (2006) especially 19 et seq; *Welser*, Die Reform des österreichischen Erbrechts, in *Bundesministerium für Justiz* (ed), *Zivilrechtsgesetzgebung heute – Festschrift Gerhard Hopf zum 65. Geburtstag* (2007) 249 et seq; *Welser*, Erbrechtsentwicklung in Österreich und Deutschland: Reform des Pflichtteilsrechts, in *Welser* (ed), *Erbrechtsentwicklung in Zentral- und Osteuropa* (2009) 1 et seq; *Welser*, Die Reform des Österreichischen Erbrechts (2009) especially 81 et seq and 105 et seq; this monograph was discussed widely in *ÖJT* (ed), *Verhandlungen des 17. ÖJT – Band II/2 Zivilrecht – Die Reform des österreichischen Erbrechts – Referate und Diskussionsbeiträge* (2010); compare especially the contributions of *Ferrari*, Die Reform des österreichischen Erbrechts (70 et seq); *Scheuba*, Reformen im Erbrecht – Einzelne Anmerkungen dazu aus der Rechtspraxis (106 et seq) and *Umlauf*, Fragen zur Anrechnung im Erb- und Pflichtteilsrecht (part 1131 et seq; part 2175 et seq); *Krejci*, Soll das Pflichtteilsrecht im Hinblick auf die Erhaltung von Unternehmen modifiziert werden?, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 66 et seq; *Fischer-Czermak*, Gestaltungsmöglichkeiten zur Pflichtteilsdeckung, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 75 et seq; *Umlauf*, Die Anrechnung im Pflichtteilsrecht: de lege lata und ferenda, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 82 et seq; *Umlauf*, Das ABGB und die Vermögensnachfolge von Todes wegen: Brennpunkt Pflichtteilsrecht, in *Fenyves/Kerschner/Vonkölch* (eds), *200 Jahre ABGB – Evolution einer Kodifikation – Rückblick, Ausblick, Methode* (2012) 69 et seq, especially 76 et seq; *Welser*, Anrechnung von Vorempfängern auf den Schenkungspflichtteil? – Rechtslage und Reformbedarf, in *Fitz/Kalss/Kautz/Kucsko/Lukas/U. Torggler* (eds), *Festschrift für Hellwig Torggler* (2013) 1295 et seq (1303 - 1304); *Krejci*, „Mutig in die neuen Zeiten.“? – Das Regierungsübereinkommen und das Zivilrecht, *GES* 2013, 485 - 486 (486).

<sup>249</sup> Compare *Kathrein*, Reformen im ABGB, in *Welser* (ed), *Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa* (2012) 69 et seq (71).

studies on that subject.<sup>250</sup> Others believe that after reforming warranty law there has been done enough.<sup>251</sup> Whatever the reasons for such a different perception may be disputes of this kind may have dramatic effects on reforming the ABGB:

This is especially true for *tort law* being once again on the agenda of the current working programme. The struggle for the reform of tort law started in the year 2000 at the latest.<sup>252</sup> Various studies and drafts have been published.<sup>253</sup>

<sup>250</sup> *Karollus*, Das neue Gewährleistungsrecht – Offene Rechtsfragen und Unsicherheitsfaktoren für die Praxis, in *Pirker-Hörmann/Hammerl* (eds), Das neue Gewährleistungsrecht – Wilhelmminberggespräche 2002 (2004) 105 et seq (114 et seq); *Schauer*, Reformbedarf im Allgemeinen Teil und im Schuldrecht Allgemeiner Teil, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), ABGB 2011 – Chancen und Möglichkeiten einer Zivilrechtsreform (2008) 51 et seq (64 et seq); *Chr. Rabl*, Die Gefahrtragung im ABGB, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1319 et seq (1331, 1336 - 1337); *Schauer*, Schuldrecht – Reformbedarf oder Kontinuität, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 183 et seq, especially 190 et seq; compare also *Kathrein*, Reformen im ABGB, in *Welser* (ed), Vom ABGB zum Europäischen Privatrecht – 200 Jahre Allgemeines bürgerliches Gesetzbuch in Europa (2012) 69 et seq (71).

<sup>251</sup> Compare *Welser*, Braucht Österreich ein neues Schuldrecht?, in Österreichische Notariatskammer (ed), Festschrift Nikolaus Michalek (2005) 391 et seq (395 et seq); *Welser*, Die Bestrebungen zur Reform des ABGB, in *Welser* (ed), Reformen im österreichischen und im türkischen Recht (2010) 17 et seq (22 - 23); *Welser*, Verdienste und Stärken des ABGB, in ÖJT (ed), Festveranstaltung 200 Jahre ABGB – 10. November 2011 (2012) 19 et seq (24); quite sceptical already before *Welser*, Reform des österreichischen Leistungsstörungenrechts, in *Fischer-Czermak/Hopf/Schauer* (eds), Das ABGB auf dem Weg in das 3. Jahrtausend (2003) 63 et seq (65 et seq, 82 et seq).

<sup>252</sup> *Hopf*, Motive und Felder einer Reform des Schadenersatzrechts, in *Bundesministerium für Justiz* (ed), Aktuelle Entwicklungen im Schadenersatzrecht (2002) 391 et seq (410); for the history of reforming tort law compare for instance *Fenyves*, Reform des österreichischen Schadenersatzrechts, in *Welser* (ed), Reformen im österreichischen und im türkischen Recht (2010) 49 et seq (50 et seq); *Kathrein*, Zur Reform des Schadenersatzrechts – Eine Skizze aus dem Schattenreich, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 237 et seq (239 et seq).

<sup>253</sup> Compare for instance *Kathrein*, Zur Reform des Schadenersatzrechts – Eine Skizze aus dem Schattenreich, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 237 et seq; *Neumayr*, Zur Reform des Schadenersatzrechts, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 257 et seq; *Kozjól*, Gedanken zur österreichischen Schadenersatzreform, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 307 et seq; *Stabenbeiner*, Vorschläge und Überlegungen zu einer Neuregelung der Haftung für Gehilfen, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 353 et seq; *Danzl*, Ideeller Schaden, in *Bundesministerium für Justiz* (ed), 200 Jahre ABGB – RichterInnenwoche 2011 (2012) 373 et seq; *Harrer*, Die Entwicklung des Haftpflichtrechts, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 381 et seq (394 et seq).

In the end the Austrian scientific community was and still is divided in two parties each of them gathering around the draft of their party<sup>254</sup> and fighting furiously for their positions and their ideas of tort law. Although the Austrian Federal Ministry of Justice tried to mediate between the two parties by publishing a draft containing compromising positions<sup>255</sup> reforming the tort law of the ABGB seems to be blocked at least for the near future.<sup>256</sup> There are certain indications that such things probably could also be one of the reasons for the delays in reforming the GesBR and in reforming inheritance law.<sup>257</sup>

- <sup>254</sup> Compare for the one side especially *Griss/Kathrein/Kozjol* (eds), *Entwurf eines neuen österreichischen Schadenersatzrechts* (2006) including the draft (1 et seq) and twelve contributions; supplemented for instance by *Griss*, *Reform des Schadenersatzrechts* (2007); compare for the other side especially *Schmidt-Kessel*, *Reform des Schadenersatzrechts I – Europäische Vorgaben und Vorbilder* (2006); *Reischauer/Spielbüchler/Welser* (eds), *Reform des Schadenersatzrechts III: Vorschläge eines Arbeitskreises* (2008) including the draft; *Reischauer/Spielbüchler/Welser* (eds), *Reform des Schadenersatzrechts II – Zum Entwurf einer Arbeitsgruppe* (2006) containing nine contributions; for an overview of both drafts compare for instance *Schauer*, *Stand der Schadenersatzrechtsreform in Österreich*, in *Bachner/Cierpial/Lemanska/Liebscher* (eds), *Aktuelle Entwicklungen im polnischen, deutschen und österreichischen Privatrecht – Vereinheitlichung oder Auseinanderentwicklung?* (2010) 9 et seq, especially 14 et seq; *Pfeiffer*, *Die Entwürfe für ein neues österreichisches Schadenersatzrecht – Fortschritt für Österreich und Vorbild für Deutschland? – Eine Untersuchung der Entwürfe unter besonderer Berücksichtigung der Principles of European Tort Law und der Tort Law Principles des DCFR* (2011).
- <sup>255</sup> Compare for the so called “Schattenentwurf”, “Retzer Entwurf” or “Fusionsentwurf” *Kathrein*, *Zur Reform des Schadenersatzrechts – Eine Skizze aus dem Schattenreich*, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 237 et seq (248 et seq); *Neumayr*, *Zur Reform des Schadenersatzrechts*, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 257 et seq (276 et seq).
- <sup>256</sup> *Kathrein*, *Zur Reform des Schadenersatzrechts – Eine Skizze aus dem Schattenreich*, in *Bundesministerium für Justiz* (ed), *200 Jahre ABGB – RichterInnenwoche 2011* (2012) 237 et seq (238, 240 - 241); *Kathrein*, *Zur Reform des Schadenersatzrechts*, in *Jarolim*, *Reform des Schadenersatzrechts – Dialog im Parlament* (2012) 2 et seq (4); *Karner*, *Gesetzgebungstechnik und Schadenersatzreform*, in *Jarolim*, *Reform des Schadenersatzrechts – Dialog im Parlament* (2012) 9 et seq (10 - 11); *Kodek*, *Schadenersatzreform – die Sicht der Praxis*, in *Jarolim*, *Reform des Schadenersatzrechts – Dialog im Parlament* (2012) 28 et seq (29 - 30); *Krejci*, „Mutig in die neuen Zeiten.“? – *Das Regierungsbündnis und das Zivilrecht*, *GES* 2013, 485 - 486 (485).
- <sup>257</sup> Compare for reforming the GesBR *U. Torggler*, *Grundfragen der GesBR-Reform*, *GES* 2012, 32 et seq on the one hand and on the other hand *Krejci*, *GesBR-Reform: Zum ministeriellen Diskussionsentwurf*, *GES* 2012, 4 et seq (10 et seq); *Schauer*, *Strukturmerkmale des Diskussionsentwurfes zur GesBR und Reflexionen über die Kritik*, *GES* 2012, 51 et seq (57 et seq); compare for reforming inheritance law *Krejci*, „Mutig in die neuen Zeiten.“? – *Das Regierungsbündnis und das Zivilrecht*, *GES* 2013, 485 - 486 (486).

### 1.3.2.4 Urgent Needs for a Refurbishment?

Although it is common sense and also repeated in the current working programme of the new Austrian Federal Government that there is a need for modernising the ABGB and adapting the code to modern times the ABGB is in general still *sufficient for the present everyday needs of legal practice*. So it is not surprising that changes are carefully prepared and considered. That is nothing new for Austrian private law. It was also agreed upon that reforming the Austrian HGB requires a step-by-step approach.<sup>258</sup> Contrary to the ABGB the refurbishment of the HGB leading to the UGB was finished during a quite short time period. Besides other reasons this fact might also indicate that there was a more urgent need for reforming the HGB<sup>259</sup> than there is for reforming the ABGB. One reason for this is probably the fact that – as already mentioned – the most disputed parts of private law are governed by ancillary statutes. By this, the ABGB is widely reduced to *fundamental principles and basic rules*. Such rules obviously do not need refurbishment every week although changes of their setting cause far reaching effects. The current working programme of the new government shows this fact quite clear. As described before the plans for reforming landlord and tenant law are presented apart from those for refurbishing the ABGB irrespective of the fact

<sup>258</sup> Compare *Krejci*, Reformbedarf im Handels- und Gesellschaftsrecht, in *Fuchs/Hornath* (eds), Wirtschaftsstandort Österreich – Festschrift Heinz Handler (2001) 263 et seq (265 et seq); *Krejci*, Unternehmensrecht und HGB-Reform in Österreich, in *Krejci/K. Schmidt*, Vom HGB zum Unternehmensgesetz (2002) 1 et seq (7); *K. Schmidt*, Unternehmensrecht und HGB-Reform in Deutschland – ein Modell für Österreich?, in *Krejci/K. Schmidt*, Vom HGB zum Unternehmensgesetz (2002) 67 et seq (76 et seq); *Krejci*, Handelsrechtsreform – Stand Herbst 2004 (2004) 13 - 14; *Krejci/Dehn*, Einführung, in *Dehn/Krejci* (eds), Das neue UGB – SWK-Sonderheft, 2<sup>nd</sup> ed (2007) 16 et seq (18); *Krejci* in *Krejci* (ed), Reform-Kommentar UGB ABGB (2007) Einf ann 4.

<sup>259</sup> Compare for the widely discussed needs of reforming the Austrian HGB for instance *Winkler*, Kaufmann quo vadis? – Zur geplanten Reform des Kaufmannsbegriffs (1999); *Krejci*, Reformbedarf im Handels- und Gesellschaftsrecht, in *Fuchs/Hornath* (eds), Wirtschaftsstandort Österreich – Festschrift Heinz Handler (2001) 263 et seq, especially 267 et seq; *Saria*, Der Yachtvercharterer als Grundhandelskaufmann, in *Bernat/Böhler/Weilinger* (eds), Festschrift Heinz Krejci (2001) 287 et seq (324); *Krejci/K. Schmidt*, Vom HGB zum Unternehmensgesetz (2002); *Schauer*, Integration des Handels- und Unternehmensrechts in das ABGB, in *Fischer-Czermak/Hopf/Schauer* (eds), Das ABGB auf dem Weg in das 3. Jahrtausend (2003) 137 et seq (139 et seq); *Krejci*, Handelsrechtsreform – Stand Herbst 2004 (2004) 15 et seq; *Krejci/Dehn*, Einführung, in *Dehn/Krejci* (eds), Das neue UGB – SWK-Sonderheft, 2<sup>nd</sup> ed (2007) 16 et seq (19 et seq); *Krejci* in *Krejci* (ed), Reform-Kommentar UGB ABGB (2007) Einf ann 13.

that landlord and tenant law is one of the most important fields of civil law. One of the reasons for this is certainly the urgency of this special reform agenda. Another evidence for the impact of the character of the ABGB as a codification of fundamental principles is that it is undisputed to implement directives usually not by changing provisions of the ABGB directly but by changing existing ancillary statutes or by enacting new ancillary statutes if necessary. This is justified by the argument that otherwise the fundamental legal system as described by the ABGB would be destroyed creating insecurity because of the fast changes of the legal environment caused by EU law.<sup>260</sup> So doubtless there are needs for a modernisation of the ABGB but they are not really that urgent.

#### 1.4 Final Remarks

Summing up it can be stated that reforming the ABGB is *reforming an old, well-tried code*. This creates a different situation in comparison to many other countries implying the use of a step-by-step approach despite all disadvantages linked to such a way of reforming a code. The modernisation of this kind of code demands a lot of patience and consideration because otherwise *reliability of law, legal certainty and predictability of court decisions* will be endangered. Only a cautious approach allows all stakeholders to adapt to a new legal regime without any relevant problems.

Modernising the ABGB is a *permanent process*. Success depends on political issues, on EU law, on the participation of legal scholarship and on the urgency of refurbishment. Because of the usually good preparation and the profound discussions of any changes there are usually no major problems in the application of new provisions.

Having in mind this background the current *working programme* of the new Austrian Federal Government is nothing new or unusual. Nevertheless only future will show which aims of the working programme will be achieved in the end.

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<sup>260</sup> *Stabentheiner*, Der Vorschlag für eine Richtlinie über die Rechte der Verbraucher aus österreichischer Sicht, in *B. Jud/Wendeborst* (eds), Neuordnung des Verbraucherprivatrechts in Europa? (2009) 1 et seq (12 - 13); *Zöchling-Jud*, Europäische Rahmenbedingungen für ein modernes Verbraucherschutzrecht, in *Welser* (ed), Konsumentenschutz in Zentral- und Osteuropa (2010) 231 et seq (241 - 242); *Dehn*, Die Umsetzung von EU-Richtlinien und das ABGB, in *Fischer-Czermak/Hopf/Kathrein/Schauer* (eds), Festschrift „200 Jahre ABGB“ (2011) 1667 et seq (1676); compare also *Smits*, Coherence and Fragmentation in the Law of Contract, in *Letto-Vanamo/Smits*, Coherence and Fragmentation in European Private Law (2012) 9 et seq (14 et seq).



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## 2 CROATIA

*Tatjana Josipović – Igor Gliba – Saša Nikšić*

### 2.1 Introduction

Unlike many other legal orders in continental Europe, Croatian private law is not codified in a single legal source. Instead of that, Croatian private law is codified in several main legal sources and many special legislative acts (*leges speciales*).<sup>261</sup> Croatian legal order belongs, as a matter of principle, to Germanic legal family, even though in certain fields of law it is essentially a mixed legal system, consisting of German, Austrian, Swiss, French and Italian laws. Regardless of the fact that Croatia does not have a civil code, private law in Croatia has the structure typical for pandectist legal systematization. Naturally, the absence of a civil code means that there is no single legal source that regulates the general part of civil law. However, other parts of civil law – property law, law of obligations and inheritance law – are covered by the main legal sources of private law: the Act on Ownership and Other Rights in Rem<sup>262</sup> (*Zakon o vlasništvu i drugim stvarnim pravima*; hereinafter: the Property Act, PA), the Inheritance Act<sup>263</sup> (*Zakon o nasljeđivanju*; hereinafter: IA) and the Obligations Act<sup>264</sup> (*Zakon o obveznim odnosima*; hereinafter: OA). The PA was chronologically the first of the main three private law legal sources that were enacted after Croatia regained independence in 1991. It was enacted on 2 October 1996 and it came into force on 1 January 1997. The next one was the IA, which was enacted on 26 March 2003 and came into force on 27 September 2003. Finally, the OA was enacted on 25 February 2005 and came into force on 1 January 2006.

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<sup>261</sup> T. Josipović: Private Law Codification in The Republic of Croatia, in Wen-Yue Wang: Codification in International Perspective, Heidelberg, Springer, 2014, 107-123.

<sup>262</sup> Official Gazette 91/96, 68/98, 137/99, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14.

<sup>263</sup> Official Gazette 48/03, 163/03, 35/05, 127/13.

<sup>264</sup> Official Gazette 35/05, 41/08, 125/11.

Company law is a separate branch of private law in Croatia, and it was also reformed when the Commercial Company Act<sup>265</sup> (*Zakon o trgovačkim društvima*) was enacted on 23 November 1993 and came into force on 1 January 1995. However, the first step regarding the transformation of the so-called social ownership of enterprises into the private ownership occurred at the moment when the Act on Transformation of Socially Owned Enterprises<sup>266</sup> came into force in 1991. This law regulated only the transformation of enterprises. The transformation of other entities that were in the regime of social ownership, such as flats or land, was regulated by other legislative acts. The transformation of the social ownership of flats was regulated by special legislation, and the general rules regarding the transformation of the social ownership of things can be found within the transitional and final provisions of the PA (Articles 354-365). According to these general rules, the rights over socially owned things were transformed into the ownership for the benefit of previous holders of the social rights. The persons who were the owners before socialism and some of their heirs were entitled either to reclaim their ownership or to get compensation, on the basis of the special denationalization legislation.

As it is clearly seen, a period of *vacatio legis* of new private law legislation was fairly long, at least if one takes into account the usual standard in Croatian legislation. This was necessary because of the excessiveness of the conducted reforms, which brought completely new instruments to some areas of Croatian positive law. If one could single out the area of private law where even the basic ideas and concepts were substituted with the new ones, it would be company law. This is a natural consequence of the fact that the core of transition from socialism to capitalism, observed from the legal point of view, is privatization and establishing the new forms of business enterprises.

Family law and labour law are also regulated by separate special legislation. They are not considered to be parts of civil law, even though certain provisions of civil law are applicable to both family and labour law in the absence

<sup>265</sup> Official Gazette 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 152/11, 111/12, 68/13.

<sup>266</sup> Official Gazette 19/91, 83/92, 94/93, 2/94, 9/95, 118/99.



of specific provisions (e.g. provisions of the PA on the property of the spouses or provisions of the OA regarding the validity of a labour contract). Even though the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*; hereinafter: ABGB) was indirectly applicable in Croatia after the World War II because the area of family law was regulated by the newly adopted legislation, family law was separated from the rest of private law, since the ABGB was considered to be contrary to the new, socialist ideology, particularly in the field of family law. This was also a consequence of the fact that, during socialism, civil law was seen as a branch of law that dealt with the legal relations regarding pecuniary interests or, in other words, with things, patrimony and performance of contractual relations.<sup>267</sup> On the other hand, family law deals with the legal relations of personal nature between family members and the legal status of natural persons. Furthermore, civil law heavily relies on non-mandatory provisions of law (*ius dispositivum*), while mandatory provisions prevail in family law.

Labour law also departed from civil law during socialism because in those days labour law was considered to be much more than a contractual relation between an employer and an employee. A special theory and legislation were developed during socialism that explained the legal relation between those two parties as a peculiar form of partnership. In the 1995, the concept of legal relations in the field of labour law switched back to the contractual concept, but labour law still remained outside of the scope of civil law. General civil provisions on contracts are applicable on a labour contract only in the case of legal gaps.<sup>268</sup> This development was followed by legal education in the framework of which both family law and labour law courses are held separately from the civil law course at the Faculty of Law of the University of Zagreb.

Both family law and labour law were very recently amended. The new Family Act (*Obiteljski zakon*) and the Labour Act (*Zakon o radu*) were enacted, and they are still regarded as separate legal branches, very remote from private

<sup>267</sup> P. Klarić, M. Vedriš: *Gradansko pravo*, Narodne novine, Zagreb, 2008, 5.

<sup>268</sup> I. Ggurev: *Labour Law in Croatia*, Kluwer Law International Alphen aan den Rijn, 2013, 25.

law. Very recently the Act on Life Partnership of the Same-sex Persons was adopted, which regulates patrimonial regime and inheritance between partners, among other issues.

There are other examples of legal branches that developed separately from property law and the law of obligations. For instance, intellectual property law is regulated by a special legislation.<sup>269</sup> However, unlike family and labour law, intellectual property law is considered as a part of private law.<sup>270</sup>

## 2.2 Influence of comparative and European law on Croatian private law

### 2.2.1 General remarks

Croatian private law was under strong influence of foreign legislation for a long time. Croatian first modern private law codification was actually the ABGB which came into force in Croatia in 1853, and it remained in force a long time after the Habsburg Monarchy and the Austro-Hungarian Empire ceased to exist. Before that, private law in Croatia was regulated by the *Tripartitum*, which was a compilation of Hungarian and, to some extent, Croatian customary law. In the coastal parts of Croatia statutory laws of individual towns were in force, which were mixtures of Roman, Venetian and Byzantine laws.<sup>271</sup> Initially, the ABGB came into force when Croatia lacked any sovereignty, but was later on kept in force after Croatia obtained the limited legislative autonomy in the Austro-Hungarian Empire, and even after 1918 as well.<sup>272</sup>

The legal tradition of the ABGB was strong because the provisions of the ABGB were applicable as an indirect legal source even during

<sup>269</sup> I. Gliha: The New Croatian Copyright System, e.Copyright Bulletin, 38 (2004), 2, 1-10.

<sup>270</sup> I. Gliha: Copyright throughout the World – Croatia, Thomson West, 2010.

<sup>271</sup> D. Čepulo: Hrvatska pravna povijest u europskom kontekstu, Sveučilište u Zagrebu, Pravni fakultet u Zagrebu, Zagreb, 2012, 96-100.

<sup>272</sup> I. Gliha, T. Josipović, in: E. Berger: Das Einfluss des ABGB auf Kodifikationen in Kroatien, Österreichs Allgemeines Bürgerliches Gesetzbuch, Band III, Das ABGB außerhalb Österreichs, Duncker & Humboldt, 2010, 180-197.; I. Gliha: Überblick der Gesetzgebung Kroatiens im Bereich des Schuld-, Sachen- und Erbrechts, Zeitschrift für Rechtsvergleichung, Int. Privatrecht und Europarecht, 3/93 (34. jg, H 3)

socialism, due to the fact that, after the end of the World War II, there were significant legal gaps and special legislation was introduced to allow the application of the ABGB.

### 2.2.2 Property law and land records law

Contemporary Croatian property law and land record legislation is still under the influence of Austrian legislation (ABGB, *Grundbuchsgesetz*, *Wohnungseigentumsgesetz*, *Baurechtsgesetz*). However, the provisions of the ABGB were not simply translated into Croatian and enacted as Croatian law. Instead of that, the drafters of the PA also included the provisions that originate in German and Swiss law. For instance, in Croatian law a possession is not a subjective right, but ‘only’ a fact protected by the law.<sup>273</sup> The concept of possession relies only on *corpus possessionis*, and *animus possidendi* is not required by Croatian property law.<sup>274</sup> This means that the so-called objective concept of possession is accepted. However, this is not a consequence of the reforms, but was already in force since 1980. Croatian property law also owes the *titulus* and *modus* model of the acquisition of ownership to the ABGB, but it does not apply it to every case of the acquisition of ownership. Instead of that, the *titulus* and *modus* are applicable to the acquisition of ownership on the basis of contracts and other legal transactions (*Rechtsgeschäft*). There are cases when the *modus* is not required. For instance, an heir acquires the ownership from a deceased person in the moment of his or her death on the basis of the law, and without any act conducted to acquire the ownership that could be qualified as *modus acquirendi*. The acquisition of ownership on the basis of a contract or any other legal transaction will occur only if a contract or another legal transaction (*titulus*) is valid.<sup>275</sup>

The land record system that was deliberately neglected during socialism needed much effort to be brought up to date.<sup>276</sup> Despite all efforts, this is still an undergoing task. The most important reason for the long reform

<sup>273</sup> N. Gavella et al.: *Stvarno pravo*, Svezak 1., Narodne novine, Zagreb, 2007, 154-155.

<sup>274</sup> N. Gavella et al., o.c., 155-156.

<sup>275</sup> N. Gavella et al., o.c., 435.

<sup>276</sup> T. Josipović: *Immobilarsachenrecht in Kroatien: Immobilienrecht, Grundbuch, Kreditwesen und Hypothekenrecht*, CLC, FOWI, Wien, 2002.

of the land record system is the lack of resources and a tendency to postpone the time periods prescribed by the law, in which the legislation in this field should become fully operational.

### 2.2.3 Law of obligations

In comparison to property law, the law of obligations significantly departed from the legal tradition of ABGB. This was a consequence of the fact that the old OA, enacted in 1978, was developed under the strong influence of French and Swiss laws. Generally speaking, French law was more important in the field of civil law liability, while Swiss law had more impact regarding contract law. The most important feature of French law that was introduced into Croatian law in 1978 was the *neminem laedere* (hurt no one) principle. The *neminem laedere* principle is still applicable and is explicitly regulated by the Article 8 OA. This means that, unlike in German law, the liability for damages in Croatian law will arise not only in case of the violation of specific rights or goods enumerated by the law, but always when the conditions of liability are met. Hence, Croatian civil liability law is not based on the so-called list of protected goods, which is accepted in German law (§ 823 BGB).<sup>277</sup> The notion of damage is defined as diminishing of somebody's patrimony, hindering of its increase and also infringing of personality rights.<sup>278</sup> It also covers pure economic loss.<sup>279</sup>

Other provisions were taken over from the Swiss OR, and some are drafted in accordance with Austrian law (e.g. liability for damage caused by motor vehicles) and Italian law (e.g. *clausula rebus sic stantibus*). It is interesting to note that Swiss law was chosen as a foreign model because it was modern, but also relatively simple, especially if compared to German law. The fact that in those days the former Yugoslavia was a socialist state was not an obstacle to look for foreign legal influences in Western Europe. Despite the former Yugoslavian state-planned economy, economic relations with Western European countries were strong and sometimes, in legislative proceedings,

<sup>277</sup> I. Gliha, M. Baretić, S. Nikšić: Pure Economic Loss in Croatian Law, in: M. Bussani: European Tort Law, Eastern and Western Perspectives, Stämpfli Publishers Ltd., Berne, 2007, 252-253.

<sup>278</sup> Article 1046 OA.

<sup>279</sup> M. Baretić, S. Nikšić, in: V.V. Palmer, M. Bussani: Pure Economic Loss, New Horizons in Comparative Law, Routledge, Cavandish, London-New York, 2009, 89.

the argument that the law in force should be compatible with the legal systems of foreign trade partners was put forward. Swiss law of obligations was a role model not only regarding the content, but also in the respect of the drafting style. Consequently, each paragraph of the OA consists of one sentence and cross-references within the OA are generally avoided.

Even though French law was an important influence on civil liability law, there were exceptions. For example, the French Civil Code was obviously the origin of the conditions of the validity of a contract, and *causa* was, according to the old OA, one of the conditions of the validity of a contract. It was abandoned later on, and it exists with a much more narrow meaning since the enactment of the new OA in 2006. Swiss law of obligations was an important role model for the regulation of specific contracts, and Swiss system of contract law is still retained in Croatian contract law. The OA regulates contracts and other types of legal transaction. Unlike German law, the emphasize is on contracts, and the provisions of the OA that regulate contracts are *mutatis mutandis* applicable to other legal transactions.<sup>280</sup> Croatian contract law recognizes two main types of the invalidity of a contract: nullity (null and void contracts, absolute nullity) and voidable contracts (relative nullity). Apart from the contracts that are null and void or voidable contracts, the OA in some cases of defects of consent prescribes that a contract is not concluded (e.g. in the case of *dissensus*), which is equalled to absolute nullity by theory and practice.<sup>281</sup>

A contract that is null and void is treated as if it has never been concluded. No action to nullify it is needed, and both parties are entitled to simply refuse performance in this case. This is a consequence of the fact that the nullity of a contract comes into existence *ex lege*. The action to declare the nullity of a contract is not time-limited. However, subsequent actions can be limited on the basis of extinctive prescription, for example, *restitutio in integrum* if the object of a claim is the monetary value of whatever was performed by the contracting parties. If, on the other hand, the object of restitution is a thing (*res*), which was delivered to the other party, time limits will not be applicable, since the claim is based on property law as a matter of principle.

<sup>280</sup> Article 14/3 OA.

<sup>281</sup> P. Klarić, M. Vedriš, o.c., 142-143.

The rules on property law are applicable, while the ownership will not pass to a buyer in the case of contract that is null and void, and a seller will remain the owner of the property, regardless of the fact that it was transferred to a buyer. In this case a seller will be entitled to a *rei vindicatio*.

Voidable contracts (relative nullity) are invalid contracts that nevertheless produce legal effects of valid contracts until the moment when they are invalidated. Prevailing opinion is that the invalidation of voidable contracts is done by the decision of a court. Therefore, a party who is entitled to invalidate it must bring actions in a court. This claim is time-barred and, according to the general rule, the action must be initiated one year from the moment when a party learned about the reason of the voidability of a contract, and three years from the moment of the conclusion of a contract at the latest. If the court invalidates a contract, it will be invalid *ab initio*, from the moment of the conclusion of a contract (*ex tunc*).

Apart from civil law liability and contractual law, Croatian law of obligations also regulates other extra-contractual relations: unjustified enrichment, *negotiorum gestio* and unilateral declarations of intent.

#### **2.2.4 Inheritance law**

Inheritance law was less affected by legal reforms of Croatian private law. Although the new IA was enacted in 2003, it was only slightly amended in comparison to the original version of the IA that was enacted in 1955. Since 1955, Croatian inheritance law was based on the principle of *ipso iure* succession, and both intestate and testate succession were regulated by the law, as well as the limited possibility of forced inheritance. The law enacted in 1955 was actually a significant reform itself because it was a shift from the Austrian to the Swiss and German models of inheritance law. As a matter of principle, testamentary succession has priority over intestate (statutory) succession. In the case of intestate (statutory) succession, legal heirs and relationships between them are regulated by the IA.<sup>282</sup> Therefore, in 2003, when the new IA was enacted, it was only a moderately revised version of the law from 1955.

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<sup>282</sup> T. Josipović, in: P. Šarčević, T. Josipović, I. Gliha, N. Hlača, I. Kunda: Family Law in Croatia, Kluwer Law International, Alphen aan den Rijn, 2011, 198.

## 2.3 Reform in different areas of private law

### 2.3.1 General remarks

The main reason for the private law reform in Croatia was the transition from socialism and planned economy to parliamentary democracy and market economy. Due to the fact that a part of the reform was conducted during the troublesome days at the end of the Croatian War of Independence, the reform of private law was not at the highest levels of the state's priorities. The reform was conducted mainly by legal scholars, who were in significant advantage, in comparison with many of legal practitioners, because legal theory relies heavily on comparative legal method in most of the cases, as it did even during socialism. It should be mentioned that the former Yugoslavia, of which Croatia was part between 1945 and 1991, was a socialist country, but had strong connections with Western Europe at the same time. It should also be stressed that Croatia, as a fairly small country (4,3 million of inhabitants), cannot develop its own law, especially complex system like contemporary law, and has natural tendency to adopt foreign legislation. The absence of a single civil code meant that the reform of private law in Croatia was conducted parallelly as the reform of the main legal sources and the adoption of different special legislative acts. Because of that, it is not possible to detect the exact point when the reform has begun. The reform of private law has never ended because of frequent amendments of the legislation in force, as well as the new legislative acts.

### 2.3.2 Property law and land records law

The new regulations of property law and land records law that came into force on 1 January 1997, brought significant changes to Croatian private law. Property law and land records law were the areas of private law that suffered the most during the time of socialism and required most of attention.

The objects of property law are things (*Sachen*), which means tangible parts of nature, which are fit for use and that are different from human beings (Article 2/2 PA). However, there are exceptions whereby objects that are not of tangible nature are the objects of rights in rem. For instance, shares in a company that exist only as an electronic record are the object

of ownership.<sup>283</sup> The claim of a creditor for the payment of a certain amount of money can be object of a lien, which means that, in this respect, it is treated like a tangible object.<sup>284</sup> Other examples are forces of nature if they are under human control and securities that exist in electronic form only.<sup>285</sup> All of these examples are the so-called legal entities equal to things.

The *superficies solo cedit* principle was reintroduced into Croatian private law, which was the most important reform at the level of the principles of property law. Therefore, a real property (immovable property) is a plot of land along with anything that is permanently attached to it.<sup>286</sup> Buildings and other objects permanently attached to a plot of land are not separate objects, but are a part of that land. This was the most important change in comparison to earlier property law legislation, especially the one that existed during socialism, when the land and the object raised upon it were treated as two separate objects. Current legislative allows that buildings and other objects that are a part of the plot of land are divided from the land in the legal sense. For instance, a specific subjective right, a right to build, was introduced by the PA. However, even in this case, the *superficies solo cedit* principle is applicable, since the right to build is treated as an artificial immovable property.<sup>287</sup> This is also another example for a right that is treated as an object (thing) in property law. The *superficies solo cedit* principle is also applicable to ownership of individual part of immovable property (condominium). Condominium is co-ownership over whole immovable property (a plot of land and building) whereby a share of co-owner is connected to individual part of an immovable property (flat, business premises, etc.) in a way that grants the each co-owner exclusive rights regarding an individual part (Article 66 PA).<sup>288</sup>

Croatian property law is based on the *numerus clausus* principle.<sup>289</sup> In Croatian property law there are five rights in rem: ownership, personal and real ease-

<sup>283</sup> N. Gavella et al., o.c., 387.

<sup>284</sup> N. Gavella et al., o.c., 95.

<sup>285</sup> N. Gavella et al., o.c., 387.

<sup>286</sup> Article 9/1 PA.

<sup>287</sup> Article 280/2 PA.

<sup>288</sup> T. Josipović: Property and Trust Law, International Encyclopaedia of Laws, Kluwer Law International, Alphen aan den Rijn, 2013, 54.

<sup>289</sup> N. Gavella et al., o.c., 30-32.



ments (servitudes), real encumbrances (real burden), liens and the right to build. As it was already mentioned, a possession is not qualified as a right in rem, or any other subjective right, but is a fact protected by the law.

Unfortunately, the idea of the drafters of the new PA that property should be regulated by a single legal source was not followed through, and today there are numerous special legislative acts that govern the legal regime of different types of things. The same is true for the security rights, that are regulated by the PA, but also by the relevant provisions of the Enforcement Act<sup>290</sup> and the Act on Judiciary and Public Notaries' Security Rights<sup>291</sup> (hereinafter: the Act on Security Rights).<sup>292</sup> The Act on Security Rights introduced the floating charge in Croatian private law. The floating charge can exist in the respect of things that are situated in certain space which is either owned by a debtor or used by a debtor on another legal basis (e.g. lease contract).<sup>293</sup> That space must be used to conduct a commercial activity. The floating charge is acquired at the moment of the registration of a creditor's right at the state owned Financial Agency.<sup>294</sup> When a particular thing leaves the designated space, the security right will cease to exist in the respect of that thing. On the other hand, a debtor is obliged to make sure that things that are in the designated space have certain value at any moment. After the maturity of a debt, things that are found in the designated space are seized and sold to cover the debt.

Property law also had to be reformed because of Croatia's accession to the EU. The PA initially regulated restrictions regarding the acquisition of the ownership of immovable property by foreign nationals. Some of these restrictions are in force during the transitional period in the respect of certain types of immovable property (e.g. agricultural land), but the most if it was abandoned regarding the EU nationals. The Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending

<sup>290</sup> Official Gazette 112/12, 93/14.

<sup>291</sup> Official Gazette 121/05.

<sup>292</sup> T. Josipović: Neuheiten im kroatischen Kreditsicherungsrecht – Auswirkung auf die traditionellen Grundsätze des Pfandrechts, in R. Welser: Das Recht der Kreditsicherung in Zentral- und Osteuropa, Manzsche Verlags- und Universitätsbuchhandlung, 2014, 73-108.

<sup>293</sup> Article 38/1 of the Act on Security Rights.

<sup>294</sup> Article 38/3 of the Act on Security Rights.

Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims, was also implemented into Croatian law as a special legislation.

### 2.3.3 Law of Obligations

The new OA, which came into force in 2006, kept most of the comparative law influences of its predecessor. Generally speaking, the law of obligations was less reformed in comparison to property law. The most significant reform in the field of the law of obligations was switching to the so-called objective concept of non-pecuniary damage. In the old OA (1978), non-pecuniary damage was defined as pain and suffering, and consequently certain categories of persons were deprived of damages (e.g. natural persons who could not feel pain and suffering, such as patients in coma, as well as legal persons). According to the Article 1046 OA, non-pecuniary damage is an infringement of the personality right. Hence, the compensation for non-pecuniary damage can be awarded to persons that were not entitled to damages in earlier legislation.

The idea of separating more general rules from specific ones is also present in the OA. The law of obligations is divided into two major parts: the general part and the specific part, which is furthermore divided into the part that regulates contracts and the part which deals with extra-contractual legal relations. Almost 600 paragraphs, many of them containing more than a few subparagraphs are dedicated to specific contracts (nominated contracts). The provisions that regulate contracts are in most of the cases of non-mandatory nature (*ius dispositivum*). Therefore, the contracting parties may, if they wish to do so, exclude the application of many provisions or deviate from them by agreeing to the regime different in comparison to the one prescribed by the OA. In any case, the contracting parties must explicitly or implicitly exclude the application of *ius dispositivum*. On the other hand, they are not allowed to exclude or deviate in the respect of the mandatory provisions of law (*ius strictum*).

The legislation in the field of the law of obligations sets forth numerous principles. Many of those are the so-called legal standard, which means that

they are not defined by the law, but are left for the interpretation of courts in particular cases. In some cases courts do not have to refer to principles because there are enough of specific provisions of law that regulate certain issue, and consequently reference to the principles is not necessary. In other cases, the situation is different, since sometimes even specific provisions refer to the principles. Such is, for example, *culpa in contrahendo* that by definition will arise if a party negotiates or breaks negotiations contrary to the good faith principle.<sup>295</sup> Therefore, in order to apply the provision on *culpa in contrahendo*, it is necessary to establish what behaviour constitutes infringement of the good faith principle. It is interesting to note that, apart from the explicitly regulated good faith principle, Croatian private law also explicitly regulates the prohibition of the abuse of right principle in both the law of obligations and property law.

The other significant novelty of the new OA was the series of provisions that serve as a means to implement EU law into Croatian law. Following directives were implemented within the OA: the Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours and the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the liability for defective products. None of these directives had revolutionary impact on Croatian law of obligations, since all of the aforementioned legal institutes already existed in Croatian positive law, particularly in the respect of the sale of consumer goods and associated guarantees. Even the old OA was very well adapted to the EU law regarding this issue because the provisions on sale contract of the old OA were drafted in accordance with the Uniform Law on the Formation of Contracts for the International Sale of Goods (hereinafter: ULFIS) and the Uniform Law on the International Sale of Goods (hereinafter: ULIS). Both the ULIS and the ULFIS had impact on the UN Convention on International Sale of Goods (hereinafter: CISG), which influenced

<sup>295</sup> T. Josipović: Die Entwicklung der culpa in contrahendo im kroatischen Schuldrecht mit Blick auf den Grundsatz von Treu und Glauben, in: R. Welser: Haftung aus Verschulden beim Vertragsabschluss in Zentral-und Osteuropa, MANZ'sche Wien, 2012.

the drafters of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, which means that provisions of the OA and EU sale law have a common origin. Apart from the Directive 1999/44/EC, the rest of EU consumer protection law is implemented in a special legislation.<sup>296</sup> The provisions of the OA are applicable to consumer contracts, unless special legislation provides otherwise.

A significant number of legal sources of the law of obligations belongs to the set of laws regulating the relation between entrepreneurs and public authorities, such as the Concessions Act, the Public Procurement Act and the Public-Private Partnership Act. The legislation in this field is fairly new and, apart from concessions, does not have a long legal tradition in Croatian legal order. It is important to note that, apart from the OA, the law of obligations is also regulated by special legislation. For instance, even though carriage contract is regulated by the OA, many other aspect of the law of obligations in the field of transport law (railroad and road transport) and maritime law are again regulated by special legislation. The same is true in the respect of air transport. Special legislation is also relevant for flat rental, usufructuary lease of business premises and usufructuary lease of agricultural land.

Croatian contract law is regulated by numerous provisions of the OA. It is fair to say that it is even overregulated in some cases. The OA contains provisions on more than thirty nominate contracts. Contracts regulated as nominate contracts by the OA are:

1. Sale contract (*ugovor o kupoprodaji*, Art. 376-473),
2. Barter contract (*ugovor o zamjeni*, Art. 474-475),
3. Order to sell contract (*prodajni nalog*, Art. 476-478),
4. Donation contract (*ugovor o darovanju*, Art. 479-498),
5. Loan contract (*ugovor o zajmu*, Art. 499-508),
6. Loan for use contract (*ugovor o posudbi*, Art. 509-518),
7. Usufructuary lease contract (*ugovor o zakupu*, Art. 519-549),

<sup>296</sup> T. Josipović: Verbraucherschutz in der Republik Kroatien, in R. Welser: Konsumentenschutz in Zentral- und Osteuropa, Manz, Wien, 2010, 53-80.; T. Josipović: Enforcement Activity in Consumer Protection Regulation in Croatia, Journal of Consumer Policy, 36 (2013), 287-314.

8. Lease contract (*ugovor o najmu*, Art. 550-578),
9. Lifelong support contract (*ugovor o doživotnom uzdržavanju*, Art. 579-585),
10. Contract of support until death (*ugovor o dosmrtnom uzdržavanju*, Art. 586-589),
11. Contract for work (*ugovor o djelu*, Art. 590-619),
12. Construction contract (*ugovor o građenju*, Art. 620-636),
13. Partnership contract (*ugovor o ortaštvu*, Art. 637-660),
14. Carriage contract (*ugovor o prijevozu*, Art. 661-698),
15. License contract (*ugovor o licenciji*, Art. 699-724),
16. Deposit contract (*ugovor o ostavi*, Art. 725-743),
17. Warehouse contract (*ugovor o uskladištenju*, Art. 744-762),
18. Mandate contract (*ugovor o nalogu*, Art. 763-784),
19. Commission contract (*ugovor o komisiji*, Art. 785-803),
20. Commercial agency contract (*ugovor o trgovinskom zastupanju*, Art. 804-834),
21. Brokerage contract (*ugovor o posredovanju*, Art. 835-848),
22. Freight forwarding contract (*ugovor o otpremi (špedicija)*, Art. 849-868),
23. Contract for the examination of goods and services (*ugovor o ispitivanju robe i usluga*, Art. 869-880),
24. Package travel contract (*ugovor o organiziranju putovanja*, Art. 881-903),
25. Agency travel contract (*posrednički ugovor o putovanju*, Art. 904-908),
26. Allotment contract (*ugovor o raspolaganju ugostiteljskim smještajem (ugovor o alotmanu)*, Art. 909-920),
27. Insurance contract (*ugovor o osiguranju*, Art. 921-989),
28. Bank monetary deposit contract (*bankarski novčani polog*, Art. 990-1001),
29. Deposit of securities contract (*polaganje vrijednosnih papira*, Art. 1002-1006),
30. Current bank account contract (*bankarski tekuci račun*, Art. 1007-1015),
31. Safe deposit box contract (*ugovor o sefu*, Art. 1016-1020),
32. Bank loan contract (*ugovor o kreditu*, Art. 1021-1024),
33. Loan contract based on the lien of securities (*ugovor o kreditu na temelju zaloga vrijednosnih papira*, Art. 1025-1027).

Letters of credits and bank guarantees are also regulated in the part of the OA that regulates specific contracts, even though they are unilateral declarations of intent by their legal nature. Certain contracts are regulated by the provisions of the general part of the OA (settlement, cession, assignment, assumption of debt, suretyship contract and novation). Cession and assignment are two different legal instruments in legal orders of continental Europe. English legal terminology is not familiar with these two terms, since it only recognizes assignment. However, the assignment in this sense, as the assignment of claim, is effectively a cession. Assignment in continental Europe is a similar, but different instrument that enables person A to instruct person B to pay person C a certain amount of money, which person A owes to person C. Person B will agree to that, since he or she is either a debtor of person A or will charge a fee to person A for fulfilling A's obligation to person C.

During the reform, which resulted in the new OA in 2006, there were proposals to expand the list of nominate contracts. The first proposal was to introduce the service contract into Croatian contract law, and the second was related to one specific type of service contracts, which is the medical service contract. Neither of these contracts are regulated by the new OA. The problem regarding service contracts was that it would be difficult to distinguish service contracts and labour contracts. This was, and still is, important, since labour contracts are also regulated by the Labour Act, which should not be applicable on service contracts. If service contracts would be regulated as nominate contracts that could be an open invitation to employers to switch from labour contract, which offers more privileges to employees, to a service contract. Because of the fact that the provisions on (general) service contract were not enacted, the idea to regulate a specific type of service contract – the medical service contract – was also abandoned.

On the other hand, the OA enacted usufructuary lease (*zakup*) and lease (*najam*) as separate contracts, which was not the case in the old OA. This is a division known in Germanic legal orders as *Pacht* (usufructuary lease) and *Miete* (lease). The criterion for the distinction of these two contracts is whether a thing that is the object of the contractual obligation is capable of producing *fructus* in the legal sense of the word.

### 2.3.4 Inheritance Law

Inheritance law underwent less significant changes than property law and the law of obligations.<sup>297</sup> Although there was an idea to adapt inheritance law to the new property law in the beginning of the inheritance law reform, this was abandoned and, apart from a few details, inheritance law remained almost the same as before. The reason why inheritance law was to be adapted to property law was to unify it one day, probably along with the law of obligations, into a civil code. The new IA, which came into force in 2003, recognized the status of legal heir of extra-marital partners, which means that an extra-marital partner is entitled to inherit on the basis of intestate succession. The law defines an extra-marital union as a cohabitation of an unmarried woman and an unmarried man which had lasted for a longer period and was terminated by the death of one partner, but only if all the conditions for concluding of a marriage are fulfilled. It is also important to note that the brothers and sisters of a deceased person are no longer forced heirs. Apart from a few minor changes in comparison to the law that regulated inheritance law between 1955 and 2003, the most important feature of new regulation was probably the transferring of inheritance proceedings to the jurisdiction of public notaries.

Inheritance law is reformed even further by the newly adopted Act on Life Partnership of Same-sex Persons, which will be a legal basis for intestate succession between partners, and in some cases between one partner and a child of the other partner, when it comes into force.

Family law remained a separate branch of law. Some of the reasons that led to the separation of family law from civil law are still relevant, and there was practically no initiative to reconnect family law and civil law. It is interesting to note that nothing changed after the collapse of socialism. Again, the absence of a civil code determined the legal development, in this case the relation between civil (private) law and family law. Without a civil code, there was no interconnection between now fully emancipated family law and civil law.

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<sup>297</sup> T. Josipović: *Erbrecht in der Republik Kroatien*, in R. Welser: *Erbrechtsentwicklung in Zentral- und Osteuropa*, Manz, Wien, 2009, 189-202.

### 2.3.5 The autonomy of will principle and mandatory provisions in private law

The autonomy of will principle is explicitly regulated in Croatian private law. In the absence of a civil code, the relevant provision is the Article 2 of the OA. Because of the fact that, during socialism, the autonomy of will principle could not have relevance typical for liberal societies, numerous mandatory provisions did not provoke any reactions from the legal community. In a certain way, the lawyers became used to mandatory provisions. The same is true for mandatory provisions that protect weaker parties in contractual obligations, for instance, in consumer protection legislation. Consumer protection in Croatia is regulated by *lex specialis* – the Consumer Protection Act.<sup>298</sup> Mandatory provisions can also be found in the main sources of private law: the PA, the IA and the OA. In the framework of the OA, it is sometimes difficult to establish which provisions of the OA are of mandatory nature.

Since the enactment of the old OA in 1978, Croatian private law became a monistic legal system, meaning that both civil law contracts and commercial law contracts are dealt with by the same legal source. This approach was retained in the new OA of 2006. However, both the old and the new OA contained numerous specific provisions for either civil law contracts or commercial law contracts. The situation became even more complicated after the enactment of the Consumer Protection Act. Apart from the subject-matter regulated by the Directive 1999/44/EC, which was implemented into the new OA, the rest of consumer protection *acquis* is implemented into the Consumer Protection Act. The main impulse to regulate consumer protection law came from the EU long before Croatia actually became one of the EU member states. The first version of the Consumer Protection Act was enacted in 2003, and current version is from 2014. As it was already mentioned, apart from the Consumer Protection Act, consumer contract law is also regulated by the Consumers Credit Act.<sup>299</sup> The fragmentation

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<sup>298</sup> Official Gazette 41/14.

<sup>299</sup> Official Gazette 75/09, 112/12, 143/13, 147/13.



of contract law is present even in the respect of specific areas of contract law. In this way, even though the mainstream legal theory still qualifies Croatian contract law as a monistic system, it is seriously undermined.

## 2.4 New regulations in practice

The most problematic part of the newly reformed private law is property law in the respect of real property. The new legislation could not change the reality on its own, and the resources intended for this purpose were insufficient. The biggest problems were accepting the new principles of property law and the transformation from social ownership to private ownership. Another significant problem was the state of the land records after almost fifty years of socialism. The subjective rights that were specific for that period of time and which ceased to exist after the new property law came into force were still registered in the land records, as they were in force. Besides that, the land records did not reflect the current state of ownership over the real property, but was, instead of that, full of obsolete informations regarding the owners and their rights. Although many of these problems were eliminated in the course of time, the reform of the land records is still taking place.

Another problem is a consequence of the fact that the reform of private law in Croatia is not a single reform, but a series of reforms. The separate legislation that regulates property law, the law of obligations and inheritance law sometimes causes inconsistencies regarding numerous details. For instance, because of the fact that the acquisition of ownership on the basis of a contract requires a valid contract, the ownership will not be acquired by a buyer if a contract was null and void. This also means that a seller will remain the owner and will be entitled to claim the possession back on the basis of the *rei vindicatio* action. In this respect, the position of Croatian contract law is similar to the position of Austrian law, which is understandable since Croatian property law is of Austrian origin to a large extent. On the other hand, the law of obligations sets forth an action on the basis of unjustified enrichment, which is applicable in case when a seller demands the return of a possession if a sale contract was invalid. The application of unjustified

enrichment in this case would be logical if the transfer of possession led to the transfer of ownership regardless of the validity of a contract, which is not the case in Croatian law.

## **2.5 Absence of a civil code**

As it was already mentioned in the introduction, Croatia lacks a civil code. There was an initiative to enact civil code at the beginning of the 1990's, but it did not attract enough support, especially from the legal practitioners. The attitude of the legal practitioners can be explained easily as a general reluctance to support any changes regarding the legislation. It is interesting to note that the opposition to legislative changes was strong despite the fact that the legal practitioners were often critical towards the legislation in force. It could be concluded that the tradition of codification was lost because of the fact that the legal practitioners got used to conduct their affairs without the civil code. Legal scholars who are proponents of the codification idea are in minority. Furthermore, the legal community as a whole became tired of legal reform, which is understandable since the legal reform was an ongoing process during socialism, during the transitional period after the collapse of socialism and, finally, during the period of Croatia's accession to the EU.

As a matter of principle, the decisions of the courts do not have the significance of a legal source. In the legal theory of civil procedural law it is often emphasized that particular judgments of the courts are law, but only in the respect of the parties that took part in litigations. It is a typical feature of the legal orders of continental Europe, and the same is true about Croatian private law. The problem of legal gaps is resolved by the interpretation, and courts still demonstrate the tendency to interpret law on the basis of the grammatical method. In some cases the grammatical method does not lead to satisfactory results. The teleological method is much less important. Because of the fact that Croatia only recently became the EU member state, the influences of the ECJ regarding the interpretation of law are still not significant.

## 2.6 Final remarks

Recent reforms brought many changes into the field of Croatian private law. However, not all areas of private law were affected in the same way. Property law and land records law were the parts of private law that were reformed to a larger extent in comparison to the law of obligations, and the law of obligations was reformed more significantly than inheritance law. There were many reasons for the reform of Croatian private law, but two of those were the most significant. The first reason was the transition from socialism and planned economy to democracy and market economy. The transition in economy demanded a reform of law. The period of socialism deeply affected Croatian private law, which in many different aspects needed to be adapted to market economy. The second reason for the reform of private law was the process of Croatia's accession to the EU. Even though EU law is not focused on private law, there are many aspects of EU law that strongly influence private law of the member states. In this respect further reforms of Croatian private law can be expected. This is particularly emphasized regarding consumer protection legislation. At this point it can be predicted that any subsequent implementation of EU consumer protection law shall occur in special legislation and not in general civil law.



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## 3 CZECH REPUBLIC

*Milan Hulmák*<sup>300</sup>

### 3.1 Preparation of the Private Law Reform and its Materialization

#### *How long has the reform, including the preparatory works, been going?*

The reform was formally launched in 2000. In that year, JUDr. Otakar Motejl, who was minister of justice at that time, charged prof. Karel Eliáš and doc. Michaela Zuklínová with preparing a new Civil Code. The reform climaxed with the adoption of the new Civil Code (Act no. 89/2012 Coll.), Business Corporations Act (Act no. 90/2012 Coll.) and International Private Law Act (Act no. 491/2012 Coll.). A number of accompanying statutes were, however, not adopted until 2013 (e.g. the Land Register Act (no. 256/2013 Coll.))

#### *What were the reasons for the reform?*

There are many views of the reasons behind the recodification. Personally, I think that it just was not possible to build modern system of private law on remainders of a code dated 1964 and a commercial code dated 1991 without replacing them. Unlike mere amendments, the reform expressed discontinuity of general approach towards private law.

The old law stressed property relations resulting in limited regulation of status matters or compensation for personal injury. The old code lacked general rules for legal entities. Many provisions were of mandatory nature (e.g. lease of apartment by spouses, interest on late payment). This was related to the issue of preferring absolute invalidity as a universal remedy for all defects of juridical acts. A consensus was reached that there should be one source of private law (for twenty years, people kept arguing, in which cases

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<sup>300</sup> This article was supported by the project APVV-0518-11 „Ingerencia súdov do súkromnoprávnych zmlúv“ („Courts intervening in private-law contracts“)

the Commercial Code should be used; there were no obvious reasons for having two sets of rules for materially identical relations).<sup>301</sup>

Things were changing, of course, in legal practice, e.g. thanks to the influence of Constitutional Court case law, more progressive rules implemented in the Commercial Code and drawing inspiration from the Allgemeines bürgerliches Gesetzbuch (ABGB – General Civil Code). Nevertheless, some issues were destined to remain unresolved without legislative action (e.g. low damages in case of personal injury).

***Have there been elaborated any studies identifying the most crucial problems with exercising the former legal conditions in practice?***

A vast amendment of the Civil Code (Act no. 40/1964 Coll.) took place in 1991. The goal was to adapt the Civil Code to the new social environment. Civil Code became the general norm of private law. The Economic Code (Act no. 107/1963 Coll.) was repealed and replaced by the Commercial Code (Act no. 513/1991 Coll.)

The mentioned amendment was, however, viewed as a temporary solution. Even during the existence of Czechoslovakia, i.e. before 1993, professors V. Knapp and K. Plank oversaw drafting of a new civil code divided into sections at the Office of the Government of the Czech and Slovak Federative Republic. When the federation dissolved, all works on the project came to a halt. The draft version served as basis for further recodification works in the Slovak Republic, being finished by professors K. Plank and J. Lazár and passed by the government to the Slovak National Council in 1997. It was withdrawn later, however, without ever being discussed.

Prof. Zoufík prepared a new draft of a civil code in 1996 at the request of the Ministry of Justice.<sup>302</sup> The draft provoked no significant response and the project was abandoned later. It never reached the stage of a legislative proposal.

There were no significant studies intended to serve as a basis for the recodification. That was undoubtedly one of the reasons why it took relatively long to prepare the new Code and why such significant changes took place during

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<sup>301</sup> Chamber of Deputies Journal no. 362 (6<sup>th</sup> electoral term), pg. 562 *et seq.*

<sup>302</sup> *Právní praxe* magazine, XLIV, 1996, no. 5-6.

its drafting (discussions regarding what and how should be changed were taking place parallel to writing the text of the Code).

### *How was the reform organized?*

Prof. Karel Eliáš and doc. Michaela Zuklínová were charged with drafting the new Civil Code in 2000. They collaborated with the Private Law Recodification Commission organized by the Ministry of Justice. The commission discussed the Civil Code and commented on the draft.

The legislative proposal was approved in 2001.<sup>303</sup><sup>304</sup> The entire text of the new Civil Code was published in 2005.<sup>305</sup> That was followed by a wave of conferences, where the draft Civil Code was debated.<sup>306</sup> 20 independent experts and judges of the Civil and Commercial Divisions of the Czech Supreme Court gave their opinion on the draft. In autumn of 2007, the draft text of the Civil Code was divided into ten parts. Ten mini-teams were constituted consisting mostly of persons not taking part in the works up to that point, overseen by a steering committee. Each of the mini-teams went through an assigned part of the draft text and prepared a report including recommendations. After the recommendations were either adopted or rejected, the draft was presented to other central authorities to comment upon in 2008. A year later, in 2009, the bill made it to the Chamber of Deputies.<sup>307</sup> Alas, there was not enough time to discuss it. Therefore, another round of comments was requested and the bill was presented to the Chamber of Deputies again in 2011.<sup>308</sup> <sup>309</sup>

<sup>303</sup> Approved by resolution of the government no 345 on 18<sup>th</sup> April 2001.

<sup>304</sup> Published in ELIÁŠ, K., ZUKLÍNOVÁ, M. *Principy a východiska nového kodexu soukromého práva (Principles and bases of the new private law code)*. Prague: Linde, 2001, 190 ff.

<sup>305</sup> ELIÁŠ, K., ZUKLÍNOVÁ, M. *Návrh občanského zákoníku (Část první až čtvrtá) (Draft of the new Civil Code – Parts One to Four)*. Prague: Ministry of Justice of the Czech Republic, 2005. Later updated versions were published on the web of the Ministry of Justice.

<sup>306</sup> Individual parts were discussed during seminars organized by the Institute of State and Law. Special debate forums were organized by the Faculty of Law of the Charles University (resulting in a series of Collections of essays on the recodification of private law published by Aspi in 2006 and 2007). Similar activities took place at the Faculty of Law of Palacký University (e.g. Compendium from the conference on the planned recodification of the Civil Code dated 30<sup>th</sup> November – 1<sup>st</sup> December 2005).

<sup>307</sup> Chamber of Deputies Journal no. 835 (5<sup>th</sup> electoral term)

<sup>308</sup> Chamber of Deputies Journal no. 362 (6<sup>th</sup> electoral term)

<sup>309</sup> For more detail on drafting and approving the new Civil Code, see SVATOŠ, M. in MELZER, F., TÉGL, P. a kol. *Občanský zákoník. § 1-117. Velký komentář. Svazek I. (Civil Code. Section 1-117. Big Commentary. Volume I)*. Prague: Leges, 2014, pg. XXI et seq.

***Were any critical remarks raised by representatives of legal theory or practice taken into account?***

Basic private law codes were drafted in a transparent manner under the supervision of expert public. The proposed text was often discussed in professional press and during conferences.<sup>310</sup> Many experts participated in preparation of the text, such as members of Private Law Recodification commission. In 2007, the text was subject to debate in expert groups, so-called mini-teams. Those mini-teams recommended amendments, some of which were later adopted in the text. The text was also consulted with judges of the Supreme Court. State authorities were asked twice to give their comments on the draft, albeit on a different version each time. That procedure included review by legislative governmental bodies, including Government Legislative Council. An entire different chapter consisted of consulting various stakeholders, such as banking associations, travel agency associations, tenants and landlords, various NGOs etc.

Throughout the preparation of the new Civil Code, decisions were made as to which comments should be reflected and which should not. Of course, the many participating lawyers never reached a common position (there were numerous opposing views as to the necessity and content of the reform itself). The scope of recommendations built-in the code can be easily documented by comparing the first published version of the code with the final text of the statute or the text of the bills discussed for the first and the second time by the Chamber of Deputies or the original proposal.

For example, obligatory civil marriages were left out of the Code as a result of incoming comments. On the other hand, numerous sections were added into the Code, such as trust law, broader regulation of consumer law or easements regarding public utility networks. The issue of possession was significantly reviewed several times. Very inspiring comments were raised regarding legal regulation of impaired legal capacity. Some deficiencies in the area of contract law were remedied. To mention some of the lesser issues, let us not forget for example the regulation of setting off. On the other hand, the effort to adopt regulation of torts from PETL was unsuccessful.

<sup>310</sup> One of the first, taking place even in the sage of a legislative proposal, was organized at the Ministry of Justice from 30<sup>th</sup> to 31<sup>st</sup> October 2000 (texts were published in *Právní praxe* magazine, 2001, no. 1-2).



***Which laws have been prepared or adapted in the course of the reform? For instance, if there was adapted a new civil code as a part of the reform, was such a civil code being prepared separately or were there any other laws being prepared together with it? These “other laws” could be not only brand new laws, but also already existing laws which had to be amended as a result of the passage of the new civil code.***

The Civil Code (Act no. 89/2012 Coll.) was prepared together with the Business Corporations Act (no. 90/2012 Coll.) and the International Private Law Act (no. 91/2012 Coll.). Especially the relation between the Civil Code and the Business Corporations Act saw numerous changes and developments (the original plan was to incorporate a number of business-related issues, such as business firm, enterprise, agency etc., in the Business Corporations Act). Derived regulation was, understandably (also in light of overall uncertainty as to the actual approval of the Code by the parliament), not prepared until after the bill itself was passed (Land Register Act (no. 256/2013 Coll.), amendments of various derived legislation (act no. 303/2013 Coll.), Public Legal Entities Register Act (no. 304/2013 Coll.), amendment of procedural legislation (act no. 293/2013 Coll.), Special Court Proceedings Act (no. 292/2013 Coll.). In some cases, draft bills prepared for the previous codes were used (such as act no. 67/2013 Coll. on certain issues related to using apartments and nonresidential premises in residential houses).

***How long was or has been the period of *vacatio legis* set by the lawgiver?***

The new Civil Code was promulgated in the Collection of Laws on 22<sup>nd</sup> March 2012. The Code became effective on 1. 1. 2014. This equals to *vacatio legis* of about 21 months.

The bill was originally intended to become effective on 1. 1. 2013, however it was quite clear that such date was not realistic.<sup>311</sup> After passing the new Civil Code, several attempts were made to postpone its effect. Those attempts

<sup>311</sup> See § 3046 in Chamber of Deputies Journal no. 362 (6<sup>th</sup> electoral term).

failed. A conference took place at the Committee of Constitutional and Legal Affairs as late as November 2013, discussing the option of postponing the effect date of the new Civil Code.

One of the reasons behind the effort to delay effect of the new Civil Code was, among other things, remaining backlog of accompanying legislation to be approved. In the middle of debating accompanying statutes, the Chamber of Deputies was dissolved and snap election took place. The Deputies, however, managed to approve part of the necessary legislation before the actual dissolution.<sup>312</sup> It was, however, up to the Senate to adopt several senatorial decrees approving several key statutes of the private law reform. As a first step, the Senate rejected proposed changes of tax legislation, passing its own amended versions instead.<sup>313</sup> To maintain binding force of those decrees, the statutes thus adopted had to be ratified at the first meeting of the Chamber of Deputies following the election. Otherwise, the decrees would expire (Article 33 paragraph 5 of the Constitution of the Czech Republic). Numerous pieces of derived legislation were not approved by the government until late 2013.<sup>314</sup>

### 3.2 Foreign and European Models

*Was the reform inspired by any foreign civil codes? Is there obvious influence of a single foreign code or was the inspiration taken from several sources? If there were more sources, is the final outcome consistent, as for both its content and terminology?*

<sup>312</sup> Act no. 303/2013 Coll., on amendment of certain acts in relation to the recodification of private law.

<sup>313</sup> Senatorial Decree no. 344/2013 Coll., on amendment of tax law in relation to the recodification of private law and on amendment of certain acts.

<sup>314</sup> E.g. governmental regulation no. 351/2013 Coll., on late payment interest and debt enforcement costs, remuneration of a liquidator, liquidation administrator and officer of legal entity appointed by court and certain aspects of the Business Journal and public registers of legal entities and natural persons, governmental regulation no. 363/2013 Coll., on template information regarding the right to cancel distance contracts or contracts entered outside business premises and the template cancellation form for such contracts.

The new Civil Code draws inspiration from foreign sources on many levels. However, there was no one determinative model because that would make the entire reform absurd from a certain perspective.

The original assignment included the instruction to draw inspiration especially from the draft Civil Code from 1937. Of course, legislation of neighboring states provided numerous ideas, e.g. the BGB (e.g. torts, dissent, auction, status of animals), ABGB or the Polish Civil Code.

The explanatory report accompanying the Civil Code refers also to the ZGB (loopholes in law in § 10), Codice Civile (assignment of contract, family enterprise) or Quebec Civil Code (trusts, adhesion contracts (§ 1798), subcontractor's responsibility for a work (§ 2630)). Some changes are derived from the Dutch Civil Code (such as the healthcare contract).

Regarding mutual compatibility of the solutions adopted from various codes, only time will tell, which solutions work and which do not. From the perspective of terminology, the Code has now been unified. However, problems will unquestionably arise. For example, the regulation of adhesion contracts (§ 1798) serves the purpose of general consumer protection in Quebec. The Czech Code, on the other hand, includes separate consumer protection sections. Therefore, it is to be seen, if adhesion contracts provisions (§ 1800 subsection 2) should be applied in cases exempt from consumer protection law (§ 1813).

***If adopting foreign models, was the lawgiver inspired mainly by actual law in action or did he only copy and rephrase the text of such foreign models?***

The foreign codes were not used just as a source of inspiration for the statutory text. Their application was also examined. However, our knowledge is limited in that respect.

In the stage of drafting the proposal, many ideas were left out in light of obtained knowledge (such as exclusion of right of first of refusal

of a co-owner).<sup>315</sup> It is quite clear now that certain rules adopted from abroad were not understood correctly, i.e. our theoretical understanding of such norms deviates from their actual use in practice (e.g. there can be doubts about the mentioned § 2630 and its compliance with the original Article 2118 - 2120 of the Quebec Civil Code, the new concept of family enterprise is a major issue on its own (§ 700 and Article 203bis Codice Civile).

***Was the reformed inspired by some European projects, e.g. Common frame of reference?***

When drafting the new Civil Code, our legislators sought inspiration in various similar projects throughout the European Union. However, no comprehensive solution was transformed as a whole.

UNIDROIT Principles 2010 were reflected e.g. in case of surprising clauses in commercial terms and conditions (§ 1753) or resolving a battle of forms (§ 1751). The Draft Common Frame of Reference was reflected e.g. in case confirmation letters (§ 1757) or the rebuttable presumption of a public offer (§ 1732 subsection 2). The European Contract Code played a rather significant role, inspiring the new contract law as a whole (causing many problems due to a different legal tradition), e.g. the newly introduced pre-contractual liability.

We should also not forget international treaties. For example the rules regarding mentally disabled people was largely influenced by the UN Convention on the Rights of Persons with Disabilities and resulting obligations on the part of the Czech Republic being implemented in the Czech legislation. Also, certain treaties of the International Labour Organization (no. 138/1973) were implemented as well as the Convention on the Rights of the Child.

<sup>315</sup> Article 5. 1. 3 of the proposal stated: “The act will no longer grant the right of first refusal to other co-owners, because such element is, in principle, alien to the institution of co-ownership. (Traditional legal systems of continental Europe have no such rules). It should be considered, whether the other co-owners should be protected in some different way.” The text can be read at [http://obcanskyzakonik.justice.cz/fileadmin/vecny\\_zamer\\_OZ\\_2000.pdf](http://obcanskyzakonik.justice.cz/fileadmin/vecny_zamer_OZ_2000.pdf) [as of 1. 9. 2014]). It was discovered later that co-owners’ right of first refusal was, in fact, included in many foreign legal systems.

### ***How has the reform adjusted to the EU law?***

The new Civil Code implements a number of European Directives. A partial attempt to list them was undertaken in § 3015.

Nevertheless, it is certain that correct implementation of Directives is a never ending story. Even more so in case of the new Civil Code, regarding the fact that the Directive 2011/83/EU on consumer rights was expecting imminent approval at the time when the Chamber of Deputies was discussing the bill. The Directive was implemented in the bill without any substantial debate, mostly by the Committee of Constitutional and Legal Affairs, before the Directive was even approved.<sup>316</sup> It should, however, be mentioned here that certain deficiencies were taken over from the older law, where they posed no problem (e.g. failure to implement Article 5 last sentence of Directive 93/13/EEC).

An example of bad Directive implementation is the public law corporation in § 1963 (it should be contracting authority under Article 2 paragraph 2 of Directive 2011/7/EU). This opens area for euro-conform interpretation.

## **3.3 The Subject Matter Aspects of the Reform**

### ***Which fundamental changes to the content have been brought by the reform as compared with the previous regulation?***

#### a) ***Basic positions***

Central focus of the new Civil Code is on human being and his or her liberty. The Code no longer focuses on regulating property relations (§ 1 of Act no. 40/1964 Coll.), focusing first and foremost on human beings and their personal relations. Autonomy of human will is stressed. The idea that everything is permitted, which is not prohibited, has come to full fruition.

#### b) ***Terminology***

The new Civil Code changes some basic terminology used in legal practice up to this point, e.g. things, juridical acts or their invalidity.

##### ▫ ***Things***

<sup>316</sup> This is no rarity in Czech conditions, most of the consumer protection sections of Act no. 40/1964 Coll., was created at the same place.

The Civil Code is based on the idea that a “thing” is everything other than a person, as long as it serves the needs of people (§ 489). Things are either tangible (also e.g. electricity as a controlled force of the nature) or intangible (e.g. property rights).

In case of real estate, the principle of *superficies solo cedit* has now been enacted (§ 506). Principally, only lots of land can be described as real estate. Structures built on land, with certain exceptions, are now mere parts of the land they stand upon. The mentioned exceptions include subterranean structures independent as to their use or public utility networks (§ 509). The term “real estate” now includes also *in rem* rights to land as well as other rights if law stipulates so (§ 498). Transitional provisions deal with the effect of the new Code on existing state of affairs.

The new regulation is aimed at securing better protection of individual pieces of property. It allows creation of *in rem* rights (as far as reasonable) and provides remedy for certain problems of the older code (debates which structures are and are not a part of the land they stand upon, omitting structures or lots of land in contracts etc.).

▫ ***Juridical acts***

Expression of will resulting in legal consequences is now called a “juridical negotiation”. This is a change compared to the older term “juridical act”, reflecting the change in the meaning. Law distinguishes between elements necessary for the mere existence of such negotiation (i.e. legal negotiation missing some of the elements is disregarded) and elements necessary for the negotiation to be valid.

As a general principle, respecting the will of the person acting becomes a key element. Legal negotiations should be viewed as valid rather than invalid. As a result, many formal requirements were left out. Some defects can be remedied retroactively, e.g. lack of form or precision. Violation of law results in invalidity only if purpose of the law so requires. Only blatant violation of good manners, law and public order now results in absolute invalidity (§ 588). If a juridical negotiation is impossible from the beginning, this also leads to absolute invalidity. All other cases result in relative invalidity,

allowing for remedying the invalidity and giving rise to the necessity to object to such negotiation (including even such cases as illegal threats).

The Civil Code includes guidelines for certain cases. Some juridical negotiations are to be disregarded (e.g. unreasonable provisions of consumer contracts), at some points, invalidity is the statutory sanction (e.g. unreasonable provisions in adhesion contracts).

▫ ***Persons***

The basic ideas regarding persons and personality remained unchanged. The possibility of declaring a person fully legally incapable was limited (including addition of various form of support, e.g. representation by a family member, maximum time of limited capacity, prohibition of declaration of complete legal incapacity). On the other hand, there are now more possibilities to grant full legal capacity to minors (emancipation). It is now harder to declare a person dead and a new concept of a “missing” person is introduced. Newly regulated is also the effect of gender change on personal status of a person.

Unlike the old Civil Code, the new Code includes detailed regulation of legal entities including foundation and institute.

c) ***Family law***

Family law tends to be connected to traditions and cultural habits of any given society. Family association law therefore requires higher level of stability. The new Civil Code respects the mentioned requirement and no basic changes take place in the area of family law.

From practical perspective, an important aspect is incorporating the marital property issues in to the bulk of family law. Unlike the old Code, only profits generated from exclusive property of one of the spouses now becomes a part of the community property (e.g. lease x profit from the lease). Spouses now enjoy greater freedom when regulating their property regime, allowing them e.g. to prevent the existence of community property at all (separate properties).

The new Code protects family in a more effective way. Exclusive property dispositions are now limited by the interests of the family – e.g. cases where a family lives in a house owned by just one of the spouses. In some cases, consent of the other spouse is required.

On the other hand, the new Code strengthens the rights of third persons. A public register of marital property agreements was created, however with agreements registered only if so agreed by the spouses or based upon an application by both spouses. Among other things, enforcing a third-party claim against the community property of both spouses is now regulated.

d) ***Absolute Property Rights***

The absolute property rights include the rights *in rem* and the law of inheritance. Their basic characteristics results from the titles - effects towards third persons and property character.

▫ *Rights in rem*

As for the rights *in rem*, the new Civil Code is also based on the principle of their exhaustive list. The law only determines what rights are rights *in rem*. However, their list is extended, e.g. prohibition of alienation and encumbrance of a thing, additional clauses in a sales contract. In addition, it cannot be omitted that also other rights may be recorded in the public register whereby their effects towards thirds persons extend (e.g. lease, usufructuary lease, and waiver of the right to damages).

The rules to protect good faith in case of acquisition from an unlawful possessor are codified whether movables or things recorded in the public register are in question. Thus, under certain circumstances an acquirer may become an owner also in case if he/she enters into a contract with a person who is not entitled to dispose of an object of sale.

Newly worded servitudes of public utility networks, a possibility of extraordinary acquisitive prescription, an adjustment of boundary markers, or a possibility to determine boundaries by the court are of practical importance. Possibilities of parties are extended also in the field of the law of secured transactions. It is possible to negotiate a negative pledge but also a self-help sale of a pledged thing, a future security interest. A regime of released security interest as well as possibility of a substitution of security interest is dealt with. Trust law is also a part of the new Civil Code.

▫ *Law of Inheritance*



In the law of inheritance there is also obvious strengthening of the meaning of an individual's will, i.e. a testator's will in this particular case. It has an impact on new possibilities of disposition *mortis causa* (inheritance agreement, legacy, donation *mortis causa*), on a possibility to set the conditions and orders, reduction of protection of forced heirs (lowering limits, ensuring a testament remains valid, simplification of disinheritance) as well as in the institute of succession by *fideicommissum*. Thus, a testator may appoint an heir of his/her heirs with respect to his/her property.

The conception of passage of debts has changed. Protection of a creditor is generally strengthened. A claim will not be statute-barred earlier than six months after inheritance proceedings were completed. All the debts of a deceased person pass to heirs. However, an heir may prevent from passing all the debts by means of the institute of reserving the making of an inventory (however, an heir is responsible for correctness).

e) ***Relative Property Rights***

The field of the law of obligations has also undergone a certain reform. Fundamental changes appear especially in the field of non-contractual obligations (obligations resulting from wrongs) and regulation of unjust enrichment.

▫ ***Contractual Obligations***

In the field of the law of contractual obligations there are no fundamental changes. The major change is the consolidation of the regulations of the Civil and Commercial Codes. Many provisions in the new Civil Code have been obviously inspired just by the regulation in the Commercial Code.

In principle, a regime of contracting will be left up to an agreement between parties. Unlike the previous legal regulation the absolute agreement of an offer and an acceptance will not be required. As for the commercial terms and conditions the law stipulates conditions under which it is possible to change them with the reservation of termination of a contractual relation. A possibility of a letter of acknowledgement has been inspired by the regulation in Germany. Strengthening of freedom of contract is balanced by an emphasis on protection of the weaker party. Therefore there is an express

regulation of usury, *laesio enormis*, concluding adhesion contracts, surprising clauses in the commercial terms and conditions, etc. In the relationships among entrepreneurs this regulation will not be often applied or it may be excluded. The protection of a consumer is conceived relatively narrowly (a consumer as a natural person); however, just as according to the previous regulation it includes a list of clauses that are automatically considered unreasonable (black list). The problems of practice are responded, for example, by an express regulation of assignment of receivables, assignment of a contract or by a more detailed regulation of securing transfer of rights.

The contract types are based on the previous legal regulation and often inspired by the regulation in the Commercial Code.

▫ ***Torts and Unjust Enrichment***

*Torts*

The new regulation of damages abandons some “good truths” of the previous legal regulation. First, consolidation of the regulations of proprietary damage and other than proprietary damage (i.e. also financial just satisfaction at the protection of personal rights) must be mentioned. On the other hand the uniform conception of a tort is abandoned and statutory liability and contractual liability are distinguished (liability without fault, causal nexus based on foreseeability). The new Civil Code will make restriction of liability to damages possible; exceptions are harm caused to a person’s natural rights, harm caused intentionally, or as a result of gross negligence, and harm towards a weaker party.

The law still contains a duty of prevention. However, in principle it is limited to protection of the absolute rights (e.g. freedom, life, health, property). A special regulation deals with a liability for failure to act, e.g. a failure to render assistance.

The following novelties may also be mentioned: admission of an alternative casual nexus in a certain extent and changes in determining an amount of damage (in principle efficient costs for restoring the function of a thing, cancellation of scoring of harm to health). As for the special cases of damages, restriction of a liability for compensation as against the existing regulation of liability for damage caused by circumstances (newly by a defect) that have

origin in the nature of an instrument, or on the other hand extending in case of compensation of damage caused by an extra dangerous operation (a significant increase of harm arising is enough) are worth mentioning.

*Unjust enrichment*

The new Civil Code does not contain an exhaustive list of single facts of unjust enrichment. On the other hand the lawgiver realizes that enrichment is a common part of human life and the cases that are not unjust enrichment occur (e.g. acting in one's own interest that will enrich also other persons).

More considerable protection of good faith in acquiring unjust enrichment, e.g. if enrichment was forced on and subsequently ceased to exist, comes up.

***Does the new regulation keep continuity with the previous regulations or is it rather discontinuous? If so, to what extent is it discontinuous? As for the extent of continuity or discontinuity, consider not only the content, but also the language and terminology.***

The meaning of the reform is a certain discontinuity otherwise the reform would lack its purpose. Another question is whether to review continuity in the situation when during the period of 100 years four significantly different legal regulations of the private law were in operation. From this point of view the new regulation often returns to well-established solutions from the General Civil Code (in its fundamental parts it was effective in the territory of the Czech Republic until 1951, in some of them even longer), but at the same time, in a number of fields it continually continues in the previous regulation (e.g. regulation of a number of contract types, protection of a consumer). A high extent of continuity naturally is in the field of the family law, on the contrary a high extent of discontinuity is in the field of law of inheritance.

From the point of the language it is clear that the code was primarily written by one person, prof. Eliáš. It was not written in the official language of lawgivers. The character of the language deviates from the language commonly used at the present as well as previous laws; it makes an unusual

impression.<sup>317</sup> As for the terminology, of course, in some case shifts occur (e.g. a thing, making juridical acts, simple loan), in other ones not. From the point of view of understanding a problem may rather be certain rich formulations where many times a question whether the lawgiver was looking for different meanings in different formulations (then these are nuances), or whether it is just a different formulation of the same arises.

***Has the reform brought certain institutes or provisions that can be considered as original, i.e. they do not exist in other states?***

Answering this question would require knowledge of other legal systems. However, an accommodation contract (s. 2326 *et seq.*) is not a usual part of the civil codes. Nevertheless, it is nothing original. It is an adoption of the regulation from the previous Civil Code that originally regulated in particular rendering services to the citizens by the socialist organizations (s. 1 of Act No. 40/1964 Sb., in the original text).

***Has the reform also touched the proportion of the autonomy of will and protection of the weaker contractual party? Which institutes restrict the autonomy of will? Under what criteria are the mandatory norms distinguished from non-mandatory norms?***

The Civil Code is to be the law for life, thus the provisions of the Civil Code primarily are non-mandatory. The law contains a general rule for determination of mandatory rules, not a list of mandatory provisions (similarly as the previous regulation in s. 2 (3) of the Civil Code of 1964 or s. 19 (2) OR).

The provisions of the law are mandatory where it is expressly set forth. It is possible to deviate from the other ones save the provisions are, for example, violating good morals, public order, infringing the right concerning the position of persons, including the right to protection of personal rights (s. 1 (2)). Mandatorines may be expressed directly (so that it is not possible

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<sup>317</sup> However, in November 2008 the Institute of the Czech Language of the Academy of Sciences of the Czech Republic issued statement that evaluated text as generally comprehensible for an ordinary citizen unlike the other legal rules.

to deviate (e.g. under a sanction of invalidity (s. 2549) or putativeness (e.g. s. 1812 (2))) or indirectly (so that it results from the meaning and purpose of the norm (e.g. s. 580 (1))).<sup>318</sup>

Thus, also the regulation of the rights *in rem* is non-mandatory in principle; such an agreement has effects towards third persons only if it is set by the law (s. 978). In some cases relative mandatory character is expressed, i.e. impossibility to deviate to the detriment of one party (e.g. s. 2235 – the regulation of leasing a flat and a house).

As compared with the previous regulation, many institutes whose purpose is protection of weaker party, e.g. prohibition of misuse of economic dependence (s. 433), usury (s. 1796), *laesio enormis* (s. 1793), and adhesion contracts (s. 1798) have been put in the law. The protection against surprising clauses in the commercial terms and conditions (s. 1753) or against interest accrual (s. 1805) was expressly regulated. Sanctioning of acting in contradiction to good morals (s. 588) or acting in bad faith (s. 6 (2)) are implied by the law. The protection of a consumer (s. 1810 and foll.) is contained in a separate chapter.

### 3.4 Experience with Exercising the New Regulation in Practice

#### *Is there any experience with exercising the new legal regulation in practice? Which provisions showed to be most problematic?*

After eight months of application of the new Civil Code it is too early to be indicative of some provisions that cause problems in practice. It appears that some provisions offer more solutions. The first commentaries on the new Civil Code differ in many fundamental issues (e.g. a requirement of a form of making juridical acts).<sup>319</sup>

<sup>318</sup> MELZER, F., TÉGL, P. and others. *Občanský zákoník (The Civil Code)*. ss. 1-117. *Velký komentář (Great Commentary)*. Volume I. Prague: Leges, 2014, p. 40 and foll., LAVICKÝ, P. a kol. *Občanský zákoník I (The Civil Code I)*. *Obecná část (General Part)* (ss. 1-654). *Komentář (Commentary)*. 1. ed. Prague: C. H. Beck, 2014, p. 20 and foll.

<sup>319</sup> An integrated series of the commentaries on the new Civil Code is issued by the publishing houses C. H. Beck, Wolters Kluwer and Leges. It is expected that complete two commentaries on the entire Civil Code will be published at the end of the year.

One of the most discussed provisions is s. 441 (2) ordering that power of attorney must be in the form required for making juridical act of an attorney. It turned out that its meaning was underestimated. Consequences of a failure to comply with such a form of a power of attorney create a separate issue. The conclusions connecting a failure to comply with the form of a power of attorney with fundamental consequences for making juridical acts that admittedly have been made by an attorney, but without a power of attorney in the due form have been enforced. Then, it causes big problems in practice in relation to making acts of foreign persons as the sole members of business partners, e.g. a need of a power of attorney in the form of a notarial deed.<sup>320</sup>

Similarly, an extensive discussion broke out about the content of s. 2165 of the new Civil Code where it is set forth that a buyer may exercise rights resulting from defects that occur in consumer products within the period of 24 months from take-over. On one hand there are opinions seeing a statutory warranty in it, the others, in the context of other provisions, understand it as a mere modification of the period for exercising the rights resulting from defects; there is also a third group of opinions.<sup>321</sup> It is an example of irresponsible interventions during the preparation.

The practice tries to avoid problems. If a problem is identified, the effort is to adopt a solution that will stand all the case, or more precisely before a necessary authority, e.g. Land Registry, a notary public, the Commercial Court (e.g. a form of decision of an assembly of the unit owners on changing the by-laws of the unit owners association - s. 1200 (3)).

<sup>320</sup> KANCL was not able to reach an agreement on a universal solution; partial problems were solved by his opinions No. 12 and 28. The Supreme Court issued his highly criticised decision file No. 29 Cdo 3919/2014 to explain this provision.

<sup>321</sup> In addition to statements in the press, concerning the discussion of this issue, for example, HULMÁK, M. in TICHÝ, L., KOČÍ, M. (eds.) *Spotřebitelská kupní smlouva (Consumer Contract of Sale)*. Prague: UK Prague, 2013, p. 29. LIŠKUTÍN, T. Otazníky nad zákonnou zárukou při prodeji zboží v obchodě od ledna 2014 (Question about the statutory warranty when selling goods in a shop since January of 2014). *Journal Právní rozhledy*, 2014, No. 5, p. 160. TOMSA, M. Ještě jednou k odpovědnosti za vady při prodeji zboží v obchodě (Once again about liability for defects when selling goods in a shop). *Journal Právní rozhledy*, 2014, No. 11, p. 404. TICHÝ, L., PIPKOVÁ, P. J., BALARIN, J. *Kupní smlouva v novém občanském zákoníku (A contract of sale in the new Civil Code)*. 1<sup>st</sup> edition, p. 411 - 414

***Are some provisions being interpreted significantly different from their lingual expression or from the original intention of the lawgiver?***

During the preparation of the code there already was a number of questions which were not answered uniformly even among the members of the committees. The answers to them were postponed to the future. Therefore intensification after passing the code is understandable. Many shifts in the interpretation occur.

An example which can demonstrate this shift is so called “Klokánky”. These are facilities for children that need immediate help. In the preparation it was proceed from the fact that a child could be put into such facilities temporarily for the period of six months as maximum (s. 971 (2)) and during this period it should be decided on further care (parents’ care, adoption, foster care, entrusting into the custody of a third person, institutional care, etc.). Under the pressure of media and these facilities the Ministry of Justice has adopted the interpretation that children may be put in these facilities repeatedly if it is in the interest of the child (s. 971 (2)).<sup>322</sup>

***Has the legal certainty become significantly lower after the new regulation entered into force, e.g. as for predictability of court decisions? Have there been taken any measures with this respect?***

The reform of the private law has certainly been an intervention in legal certainty. The Civil Code alone has cancelled 238 legal regulations or their parts. If it did not happen so, it would not be a reform and adopting the new Civil Code would be unnecessary. An attitude of the justice to the code has been expected with excitement.

However, the new Civil Code is not a code for five years but a basis of the private law that should be in operation for decades. The legal certainty is what the code should lead to. A similar situation is in predictability of court decisions. Neither one is a result of a moment but the demonstration of the stable legal environment.

<sup>322</sup> An interpretation opinion on a stay of children in the facilities called “Klokánek” is available at <http://portal.justice.cz/Justice2/MS/ms.aspx?o=23 & j=33 & k=6230 & d=334622> [cit. 1. 9. 2014].

The previous regulations of the private law were provisional solutions adopted after the year of 1989. They hardly could lead to the stable legal environment (Act No. 40/1964 Sb. was amended 48 time in the period from 1989 to 2011) and many issues were regulated in the special regulations.

It was not possible to talk about a high level of predictability of court decisions even before passing of the new Civil Code. The following examples may be mentioned: an idea of the protection of good faith of an acquirer of real property that had been gaining ground in the case law gradually for 20 years; opinion of the Constitutional Court Pl. ÚS-st. 21/05 according to which many people were deprived of their claims through the restitution proceedings, invalidity of the securing transfer in the form of a fiduciary transfer, the Supreme Court, file No. 31 Odo 495/2006.

The Ministry of Justice was aware of an intervention in the legal certainty and a need of public education regarding the new Civil Code. The Ministry of Justice organized an information campaign, presented the basic changes in the media, and arranged a number of trainings for officer of administrative authorities. The education of judges was ensured by the Czech Judicial Academy through a great number of trainings at the seats of the regional courts.<sup>323</sup> The Committee for application of the new civil legislation was established at the Ministry of Justice that was answering the questions of the public concerning the new Civil Code.<sup>324</sup> Its expert group composed of representatives from practice as well as academic community discussed the more complicated issues; records of their talks and adopted opinions on the single issues were published.<sup>325</sup> These not binding opinions were of welcome assistance for the practice in solving the first.

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<sup>323</sup> Only till September of 2013 trainings for 5509 persons from the ranks of judges and prosecuting attorneys were held ([www.jacz.cz](http://www.jacz.cz)).

<sup>324</sup> Answers to frequent questions were published at <http://obcanskyzakonik.justice.cz/infocentrum/caste-dotazy/> [cit. 1. 9. 2014].

<sup>325</sup> Its opinions are available at <http://obcanskyzakonik.justice.cz/vykladova-stanoviska/> [cit. 1. 9. 2014]



### 3.5 New Civil Code

***What is the position of the civil code within the scope of private law? Is there also any separate commercial law codification or are the commercial law provisions included in the civil code? Are any special provisions in the civil code applying solely to businesses? Does the civil code also regulate family law issues?***

The new Civil Code creates the unified private law. The Commercial Code (Act No. 513/1991 Sb.) was repealed. However, it does not mean that the Civil Code would not contain any special regulation. It regulates the position of an entrepreneur (s. 420 *et seq.*); some provisions are primarily applicable to the relations of entrepreneurs (e.g. regulation of a due date of a debt in s. 1963, regulation of letters of acknowledgement in s. 1757), other provisions are excluded (e.g. regulation of usury pursuant to s. 1796, regulation of *laesio enormis* pursuant to s. 1793).

The Business Corporations Act (Act No. 90/2012 Sb.) regulates only the status matters of business companies and cooperatives.

The new Civil Code also includes the regulation of the family law (Book II). The regulation of the registered partnership was left out of the code for the purely political reasons (Act No. 115/2006 Sb.).

***What is the structure of the civil code? How many parts or chapters does the civil code consist of? How are the parts and chapters entitled and how are they subdivided?***

The new Civil Code contains 3081 provisions divided into five parts (books) – I. General, II. The Family Law, III. Absolute Property Rights, IV. Relative Property Rights, and V. Common and Transitional Provisions.

Book I., the General Part, is divided into titles that regulate the scope of regulation and its basic principles, persons, representation, things and their division, and legal facts.

Book II., The Family Law, is divided into the following titles: Marriage, Family Relationship and Relation by Affinity, Tutorship and Other Forms of Care for a Child.

Book III., Absolute Property Rights, contains the following titles: General Provisions, Rights in rem, and the Law of Inheritance.

Book IV., Relative Property Rights, includes the following titles: General Provisions on Obligations, Obligations Resulting from Making Juridical Acts, Obligations Resulting from Wrongs, and Obligations Resulting from Other Legal Reasons

Book V., Common, Transitional, and Final Provisions, contains two titles: Common Provisions, and Transitional and Final Provisions.

***Does the civil code include provisions on connection between private and public law? Or if the civil code does not include any such express provisions, what approach to this issue is taken by legal theory and practice? For instance, the Sec 1 para 1 of the new Czech Civil Code prescribes that exercising of private law shall be independent from exercising of public law; however most of the theorists do not share this approach and consider it unsustainable.***

In s. 1 (1) the new Civil Code emphasizes that exercising the private law is independent of exercising the public law, namely according to article 7 of *Code Civil*. It is a mere principle of the new code. The unity of law as emphasized by the Constitutional Court<sup>326</sup> is not interfered with. Likewise, the point is not that the public law (e.g. constitutional law, procedural law) would not have an influence on the private law.<sup>327</sup>

The independence in exercising the private law becomes evident especially in four areas. The definition of terms for the purposes of public regulation cannot be adopted automatically in the field of the private law (e.g. the definition of the term “flat” in the building regulations), an absence of public authorization to a certain activity does not automatically mean an invalidity of a juridical act (s. 5), breaching a provision of the public regulation does not automatically mean invalidity of a juridical act (s. 580), breaching a public duty does not automatically mean the right to damages (s. 2910).

<sup>326</sup> E.g. judgment of the Constitutional Court, file No. Pl. ÚS 33/2000.

<sup>327</sup> Compare a list of cases when the Civil Code itself calls for the public law in LAVICKÝ, P. Kritické poznámky ke koncepci návrhu občanského zákoníku (Critical notes on the conception of the bill of the Civil Code). *Journal Právní rozhledy*, 2007, No. 23, p. 848.

Rather than a substantial novelty in the legal regulation it is a response to the previous legal regulation and generalization of the principle that projects in further provisions. However, it does not mean that the public law might not have private consequences (e.g. a decision on the permission to enter a record in the Land Register in order to acquire a right of ownership of registered real property, ordering a duty to modify real property because of protection of the public interest in the lessee's obligation).<sup>328</sup>

***Does the civil code include many procedural provisions or does it keep the procedural provisions on minimum level with respect to lucidity of the laws?***

The Civil Code stipulates the rights and duties of individuals whereby it also stipulates to a great extent what preconditions must be complied with in order that the right would be recognized (e.g. existence of a contract, debtor's default, a breach of duty, and a right to compensation of harm, etc.). However, in many places a procedure how to seek these rights before the court or another competent body is regulated.

The Civil Code stipulates:

- a) burden of proof of individual legal persons either by an express formulation (s. 1839, s. 2006 (2)) or by determining rebuttable presumptions (s. 2911);
- b) a requirement of provability, apparent nature (e.g. s. 8, s. 588, s. 1095, s. 2072)
- c) content of an action (e.g. revindication in s. 1041 (1), a formulation of demand for relief in s. 589),
- d) time limits for lodging a petitions (e.g. s. 1008, 2290),
- e) not being bound by a procedural motion (e.g. s. 577),
- f) binding effect of judicial decisions and reasoning of deviations (s. 13).<sup>329</sup>

<sup>328</sup> Compare. ELIÁŠ, K. K justifikaci pravidla o nezávislosti uplatňování soukromého práva na uplatňování práva veřejného (Justification of a rule the independent exercise of private law on public law). *Právník*, 2014, 11, 1007-1033. MELZER, F., TĚGL, P. and others. *Občanský zákoník (The Civil Code) 117. Velký komentář (Great Commentary)*. Volume I. Prague: Leges, 2014, p. 40 and following.

<sup>329</sup> More details in LAVICKÝ, P. *Procesněprávní pravidla v novém občanském zákoníku (Procedural rules in the new Civil Code)*. In *Reforma súkromného práva a Slovensku a v Čechách (Reform of the private law in Slovakia and the Czech Republic)*. Brno - Pezinok: Masaryk University - Judicial Academy of the Slovak Republic, 2013, p. 82-99.

***Does the civil code include certain provisions which could be considered as its style features? For instance the Sec 7 and 16 of ABGB claims its allegiance to natural law rationalism, the Sec 1 of the Swiss civil code gives power to judges to bridge legal loopholes by using a principle that they would determine if they were lawgivers.***

The principle expressed in s. 3(1) “The private law protects human’s dignity and freedom and one’s natural right to seek and defend happiness of oneself and one’s family and next of kin in such a way that does not cause unreasonable harm to other persons” is mentioned very often.

***Does the civil code expressly set forth any principles of private law or does the civil code leave it to theory and judicial decisions?***

From the above mentioned it is obvious that the basic principles of the new Civil Code are defined in the book one, part one (ss. 1 to 14). A non-exhaustive list of basic principles of the private law is contained in s. 3. It is an open list as it refers also to other generally accepted principles of equity and law. The special meaning of these principles is emphasized also in the transitional provisions; s. 3030 emphasizes a duty to take them into account though the rights and duties are considered according to existing legal regulations.

***Which role is assigned to judges and their decisions by the civil code? Does the civil code recognize the approach that judges have the authority to make law? How can the legal loopholes be bridged? Are judicial decisions understood as sources of law? Does the civil code often call upon courts to interfere with the relationships of substantive law with their judicial constitutive decisions?***

A court decision is understood as an equitable solution of disputes in the civil law. Therefore, the lawgiver addresses the courts where it is not possible to determine a solution in advance considering to various circumstances (e.g. solutions of disputes of co-owners pursuant to s. 1139). Therefore, an extension of a possibility of their interventions in private relationships occurs which is also related, among others, to the regulation of the new institutes (e.g. the regulation of a contract as a consequence of a change of circumstances pursuant to s. 1764) and to an effort to comply with

the principle of maintaining the contract validity in s. 574 (e.g. a possibility of a change of price pursuant to s. 2620, s. 577, moderation of the amount of contractual penalty s. 2051).

As one of its principles the Civil Code declares a duty to respect the legitimate expectations created by the decision-making practice. Provision of s. 13 stipulates that every person who seeks the legal protection may reasonably expect that his/her legal case will be decided similarly as another legal case that has been already decided and corresponds with his/her case in material elements; if the legal case has been decided differently, every person who seeks the legal protection has the right to a convincing explanation of the reason of this deviation. It only is a general instruction to respect the legitimate expectation not introducing the principle *stare decisis* into the Czech law.<sup>330</sup> The case law is not a source of law. However, it certainly does not mean that it is pointless.<sup>331</sup>

The Civil Code expressly regulates the role of the courts in solving the loopholes in the law. According to the example of s. 1 (2) ZGB the code declares an open manner towards the judicial completion of the law in solving the loopholes in the law. Pursuant to s. 10 (1) unsolved issues are to be solved according to the provision that relates to the legal case as for the content and purpose most similar to the legal case being considered (*analogia legis*). However, if there is no such provision, s. 10 (2) refers to consideration according to generally accepted rules of equity with regards to the condition of the legal science and the settled decision-making practice so that a good arrangement of rights and duties is reached.<sup>332</sup>

<sup>330</sup> A similar formulation may be found also in s. 3 (4) of the Rules of Administrative Procedure; compare also the case law of the Constitutional Court, e.g. ÚS file no. II. ÚS 566/05.

<sup>331</sup> Compare MELZER, F., TÉGL, P. and others. *Občanský zákoník (The Civil Code)*. ss. 1-117. *Velký komentář (Great Commentary)*. Volume I. Prague: Leges, 2014, s. 225 and following.

<sup>332</sup> More details in ŠEJVL, M. in HULMÁK, M., BEZOUŠKA, P. et al. *Stará judikatura ve světle nových zákonů (The old case law in the light of new laws)*. Olomouc; Juridicum Olomoucense, 2012, p. 57 and following BEZOUŠKA, P. *Soudcovské dotváření práva vykračující z mezí zákona v návrhu českého občanského zákoníku (Judicial completion of the law getting out of the law in the bill of the Czech Civil Code)*, *Journal Právní rozhledy*, 2011, No. 1, p. 20



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## 4 GERMANY

Jan Peter Schmidt\*

This paper gives an account of the ‘Modernization of the German Law of Obligations Act’ from 2001, which brought about the most important and most comprehensive reform of German private law of the last few decades (*Gesetz zur Modernisierung des Schuldrechts*, 26 November 2001, *Bundesgesetzblatt I* 3138), amending large parts of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB), as well as a number of other statutes.

### 4.1 Preparation of the Private Law Reform and its Materialization

*For how long has the reform, including the preparatory works, been underway?*

The idea of a comprehensive reform of the German law of obligations was first proposed at the end of the 1970s, and the reform was formally concluded in November 2001. The whole process thus lasted approximately 22 years. However, two different stages should be distinguished: first, from the late 1970s until 1994, the process was slowly but steadily carried on, but came to a sudden halt in 1994, when the government apparently lost interest in the project. It was then only in September 2000 that the idea was revived by the Ministry of Justice, much to the surprise of the legal community. The reform was then pushed through at great speed, and was concluded in little more than a year.

It is somewhat ironic that the first stage lasted for about 15 years without bringing a definite result, while the second stage took little more than a year but resulted in the enactment of a new law. To conclude the reform so quickly was of course only possible because the Discussion Draft, which was presented in 2000, drew heavily on the previous work. Nevertheless, the main reason for the speed at which the reform proceeded was an external one, as is explained below. In academic circles, there is a general consensus

\* I am grateful to Stephen Ryan for linguistic advice.

that the quality of the reform, even though it is regarded as a success overall, was seriously affected by the huge time constraints under which the reform was passed.

***What were the reasons for the reform?***

Initially, i.e. in the late 1970s and early 1980s, the objectives of the reform were the following: (1) the integration of a number of special statutes into the BGB, such as the Standard Terms of Business Act of 1976 (*AGB-Gesetz*), the Act on Instalment Sales (*Abzahlungsgesetz*) of 1894, and several statutes that dealt with strict liability; (2) the incorporation of new types of contractual relationships into the BGB, such as doctors' contracts, contracts concluded with old-age and nursing homes, contracts relating to the supply of energy, and contracts between private clients and banks; (3) the reform of a number of rules on obligations already existing in the BGB, concerning sales contracts, contracts for work, unjustified enrichment and delict; and (4) the desire to reshape the general law of obligations in order to make it less complex and structurally more coherent, and to bring it in line with new international developments.

The decisive push for the reform, which, as stated above, occurred only in 2000, was triggered by a somewhat unrelated factor, i.e. the need to incorporate into German law, by 1 January 2002, the European Consumer Sales Directive (1999/44/EC). However, this task in itself would only have required marginal adjustments to the existing law. There were various driving forces behind the Government's decision to opt instead for a large-scale reform, tagged as the "big solution" (*große Lösung*). First, it wished to avoid the fragmentation of German sales law that would have resulted from the creation of special set of rules just for consumer sales. Therefore, the regime prescribed by the Sales Directive was to a large degree extended to all types of sales contracts, including commercial sales contracts. Second, the Government still wished to achieve the goals that had originally been set in the late 1970s and early 1980s, i.e. to modernize large parts of the law of obligations and to incorporate a number of special statutes into the BGB. The latter point in particular had gained a lot in significance in the meantime, in view of the numerous European Directives on consumer protection



that had been enacted since the 1980s (doorstep selling, product liability, consumer credit, time-sharing, distance contracts, etc.), which had been dealt with in piecemeal legislation.

***Have any studies been conducted which identify the most significant-problems with exercising the former legal conditions in practice?***

Over the years, a great number of such studies were conducted. After the Ministry of Justice had first presented its plans for reform to the Federal Parliament and the Meeting of the Association of German Lawyers (*Deutscher Juristentag*), it requested a number of academic opinions on specific matters of possible reform. These (in general quite extensive) opinions were published between 1981 and 1983 in three volumes, and some of them were to be quite influential. In addition, in 1983 the German Association of Teachers of Private law devoted a special conference to the reform plans, and later published the keynote speech and a discussion report.

In 1984, a Reform Commission was established by the Ministry of Justice, which in 1992 published a detailed Final Report. The (ultimately successful) Draft that was presented by the Ministry of Justice in 2000 was accompanied by a report of several hundred pages, which was heavily commented upon by academics and practitioners immediately after its publication.

***How was the reform organized?***

After the aforementioned preliminary studies were conducted, a Reform Commission was established in 1984, which was headed by the responsible Director-General of the Ministry of Justice. It also consisted of four delegates from the justice departments of the German Federal States (*Bundesländer*), five judges, one practicing attorney, one notary, and four prominent university professors. Over the subsequent years, the Commission held 22 meetings, each of which lasted several days. In 1991, the Commission presented its extensive Final Report, which was published in 1992. It contained specific legislative proposals for different areas of the law, as well as the reasoning behind these proposals. In 1994, the Commission's Report was discussed intensively at the 60<sup>th</sup> *Deutscher Juristentag*.

After the aforementioned six year hiatus, the Ministry of Justice published a new Draft Proposal in 2000, which was largely based on the Final Report from 1992. In reaction to the wave of criticism it attracted, mostly voiced by academics, the Government established two Working Groups, which were supposed to examine critically the Draft and its recommendations. One Working Group dealt with the topic of non-performance, and consisted mainly of professors, the most influential of them being Claus-Wilhelm Canaris from the University of Munich. The other Working Group dealt with the law of prescription, sales law, and other matters, and consisted of delegates from the *Bundesländer*, judges of the Federal Supreme Court, practitioners and one professor. Due to the aforementioned time pressure, the Working Groups only had a period of about two months to discuss the Draft. None the less, a number of substantial changes were proposed. In the meantime, the Government had also organized hearings for various interest groups. On the basis of the proposals made by the Working Groups and the suggestions and requests which arose out of the hearings, a Revised Draft was published in May 2001. During summer and autumn of 2001, this Draft was pushed through Parliament by way of an accelerated procedure, during which time it was again repeatedly changed.

***To what extent were the critical remarks raised by representatives of legal theory and practice taken into account?***

As the outline of the reform process has shown, the German Government was at all stages seeking the active participation of legal academia and legal practice, and was very much open to critical suggestions, many of which were taken up. In fact, Professor Canaris, as member of the Working Groups on non-performance, influenced the project to such an extent that the many studies on the new regime which he published afterwards are largely viewed as an *interpretatio authentica*.

***Which laws were prepared or adapted in the course of the reform? For instance, if a new civil code was adapted as a part of the reform, was it prepared separately, and were any other laws prepared together with***

***it? (Such “other laws” could include not only new laws, but also already existing laws which had to be amended as a result of the passage of the new civil code.)***

Besides the BGB, numerous others laws were altered or even repealed by the reform, in order to carry out the necessary adaptations. Examples are the German Commercial Code, the Introductory Act to the German BGB, those statutes whose content was transferred to the BGB, etc. All these amendments were carried out in the same act that reformed the BGB.

**What was or has been the length of time of the period of *vacatio legis* set by the lawgiver?**

The *vacatio legis* was necessarily very brief, as the Consumer Sales Directive needed to be implemented by the end of 2001. Hence, the new act was promulgated 26 November 2001 and entered into force already 1 January 2002. For some matters however, such as the law of prescription, specific transition rules were created in the Introductory Act to the German BGB (see, eg, Art. 229 § 6 *Einführungsgesetz zum Bürgerlichen Gesetzbuch*).

## 4.2 Foreign and European Models

***Was the reform inspired by any foreign civil codes? Is there an obvious influence of a single foreign code, or was the inspiration taken from several sources? If there were more sources, is the final outcome consistent in both its content and terminology?***

One of the main criticisms levelled against the Discussion Draft from 2000 was that it was largely based on the earlier Draft from 1992, and thus had failed to take into account important international developments which had taken place in the decade of the 1990s: the adoption of a new Dutch Civil Code in 1992, the publication of the UNIDROIT Principles of International Commercial Contracts (PICC) in 1994 and of the Principles of European Contract (PECL) in 1995. During the discussions on the new Draft, many references were made to these texts and, at least in part, they were still taken

into account for the final version. Still, the majority view among legal academics is that a big chance was missed to make the BGB itself an example to be followed in the process of the harmonization of European private law. There are however two international models which have greatly influenced the reform right from the beginning, and these are the Hague Uniform Law on the International Sale of Goods (ULIS) of 1964 and the Vienna Convention on Contracts for the International Sale of Goods (CISG) of 1980. In the BGB, this influence is shown very clearly in the remedies that are available to the buyer in case of non-conformity, and their integration into the general regime for non-performance.

***If foreign models were adopted, was the lawmaker inspired mainly by actual law in action, or did he merely copy and rephrase the text of such foreign models?***

As regards the most influential legislative model, the CISG, the lawmaker sought to take into account not only the model itself, but also the existing case law.

***Was the reform inspired by some European projects, e.g. Common Frame of Reference?***

As stated above, in the last period of the reform, the PECL and the UNIDUIT-PICC were often referred to in the discussions on the rules on non-performance, even if their influence remained limited. As regards the new law of prescription, it follows the model of the PECL quite closely, a fact which was also expressly pointed out by the Government. Other European projects, such as the DCFR, appeared only years after the reform was finished.

***How has the reform adjusted to the EU law?***

As is stated above, the need to implement the Consumer Sales Directive had been the trigger for the reform. As far as the reform concerned other matters of consumer contract law, these were of a rather formal nature, incorporating special statutes into the BGB.

### 4.3 The Subject Matter Aspects of the Reform

***What fundamental changes to the content have been brought about by the reform as compared with the previous regulation?***

The changes brought about by the reform can be divided into two categories: formal changes and substantive changes. The formal changes concerned, besides the integration of a number of special statutes into the BGB, the codification of legal doctrines that were absent from the black letter rules, but firmly established in German case law. This concerned, among others, the doctrines on *culpa in contrabendo* (now § 311 BGB) and on change of circumstances (*Wegfall der Geschäftsgrundlage*, now § 313 BGB). With these formal restatements, the legislature wanted to bring the BGB up to date, so that it could (again) fulfil its original function, to provide, as far as possible, a complete account of the existing German private law. In order to avoid problems of interpretation, the legislature expressly stated that the new provisions were not meant to change the position that had existed under the old (case) law.

Important substantial changes were effected, particularly in the law of prescription, the general regime for non-performance, and the law of sale:

- Under the former regime, prescription periods were highly differentiated, which made their application quite complex and sometimes led to rather arbitrary results. Besides, most prescription periods were regarded as being too long for modern times. The new regime (§§ 194 ff. BGB) therefore aimed at shortening and unifying the prescription periods, by establishing a general period of (only) three years, the commencement of which however depends on a subjective criterion, ie, the creditor must be aware of his claim. Next to this general period, a number of specific prescription periods of up to 30 years continue to exist.
- The regime for non-performance (§§ 275 ff. BGB) was completely restructured. Under the old law, at least according to the understanding that dominated for almost a hundred years, a general distinction was made between different types of non-performance, such as impossibility, delay, and

‘positive breach of contract’ (*positive Vertragsverletzung*, a category not contained in the BGB, but developed by legal doctrine). The new law in turn works with the uniform concept of ‘breach of duty’ (*Pflichtverletzung*).

- Under the old sales law, the buyer could only choose between two remedies if the goods sold were defective: redhibition of the contract or reduction of the price. This rather inflexible regime, which stemmed from Roman law, in many cases failed adequately to reflect the interests of the parties. The new regime (§§ 433 ff. BGB) therefore gives the seller a right to a supplementary performance, which entails either repairing or replacing the defective goods. In addition, the law of sale has been integrated into the general regime of non-performance, so that the delivery of defective goods now automatically constitutes a ‘breach of duty’ which can give rise to a right of termination or a claim for damages. This solution was meant to do away with the many inconsistencies that under the former law had resulted from the disconnection between sales law and the general rules on non-performance (the same concept as for sales law was implemented for contracts for work, §§ 631 ff. BGB).

***Does the new regulation keep continuity with the previous regulations? If it does not, to what extent is it discontinuous? In considering the extent of continuity or discontinuity, not only the content, but also the language and terminology, should be considered.***

The German Government regarded the new regime not as a break with the past, but as a continuation of the existing tradition. That is why it consciously chose to label the project as a ‘Modernization’ (*Modernisierung*), and not as a ‘Reform’.

As for the aforementioned formal changes, there is clear substantial continuity. As regards the substantive changes, they are somewhat discontinuous, especially the reform of the law of prescription, which introduced not only an entirely new basic model, but also numerous specific changes. In other areas, discontinuity is often more apparent than real: although the new regimes of non-performance and sales law introduced new central concepts,

such as ‘breach of duty’ (*Pflichtverletzung*) and ‘supplementary performance’ (*Nacherfüllung*), practical cases will often be decided with the same result as under the old law, only with different reasoning.

***Has the reform brought about certain institutes or provisions that can be considered as unique, i.e. that do not exist in other states?***

Although the new general regime of non-performance has much in common with that of other countries or international models such as the PECL, as a whole it seems to be rather unique, especially as regards its complexity. In this respect, the reform is generally viewed critically in Germany, as it is felt that a chance was missed to establish a regime that could serve as a model for a future unification of European Private Law.

***Has the reform also affected the proportion of the autonomy of will and protection of the weaker contractual party? Which institutes restrict the autonomy of will? Under what criteria are the mandatory norms distinguished from non-mandatory norms?***

The reform has not brought fundamental changes in this respect, but a certain tendency to restrict freedom of contract for the sake of consumer protection is evident. To a large extent this was of course a consequence of the need to transpose the European Sales Directive into German law. In some instances, however, the German legislature deliberately went beyond even the prescribed standard of protection and thus restricted private autonomy more than was required. Probably the most controversial example is § 475 (1) BGB, which declares large parts of sales law to be mandatory in case the contract was concluded between a business and a consumer. Some authors even went as far as to regard the rule as unconstitutional, for restricting freedom of contract in a disproportionate manner.

Mandatory rules are usually expressly designated as such by the law, for example by stating that the parties must not deviate from them, or that a corresponding agreement may not be invoked.

A related issue that continues to be discussed in controversial terms concerns the liability of the debtor. On the one hand, the current law is often criticized as being too liberal, as damages for non-performance are only

granted if the debtor is responsible for the breach of duty, thus requiring, as a rule, at least lack of diligence (the existence of fault however is presumed, § 280 (1) BGB). On the other hand, some writers ascribe to the new regime a tendency to extend the debtor's duties to perform beyond what can reasonably be expected on the basis of the contract.

#### **4.4 Experience with Exercising the New Regulation in Practice**

*How has the new legal regulation worked in practice? Which provisions have proven most problematic?*

As the reform has been in force for more than ten years now, there is ample practical experience with it. While the new regime has successfully managed to solve many problems that had existed under former law, it has at the same time stirred up countless new controversies. The legal literature that has been written on the new law of obligations already fills numerous library shelves.

There is practically no single provision of the reform which has not given rise to any dispute as regards its interpretation. The most problematic have proven to be: §§ 280 ff. BGB, which established an extremely complex system of remedies in the case of non-performance, §§ 346 ff. BGB on the effects of termination, and § 439 BGB on supplementary performance in case of defective goods. The latter norm has twice been found by the European Court of Justice (ECJ) to be not in accordance with the Consumer Sales Directive, inasmuch as it limits the buyer's rights more than is permissible. The first decision of the ECJ (C-404/06 [*Quelle*]) triggered a further legislative amendment, while the second (C-65/09 and C 67/09 [*Weber und Putz*]) led to an interpretation of § 439 (1) BGB which many regard as *contra legem*.

*Have some provisions been interpreted significantly differently from their textual expression or from the original intention of the lawgiver?*

Besides the examples just mentioned, there are further cases where an extensive or restrictive interpretation of a provision is employed or at least



discussed, or where the intention of the lawgiver, which was often clearly documented, is regarded as unsatisfactory. As a result, the new rules are not always applied in the way that had been originally intended.

***Has the legal certainty significantly decreased since the entering into force of the new regulation, e.g. as for the predictability of court decisions? Have any measures been taken in this regard?***

The reform triggered a fair amount of legal uncertainty, particularly in the first years after its enactment, due to numerous interpretative controversies that arose immediately. However, both the courts and legal academics have made a determined effort to solve the new problems in a coherent fashion, and many controversies have by now been settled.

#### **4.4.1 Selected Bibliography (in chronological order of publication)**

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- Bundesminister der Justiz (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992) (Final Report of the Reform Commission established in 1984)
- Wolfgang Ernst/Reinhard Zimmermann (eds), *Zivilrechtswissenschaft und Schuldrechtsreform* (2001) (intensive academic discussion of the Draft from 2000)
- Claus-Wilhelm Canaris (ed.), *Schuldrechtsmodernisierung 2002* (2002), IX ff. (genesis of the reform), XI ff. (most important innovations), 3 ff. (*travaux préparatoires*)
- Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (2005), 30 ff. (genesis of the reform), 39 ff. (liability for non-performance), 79 ff. (sales law), 122 ff. (law of prescription), 159 ff. (integration of consumer law)
- Horst Ehmann/Holger Sutschet, *La reforma del BGB: Modernización del derecho alemán de obligaciones* (2006) (Spanish translation of the German original from 2002)

- Carsten Herresthal, 10 Years after the Reform of the Law of Obligations in Germany – The Position of the Law of Obligations in German Law’, in: Reiner Schulze/Fryderik Zoll (eds), *The Law of Obligations: A New Wave of Codifications* (2013), 173, 191 ff. (on the influence of CISG and PECL)
- Reinhard Zimmermann, ‘Réforme du droit de contract: l’expérience allemande’, in: Walter Doralt/Olivier Deshayes (eds), *Reforming the Law of Obligations and Company Law: Studies in French and German Law* (2013), 25 ff. (genesis and general aspects of the reform)
- Markus Artz/Beate Gsell/Stephan Lorenz (eds), *Zehn Jahre Schuldrechtsmodernisierung* (2014) (taking stock of successes and failures of the reform ten years after its enactment)

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## 5 HUNGARY

György Czirfusz<sup>333</sup> – Barna Arnold Keserű<sup>334</sup>

### 5.1 Preparation of the Private Law Reform and its Materialization

#### 1.

The reform of private law was always a difficult question in Hungary. The highest level of a reform is the adoption of a civil code, which gives new fundamentals to the private law. In the Hungarian civil law history there was more attempts to create the first civil code of Hungary. The first five drafts of the civil code were created in 1900, 1913, 1914, 1916 and 1928. All of them were the victims of political discussions and the First World War was also a retentive event. However, the drafts and their preparatory works continuously had been proving useful in the latter codification works. After the numerous codification attempts, the first Civil Code which came into force, the Act IV of 1959 was created between 1953 and 1959. Ironically, this era was hostile to the capitalist type of circulation of property, so it confined it within the narrowest possible limits.<sup>335</sup>

After the change of political regime in 1990 there was a permanently increasing demand for amendment in order to adapt the Civil Code to the contemporary social and economic circumstances. Four-fifths of the over one hundred and fifty remarkable modifications of the Civil Code were effected in the last 24 years, which fact clearly shows the need of a comprehensive rethinking of the fundamentals and the detailed rules of private law. It is important to see that the new Civil Code is the final step of a very long way, the final step of a 24 years long reform. The personal and financial relations turned up and downs since the enactment of the former Civil Code, and after the change in political regime the changes became faster.

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<sup>333</sup> Part III.

<sup>334</sup> Part I, II, IV, V.

<sup>335</sup> SZÉKELY, László: The Second... (The New Civil Code of Hungary), in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 241.

The text was amended, modified or nullified almost in six hundred subsections. This huge number of modifications inevitably decrease the coherence of an act, it caused logical oppositions and disproportions, plus a so often modified act is not aesthetic and elegant, especially if it is a fundamental source of law. The new Civil Code regulates new legal instruments, which have already existed in the judicial practice (like the leasing, factoring or franchise contracts) but they worth to incorporate into law. Another reason for the reform was to ensure the highest level of harmonization with the law of EU. Hungary always has fulfilled the harmonization obligations, however the way of it was not always the best: the logical clearness of the Code was injured many times.<sup>336</sup>

A Codification Committee was set up under the leadership of Tamás Sárközy in 1989. After 1990 Attila Harmathy and Lajos Vékás were co-presidents of the Committee, but the work of the working group slowly stopped. A new impetus was given by the Government Decision Nr. 1050/1998 (IV.24.), which prescribed to create working groups for specified topics within the scope of the concept of new Civil Code.<sup>337</sup> The concept - without detailed text - was adopted by the Government Decision 1009/2002 (I.31.) and it was communicated to the public for professional discussion. The Drafting Committee - led by Lajos Vékás - published the first text-version of the new Civil Code by the end of the year 2006. The Ministry of Justice and Law Enforcement couldn't accept every method of the Drafting Committee. On the 30<sup>th</sup> of August 2007 the mandates of the members of the Drafting Committee were ceased and the Ministry took over the codification tasks. After further consultations with the private sector, the final version of the new Civil Code draft was created in 2008, which was adopted by the Government and was submitted as a draft of act. The Parliament adopted the new Civil Code on the 21<sup>st</sup> of September 2009 in the Act CXX of 2009, but László Sólyom, President of the Republic

<sup>336</sup> *The conceptual questions of the New Civil Code - interview with Ministerial Commissioner László Székely*, <http://ptk2013.hu/intervju/az-uj-ptk-koncepcionalis-kerdesei-intervju-szekely-laszlo-miniszteri-biztossal/942>, 2014.02.23.

<sup>337</sup> SÁRINÉ SIMKÓ, Ágnes: Az új Polgári Törvénykönyv megalkotásának jelenlegi helyzete Magyarországon [The Current Situation of Creating the New Civil Code in Hungary], in *Romániai Magyar Jogtudományi Közöny*, Issue 2006/3., 87., <http://rmjk.adatbank.transindex.ro/pdf/006Sarine.pdf>, 2014.08.27.

and former President of the Constitutional Court did not sign it and sent back to the Parliament for further considerations. The Parliament partially took into consideration the suggestions of the president and adopted again the new Civil Code and it was promulgated as an act, which first and second book intended to be in force on the 1<sup>st</sup> of May 2010, the other parts on the 1<sup>st</sup> of January 2011, and one section only on the 1<sup>st</sup> of January, 2015. A separate act (XV of 2010) was adopted to have the Civil Code enter into force, it defined these dates. It wasn't signed by the president either, however the Parliament adopted it again without any changes. Seemingly there were not any obstacles before entry into force, until the Constitutional Court nullified this act because of the short *vacatio legis* and the harm of legal certainty because of the nonsense fractional coming into force. Meanwhile there was an election and change in government, so this Civil Code was never in force.<sup>338</sup> As Ferenc Petrik ironically wrote, according to the tradition the fates of the Civil Code drafts were always the same, they did not enter into force.<sup>339</sup>

## 2.

The new government with the Decision Nr. 1129/2010. (VI.10.) set up a new structure of Codification Committees for the New Civil Code. The members of the Committees was the same as before 2007, and Lajos Vékás got his presidential status back. The Decision shared the tasks of codification between three committees. The Civil Law Codification Main Committee was responsible for the decisions in important, conceptual questions. The Civil Law Codification Editorial Committee was responsible to ensure the coherence of the text and to decide in theoretical questions. The Civil Law Operative Professional Committee was responsible also to work out theoretical questions and to create the draft of the Code with explanation.<sup>340</sup>

<sup>338</sup> SZIKORA, Veronika: *Az új Polgári Törvénykönyv kodifikációjának folyamata* [The Process of the Codification of the new Civil Code], 1-3., [http://jog.unideb.hu/documents/tanszekek/polgari/uj\\_ptk/kodifikacio\\_tortenete\\_2013.pdf](http://jog.unideb.hu/documents/tanszekek/polgari/uj_ptk/kodifikacio_tortenete_2013.pdf), 2014.02.23.

<sup>339</sup> PETRIK, Ferenc: *Az új Polgári Törvénykönyv tervezetivel kapcsolatos dilemmák* [Dilemmas Concerning to Drafts of New Civil Code], in *Magyar Jog*, Issue 2011/2., 65.

<sup>340</sup> The members of the Committees in different formations were: Zoltán Csehi, Attila Harmathy, István Kemenes, András Kisfaludi, András Kőrös, Tamás Lábady, Attila Menyhárd, Ferenc Petrik, Tamás Sárközy, László Székely, Lajos Vékás, Emilia Weiss, György Wellmann, János Zlinszky.

The codification process after 2010 was quieter than in the previous decade. Two reasons were behind that. The first factor was the decreasing interest from the media. In 2010 the Parliament adopted a new act about the freedom of press and contents of media, which consists the main rules about the liability of press and press rectification. In the previous decade the media was interested in the codification from a selfish reason, because the newspapers and internet providers were directly affected through the Civil Code draft. In 2010 these rules were transferred into separate acts, so the codification became less interested. The second fastidious factor was the right for voting of the persons, whose legal competence is limited or completely precluded. Until 2005 these people were automatically excluded from the elections. This rule affected cca 60.000 persons of legal age. In 2005 this provision was nullified. The new acts about the parliamentary election (CCIII of 2011) and election procedure (XXXVI of 2013) brought a significant turn: these people are not automatically excluded from the elections, but when the court limits or precludes their legal competency, it has to make a decision obligatory case by case about the right for voting. This change drew the teeth of a very problematic question concerning to guardianship.

The Civil Law Codification Main Committee on the 16<sup>th</sup> of December 2011 adopted the final version of the Code, which was adopted also by the Government without changes on the 15<sup>th</sup> of February 2012. The Parliament discussed the text of the new Civil Code in the end of 2012, and after some changes it was adopted on the 11<sup>st</sup> of February 2013 (Hereafter I mean under new Civil Code the Act V of 2013). The Code entered into force on the 15<sup>th</sup> of March, 2014. This date is symbolic, it is the national holiday of the 1848-49 revolution which meant the end of the feudalism.

The structure of the former Civil Code became outdated, the jurisprudence has overwrite it in many points what was condensed in the legal education. The last 24 years is very rich in scientific researches and studies, the judicature has developed the civil law through the legal interpretation. This way an enormous knowledge was piled up which the Codification Committees could use. Especially because the members of the Committees and the additional experts were those academics, scholars and judges, who shaped our

jurisprudence in the last decades. Therefore there was no need for special investigations to identify the crucial problems, they came up previously in the academic sphere.

During this codification the Committees focused only on the new Civil Code. The starting point was that the existing law can be maintained in general and just those necessary changes have to be done, what are justified by the changing economic and social circumstances. Therefore where it was possible, the new Civil Code preserved the rules of the older one, and integrated some separate laws in total (like the family law and corporate law), and some other laws partially, only the substantive rules of them (like the rules of real estate register). The new Civil Code integrated also the judicial practice of the high courts. The Code has a careful attitude, because it doesn't accept the innovative and alternative solutions, when it would cause unnecessary instability in the legal system. Instead of these risky solutions it chose the traditional ways.

Beside the Code there was a need to adopt more major statutory instrument which were prepared by the Ministry of Justice. The Act CLXXVII of 2013 contains the interim provisions concerning the entry into force of the Code. The main role of the act is to ensure the harmony between the former and new Code and to define which rules of the new Code can be used in the prior legal relations or in the pending proceedings after the 15<sup>th</sup> of March, 2014. Next to the definition of interim provisions this act repealed the former Civil Code and the acts of family law and corporate law. It also has some authorizing provisions for the Government to create private law regulations. The Act CCLII of 2013 contains the amendments of every act, which were affected by the entry into force of the new Code. It is called "salad act", because it is such a mixed act, like a salad where one can find almost everything. The act amended cca 180 acts, including the new Code itself. Besides there are some minor amending act focusing on a narrower field, like real estate register or insurance.

Some rules of the Code got separate regulation in an independent law. It is a quite strange solution, that the lawgiver adopted the Act CLXXIV of 2013 about the neighbors' servitudes. Previously the rules of them had a place in the Code, now they are just named in the new Code, and the rules are

in the separate act. The solution is strange, especially when we see the length of the act, it has only eleven short sections, which have really important substantial provisions. However it is true that these rules have lower level of abstraction comparing to the other parts of the property law, and keeping these casuistic provisions in the highly abstract property law would cause some editorial discrepancy. The Act CCXXI of 2013 regulates the register of loan security, what testifies authentically the statements of the debtors, who gave security in a contractual relation. The trust is a new institution in the Hungarian private law, so it was required to adopt the Act XV of 2014 about the trustees and the rules of their activities. The Act CLXXV of 2013 refers to the register of the preliminary legal statements and the persons under guardianship. The reform of the guardianship brought more changes. One of them is the preliminary legal statement, what provides the opportunity to name or to exclude somebody from the role of guardian in the case of a possible future placement under guardianship. These statements have to be recorded in a register as well as the persons who are standing under guardianship. The register is maintained by the administration of the courts. Other result of the reform is the introduction of the supported decision making, which provides help without the affection of the legal capacity. The Act CLV of 2013 expands the short rules of the Civil Code, it regulates the appointment and the activities of the supporter and the termination of their status. It also has provisions on the professional supporters. The Act CLXXVI of 2013 specifies the rules of the transformation, merger and demerger of legal entities. The act is concerned with all types of legal entities named in the Civil Code, except the foundations and associations. The act should be applied for the additional types of legal entities, if the special act has not own provisions, just recalls the rules of the Civil Code or this act.<sup>341</sup>

The Civil Code was adopted by the Parliament on the 11<sup>th</sup> of February 2013, and it was promulgated on the 26<sup>th</sup> of February. The length of *vacatio legis* was more than one year, the Code entered into force on the 15<sup>th</sup> of March 2014. The lawgiver has learned from the failure of the previous codification

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<sup>341</sup> RÉPÁSSY, Róbert: Jogalkotási feladatok az új Ptk. hatálybalépésével kapcsolatban [Legislative Tasks Concerning with the Entry into Force of the New Civil Code], in *Magyar jog*, 2013/11., 641-648.



attempt, and provided long enough *vacatio legis* to avoid the harm of legal certainty. According to the previous unconstitutional solution in 2009, the then version of the codex would entered into force fractionally, what was an obviously confusing choice, but this time the whole Code entered into force at the same time. During the *vacatio legis*, the chamber of attorneys, the courts and prosecutors' offices and other organizations organized continuously various training sessions in order to prepare the person in judicature to know and to apply the new Code properly. This period was long enough to reach this goal, the further questions will arise in the practice, what will be discussed in newer trainings.

## 5.2 Foreign and European models

The new Civil Code has not an explicit foreign model, however it considered and applied many solutions from the foreign codexes. The Austrian, German and Swiss influence affected the Hungarian private law earlier, because the first codification attempts in the beginning of the XX century took into account the codex's of these countries. The ABGB was in force from 1853 to 1861 directly in Hungary, however it has left deep marks for a long time in the Hungarian private law. The ABGB was used by the courts for many decades, even also after its abolishment in Hungary.<sup>342</sup> The codex drafts in 1900, 1913, 1914 and 1916 were based on the BGB and ABGB, and the exemplar of the most important draft in 1928 was the ZGB. The approach of ZGB aims to reduce the legal loopholes and prefers the high level of abstraction, what was preserved by the new Civil Code. Many solutions of these codexes were built in the Hungarian private law, so we can say, that the traditional Hungarian private law contains many elements which were created by them.

Next to these classical acts the Civil Code was affected by the most modern codexes, like the Dutch civil code, the *Burgerlijk Wetboek* and the codex of Quebec State in Canada. These codexes gave an example of defining the scope of the Civil Code and building up its structure. The most obvious influence can be seen in the so-called Quebec-clause at beginning

<sup>342</sup> BÍRÓ, György - LENKOVICS, Barnabás: *Általános tanok* [General doctrines], 2013, Novotni, Miskolc, 42-43.

of the Code, but it was used by the former Code as well. In spite of these influences, none of these codexes have a model role in the codification process.

The legislation of the EU affects some fields of private law directly, like the corporate law or consumer-protection law. More and more directives were born on these fields, which resulted the enormous size of the European private law. The codification committees didn't intend to build in all of these rules into the Code, because they are very fractured, casuistic and frequently changing, and these attributes can't serve the aims of a long standing fundamental legal instrument. Therefore the Code implements only the stable core of the European consumer-protection contract law, and it leaves the other rules of the directives in separate acts and regulations. This way the Code takes over – amongst many others - the rules of unfair conditions in general contract terms and warranty from the EU law.<sup>343</sup>

The Civil Code utilizes the results of the international legislation as well. Within this circle the followings worth a mention: the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Principles of International Commercial Contracts by the UNIDROIT, the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR). The effects of these international legal sources and the implementation of EU directives will be described in the following part.

### **5.3 The Subject Matter Aspects of the Reform**

The theoretical and practical starting point of codification was that the new codex shall only change the 1959 Civil Code there and to that extent “where it proves to be necessary according to today's social and economic requirements”<sup>344</sup>. The constructing legal works mapped modern society's needs, for which throughout investigation of jurisdiction was indispensable, as well as getting to know the tension and contradictions – and of course their reasons – between statutory law and juridical practice. The new civil

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<sup>343</sup> VÉKÁS, Lajos: O novom maďarskom Občianskom zákonníku [About the New Civil Code of Hungary], in *Právny obzor*, Issue 2013/4., 317.

<sup>344</sup> Ibid. 313-325.

law codex almost raises the message of juridical practice to normative level, the message which shall be set as an example in the future; however, if it does not suit the modern age's requirements, it wanders off the previously accepted path with an explicit rule.

The new codex strives to make the norms included in it clear, transparent, understandable and evident not only for people who studied law but for laic readers, too. Where it is possible, the legal code uses simple notions, of course, perfectly keeping the requirements of correct civil law terminology in mind.

Now, we are attempting to present the new codex's spirit through showing some content innovations and their dogmatic reasons. Due to content boundaries, it is obviously not our aim to investigate all changes in detail.

## 1.

Regarding legal consequences which are independent from the imputation of violation of personal rights, the new codex provides opportunity for the injured party to demand the assignment of financial advantage acquired with the violation of law according to the rules of unjust enrichment. Furthermore, the new Civil Code introduces the civil law claim for grievance fee, which excels from the circle of compensation based on its content, too. Proving financial disadvantage is not a substantive condition for demanding grievance fee that is, the court can oblige the violator to pay the grievance fee even if the injured party does not prove the disadvantage caused against him/her but considering the case's circumstances, gratification is justifiable.<sup>345</sup>

## 2.

Deviating from the solution of the 1959 Civil Code, the new codex integrates legal rules referring to business organizations differently. The codex writing's theoretical base was to include those legal norms into a single frame which collective regulation serves the simplification of law enforcement through unified terminology, compaction and methodological homogeneity

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<sup>345</sup> JOBBÁGYI, Gábor: Personality Rights, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 287-290.

of rules. In harmony with all these, integrating business organizations' legislation into the civil law codex was given by the boost that business organizations' legal relations are realized in the field of civil law, besides, civil law rules are perfectly suitable for ensuring business organizations' legal frame from methodological point of view, as well. Business organizations' rules perfectly suit the norms of legal persons, hence, the new codex places the rules referring to business organizations in the Third Book on legal persons. The structural solution by no doubt expresses that the general rules of legal persons give the subsidiary-like legislation of business organizations. Thanks to the legal rules included in a unified frame, inner contradictions and unjustifiable duplicity of rules is preventable. The Swiss, the Dutch and the Italian codification stepped onto the road of corporate law codification.<sup>346</sup>

### 3.

For the sake of completeness we note that with taking the above mentioned codification principles into account, the new codex also builds family law in. The material of family law's integrity demands that the new Civil Code adequately expresses family law relations' individual characteristics which differentiate them from financial circulation. The new Civil Code corresponds to this new requirement in a way that at the beginning of the book on family law it exclusively presents principles only prevailing in frames of family relations.<sup>347</sup>

### 4.

Besides the right of property norms, in its Book of Right in Rem, the code – in more detail compared to previous rules – presents the regulation of tenure law and limited right in rem. The most important substantive law rules

<sup>346</sup> SZEGEDI, András: Outlines of the New Regulation of Hungarian Company Law, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 349-358.

<sup>347</sup> REIDERNÉ BÁNKI, Erika: Changes in Family Law, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 291-304.

of land register can be found in this book.<sup>348</sup> In the previous Civil Code rules of lien were placed in the part on law of obligations. The new Civil Code alters this solution and places the conceptually unified rules in the book on the right in rem. The reason for the structural modification is in connection with those circumstances that nowadays right in rem side of mortgage law appears in a more decisive form than the nature of law of obligations. The book on the right in rem does not “follow the traditions” either, the new codex’s Fifth book is not entitled as “Property law” but the “Right in rem”.

## 5.

The circumstance that the new codex raises the prohibition of fiduciary collateral to legislative level via taking juridical practice and the results of legal theory into account, conceptually stands in close connection with the rules of mortgage law. For the adequate ensuring of creditor’s needs gaining right of property for the creditor is hardly necessary, especially referring to that the new codex creates mortgage law rules serving the justifiable interests of the creditor. Thanks to the balanced mortgage law rules, taking the right of property away from the creditor is not necessary for the ensuring of creditor needs.<sup>349</sup>

## 6.

Compared to the 1959 codex, it is a significant change that law of obligation rules excels from contractual law rules. The new standard text lists the common rules referring to all obligations in the part of right of obligations – obviously, including contracts, too.

## 7.

The basic idea of changes in connection with contractual law is that contracts are necessarily connected to risk and fair grouping of risks is the task of civil law rules. We also have to mention that according to requirements

<sup>348</sup> About the protection of land see: HORVÁTH, Gergely: Protection of Land as a Special Object of Property (New Directions of Land Law), in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 359-366.

<sup>349</sup> About the invalidity see: MENYHÁRT, Ádám: Invalidity of Contracts in the New Civil Code, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 317-328.

of the modern age, contractual law has to correspond both to professional participants of business relations and also to the interests of not vendor private people. The questions whether the increased needs of contractual legal norms can be fulfilled with unified rules referring to the whole of financial relations, and whether the duplication of rules – on the part of special needs of traders – is necessary, become inevitable. The new codex consequently follows the monist thinking. Well, let us see based on what consideration have the codex's creators decided besides contractual rules. The basic question of individual commercial private law's existence is whether traders have such needs which the civil law codex which is up-to-date from structural and content point of view, cannot fulfill. We did not find such needs. Moreover, foreign examples indicate that the legal innovations of the last decades show into the direction of the commercialization of civil law that is, civil law rules are becoming more and more commercial law-like. The strengthening face of consumer law protection created the realization that holding special rules is not necessary in order to fulfill the special needs of traders but for the interests of the consumer, who is the weaker party in the interest justification battle. The new codex's basic principle is that contractual law follows traders' level of needs (both regarding general rules and individual contracts), and special rules are only worded where they are inevitable regarding consumers' needs. The new Civil Code's orientation is perfectly presented by those named contract types which were previously only parts of commercial law (factoring, financial leasing, franchise, confidential property management contracts or trust). For the sake of completeness, we refer to that commercial private law is the product of feudalism when particular-like, untransparent braces of civil law was not borne by commercial law cases requiring quick procession. Besides, taking monist thinking through was more important because doubled rules along traders would have practically turned contractual law into three-level, in which the third level would have been composed of rules of consumer contractual law. Contractual law experiences regulated in commercial law codex show that individual commercial contractual law is burdened by delimitation and interpretational difficulties in practice. The Codification Committees tried to avoid these troubles.

## 8.

During the rulemaking of contractual law, we have to take the questions of consumer contracts' content and taxonomical situation into account. By no doubt, one-sidedly cogent rules of consumer contracts seem to be alien elements in contractual law, which professes the widest justification of private autonomy, however, in spite of all these, Hungarian legislators have the standpoint according to which rules tailored to consumer contracts being present in not a negligible weight in the object of property, cannot be left out from the codex. We cannot leave out that the European Union's legislation has reached civil law, into which it mainly interferes through directives, for the sake of consumers. Through the comprehensive reform of civil law, the question that which products of the extremely wide directive making shall be part of the regulation frame of the new codex, also remained unanswered. The Codification Committee had the standpoint that only those directives can be built into the new codex which surely prove to be future proof. Codex creation is a venture affecting more generations, which "notion" is stability and reliability, with which requirements a law code which shall nervously answer the Union legislation often unprincipled and complicated changes, would not be compatible. Based on this consideration, the new civil law codex builds the Council's 93/13/EEC principle on unfair conditions applied in contracts made with consumers, 1999/44/EC principle of the European Parliament and the Council on consumer products' bill of sale and connecting warranty and some rules of 2011/83/EU principle into law of obligations.<sup>350</sup> During the European Parliament and the Council's 1999/44/EC principle's implementation, answering two questions became inevitable: legislators have to decide on the technique of implementation and have to choose the degree of increased legal protection, as deviating from the principles' rules can happen for the sake of consumers, not to mention that increased legal protection can be spread to contractual legal relations falling outside of consumer contracts. From the point of view of legislation, more opportunities exist: beside a separate legislative act, on the top of legislators' convenience (which is proved by a great num-

<sup>350</sup> FAZEKAS, Judit: Recodification – Integration – Modernisation: Consumer Protection Rules in the New Civil Code, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 329-340.

ber of legislative products from Brussels), the principle of private autonomy's sanctity also exists. Its obvious disadvantage is that it "enriches" private law rules of legal institutions serving to remedy deficient compliance. It is questionable whether to what extent will law enforcement become easier for the recipients, the consumers, with this solution. The Hungarian legislator regulates the principle's law protection toolbar among the general rules of deficient compliance in the 1959 and the new Civil Code as exception next to main rule, in a coherent frame with them. The same element of both codices is that they fulfill the obligatory principle task, namely that they do not impart consumers in a higher degree of protection than it is obliged to do so.

## 9.

The juridical practice of the last quarter century has gone through a constant change regarding the question of determining responsibility for causing damage with breaching of contract. Jurisdiction has gradually used that thinking of legal policy that there is no place for the investigation of subjective condemnation in contractual relations and that this type of investigation would not be practical as finding that link in modern goods relation for which damage could be blamed on, is hardly possible. Instead, the juridical practice takes the following as a base: entering into contracts means risk for all contracting parties and contracting parties shall make a stand for circumstances being present in their venture circle – independently from the imputability of their behavior – that is, ensuring circumstances falling outside of the party breaching the contract's investigation sphere could give reason for being exempted from the compensation obligation. The new codex sanctioned juridical practice. It separates the previously united contractual and tort compensation claim's rules along the conditions of extraction, refundable consequence damage and different conditions of back profit. Responsibility for damage caused by breach of contract becomes an individual responsibility figure in statutory law, which is regulated among the general rules of the breach of contract in the new Civil Code. Based on the developed exemption rule of the new codex – via taking CISG, PECL, UNIDROIT principles into consideration –, the person causing the damage



is exempted from the legal consequences of causing damage if three conditions hold at the same time. For being exempted, the person who caused the damage has to prove that

- the causal circumstance falls outside of the sphere of the person causing the damage,
- the causal circumstance falling outside of the causal party was not objectively foreseeable at the time of entering into contract,
- it is not expectable at the time of breaching the contract from the causal party to avoid or cease the damage.

The verification constraint shall be carried out by the person breaching the contract in order to be exempted from the responsibility.

Consistent emergence of a stricter responsibility system – especially taking the aim of locating market viewpoints and damage consequences of the breach of contract into account – would lead to misshapen results regarding the degree of compensation. Regarding back profit and damage consequences, in the new Civil Code – as these damages are dependent on not known factors for the obligant in the lack of informing the entitled – the normative consequence of foreseeable clause will prevail: in this circle, damage has to be compensated to such degree, in which degree the harmed party proves that the damage, as the possible consequence of the breach of contract, was foreseeable at the time of entering into contract. The new codex fixes that the damage caused in connection with the provided service has to be fully compensated as damage caused in the contractual obligation is fully foreseeable.<sup>351</sup>

Objective compensation and limitation of the degree of compensation on foreseeable damage creates a balanced system in contractual relations between the parties in the field of risk-sharing. The foreseeability clause perfectly suits the market viewpoint as well, as it incents the potential causal to think over the risks, and the other contractual party to reveal risk factors deriving from entering into contract.

<sup>351</sup> KÓHIDI, Ákos: Major Changes in Tort Law in the New Civil Code, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 342-343.

**10.**

In the circle of liability for defects, jurisdiction mainly surpassed unrealistic, strict limitation deadlines. The main problem was caused by that services accessible in the field of market are impossible to be categorized in a way that the interest of the entitled for perfect fulfilment is not unduly harmed. The need that validation deadlines referring to warranty rights shall be in harmony with the period expectable regarding the products' technical aspects, was formed in juridical practice. Behind limitation deadlines the following thought is present that the dependent legal situation after having fulfilled the contract shall be closed sooner or later for the sake of the obligant, as it would be unfair to keep him/her uncertain for an especially long time regarding whether the entitled has demands against him because of deficient fulfilment or not. The new codex terminated deadlines in the circle of warranty demands, so courts will judge whether - via taking the service's nature into account - demand validation falls outside of the service's expected service life, or not. The Civil Code also takes the circumstance into consideration that the obligant's contractual covenant spreads to that the service's service life shall correspond to the period expectable regarding the products' technical aspects. It is indisputable that the obligant is obliged to fulfill the warranty needs that were validated in time, however, it cannot be stated that increased value due to increased service life coming from repairing or replacing belongs to the sphere of failed compliance. The dilemma of increased value is solved by the new codex on the level of legislation: if the goods are replaced after most of the time of the liability for defect has passed, and it results in a great deal of increased value for the entitled party, the obligant shall demand the reimbursement of the enrichment. The new Civil Code favors the consumer, as the cited civil law rule cannot be applied in the circle of consumer contracts.

**11.**

The new codex introduces the institution of product warranty in the circle of consumer contracts. Emerging from the relative system of the contract, consumers can demand remedy directly at the service provider: repair or

– in case of fulfilling replacing conditions – replacing. Only personal property belongs to the effect of product warranty and the producer has to deal with product warranty within two years of releasing the product.

## 12.

During the legal works, the legislators put special attention to that the previous rules of the law of inheritance is only modified to the smallest degree as traditions have the most important part in the law of inheritance. Modifications in the law of inheritance mirrored the economic and social changes after the transition. The new codex excludes the surviving spouse from general fruition-inheritance, instead, children inherit. Another important change is that in case of no descendants, besides the surviving spouse, the dead person's parents also inherit.

### 5.4 Experience with Exercising the New Regulation in Practice

At the time of writing this article, we don't have any experience at the courts, because the Code is so new that this short time wasn't enough to carry out court decisions based on the Code. The Act CLXXVII of 2013 contains the interim provisions concerning to the beginning of the term of validity of the Code and the existing legal relations. As a general rule the act prescribes, that the Code shall be applied on those facts, legal relations and legal statements, which were born after the entry into force. This way the majority of the cases where the judge can decide on the basis of the new Code could be in a very embryonic period, the first wave of the decisions will arrive a few months later. Furthermore, the former Code shall be applied in the bigger part of the current court cases, so up to a few years the two Code will be used simultaneously. An interesting provision in the above mentioned act, that the former Code shall be used for those obligations, what were established after the entry into force of the new Code but were based on a fact or legal statement originating from an older obligation during the effect of the previous Code. In addition, the act gives retroactive effect for multiple provisions of the Code, so the valid and/or applicable private law is a quite diffuse material, because they don't overlap each other.

This regulation method surely weakens the legal certainty and the predictability of a court decisions and it burdens the judges with the difficult task that they have to synthesize many provisions to find the applicable law.

## 5.5 New Civil Code

### 1.

The new Civil Code of Hungary, just like the previous one, is the constitution of private law because of its codex format. The 1:2. § (2) paragraph says, that the other regulations concerning to private law shall be interpreted in harmony with the Code. This solution is known as the so-called Quebec-clause, which creates an interpretation priority for the Code against the same level of legal sources, which would be normally equal to the Code. The Code tries to regulate the widest spectrum of the civil relations, what can be seen on the thickness of the Code. “This method, of course, must not be used for its own sake, it must cope with the continued presence of private legal regulations even in the case of the most successful codification attempts.”<sup>352</sup> The Code regulates the fundamental personal and property relations, so there are necessarily other sources of law in the private law, which are special regulations compared to the Code. The Code gives the subsidiary background for these special fields eg. intellectual property rights<sup>353</sup> or agricultural law. The Code provides the maximum coherence for the private law, the established terminology must be guaranteed in the separate laws.

The Hungarian private law accepts the monist theory of the commercial law, which means there are no separate regulations in the Code for commercial activities. Of course there are special type of contracts and consumer protection provisions which inevitable refers to commerce, however this origins

<sup>352</sup> Székely: *op. cit.* 241.

<sup>353</sup> The Part IV. of the Russian Civil Code was adopted in 2006, which incorporated the rules of intellectual property law. Hungary didn't choose this way, the intellectual property law remained a relatively independent, specific field of civil law, ruled by separate acts. See in more detail: SZALAI, Péter: Intellectual Property Rights in the Hungarian Legal System, with an Overview of the New Civil Code, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 305-315.

from the nature of these legal institutions and doesn't mean the duplication of civil law regulations according to commercial and non-commercial activities.

The Code incorporates the previously separated family law. In the socialist era the main ideology held incompatible the family law with the core private law, because the family relations can't be treated like any other proprietary relations in the bourgeois private law. Nowadays this transcended theory couldn't prevent the incorporation of this classical part of private law into the Code. Of course family relations have specialties, which are articulated in special principles which have to be applied in this area.<sup>354</sup>

## 2.

The structure of the Code is a brand new solution in the Hungarian legal system, what is justified by the huge size of the codex. It is divided into books, these create the first level of the division, and it gives the opportunity to increase the structural units in order to arrange the parts of the Code properly. Under the books there are parts, titles and chapters. In the chapters there are numbered subtitles which refers to the legal institution what is regulated (eg. sale contract), and every section has an own title after the section number, which makes very transparent the structure of the concerned legal institution.<sup>355</sup> The numbering of the structural units and the sections begins anew in every book. The first number of a section is a reference to the number of the given book, and after a double-dot stays the section number (eg. 5:14. § means the fourteenth section of the fifth book). The Books of the Code are the followings:

- First Book: Introductory provisions [6 sections],
- Second Book: The individual as a legal entity [4 parts, 12 titles, 55 sections],
- Third Book: The legal person [7 parts, 27 titles, 44 chapters, 406 sections],
- Fourth Book: Family law [5 parts, 16 titles, 22 chapters, 244 sections],
- Fifth Book: Right in rem [4 parts, 13 titles, 34 chapters, 187 sections],

<sup>354</sup> SZÉKELY: op. cit. 243.

<sup>355</sup> Ibid. 244.

- Sixth Book: Law of obligations [6 parts, 36 titles, 74 chapters, 592 sections],
- Seventh Book: Law of inheritance [5 parts, 16 titles, 100 sections],
- Eighth Book: Final provisions [3 parts, 6 sections].
- The Code consists 1596 sections in total, what makes it the longest act in Hungary.

### 3.

In the 1:2. § (1) the Code establishes a new connection between private law and public law. According to this rule, the provisions of the Civil Code shall be interpreted in harmony with the constitutional order of Hungary. Under the term of constitutional order one can find the norms of the Fundamental Law, especially the basic human rights, the cardinal acts adopted on the basis of delegation rules of the Fundamental Law, and the decisions of the Constitutional Court. Through the Fundamental Law, the Civil Code got additional principles, which were always considered as private law principles, but the Code doesn't articulate them explicitly. The Article 28 of the Fundamental Law says: "in the course of the application of law, courts shall interpret the text of legal regulations primarily in accordance with their purposes and with the Fundamental Law. When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good."

### 4.

The Code keeps the procedural provisions on a minimum level, it regulates only the main cornerstones, which are more or less substantial questions. The most typical procedural provisions are the enumeration of the persons who are entitled to commence an action in a specific case. For example the placement under guardianship can be requested by the spouse, companion, lineal relatives, sibling, legal representative, guardianship authority and the prosecutor. The Code lists the same way those entities, who are allowed to file an *actio popularis* in order to find invalidity of an unfair condition in a general contract terms of a consumer contract. The general procedural rules can be find in the Act III of 1952 about civil procedures, and there

are some additional sources of law, which specifies the procedural steps of a substantive subject matter of the Civil Code. For example the Code defines the basic conditions of the presumption of death, but the detailed procedural rules are placed in a ministerial regulation. Similarly the substantial rules of placement under guardianship take place in the Code, but the procedural rules are specified in a government regulation. The procedural rules may change very often, so it is justified to keep them separated from the Code in order to maintain its stability.

## 5.

The First Book of the Code, the introductory provisions contain the scope of the act and those principles, which are applicable not only within the Code but in any sources of private law. The number of the basic principles has been reduced compared to the former Code. The Hungarian civil law literature splits the principles into two groups: declarative and operative principles. The declarative principles don't have *expressis verbis* normative basis, however they can be read out from the whole text of the Code. Such principles are justice, reasonableness and legal certainty. These pervades the material of the private law, and a judge can grasp them as interpretation tools, however he can't justify a decision solely with these principles. In contrast, the operative principles are listed amongst the introductory provisions and they can serve as a legal ground of a decision. These principles are: the interpretation of legal regulations, the requirements of *bona fides* and honesty, reasonable conduct and the prohibition of the abuse of rights.<sup>356</sup> "Supplementary principles are articulated at the beginning of each Book, e.g. separate principles are applied in relation to the specifics of family legal relations contained in the Book on Family Law."<sup>357</sup> Special principles can be found in contractual law. Such is the principle of mutual cooperation, what was a general requirement in each private legal relationship in the previous Code, now it is enforced primary in the contractual relations. However one can find a lot of references to mutual cooperation outside of the law of contracts, so actually it has an effect in every fields of private law.

<sup>356</sup> BÍRÓ – LENKOVICS: *op. cit.* 65-70.

<sup>357</sup> Székely: *op. cit.* 245.

The Code maintains the basic principle of bona fides and honesty the same way as it was in the past, which is an acknowledged rule of conduct in several national codes and law harmonization bills. It gives a minimum level of morality to the legal relations, what can provide mutual trust between the parties.<sup>358</sup>

The Code applies the premise of reasonable conduct, what acquired solid foundations thanks to the judicial custom and interpretation, this way it is flexible enough to give space to the judges.<sup>359</sup>

The prohibition of the abuse of rights means the borders of the free exercise of civil rights. The Code defines the prohibition as a general rule, and defines a special case, where the abuse of rights is realized in denial of a legal statement, and this conduct does injury to an important public interest or a particular substantial private interest. In this case the court judgment may be substituted for a statement.

## 6.

The decisions of the courts have special role in the Hungarian legal system. In the narrow sense, legal sources of private law are only the Fundamental Law, the acts adopted by the Parliament and the different types of regulations (governmental and ministerial decrees, local government ordinance). However, the court decisions have importance in the forming and development of private law, therefore we can consider them as quasi sources of private law.

On the highest level of the court system is the Curia. The whole court system, leading by the Curia are not merely automatons, they interpret and use the law, this way they also develop it necessarily. In formal sense, the “*praetor ius facere non potest*” doctrine still exists, however in a concrete case the judge creates “case law” (but not in the Anglo-Saxon meaning), as the roman said “*praetor ius facit inter partes*”. The private law is a living law if the courts interpret their rules and fill the sentences with real content. The decisions of the courts establish the connection between the very

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<sup>358</sup> Ibid. 246.

<sup>359</sup> Ibid. 246.



abstract norms and the very concrete facts.<sup>360</sup> When the Code or other legal sources don't have an exact provision for the real situation, the judge can bridge these legal loopholes with the use of above-mentioned principles. This isn't laid down in the Code, it originates from the nature of the private law. Of course, judges don't like to justify their decisions solely with principles, because they can find themselves easily in the field of natural law, where the legal argumentation can be turned from judicature into philosophical jurisprudence.

The Fundamental Law and the Court System Act have made provisions for the Curia in order to guarantee the uniformity of judicature. In order to achieve the consistent judicature the Curia is entitled to adopt uniformity decisions and to formulate opinions by its departments.<sup>361</sup> The uniformity decisions are obligatory, the courts have to use them from the time of their publications. Formally, the opinions aren't obligatory, but their informal binding effects are statistically proven. The unique case-by-case decisions have also an orientation role, however those aren't obligatory either.

The Curia had been adopted many uniformity decisions and different types of opinions before the entry into force of the new Code. The Curia listed those previously adopted decisions in the 1/2014 uniformity decision, which shall be applied henceforward, because the affected substantial law remained the same. More than 60 theoretically important decisions were sustained and many annulled because their normative basis had changed or they had incorporated into the Code explicitly.

The decisions of the Constitutional Court are additional quasi sources of law, mainly as a negative legislation, but the Constitutional Court also interprets the norms of the Fundamental Law. For example in the decision 17/1992 (III.30.) it analyzed the meaning of property on the constitutional level, in turn the decision 64/1993 (XII.22.) made a distinction between the different meanings of property on the constitutional and private law levels. It was a spicy situation, when the Constitutional Court

<sup>360</sup> BÍRÓ - LENKOVICS: *op. cit.* 118.

<sup>361</sup> OSZTOVITS, András: The New Organizational System of the Hungarian Courts, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 137.

in the decision 7/2014 (III.7.) nullified a passage in the Code just before its entry into force. The 2:44. § amongst the personality rights prescribed, that the protection of personality rights of public figures can be restricted in the name of freedom of speech from equitable public interest, according to the test of necessity and proportionality, without the prejudice of human dignity. The Constitutional Court found the “equitable public interest” part unconstitutional, because it meant an unjustified additional requirement for the exercising of free opinion and it limited the freedom of expression.

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## 6 POLAND

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### 6.1 Preparation of the Private Law Reform and its Materialization

#### 1.

While the first key date in the development of contemporary private law in Poland was the year 1989, in which Poland returned to a democratic political system and transitioned from a centrally-planned to a market economy, to properly understand the process of transformation in private law it is necessary to look as far back as the inter-war period.<sup>363</sup> The complicated history of the lands comprising the Polish-Lithuanian Commonwealth following its collapse in the late 18th century resulted in the Polish state reconstituted in 1918 encompassing areas governed by four different systems of private law. The Napoleonic wars brought French law to the central territories of the Polish Republic (with the Napoleonic civil code at the head), as well as Polish law modelled on it. The eastern lands were governed by Russian law, primarily by volume 10 of the Code of Laws. Western territories were subject to German law, primarily the BGB, while the southern lands were under Austrian law and its ABGB (with the exception of a very small part of the region where Hungarian law was in effect). Developing a uniform legal system was one of the first tasks facing the independent state, and to accomplish it the Polish Codification Commission was

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<sup>362</sup> The author a member of the Civil Law Codification Commission by the Minister of Justice of the Republic of Poland, however, the opinions expressed herein are his own and do not represent the position of the Commission.

<sup>363</sup> A basic discussion of this issue can be found in civil law textbooks; see e.g. Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna* [Civil Law – General Part], Warszawa 2013, p. 19 et seq. A more thorough theoretical analysis can be found in the work of L. Górnicki: L. Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919-1939* [Civil Law in the Work of the Polish Codification Commission in 1919-1939], Wrocław 2000; L. Górnicki, in: *System Prawa Prywatnego*, t. 1, *Prawo cywilne – część ogólna* [The Private Law System, vol. 1, Civil Law – General Part] (ed. M. Safjan), Warszawa 2012.

appointed in 1919. It was an advisory committee of experts, independent of state authorities, that prepared draft legislation that was subsequently brought by the Minister of Justice to the Parliament as draft bills, or which the President of the Republic enacted in the form of regulations.

The work of the Codification Commission aimed at unifying private law through the adoption of successive acts, then by joining them into a greater whole (primarily in a Civil Code). In this manner, the Cooperatives Act (1920), the Copyright Act (1926), the Unfair Competition Act (1926) and the Patent Act (1928) were all enacted. In respect of fundamental areas of private law, the Commission composed and succeeded in having passed the Code of Obligations (1933) and the Commercial Code (1934). The Commission also conducted very advanced work on the general provisions of civil law, property law, family law and inheritance law, all of which was interrupted by the outbreak of World War II. Both the Code of Obligations and the Commercial Code, as well as the unfinished drafts of other private law legislation, were representative of the period's highest levels of legislative quality. Their creators were aided by their outstanding knowledge of leading European laws of the time – those which were in effect on Polish soil, as well as the law of obligations and the civil code of Switzerland. Discussion concerning the law of obligations even took into account the French-Italian draft law of 1927.

After World War II had come to a close but before the country had been entirely taken over by communist forces (a process which lasted from 1945 to 1948), civil law was unified by a series of decrees issued in 1945-1946 modelled very tightly on pre-war draft legislation. These decrees encompassed the general provisions of civil law, personal law, marital law, guardianship law, property law and inheritance law. At this stage, Poland possessed a complete, unified and modern private law system which took into account the accomplishments of western Europe's most well-developed legal systems, and was in some senses even more advanced. However, this system was subsequently dismantled by legislation intended to implement communist ideology, introducing separate regulation of economic trade, particularly between state entities (which came to dominate the economy as a result of forced nationalization). Attempts were made from the 1940s to develop

a unified civil code, but the initial draft was rejected by the authorities as it did not sufficiently reflect the foundations of communist ideology. Only in 1956 did the newly-appointed Codification Commission develop further draft codes, the last of which was enacted in 1964. Alongside this code a separate Family and Guardianship Code was enacted (it remains unclear what led to this material being separated from the Civil Code), and the Commercial Code of 1934 was abrogated. The Civil Code of 1964 is generally regarded as a modern codification of private law, closely following the legal thought of the western world, which is the result of its solutions being modelled on the provisions composed by the Codification Commission of the inter-war period. The quality of this legal act has been diluted by assorted solutions introduced into it owing to the demands of the ideology in power at the time. They represented, however, external interference in the coherent structure and idea of the Code, which made it easier to adapt to the requirements of a modern market economy after 1989.

The process of private law reform began immediately following the return to a democratic political system and market economy. It was initiated by a commission that had been appointed back in 1986 by the Minister of Justice, but since 1996 the Civil Law Codification Commission has been tasked with drafting comprehensive changes to the civil law.

## 2.

The roots of reforms underway since 1989 are, to a certain extent, obvious. Regardless of the high legislative quality in normative acts from communist times, they had to take into account the reality of that period's political and economic model to varying degrees. Thus the first task was to remove regulations that were incompatible with the requirements of a democratic law-governed state and of a market economy, together with the introduction of regulations vital in new circumstances. Primarily for this reason – owing to the urgency of the task, but also as a result of the relatively good quality of the Code of 1964 – it was determined that a new Civil Code need not be written, but rather that the existing one would be amended. This was a good decision considering that, with some alterations, the 1964 Code could serve as a tool for organizing economic activity, quick preparation of a new draft

was an unrealistic proposition, and the perspective of attempting to secure membership in the European Union would in any event necessitate further extensive changes to a new codification. This is why during the first period (1989-1990) changes were limited to the removal of institutions tightly linked with the socialist system (various categories of ownership with privileges given to social i.e. public ownership, particular regulations on trade between state economic entities), as well as to the introduction of some useful institutions for a market economy (detailed regulation on freedom of contract, *rebus sic stantibus* clause, valorisation of monetary obligations, securities). A portion of the pre-war Commercial Code was also restored addressing commercial companies. Next, in 1996 changes were made to provisions of the Civil Code concerning the conclusion of contracts. The more serious changes were accompanied by numerous, more detailed amendments to remove legislative oversights or to introduce changes in individual civil law institutions, for such reasons as the need to bring them into line with the Constitution of the Republic of Poland of 1997. Of fundamental significance in the area of commercial law was the Code of Commercial Companies enacted in 2000.

An important stage of private law reform was the years 2000-2004, during which the *acquis communautaire* of the European Union was implemented into Polish private law. This process was completed on time, but its impact on the cohesion and transparency of the civil law regime was not a positive one. In order to ensure compliance of domestic regulations with the relevant EU directives, preference was given to the method of direct transposition of EU directives onto domestic regulations, and to regulating issues addressed by EU law with statutes located outside codified regulations. Thus, for example, provisions on unfair terms in consumer contracts were inserted into the Civil Code, but retaining the terminology of the Directive, foreign to the language of Polish civil law. However, provisions addressing distance contracts or contracts concluded out of business premises, as well as those on consumer sale, all addressing subject matter within the Code, were located in separate statutes.

The growing internal incoherency of the private law system resulting from numerous partial revisions was the first reason why it was decided to begin



work on drafting a new Civil Code. The second reason was the conviction that some portions of that system (e.g. liability in contract, limitation) require more thorough reform that cannot be conducted by way of a fragmentary amending. The third factor influencing the decision to begin work on a new Civil Code is the reduction seen in the European Union's legislative activity in the area of private law (in particular, the rejection of the idea of a common European Civil Code) and the move away from full harmonization accompanied by attempts at applying optional regulation.

### 3.

The decision to undertake work on a new Civil Code was made by the Civil Law Codification Commission in 2006. It was, however, preceded by predatory work during which representatives of the Polish legal community were accompanied by experts from the Netherlands, Germany and the United Kingdom, with the assistance of the Center for International Legal Cooperation (CILC). The result of this work was published in 2006 in a volume presenting some of the assumptions and directions for legislative activity.<sup>364</sup>

### 4.

The entity responsible for the substance of private law reform is the Civil Law Codification Commission by the Minister of Justice. The Commission presently has 16 members including both theorists and practitioners of civil, family and private commercial law. The present Chair of the commission (whose term lasts four years) is prof. Tadeusz Ereciński, Chief Justice of the Civil Law Chamber of the Supreme Court. The Commission has a broad remit, encompassing all areas of civil law (substantive and procedural), family law, commercial law and intellectual property law. The Commission's tasks are:

- preparing principles, basic ideas and general directions for changes in civil, family and private commercial law,

<sup>364</sup> Komisja Kodyfikacyjna Prawa Cywilnego, *Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej* [Civil Law Codification Commission, Green Paper. An Optimal Vision of the Civil Code of the Republic of Poland] (ed. Z. Radwański), Warszawa 2006.

- developing principles and drafts of fundamental significance for the system of civil, family and private commercial law, taking account of the tasks resulting from the need to harmonize Polish law with European law, and
- assessing and giving opinions on draft legal acts presented by the Minister of Justice.

Because of this definition of its tasks, the Commission must conduct three kinds of work in the same time:

1. preparation of drafts of new codes: Civil Code and Civil Procedure Code,
2. preparation of drafts of necessary changes to existing codes and statutes,
3. extemporaneous activities such as providing opinions on draft legislation concerning civil law as prepared by the government or by Parliament.

The leading principle that the Commission attempts to follow in its work is that only minor changes and those necessary for ensuring compliance with the Constitution, international law and EU law are introduced into existing legislation, while larger reforms will be contained in a new Civil Code. There are, however, exceptions to this rule. One example is the recent draft amendment to the Civil Code, which entered into force on 25. December 2014. It came about in conjunction with the necessity to implement Directive 2011/83 on consumer rights, which required the implementation of minor changes to the manner in which the Code regulates matters of sale. The Codification Commission at the same time took the opportunity to re-implement Directive 1999/44 on the sale of consumer goods. It was initially introduced into Polish law in 2002 by way of a separate Consumer Goods Sale Act, whose content essentially repeated that of the Directive. This method of implementation generated two undesirable effects for the civil law system. Firstly, a third regime of contractual liability for sellers arose – dependent on the classification of the parties and the subject material of the contract, liability could be borne either under the provisions of the Civil Code based on the concept of implied warranty for defects, under provisions of a consumer sale contract with liability grounded in nonconformity of goods with the contract, or even under the Vienna

Convention (CISG). This obviously caused difficulties in determining and applying the proper law. Secondly, consumer sale regulation was in some ways less beneficial to the buyer than the provisions of the Civil Code applying to non-consumer goods. The provisions of the Civil Code and implied warranty provide the buyer with the freedom to choose between rescission of the contract, reduction of the price of the good, and exchange (or repair) of the product purchased. Meanwhile, under the Consumer Sale Act the legislator adopted the minimum standards set forth under the Directive, consisting in a hierarchy of prerogatives afforded to the buyer limiting the possibility of rescission of the contract or of a reduction in price. For these reasons, apart from legislation implementing the Directive on consumer rights the Codification Commission proposed abrogating the Consumer Sale Act and amending the provisions on implied warranty so that they would provide the remedies required by the Directive on the sale of consumer goods. The model of work on drafting a new Civil Code as adopted by the previous Chair of the Commission and leading promoter of the idea of a new codification, prof. Zbigniew Radwański (deceased), consisted in establishing a relatively large number of teams composed of both individuals from the Commission and from outside it, coming from various academic centres, and those teams would prepare drafts of particular fragments of the new Code. This method had its merits. It allowed a relatively large number of members of the legal community to contribute to the discussion of the new Code at an early stage of its development, giving that community real influence on the fate of this important project. It also ensured the substantive benefit of generating a broad spectrum of opinions, facilitating comprehensive consideration of the issues at hand. However, it also had its flaws, such as difficulty in reaching conclusions, inconsistencies in the results of work, the absence of an individual or small group of people directing the work and overseeing the process and, also importantly, responsible for the result. As the work progressed, this method began to evolve. The first partial drafts are presently under review by smaller teams dominated in numbers by members of the Commission. This is intended to ensure the project's greater

substantive and formal cohesion. We may expect that after the teams have completed all of the partial drafts, their work will be reviewed and revised in its entirety by a small group of the Commission's members.

The present state of work on the new Civil Code creates a quite complex picture, as not all elements of that work are progressing at the same rate.

The first completed draft was that of Book I (General Provisions), finished in 2008. It was published in order to provoke debate.<sup>365</sup> This could be seen as a controversial decision, as the draft could not be considered a finished product – the shape of the Code's general provisions naturally depend on the solutions adopted in its detailed sections, particularly in the law of obligations and property law, which are the most tightly linked with the general provisions. Publication of the draft did evoke a discussion among the academic community, in which sometimes quite critical opinions were expressed as to particular proposed solutions, as well as general opinions about the idea of creating a new Code. While it is difficult to say conclusively, it would seem that the decision itself to develop a new Civil Code does not have a great deal of dissenters within the academic community; representatives of the legal profession also do not fundamentally oppose it. However, the justices of the Civil Chamber of the Supreme Court were vociferous in their opposition to work on a new Civil Code.<sup>366</sup> The draft of the first book is presently under revision by a small team from the Codification Commission, the objective of which is to explore the validity of postulates put forth in the confines of scientific discussion, to repair flaws observed

<sup>365</sup> Komisja Kodyfikacyjna Prawa Cywilnego działająca przy Ministrze Sprawiedliwości, Księga pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem [Civil Law Codification Commission by the Minister of Justice, Book One of the Civil Code. Draft with reasons], Warszawa 2009.

<sup>366</sup> See: Izba Cywilna Sądu Najwyższego, Projekt Kodeksu cywilnego. Księga pierwsza. Sprawozdanie z dyskusji przeprowadzonej w Izbie Cywilnej Sądu Najwyższego [Civil Chamber of the Supreme Court, A Draft Civil Code. Book I. Report from the discussion conducted in the Civil Chamber of the Supreme Court], Przegląd Sądowy 2010, no. 2, p. 104 et seq. This position is argued against by Z. Radwański, Uwagi do sprawozdania z dyskusji przeprowadzonej w Izbie Cywilnej Sądu Najwyższego nad „Projektem Kodeksu cywilnego. Księga Pierwsza” [Remarks on the report from the discussion conducted in the Civil Chamber of the Supreme Court on „A Draft Civil Code. Book I“], Przegląd Sądowy 2010, no. 4, p. 5 et seq.

in the draft legislation, and to bring it into compliance with drafts of other portions of the Code composed during the same period. There is also discussion of extensive changes to that book and its particular solutions.

Work on the law of obligations (Book II of the Code) is divided into several parts. General provisions concerning obligations were prepared during the Commission's previous term by a number of teams, and are presently being reviewed, edited and harmonized by a smaller team from the Codification Commission. Some fragments of the draft in their initial form have already been published as books or in academic journals. In particular, draft provisions on the performance of obligations and the effects of non-performance prepared by academics from the Jagiellonian University in Kraków were published along with a rationale in 2009.

Part of the law of obligations which deals with specific contracts is at a relatively early stage of development, as this is the area in which the most wide-ranging changes are foreseen. No partial draft has been completed, nor presented to the Commission.

The third book, concerning property law, is at a very advanced stage of preparation. The first draft is essentially completed, but certain decisions as to its scope and structure have yet to be taken. This is linked with the contemporaneous work conducted on the general provisions.

The planned fourth book (family law) will most certainly be based largely on the Family and Guardianship Code presently in force. The decision to include family law in the Civil Code, taken at the beginning of work on the draft Code, may still be placed under discussion. Increasingly deep discrepancies between the fundamental principles of property relations in civil law and the principles on which family law is based may provide arguments in favour of leaving the latter material the subject of separate legislation in order to prevent familial relations being "infected" by the concepts and particular solutions governing property relations.

The Code's fifth book, inheritance law, is largely complete, but has not yet been submitted for discussion to the entire Commission.

## 6.2 Foreign and European Models

The Codification Commission is not basing its work on the new Civil Code on any specific normative act in place in another country. During conceptual work, the solutions adopted in other countries are analyzed and discussed, including ones from both the continental law tradition and common law. Many of these solutions have an influence on the shape of the regulations under development, but the content of legislation in force in other countries is not being adopted. An important source of inspiration in respect of the law of obligations and of general provisions of civil law (particularly juridical acts) is model legislation. During preparation of amendments to the civil code at the end of the 1990s and beginning of the 21st century a significant role was played by the Principles of International Commercial Contracts and Principles of European Contract Law. At present, a great deal of attention is being paid to the Draft Common Frame of Reference during work on the aforementioned portions of the Code. It is a matter of course that the prepared drafts take account of the obligations resulting from European Union directives. It is the Commission's intention to incorporate European law into the content of the Civil Law to a greater degree than before, as well as to limit the number of statutes outside the Civil Code implementing European Union law.

## 6.3 The Subject Matter Aspects of the Reform

The following remarks are limited to addressing work on a new Civil Code, as this is currently the most significant reformatory initiative in Polish private law. Because the work is in progress and at a relatively early stage – not even an initial draft of the Code has been completed – we may speak only of plans and assumptions, and to a certain degree about decisions already taken, which are not yet final.

In the broadest sense, it may be said that continuation is the leading principle of the work underway on codification. Various changes as to the structure and content of regulation are being planned and drafted, but the primary characteristics of Polish civil law as embodied in the Civil Code of 1964 are to remain unchanged. It is thus statutory law, with the lead role

played by the Code and with other statutes performing a supplemental role. The role of the judiciary is not to make law in the strict sense of that term, but rather limited to interpretation and application of statute. However, in both the former and the latter the courts have significant leeway in shaping the legal landscape. The language of statute is naturally imprecise, thus the terms used in it require clarification. Alongside linguistic interpretation, another significant role is played by systemic interpretation, oriented towards seeking the meaning of a legal provision based on its relation to other norms within the system, particularly ones higher in the hierarchy, and functional interpretation, which consists in seeking the values protected by a given legal provision and assigning it with the meaning allowing it to perform that function to the greatest possible degree. In this way, courts may use interpretation to join in shaping the content of the law as it applies. In turn, an active role for the court in the process of applying the law (resolving individual cases) comes about mainly in two types of situations. The first of them are relatively uncommon circumstances in which a statute explicitly gives the court discretion within fixed boundaries, e.g. that in a given factual situation the court may award damages (*i.e.* decide as to whether they are to be awarded or not, following only general guidelines established in the law). A second backdoor for more elastic decision-making is constituted by the relatively frequent appearance in the Code of imprecise terms. These may take the form of purposefully vague labels for particular states, such as “important reasons” or “due diligence”, which leave the court with a certain measure of freedom in the qualification of factual circumstances from the perspective of a legal norm. They may also be so-called general clauses, *i.e.* phrases that order the court to perform its own assessment according to certain extra-legal criteria of judgment (moral or economic). The most important of these clauses is the good morals clause, which primarily serves as the foundation of the construction of abuse of a right.

The Code contains exclusively substantive norms, without procedural regulation (with the exception of regulation concerning distribution of the burden of proof). These norms regulate the prerogatives and behaviours of entities under the civil law. The Polish legislative tradition does not recognize the inclusion of abstractly expressed principles of law within

the content of a normative act. These principles may, however, be deduced from particular substantive regulations in the writings of legal scholars and in jurisprudence.

The structure of the Code is to remain essentially based on a slightly modified pandectic layout, with general provisions given in a separate, first book, and with a clear division of the second book (law of obligations) into general rules and rules governing particular types of obligations (primarily contractual). Serious consideration is being given, however, to introducing a distinct section within the Code (most likely a separate book, but an alternative under consideration is a separate title within the book on obligations) containing regulation on securing receivables. This would represent a break from the traditional division into property law and law of obligations, bringing together regulation concerning such areas as transfer of title as security, mortgage, surety, guarantee and other forms of security, both personal and in property. Advantage of such a solution would be not only grouping in one place institutions which are functionally similar, but only constructed differently. Above all, this would make it possible to develop general regulations for all forms of security, addressing such issues as information obligations, accessoriness and exceptions to it, the effects of excessive security, etc. Certain structural changes are also planned, both within and across particular books. At present, provisions on the conclusion of contracts are being transferred from Book I (General Provisions) to Book II (Obligations), and provisions addressing things and other subjects of rights from Book I to Book III (property law). In turn, analysis is being undertaken of the possibility of creating and including in Book I a collection of general provisions concerning the assignment of subjective rights, which would contain a portion of the regulation that repeats itself in several places throughout the present Code (e.g. provisions on acquisition of ownership, assignment of claims and alienation of inheritance).

The style of the Code is to remain synthetic, preferring clear and precise general formulations rather than lists and examples. Another noticeable aspect is the attempt to retain legal terminology taken from the 1933 Code of Obligations and the Civil Code of 1964. This is particularly important from the perspective of legal interpretation, not only because linguistic rules



play a significant role in the process of interpreting the law. Equally significant is the concept of the rational legislator, a theory widely-propagated in both legal scholarship and judicial practice. This is not the only possible manner of elucidating the process of interpreting the law, but it enjoys broad acceptance. It treats legal interpretation as a strain of humanistic interpretation, thus leading to the assumption that normative acts are the work of one (obviously fictional) rationally-operating author. One effect of this concept is that when the wording of a provision is changed, it is generally assumed that this is accompanied by the desire to change the legal norm expressed by that provision. For this reason it is necessary to exercise caution when formulating new statutory regulations so as to avoid the suggestion of substantive changes when only an editorial correction is intended.

There is no doubt that the Code will attempt to encompass both professional and consumer trade, to at least the same degree as at present if not to a greater one.

Fragments of the draft already developed by particular working groups of the Codification Commission contain what are in some ways significant departures from the law presently in force. In respect of the general provisions of the Code, an important proposal – at least from a theoretical perspective – is a change in the definition of a juridical person. This is only, however, a consequence of the development of the law. The current Code initially attempted to retain the bipartite division of legal entities into natural persons and juridical persons, with the latter being regulated by the so-called normative method – the legal personhood of a particular organization or category of organizations was conferred by statutory provision. At the same time, scholars considered that a fundamental characteristic of a juridical person was the sole liability of that person for its obligations (absence of subsidiary liability of other persons, e.g. members or managers of a given organization). This narrow, normative understanding of a juridical person did not entirely meet the needs of the real world, in which organizations attempted to function which were not assigned legal personhood by any regulation. What is more, with time there appeared regulations assigning legal capacity and capacity to commit juridical acts to particular organizational entities which were not classified by statute as juridical

persons (commercial partnerships, companies in organization, homeowners' associations). Subsidiary liability was established in statute for these entities' members or managers. A 2003 amendment to the Code required that provisions addressing juridical persons be applied to these entities as appropriate. The draft of Book I of the new Civil Code uniformly treats all organizational entities assigned legal capacity as juridical persons, accepting the fact that some of them will not bear exclusive liability for their debts.

Another significant proposed change is expansion of regulation concerning interpretation of juridical acts (particularly contracts). In this particular case we may speak of continuation, as the proposal concerns fashioning the principles of interpretation developed by scholars and accepted by jurisprudence against the backdrop of a terse Art. 65 into codified regulation.

Rather serious – but not quite fundamental – changes are proposed in respect of provisions on defects in declarations of will and nullity of a juridical act. These changes mainly consist in more detailed regulation of the conditions and effects of particular defects in a juridical act. The position of free will as the supreme principle of civil law is not violated, and it may even be strengthened as a result of some particular changes. There are plans to remove a provision restricting freedom of contract, introduced (hastily in my view) in 1990 and consisting in requiring that the content and objective of a contract be compliant with “the nature of the contractual obligation”. The only limitations on freedom of contract that will remain are provisions of statute and good morals. In addition, the general provisions of the law of obligations is to contain regulation accenting the dispositive character of that law's norms. It is to proclaim that the provisions of the law of obligations are *ius dispositivum* unless something different results from their wording or objective. This regulation does not indicate which functional considerations may result in a norm being absolutely binding (it is generally accepted that these considerations include protection of the public interest, the interest of a third party or the interest of the weaker party to a contractual relationship), but its very presence is intended to prevent the courts from mistakenly perceiving an imperative attribute in some provisions. However, if the proposed provisions are accepted, a limitation on

the freedom of contract as presently understood will result from the introduction of a mechanism for judicial review of contractual provisions not negotiated individually in relations between professional entities.

The draft regulation addressing the form of juridical acts is to further reduce the level of formalization of transactions, and to provide uniform regulation of forms of declarations other than declarations of will (mainly information provided to the other party of a legal relationship). Both of these objectives are to be furthered by a new concept of a document, which has been defined in the draft as “information recorded in a manner allowing for its preservation and future access”. This concept serves as the foundation for the documentary form of juridical acts – a declaration of will submitted in the form of a document, in a manner facilitating the determination of the person who has submitted it. These are controversial propositions, and will be the subject of further discussion.

It is vital to make deep changes in the current regulations concerning limitation periods, particularly in order to reduce the quantity of different periods scattered about various civil law regulations and which do not always have a reasonable justification. In addition, a discussion must be initiated over the application of limitations on non-economic claims – they are not presently subject to limitations, and the first draft of the general provisions of the Civil Code contains changes in this respect.

The most far-reaching changes in the general provisions of the law of obligations are planned in the area of contractual liability. There is not enough space for them to be discussed here. In a general sense, they consist primarily in eliminating the current complicated system of contractual sanctions, regulated separately for reciprocal contracts and other contracts and, to a large degree, separately for contracts of sale, contracts of specific work and tenancy contracts (implied warranty). It is to be replaced by a uniform group of rules regulating the rescission of contracts, reduction of counter-performance, exchange or repair of performance and damages, additionally incorporating the Consumer Sale Directive. The liability for non-economic loss resulting from non-performance of an obligation is also to be introduced, but only in cases when the obligation’s primary objective was to protect a non-economic interest of the creditor.

In respect of liability in tort no revolutionary changes should be expected, but a great deal of individual solutions will require rethinking and, perhaps, improvement. It is certain that the system of liability in tort will continue to be based on a general clause and detailed regulations addressing more narrowly-defined events resulting in injury. Consideration is, however, being given to a change in the general clause that would lead to elimination of the concept of fault, i.e. culpability (whose understanding in Polish scholarship and jurisprudence encompasses subjective elements as well), instead applying the criterion of objectively improper conduct.

As mentioned previously, work in respect of particular nominate contracts is not at an advanced stage. There is a general consensus among the Commission's members that it is necessary to shift the fundamental burden of regulation from contracts transferring ownership (particularly by way of sale) to contracts on the provision of services. This represents an attempt at having the law keep pace with developments in the contemporary economy. Accordingly, regulations addressing services will have a greater impact than at present on the content of general provisions of the law of obligations. The question of the structure of detailed provisions concerning obligations remains to be resolved. A proposal has been floated to depart from the current system based on distinguishing a large number of rather narrowly-defined contracts, adopting in its place a more elastic solution based on differentiating several basic categories of contract (sale, provision of services, use of an object, etc.) with more specific provisions for some of their sub-categories.

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## 7 ROMANIA

*Christian Alunaru – Lucian Bojin*

### 7.1 Preparation of the Private Law Reform and its Materialization

#### **How long has the reform, including the preparatory works, been going?**

The new Romanian Civil Code (Law no. 187/2009) was promulgated in 2009, published in Romania's Official Journal no. 511 of 24 July 2009 and entered into force on 1 October 2011. It replaced the old Civil Code of 1864, entered into force on 1 December 1865. The latter Code was considered an imitation of the Napoleon Code of 1804, even though it also used other sources of inspiration, such as the Belgian Mortgage Act of 16 December 1851, Pisanelli's project of Civil Code and certain old Romanian law provisions.

Certain imperfections of the old Code, consisting in the drafting and interpretation of certain articles, controversial in Romanian legal literature, as well as the economical and social evolution of the society had, as a consequence, three attempts to replace the Code, in 1940, 1971 and 2004.

The first project failed due to the war. The second project was elaborated during the communist period and purported to impose representative regime principles, especially the socialist State property law and the legal relationships between public undertakings.

The third project, of 2004, drafted by a commission formed by professors from University of Bucharest and Cluj and experienced practitioners, was communicated to the Courts and Prosecutors' Office for comments and proposals. This project was voted in the Romanian Parliament only by the Senate, without the support of the Chamber of Deputies. For this reason, a new project was drafted, financed by the World Bank.

A new commission was formed by professors from University of Bucharest and civil law practitioners, aided by the Canadian Agency for International

Development through the expert commission that drafted the Quebec Civil Code of 1991. The new Civil Code project was approved by the Romanian Government in 11 March 2009. A period of two months of examination by a special parliamentary commission followed.

According to the Civil Code's Statement of Reasons, the debate in the special parliamentary commission continued the public consultation process. Those interested had the possibility to submit proposals and observations. The website of Ministry of Justice contained a special section for receiving proposals and observations, together with an online version of the project. Nevertheless, the project was examined by the special parliamentary commission only for two months. Next, the Parliament rapidly approved the project, without debates, as the Government accountability procedure was undertaken. Thus, the Civil Code was promulgated on 24 July 2009. However, its entry into force was postponed until 1 October 2011, while numerous modifications were brought, especially by the Implementation Law no. 71/2011.

### **What were the reasons for the reform?**

The main reason for the reform was that the old Code did no longer meet the economic and social reality in Romania and the new European private law norms. Another reason was the archaic language of the 1864 Code that no longer fit the modern society. Also, certain legal institutions, such as strict liability tort, moral damages, unjust enrichment, leasehold etc., were not expressly provided by the Code, the lack being fulfilled by doctrine and case-law.

In any case, it cannot be argued that a reason for the reform would be the need to eliminate the communist provisions. Unlike other communist States, Romania did not replace the old Civil Code (which was very similar to the French Code) with a communist code. During the 44 years of communist regime and the subsequent years until 2011, the law in force was the code promulgated with almost a century before the communist period.

The Statement of Reasons of the new Civil Code identifies the reason of the reform as being a consequence of the new engagements towards the European Commission, establishing the mechanism of cooperation and

verification (Commission Decision 2006/928 EC of 13 December 2006, Official Journal L 354, 14. 12. 2006). In the Report from the Commission to the European Parliament and the Council on Accompanying measures in the context of Romania's accession to the EU (Brussels, 27 June 2007) it is mentioned that "Regarding the legal reform and the fight against corruption, Romania needs to complete the adoption of the new Civil Procedure Code...".

As can be seen, the Civil Procedure Code is expressly mentioned. Naturally, the removal of the Romanian judicial system deficiencies would require a procedural reform and not a substantive law one. Nevertheless, the Statement of Reasons states that "the ample ongoing reform work of procedural law can be undertaken in good conditions only in a unitary, overall vision, which presupposes legislative consistency and a tight correlation with the substantive reform on material law (a civil law reform)". Further, the Statement of Reasons shows that the last Interim Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism (Brussels, 12 February 2009) emphasizes the great importance for the judicial system of the adoption of the four new codes: Civil Procedure Code and Civil Code, Criminal Procedure Code and Criminal Code.

The Reasoning from the Statement of Reasons of the Civil Code is contradicted by the events: the two codes did not enter into force at the same time, as the Civil Code was adopted on 1 October 2011, while the Civil Procedure Code was adopted on 15 February 2013.

**Have there been elaborated any studies identifying the most crucial problems with exercising the former legal conditions in practice?**

The authors of the Civil Code argue in the Statement of Reasons that the main issues raised by doctrine and case-law were considered in the drafting of the new Code. Some of them can indeed be recognized, such as regulating limitation (extinctive prescription) under different provisions than the ones regulating acquisitive prescription, the latter being a consequence of possession and is contained by the Third Part, concerning goods. Further, it was taken into consideration that the so called natural and legal easements

of the old Code were considered by doctrine as rather being normal restrictions of property rights for assuring good neighboring relationships and not actual easements, as they are not dismemberments of property rights. Only the easements established through a person's deed are actual easements. This view was transposed in the Civil Code and, consequently, the Easements Chapter contains only the ones established through the owner's will (the former easements established through a person's deed), while the former natural and legal easements were included in the legal restrictions of property rights. Also, contractual liability is mentioned in the Code for the first time, aside tort liability, as well as strict liability, aside subjective liability.

In conclusion, it can be noted that many of the critics brought by the doctrine to the old Civil Code were included in the text of the new Code. However, it cannot be stated that special studies were undertaken in order to identify these problems.

### **How was the reform organized?**

As we have previously showed, in 2004, a project was drafted by a commission formed by professors from University of Bucharest and Cluj and experienced practitioners, which was communicated to the Courts and Prosecutors' Office for comments and proposals. This project has been voted in the Romanian Parliament only by the Senate, without the support of the Chamber of Deputies. For this reason, a new project was elaborated. This project was organized by the Ministry of Justice. A new commission was formed by professors from University of Bucharest and civil law practitioners, selected, as the New Civil Code's Statement of Reasons shows, in a transparent proceeding specific for the technical assistance contracts financed by the World Bank (the payment of the external collaborators being supported by the loan granted by the World Bank for financing the Project of Institutional Development of the Private and Public Sector – PPIBL, administered by the Ministry of Finance through UMP-PPIB). The commission was aided by the Canadian Agency for International Development (CIDA) through the expert commission that drafted the Quebec Civil Code in 1991. The Canadian Commission was formed by professors, magistrates



and attorneys, whose participation consisted in periodic counseling regarding the project, effective participation in the drafting commissions and supply of documentation and comparative law studies.

The new draft of the Civil Code project was approved by the Romanian Government on 11 March 2009.

Regarding the conduct of the public debate of this project before adoption, we have a few comments to make. According to the Statement of Reasons of the Civil Code, the commission that drafted the code has encouraged the submission of improvements by any interested entity or person. Thus, all interested socio-professional categories had the possibility to submit proposals and observations for discussion. For encouraging the active participation of the civil society in improving the project, the Ministry of Justice launched a public appeal, towards all interested persons, to submit observations and improvement proposals to be analyzed by the parliamentary commission.

Moreover, the website of Ministry of Justice contained a special section which provided explanations regarding certain provisions, views and institutions referred to by the project and received comments and suggestions leading to improvements of the draft text. The Ministry of Justice also organized press conferences and drafting reunions with representatives of non-governmental organizations and mass-media, during which controversial provisions were debated, especially the ones regarding the “defence of non-patrimonial rights” and “private life and human dignity”.

The Commission’s conclusion, expressed in the Civil Code Statement of Reasons, is that this form of public consultation would be the most appropriate and sufficient: “By allowing the consideration of proposals submitted by an extremely large group of people, organizations, institutions, this extended consultation represents the most efficient and relevant form of public debate”.

In spite of these optimistic statements, we consider that an effective, direct debate with all categories of jurists (academics, researchers, magistrates, prosecutors, attorneys, notaries public, legal counsels, experts), before submitting the project to Parliament, could not have taken place. In Romania,

there is no National Congress of Jurists (as in Germany or Austria) that could regularly debate the topical legal issues and submit proposals based on practice<sup>367</sup>. The existent Union of Jurists, that publishes the most relevant legal journal in Romania, “*Dreptul*”, organizes events, but not congresses for jurists, after the German model.

Moreover, no parliamentary debate took place, as the Government did not choose the procedure of parliamentary debate of the codes, but opted for Governmental Accountability under Article 113 of the Constitution. This proceeding allows the Government to be held accountable for a certain law (here, the Civil Code and the Civil Procedure Code) so that either the law is adopted or the Government is dismissed on the basis of a motion of censure. Consequently, there was no debate in Parliament on the 2644 articles of the Code.

The critiques already brought in the legal literature confirm the fact that the “public debate”, as it was understood by the commission that drafted the project of the new code, was not enough, but a direct and open discussion with the main categories of jurists, theorists and practitioners alike, would have been required, eventually in the context of a congress of jurists, after the German or Austrian model. Numerous critiques and even amendments were brought to the Code after its entry into force (including through the Implementation Law no. 71/2011), which is a clear proof that such a debate did not exist before the adoption.

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<sup>367</sup> For details regarding the way the German and Austrian Jurist Congresses are organized, the method of debate of current legal issues in all branches of law and the adoption by vote of decisions concerning legislative amendments that are forwarded to the Parliament see: Cr. Alunaru, *Al 61-lea Congres al juriștilor germani*, in “*Studii de drept românesc*”, Editura Academiei Române, nr. 1-2/1997; *Idem*, *Câteva concluzii pe marginea reformei Codului civil austriac, aplicabile procesului de reformă legislativă din România*, *op. cit.*, p. 49 - 55; *Idem*, *Câteva concluzii la cel de-al 64-lea Congres al Juriștilor Germani de la Berlin* – in “*Studii Juridice*”, University Press, October 2003, p. 15-22; *Idem*, *Tendințe actuale în dreptul comunitar relevate la al 4-lea Congres European al Juriștilor de la Viena*, in “*Revista română de drept comunitar*”, Editura Wolters Kluwer Romania, nr. 4/2007, p. 192 - 2006.

**Were any critical remarks raised by representatives of legal theory or practice taken into account?**

As we have already shown, along decades, the doctrine has criticized the inappropriateness or lack of regulation of certain legal institutions of the 1864 Civil Code:

A legal definition of estate; delimitation of public property from private property; the express regulation of leasehold; the so-called natural and legal easements, which are, in fact, legal restrictions of property rights; express regulation of unjust enrichment; express regulation of maintenance contract; delimitation of tort liability from contractual liability; regulation of strict liability tort; moral damages.

**Which laws have been prepared or adapted in the course of the reform? For instance, if there was adapted a new civil code as a part of the reform, was such a civil code being prepared separately or were there any other laws being prepared together with it? These “other laws” could be not only brand new laws, but also already existing laws which had to be amended as a result of the passage of the new civil code.**

The Romanian Government intended to initiate a large-scale reform of the legal system, by introducing four new codes: Civil Code, Civil Procedure Code, Criminal Code and Criminal Procedure Code. Due to objective reasons, mainly the lack of necessary infrastructure, the “great reform” was considered hard to accomplish and was prolonged. Therefore, even if the Civil Code was promulgated on 24 July 2009, it could not enter into force until 1 October 2011, while the Civil Procedure Code (Law no. 134/2010, published in the Official Journal I No. 545 of 3 August 2012) entered into force only on 15 February 2013, on the basis of the Implementation Law no. 76/2012.

In these circumstances, a law called “the small reform of justice” was promulgated (Law no. 202 of 25 October 2010), concerning certain measures for accelerating judicial proceedings, published in the Romania’s Official Journal I, no. 714 of 26 October 2010. The law entered into force 30 days after

publishing, hence on 25 November 2010, except the provisions concerning divorce by administrative or notarial procedure, which entered into force 30 days later.

The law amended the Civil Procedure Code and numerous other laws related to civil proceedings.

The Civil Procedure Code was amended, among other, in the following respects:

- Inadmissibility of a new request of relocation of the case without invoking new reasons, unknown at the time of the first request;
- Completing the data for party identification in the summons with modern methods, such as telephone number, fax number, email address, or for legal persons with the registration number of trade registry or the legal persons registry, fiscal code and bank account; in case the plaintiff is domiciled abroad, he has to choose a domicile in Romania, where all the communications regarding the case will be made; in case the plaintiff is represented by an attorney, he must mention his name and office address;
- Judge's right to administer other evidence *ex officio*, even if the parties resist;
- Judge's obligation to encourage reconciliation of the parties during the entire trial, giving the necessary instructions, requesting, to this purpose, personal appearance even if the party is represented;
- Judge's right to recommend in any stage of the trial, when necessary and according to the case circumstances, mediation, in order to solve the dispute amicably;
- Court's right to fix short terms, even from one day to another, according to case circumstances; the possibility to notify the parties by phone, fax, email or any other communication means that ensure notification of receipt and confirmation of notification;
- Objections concerning the procedures could be made only by statement of defence or on the first court appearance, except for the public policy ones;
- Acceleration and simplification of the proceedings regarding the appointment of experts and of the duration for completion of expert report;

- Inadmissibility of the appeal or recourse for correction, clarification or removal of inconsistent provisions or completion of the decision, for this being created a special proceeding under art. 281–281<sup>2</sup> of the Civil Procedure Code;
- Removal of possibility of appeal for a series of decisions of the first instance courts, such as requests for alimony as the case’s main purpose; cases that have an object in value up to 100.000 lei, in civil and commercial matters; possessory actions; commercial eviction actions; civil registry actions and provisional measures; requests for damages caused by judicial errors in criminal cases and other cases provided by the law;
- Appellate court’s right to overturn the challenged decision and keep the case for retrial on merits if it finds that the first instance court has decided the case without judging on merits or if the judgment was made in the absence of an unduly summoned party; sending the case for retrial to the first instance court or to one of equal degree can be made only once and only if the parties have expressly solicited this through the appeal request or summons;
- Removal of the right to review decisions of cases with value under 2000 lei;
- The Review court’s right to overturn the decision and send the case for retrial can be exercised only once during the trial in which the previous court decided the case without judging on merits, if the judgment was made in the absence of an unduly summoned party during administration of evidence as well as during debates, or if the decision was overturned due to lack of jurisdiction;
- Admissibility of appeal in the interest of the law only if there is proof that the matters of law have been settled differently through irrevocable decisions, annexed to the request;
- Acceleration of the procedure for enforcement of judgments;
- Settlement of divorce requests in the council chamber, without administering evidence of the reasons for divorce and deciding over juvenile custody and parent contribution to children’s education, maintenance and training expenditure;

- Possibility of settlement of commercial disputes through direct conciliation and mediation; possibility of judging commercial disputes, if the parties are duly summoned, in the council chamber, even on the next day or on short terms.

**The Small Reform of Justice Law (Law no. 202 of 25 October 2010) also amended other laws regarding civil trials:**

- *Law no. 4/1953 – The Family Code* (republished in the Official Bulletin no. 13 of 18 April 1956, with subsequent amendments) was amended in what regards divorce, which can take place through spouses' mutual agreement, at the request of both spouses; when due to serious reasons the relationship between spouses is roughly damaged and marriage is no longer possible; at the request of the spouse whose health makes the continuation of marriage impossible. Divorce through mutual agreement can be granted by the court irrespective of the length of marriage or of the existence of minor children of the marriage. Likewise, the dissolution of marriage through mutual agreement can be signed before a public notary or a civil status officer from the place of marriage or from the last mutual domicile of the spouses, under the condition that both spouses agree to divorce and don't have minor children, adopted or born during the marriage.
- *Law no. 304/2004 concerning judicial organization* (republished in Romania's Official Journal, Part I, no. 827 of 13 September 2005, with subsequent amendments) was amended in what regards the organization of the High Court of Cassation and Justice (in 4 sections – The Civil Section and Intellectual Property, The Criminal Section, The Commercial Section, The Section for Contentious Administrative and Fiscal Business, 4 panels of 5 judges and The Joint Sections, with own competence) as well as regarding the panels of 5 judges. It was introduced the right of the panels of 5 judges of the High Court to examine the admissibility of recourse in the council chamber, without summoning the parties. In the case in which the appeal is lodged against a non-reviewable decision, against a decision that can be appealed only with the merits, against an appeal or a request for annulment decision, the panel rejects

the request as inadmissible. Another provision was added, regarding the first instance court's panel of judges for labor and social insurance conflicts, which is made up by a judge and 2 judicial assistants.

- **Law no. 188/2000 concerning bailiffs** (published in Romania's Official Journal, Part I, no. 559 of 10 November 2000, with subsequent amendments) was amended in what regards the competence of bailiffs and their obligation to register their appointment to office at the court of appeal in whose jurisdiction the office is, in a 90 days term.
- **Article 2 of the Government Ordinance no. 66/1999 for Romania's accession to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents** (adopted in Hague on 5 October 1961, published in Romania's Official Journal, Part I, no. 408 of 26 August 1999, approved by Law no. 52/2000, with subsequent amendments) was amended in what regards the competent Romanian authorities to apply the Apostille provided by art. 3 para. (1) of the Convention, which are: tribunals, notary public chambers and prefectures.
- **Paragraph 1 of Article 57 of the Law on Notaries Public and Notary Activity no. 36/1995** (published in Romania's Official Journal, Part I, no. 92 of 16 May 1995, with subsequent amendments) has amended the competence of the Chamber of Notaries Public from the notary's main office, or county offices in which the notary public has instrumented the document, to superlegalize the public notary's signature and seal, when this superlegalization is necessary for the validity of the notarial document abroad.
- **Article 4 para. 1 of the Law on administrative litigation no. 554/2004** (published in Romania's Official Journal, Part I, no. 1154 of 7 December 2004, with subsequent amendments) was amended so the legality of unilateral administrative act with individual character, irrespective of the issuance date, can be investigated anytime during a trial, as an objection, *ex officio* or at the interested party's request. In this case, the court, finding that the settlement of dispute on merits is dependent on the act, notifies the competent court and suspends the case; the notification decision is non-reviewable and the decision of rejection is reviewable only with the merits of the case. The case

suspension is not ordered if the court before which the plea of illegality is raised is competent to decide upon it, nor if the plea of illegality was raised in criminal matters.

- ***Law no. 105/1992 on regulation of private international law relationships*** (published in Romania's Official Journal, Part I, no. 245 of 1 October 1992) was amended in respect to the lack of international jurisdiction of Romanian courts, which can be invoked during the entire trial.
- ***Government Ordinance no. 2/2001 on legal regime of contraventions*** (published in Romania's Official Journal, Part I, no. 410 of 25 July 2001, approved with amendments by Law no. 180/2002, with subsequent amendments) was amended so that unless the law provides otherwise, the judicial decision that solved the case can be reviewed within 15 days from the communication date, at the section of administrative litigation of the tribunal. Motivation of the recourse request is not compulsory. The recourse motives can be sustained orally before the court. The recourse suspends the execution of the decision.
- ***Government Emergency Ordinance no. 195/2002 on circulation on public roads*** (republished in Romania's Official Journal, Part I, no.670 of 3 August 2006, with subsequent amendments) was amended so that the complaint suspends the execution of fines and contraventional sanctions, from the date of registry until the date of pronouncement of judgment. The judicial decision by which the court solves the complaint is final and irrevocable.
- ***Law no. 61/1991 on sanctions for acts of infringement of social coexistence norms and public order*** (republished in Romania's Official Journal, Part I, no.387 of 18 August 2000, with subsequent amendments) was amended so that the judicial decision by which the court solves the complaint is final and irrevocable.
- ***Article 26 para. 3 of the Law no. 10/2001 on legal regime of property abusively taken during 6 March 1945 - 22 December 1989*** (republished in Romania's Official Journal, Part I, no.798 of 2 September 2005, with subsequent amendments) was amended so that the Decision or, as the case, the motivated disposition of notification rejection or of the restitution in-kind can be challenged by



the requesting party at the Civil Section of the Tribunal in whose jurisdiction the office of holding unit is located or, as the case, of the entity invested with the settlement of notification, within 30 days from the communication date. The tribunal's decision is reviewable by way of recourse by the court of appeal.

- ***Law no. 221/2009 on political convictions and the related administrative measures rendered during 6 March 1945 - 22 December 1989*** (published in Romania's Official Journal, Part I, no.396 of 11 June 2009, with subsequent amendments) is amended so that the tribunal's decision is revivable only by way of recourse by the court of appeal. Furthermore, a request can be filed by any person who was convicted on political grounds during 6 March 1945 - 22 December 1989 or who suffered political administrative measures, as well as, after his/her death, by the spouse or the descendants up to second degree, in 3 years from the date of entry into force of the law.
- ***Article 132 para. 9 of the Law no. 31/1990 on companies*** (republished in Romania's Official Journal, Part I, no. 1066 of 17 November 2004, with subsequent amendments) was amended so that the request will be judged in the chamber of council. The judgment is reviewable by way of recourse, within 15 days from the date of entry into force of the law.
- ***Article 26 of Law no. 192/2006 on mediation and organization of the profession of mediator*** (published in Romania's Official Journal, Part I, no. 441 of 22 May 2006, with subsequent amendments) was amended so that "for the activity of informing and counseling the parties regarding the mediation proceeding and its advantages, carried out according the law before the conclusion of the mediation contract, the mediator cannot claim fee".
- ***Article 23 para 2 of Law no. 146/1997 on judicial stamp duties*** (published in Romania's Official Journal, Part I, no.173 of 29 July 1997, with subsequent amendments), was repealed.
- ***Article III of the Government Emergency Ordinance no. 212/2008 for amending Law no. 146/1997 on judicial stamp duties*** (published in Romania's Official Journal, Part I, no. 837 of 12 December 2008, approved and amended by Law no. 276/2009) was repealed.

- *Article 16 of Criminal Procedure Code* (republished in Romania's Official Journal, Part I, no. 78 of 30 April 1997, with subsequent amendments and completions) was amended with regard to the transaction, mediation and recognition of civil claims: “(1) During the criminal trial, regarding civil claims, the defendant, the civil party and the civilly liable party may conclude a transaction, a mediation agreement, in accordance with the law. (2) The defendant, with the consent of the civilly liable party, may recognize, wholly or in part, the claims of the civil party. (3) In the case of recognition of civil claims, the court orders damages only for the recognized deed. Regarding the unrecognized civil claims, evidence will be administered.”
- *Article 145 para 3 of Law no. 8/1996 on copyright and related rights* (published in Romania's Official Journal, Part I, no. 60 of 26 March 1996, with subsequent amendments and completions) was repealed.

Another law that has brought important amendments to the Civil Code and many other special laws regulating Romanian private law is **Law no. 71/2011 for the implementation of Law no. 287/2009 concerning the Civil Code**, published in Romania's Official Journal, Part I, no. 511 of 24 July 2009, which had the main purpose of synchronizing the existing civil legislation with the provisions of the Civil Code, as well as solving the conflict of laws caused by the entry into force of the code. **What is unusual about this law is that it brings numerous amendments to the Code itself, which was barely adopted 2 years before and had not yet entered into force at the time when it was already amended.** This fact, we believe, proves that the code was hastily adopted, without a thorough analysis of its implications.

#### **Special laws amended by the Law for the implementation of the new Civil Code:**

- Law no. 31/1990 on companies, republished in Romania's Official Journal, Part I, no. 1066 of 17 November 2004, with subsequent amendments and completions, was amended so that the contribution in kind to the company's capital can consist of a property;

the tribunal is competent to solve requests and reviews; conditions for mortgage on shares; completion of the provisions of this law with those of the Civil Code and the Civil Procedure Code.

- Article 1 paras (1) and (2) of Law no. 26/1990 on trade registry, republished in Romania's Official Journal, Part I, no. 49 of 4 February 1998, with subsequent amendments and completions, was amended with respect to the natural or legal persons obligated to request incorporation and registration in the trade registry, before the commencement of economic activity. Furthermore, Article 21 lit. d was amended in what regards the matrimonial convention, matrimonial regime, divorce, nullity of marriage or matrimonial convention.
- Article 14 para (3) of Law no. 1/2005 on organization and functioning of the cooperative, published in Romania's Official Journal, Part I, no. 172 of 28 February 2005, with subsequent amendments, was amended so that the memorandum of association must be authenticated if the contribution to the capital consists of a property.
- Articles 88 and 89 of Law o. 8/1996 on copyright and related rights, published in Romania's Official Journal, Part I, no. 60 of 26 March 1996, with subsequent amendments and completions, was amended so that the depicted person's consent is needed in order to use his/her portrait, as well as the successor's consent, 20 years after the person's death. The consent is not needed if the portrayed person is a model or was remunerated for being depicted. A person's correspondence may be used only with the consent of the recipient and after his/her death, for 20 years, with the consent of the successors, if the recipient did not wish otherwise.
- Articles 26 and 29 of Government Emergency Ordinance no. 97/2005 on records, domicile, residence and identity documents of Romanian citizens, published in Romania's Official Journal, Part I, no. 641 of 20 July 2005, approved with subsequent amendments and completions by Law no. 290/2005, with subsequent amendments and completions, was amended so that the "Natural person's domicile is the place the person declares as main address" and "the residence is the place the person declares as secondary address, other than the domicile address".

- Articles 144 and 147 of Law no. 95/2006 on health reform, published in Romania's Official Journal, Part I, no. 372 of 28 April 2006, with subsequent amendments and completions, was amended so that the removal of organs, tissues and cells of human origin for therapeutic purposes may be performed on a living adult donor, with full legal capacity, after written, free, informed and express consent.
- Insertion of Article 29<sup>2</sup> in the text of the Law on notaries public and notary activity no. 36/1995, published in Romania's Official Journal, Part I, no. 92 of 16 May 1995, with subsequent amendments and completions, according to which a National Notary Registry of Matrimonial Regimes is established.
- Articles 35, 36 and 37 of Law no. 33/1994 on expropriation for public purposes, published in Romania's Official Journal, Part I, no. 139 of 2 June 1994, was amended with respect to the conditions in which the former owner can request retrocession, the limitation period and the conditions in which the former owner has priority for acquisition if the purpose for which the expropriation was made has not been accomplished and the expropriator wants to sell.
- Law no. 51/1995 on organization and exercise of the profession of attorney, republished in Romania's Official Journal, Part I, no. 98 of 7 February 2011, with subsequent amendments, was amended so that the attorney has the right to exercise fiduciary activities. The limited liability professional company was introduced as a form of exercising the profession.
- Government Emergency Ordinance no. 86/2006 on organization of the activity of insolvency practitioners, published in Romania's Official Journal, Part I, no. 944 of 22 November 2006, approved with amendments and completions by Law no. 254/2007, with subsequent amendments and completions, was amended with respect to the assets of the limited liability professional company and the form of the company's contract.
- Law on Cadastre and Real Estate Publicity no. 7/1996, republished in Romania's Official Journal, Part I, no. 201 of 3 March 2006, with subsequent amendments and completions, was amended

in the following respects: purpose of entry in the land registry, competence of the cadastre and land registry offices, type of entries in the land registry, correlation with the new Civil Code etc.

- Article II of Government Emergency Ordinance no. 64/2010 on amendment and completion of Law on Cadastre and Real Estate Publicity no. 7/1996, republished in Romania's Official Journal, Part I, no. 451 of 2 July 2010, was amended so that until 31 December 2016, the request to open land books under this law is exempt from tariffs.
- Law no. 213/1998 on public property and its legal regime, published in Romania's Official Journal, Part I, no. 448 of 24 November 1998, with subsequent amendments, was amended in regard to the designation of state's representative in disputes concerning the right to administration. Articles inconsistent with the new Civil Code were repealed.
- Article 5 para (1) lit. (c) and (d) of Law on gratitude to heroes, martyrs and fighters who contributed to the Romanian Revolution of 1989, and to people who have sacrificed their lives or have suffered from anti-labor uprising in Brasov on November 1987 no. 341/241, published in Romania's Official Journal, Part I, no. 654 of 20 July 2004, with subsequent amendments and completions, was completed in regard to the rights granted to the concerned persons.
- - Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, published in Romania's Official Journal, Part I, no. 1027 of 27 December 2006, approved with amendments and completions by Law no. 227/2007, was completed with regard to the formal conditions for the validity of testamentary dispositions concerning money, values and securities deposited by clients.
- Law on notaries public and notary activity no. 36/1995, published in Romania's Official Journal, Part I, no. 92 of 16 May 1995, with subsequent amendments and completions, was completed with regard to the notary succession procedure.
- Law no. 136/1995 on insurance and reinsurance in Romania, published in Romania's Official Journal, Part I, no. 303 of 30 December 1995, with subsequent amendments and completions, was amended so that it corresponds to the new Civil Code.

- Article 20 para (3) of Government Ordinance no. 19/1997 on transports, republished in Romania's Official Journal, Part I, no. 552 of 11 November 1999, with subsequent amendments and completions, was amended so that the public transport contract corresponds to the new Civil Code's provisions.
- Government Emergency Ordinance no. 12/1998 on Romanian railroad transport and reorganization of Romanian National Railway Company, republished in Romania's Official Journal, Part I, no. 834 of 9 September 2004, with subsequent amendments and completions, was amended with regard to the conclusion and performance of the transport contract.
- Article 35 para. (1) of Government Emergency Ordinance no. 40/1999 on protection of tenants and rent determination for housing, published in Romania's Official Journal, Part I, no. 148 of 8 April 1999, approved with amendments and completions by Law no. 241/2001, with subsequent amendments, was amended so that for tenancy agreements longer than 1 year, the owner can request the increase of the rent if he/she has not waived this right.
- Law no. 190/1999 on mortgage loans for investment property, published in Romania's Official Journal, Part I, no. 303 of 30 December 1995, with subsequent amendments and completions, was amended with regard to the mortgage duration, established that art. 2380 of the Civil Code is not applicable with respect to the mortgage loans for investment property granted on the basis of this law and establishes that the legislation on consumer protection is applicable.
- Government Ordinance no. 9/2000 on statutory rate of interest on pecuniary obligations, published in Romania's Official Journal, Part I, no. 26 of 25 January 2000, approved with amendments by Law no. 356/2002, was completed so the parties have the right to establish, through agreements, the interest rate for repayment of a loan or for late payment. Also, a classification of interests was introduced.
- Article 5 para. (2) of Government Ordinance no. 9/2004 on certain contracts on financial guarantees, published in Romania's Official Journal, Part I, no. 78 of 30 January 2004, approved with amendments

and completions by Law no. 222/2004, was amended, stating the provisions of the Civil Code are not applicable to the contracts regulated by the ordinance.

- Law no. 304/2004 on judicial organization, republished in Romania's Official Journal, Part I, no. 827 of 13 September 2005, with subsequent amendments and completions, was amended with respect to the organization of the High Court of Cassation and Justice.
- The National Securities Commission will amend Title VI, Ch. 3, section 3 of the SC Central Deposit SA Code, in order to permit the transfer of mortgaged financial instruments and the establishment of mortgages of subsequent ranking without the consent of the holder of the mortgage with a preferential rank.

Two days before the entry into force of the Civil Code, the Government has adopted, by way of Emergency Ordinance, measures necessary for the entry into force of the Code, even though the Implementation Law has already been adopted. Furthermore, a series of articles were amended with only two months before the entry into force of the code (Rectification no. 489/2011 of 8 July 2011, Off. M 489/2011).

**How long was or has been the period of *vacation legis* set by the lawgiver?**

26 months.

## 7.2 Foreign and European Models

**Was the reform inspired by any foreign civil codes? Is there obvious influence of a single foreign code or was the inspiration taken from several sources? If there were more sources, is the final outcome consistent, as for both its content and terminology?**

According to the Statement of Reasons of the Civil Code, the authors hold that for the drafting of the project new, modern regulations, existent in other legal systems were used as models, as well as the attempts made over time for amending and completing the Civil Code into a work that

values the fundamental elements of substantive law – perennial norms and principles – and topical elements, representative of a dynamic reality, at the same time.

Among the foreign codes cited as sources by the authors of the project are:

- The Civil Code of Quebec;
- The French Civil Code;
- The Italian Civil Code;
- The Spanish Civil Code;
- The Swiss Civil Code;
- The Swiss Code of Obligations;
- The German Civil Code;
- The Brazilian Civil Code.

The Civil Code of Quebec not only is the first one cited, but is the most important source of inspiration, due, among other, to the fact that the project's authors were aided by the Canadian Agency for International Development (CIDA) through its expert commission that has drafted the Civil Code of Quebec in 1991, as the Statement of Reasons clearly shows.

Nevertheless, the mere enumeration of so many sources of inspiration, from different legal systems, leads to the conclusion that the result is an eclectic work, but with certain inconsistencies, from which we will point a few:

**The definition of the contract of sale, provided by Article 1650 of the new Civil Code:** “The sale is the contract by which the seller transfers or obliges to transfer to the buyer the property over a good in exchange of a price that the buyer obliges to pay”. This definition is eclectic and confusing as it comprises a fundamental contradiction. There are two different views regarding the effects of the contract of sale. In the German and Austrian view, the contract of sale is an act of obligation and, therefore, not a title on the basis of which the transfer of property is made. In order to accomplish this, the “*modus*” is necessary, namely the handover (remittance) of the good, for movable property, or registration in the land book, for immovable property. In the consensualist Romanian view (inspired



by the French one), the contract of sale is a real contract (*translator's note* - the handover of the good is a condition for the existence of the contract), which has the effect of property transfer, without any additional acts.

In this sense, we quote Article 1674 of the new Civil Code regarding the **Transfer of property**: “Except the cases provided by law or if the parties have not agreed otherwise, the property is transferred to the buyer in the moment of the conclusion of contract, even if the good has not been handed over or the price has not yet been paid”. Therefore, the mere agreement of the parties transfers the property, as effect. In such a view, as the property is transferred in the moment of the conclusion of the contract, the provision according to which the seller “obliges to transfer to the buyer the property over a good” is inconsistent.

The Romanian view regarding the contract of sale was emphasized by doctrine long before the promulgation of the new Civil Code, on the basis of the provisions of the old Civil Code (Article 971 as *lex generalis* and Article 1295 para (1) as *lex specialis* for sale), as the transfer of property is made by the simple consent of parties<sup>368</sup>. It was held that the German principle, according to which the contract of sale creates a mere obligation, is a reminiscence of Roman law. In Iustinian's *Digests*, the contract of sale (*emptio-venditio*) was a consensual contract, a source of obligation, which had the effect of property transmission only after the handover of the good (*traditio*). The modern civil codes, of French inspiration, as the Romanian Civil Code is, have a different view regarding sale, considering it a property transferring contract. The property is transferred *solo consensu*. Therefore, a subsequent obligation to transfer property cannot exist.

The Romanian contemporary doctrine<sup>369</sup> emphasizes the difference between the Romanian definition of sale and the one comprised by the German Civil Code<sup>370</sup>, where the contract of sale does not transfer property, but is a mere

<sup>368</sup> Dan Chirică *Tratat de drept civil. Contracte speciale. Volumul I Vânzarea și schimbul*, Editura C.H.Beck, București 2008, p. 25.

<sup>369</sup> Ion Dogaru/Edmond Gabriel Olteanu/Lucian Bernd Săuleanu, *Bazele dreptului civil. Volumul IV. Contracte speciale*, Editura C.H.Beck, București 2009, p. 8.

<sup>370</sup> § 433 BGB „Durch den Kaufvertrag wird der Verkäufer einer Sache verpflichtet, dem Käufer die Sache zu übergeben und das Eigentum an der Sache zu verschaffen”.

act of obligation.<sup>371</sup> The same view is held by the Austrian law. According to § 1053, 1061-1063 ABGB, the seller obliges to transfer the property as the buyer obliges to pay the price. The buyer has only an account receivable, a personal right for the transfer of property and possession. For the transfer of property the good must be handed over (§ 380, 1053 ABGB) and for the immovable property, it must be registered in the land book (§ 431). A distinction must be made between the conclusion of the contract of sale and its performance. Rarely the two take place simultaneously, as in the case of sale in a store.<sup>372</sup> Conversely, in Romanian law, this is the rule: the contract of sale is an act of obligation as well as a real act of property transfer, at the same time. The exceptions provided by the new Civil Code regarding the unascertained goods and immovable property prove once again the rule provided by Article 1674 of the new Civil Code regarding the transfer of property.<sup>373</sup> In conclusion, this eclectic and inconsistent definition is the result of a mixture between different legal systems, or, in the case at hand, different ways of transferring property.

Other inconsistencies resulting from the compilation of different legal systems can be noticed in the use of the same **legal terms with different meanings**, used in the same code, which is inadmissible. Thus, “the state of necessity” is a legal limit of property rights (Article 624), a vice of consent when concluding contracts (Article 1218), as well as a cause limiting tort liability (Article 1361).

Some other inconsistencies regard the regulation of **civil liability**, which is of two types: tort and contractual liability.

In the old Code, the notion of contractual liability was not expressly provided for, which does not mean that it didn't exist, it's just that it was regulated together with damages, as effects of obligations, which formed

<sup>371</sup> ”Der Kauf ist ein gegenseitiger schuldrechtlicher Vertrag. Er verpflichtet den Verkäufer, dem Käufer einen Vermögensgegenstand (Kaufgegenstand) zu verschaffen, und den Käufer, den Kaufpreis zu zahlen und den Kaufgegenstand abzunehmen.” (*Schulze Reiner/ Dörner Heinrich/ Ebert Ina/ Hoeren Thomas/ Kemper Rainer/ Saenger Ingo/ Schreiber Klaus/ Schulte-Nölke Hans/ Staudinger Ansgar*, BGB Handkommentar, 7. Auflage, Nomos, Baden-Baden, 2012 – Commentary to §§ 433 - 480, marginal note 1).

<sup>372</sup> *Welser*, Bürgerliches Recht 13 II Editura Manz Wien, 2007, p. 166.

<sup>373</sup> See also *Christian Alunaru/Lenuta Botos*, Das Kaufrecht in Rumnien nach dem neuen ZGB, Editura Nomos facultas.wuv, Wien 2013, p. 31 - 37.

Chapter VII of Title III (“Concerning contracts and agreements”). For this reason, renowned treatises of theory of obligation do not contain a distinct chapter for contractual liability, as damages for breach of contractual obligation are seen as “one of the possible aspects of performance of contractual obligation by equivalent, when execution in kind is not possible”.<sup>374</sup> Some authors have criticized this structure of the old Civil Code, considering that it is more logic to analyze contractual liability in a distinct chapter, with this title<sup>375</sup>, and not just as a form of executing obligations by equivalent.

The new Civil Code tried to implement this new view, but it proved to be, once again, inconsistent. Chapter IV, Title II of Book V “Concerning obligations” is entitled “Civil liability” and the first two articles are “Tort liability” (art. 1349) and “Contractual liability” (art. 1350), which, at first sight, would lead to the conclusion that the law has finally adopted the view expressed by doctrine long ago, namely the unitary regulation of the two types of liability. In spite of this appearance, the code keeps the old structure by regulating contractual liability **not as a distinct type of civil liability, but still as a form of “performance of obligations by equivalent”** (section 4 of the chapter concerning “Enforcement of obligations”). Therefore, contractual liability is defined as a type of civil liability, but when we look for the related provisions, we cannot find them, since they appear under a different name.

**If adopting foreign models, was the lawgiver inspired mainly by actual *law in action* or did he only copy and rephrase the text of such foreign models?**

<sup>374</sup> T. R. Popescu, P. Anca, *Teoria generală a obligațiilor*, Editura Științifică, București 1968, p. 320; C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligațiilor*, Editia a IX-a, revizuită și adăugită, București 2008, p. 330; Ion Dogaru, Pompil Drăghici, *Bazele dreptului civil. Volumul III. Teoria generală a obligațiilor*, Editura C. H. Beck, București, 2009, Cartea a IV-a “Efectele obligațiilor”, Titlul I. “Privire generală asupra efectelor obligațiilor”, Secțiunea a 3-a “Executarea indirectă (prin echivalent) a obligațiilor civile”, p. 431 - 469.

<sup>375</sup> Liviu Pop, *Drept civil, Teoria generală a obligațiilor*, Editura Lumina-lex, București 1998, Partea a II-a “Răspunderea civilă”, Titlul III “Răspunderea civilă contractuală”, p. 336 - 359; Idem, *Tratat de drept civil. Obligațiile, vol. II Contractul*, Editura Universul Juridic, București 2009, Titlul III “Efectele contractelor”, Subtitlul III “Consecințele neexecutării contractelor”, Capitulul I “Răspunderea contractuală”, p. 644 - 707.

At least for some of the main sources of inspiration (such as the Quebec Code), the *law in action* approach was taken, as not only legislative texts were taken into account but also the relevant case-law.

**Was the reformed inspired by some European projects, e.g. Common framework of reference?**

In the Statement of Reasons there is no reference to the Common frame of reference as a source of inspiration of the Code, and that can be explained by the fact that the main preparation work was prior to the publication of the Draft Common Frame of Reference. Instead, the Principles of European Contract Law have been taken into account when drafting the new Code.

**How has the reform adjusted to the EU law?**

Article 5 of the new Civil Code states, as a general note, that “in the matters referred to by the present code, the norms of the European Union are applied with priority, regardless of the parties’ status”.

In the Statement of Reasons of the new Civil Code, in the section regarding the compatibility of the project with the related EU legislation, it was expressly provided that “the legislative solutions comprised by the project of the New Civil Code were considered so that the proposed provisions do not conflict EU directives or hinder the direct application of EU regulations” (norms relevant for the general civil legislation, transposed or whose direct application has been facilitated by the adoption of special laws). Of these, we mention:

- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Published in the Official Journal L 095 of 21. 04. 1993;
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, published in the Official Journal L 149 of 11. 06. 2005;

- Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, Published in the Official Journal L 271 of 9. 10. 2002;
- Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Published in the Official Journal L 171 of 7. 7. 1999;
- Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Published in the Official Journal L 144 of 4. 6. 1997;
- Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, Published in the Official Journal L 280 of 29. 10. 1994;
- Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, Published in the Official Journal L 177 of 30. 6. 2006;
- Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions, Published in the Official Journal L 177 of 30. 6. 2006;
- European Parliament and Council Directive 2001/24/EC on the reorganization and winding-up of credit institutions, Published in the Official Journal L 125 of 5. 5. 2001;
- Convention 80/934/ECC on the law applicable to contractual obligations (Rome Convention), Published in the Official Journal L27 of 26. 01. 1998;
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Published in the Official Journal L199 of 31. 07. 2007;

- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Published in the Official Journal L 338 of 23. 12. 2003;
- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Published in the Official Journal L 177 of 04. 07. 2008;
- Commission Green Paper of 17 July 2006 on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition;
- European Commission's proposal for the Project of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III);

In conclusion, the direct transposition of EU norms in the new Civil Code was not, generally, opted for, as they are transposed by special laws, many of which were adopted during the pre-accession period (before 2007). As an example, Article 1349 para 4 of the new Civil Code expressly states that “liability for the damage caused by defective products is established by the special law”.

### **7.3 The Subject Matter Aspects of the Reform**

#### **Which fundamental changes to the content have been brought by the reform as compared with the previous regulation?**

A fundamental change brought by the new Civil Code regards, in the first place, its structure. The old Code of 1864, following the model of the French Civil Code, had only 3 Books, while the new Civil Code has 7 Books. We will analyze this aspect later on, when answering the question regarding the structure of the code. The higher number of Books does not necessarily mean that the Code comprises new matters, inexistent in the former code.

Book I is entitled “Persons”. Initially, the old Code also comprised a similar first book, but during the communist period, in the year of 1954, this book was repealed and replaced with a special law, Decree no. 31/1954. Now, the regulations regarding persons are once again brought in the Civil Code.

Book II is entitled “Family”. The old Code also comprised norms regarding family, but they did not form a distinct Book. However, they were repealed during the communist period and replaced in 1954 with a Family Code. This code was repealed when the new Civil Code entered into force on 1 October 2011 and the norms regarding family were reintroduced into the Code.

Book III, “Goods” is not a new book. In the old Code, it was entitled “On goods and various modifications of property”. The new Book has a different content, which we will analyze later on.

Book IV, “Succession and liberalities”, also existed in the old Code, but not as a distinct book, as the matter was regulated in the Titles I and II of Book III, “On various ways of obtaining property”.

Book V “Obligations” is a clearer restructuring of the matter which was spread over 15 of the 19 titles of Book III, “On various ways of obtaining property” of the old Code. This book also brings novelties. Thus, it includes contracts which were formerly considered exclusively commercial, such as the supply contract, repurchase agreement, agency contract, intermediation agreement, current account contract, banking contract etc. This is a consequence of the repeal of the Commercial Code (entered into force on 1 September 1887) and generalization of the monist conception regarding civil relationships. The commercial and civil relationships are no longer distinguished. The notion of “merchant” was replaced by the notion of “professional”. Special regulations were provided for this new type of legal subjects. Furthermore, the Civil Code contains express regulation of contracts such as maintenance contract, which doctrine and case-law have long recognized as “unnamed” contracts.

Book VI, “Prescription, extinction and calculation of terms” is not essentially a new matter. Prescription was also regulated by the old code, in title

19 of the 3<sup>rd</sup> Book, “On different ways of obtaining property”. The novelty consists of the fact that the new regulation separates it, for the first time, from the acquisitive prescription (usucaption).

Initially, in the old Code, the two institutions were regulated together, after the French model, being considered legal effects of the passing of time: through acquisitive prescription (Fr. “*la prescription acquisitive*”) a right is gained, while through extinctive prescription (Fr. “*la prescription extinctive*”) a right is lost. According to Article 2219 of the Napoleon Code, “*La prescription est un moyen d’acquérir ou de se libérer par un certain laps de temps, et sous les conditions déterminées par la loi*”. The Decree no. 167/1958, repealed and replaced the provisions regarding extinctive prescription, thus being separated from the ones regarding acquisitive prescription (usucaption). The new Civil Code regulates extinctive prescription in the 6<sup>th</sup> book, but keeps the distinction between the two institutions. Acquisitive prescription is regulated in the 3<sup>rd</sup> book concerning goods, as an effect of possession.

Book VII, “Private international law provisions”, is a complete novelty. Previously, these provisions were comprised by a special law, Law no. 105/1992. The opportuneness of including this book in the Civil Code was controversial. For example, while presenting the new Civil Code at the International Conference “*Dies Luby Iuriprudentiae*” held at Castle Smolenice (Slovakia), during 17 - 18 September 2009, professor Vékás Lajos, coauthor of the Hungarian Civil Code argued that this book is not useful: “After the entry into force of the Roma I and Roma II Regulations on the law applicable to contractual and non-contractual obligations, an essential part of the conflicts of law was unified inside the European Union. The Regulations create a *loi uniforme* for the member States. This means that the courts must apply the unified rules of conflicts of law with regard to third States as well. Thus, there is very little room for national conflicts of law. For this, a detailed regulation in the national codes is not needed. Besides this, it can already be noticed that the unifying process continues with regard to family and succession law.”

Besides the structural changes, the Code also brings novelties in the matter of family, where engagement is regulated for the first time. In the matter of real rights, the public property and the corresponding real rights are



regulated for the first time in the Code: administration right, concession right and the right of free use. Also, in the matter of real rights, the natural and legal easements were included in the category of legal restrictions of the right of property. Leasehold was expressly provided for the first time. Previously, they were a doctrinal creation based on the rebuttal of the presumption of accession in the case of the building or plantation on someone else's land. The fiduciary is regulated for the first time. In the matter of obligations, unjust enrichment is expressly provided for the first time. Previously, it was a doctrinal creation based on special regulations in different matters. Tort liability is regulated in more detail, in 46 articles instead of the 6 articles of the old Civil Code. Strict liability tort, besides the classic liability, based on fault and moral damages are also expressly regulated for the first time.

In the matter of civil liability, a clear delimitation between tort liability (defined at Article 1349) and contractual liability (defined at Article 1350) is made for the first time. Furthermore, the principle according to which either party can waive the application of contractual liability rules in order to opt for more favorable rules was introduced. The principle has been previously referred to by doctrine and case-law<sup>376</sup> (without a legal basis) as an interdiction to opt between tort and contractual liability, tort liability being stricter<sup>377</sup>.

**An exception admitted** by doctrine (which the code does not expressly provide, but to which it refers as “exception provided by the law”) is the situation in which failure to perform the contract may constitute a crime.

<sup>376</sup> Supreme Tribunal, Guiding decision no. 11 of 2 August 1965, in *New Justice* no. 8/1965, p. 109.

<sup>377</sup> See also: M. Eliescu, *Raportul dintre răspunderea contractuală și cea delictuală. Problema cumulului celor două responsabilități în dreptul RPR*, in *Studii și cercetări juridice*, no. 1/1963, p. 25 et seq.; Idem, *Răspunderea civilă delictuală*, Editura Academiei, București 1972; R. Sanilievici, *Dreptul la opțiunea între temeiul contractual și cel delictual al răspunderii civile*, in *Revista română de drept*, no. 2/1967, p. 33 et seq.; Fr. Deak, *Opțiunea între instanța penală și cea civilă și între temeiul delictual și contractual al răspunderii civile*, in *Revista română de drept* nr. 7/1967, p. 30 et seq.; C. Stătescu, *Cu privire la raportul dintre norma de drept procesual și norma de drept substanțial. Implicații cu privire la cumulul răspunderii civile delictuale și răspunderea contractuală*, in *Revista română de drept* no. 5/1981, p. 7-13; L. Mihaș, V. Stoica, *În legătură cu incidenta răspunderii civile delictuale în raporturile dintre părțile din contract*, in *Revista română de drept* no. 9/1983, p. 8 -14; Liviu Pop, *Drept civil. Teoria generală a obligațiilor*, Editura Lumina lex, București 1998, p. 356 - 357.

In this case, the creditor can request damages before a criminal court as well as before a civil court, on delictual or contractual grounds. Once the choice is made, it cannot be undone, as the principle of *”electa una via secunda non permititur”* (*”electa una via non datur recursus ad alteram”*) is applicable.

Mention must be made regarding the fact that the absence of the notion of **“contractual liability”** from the old Code did not imply that failure to fulfill contractual obligations would not engage the debtor’s liability. This type of liability was regulated together with the matter of damages, in Chapter VII, “Effects of obligations”, of Title II (“On contracts and agreements”).

**Does the new regulation keep continuity with the previous regulations or is it rather discontinuous? If so, to what extent is it discontinuous? As for the extent of continuity or discontinuity, consider not only the content, but also the language and terminology.**

A certain continuity can be seen, especially from the perspective of the structure of the Code, where we can note that the main fields of civil law are treated both in the new Code and in the old one. The provisions concerning the persons, and those concerning family, that existed under the old Code but were canceled from it during the communist regime (and dealt with in special laws) were taken back to the Code, in Books I and II. Also, the prescription was brought back to the Code, while during the communist era, it was object of a special Act (Decree 167/1958). In terms of structure, were also kept in the new Code the provisions concerning the property, the contracts, the successions, etc.

There are also novelties in the content of the Code. One of these is the regulation of the private international law within the Code, in Book VII, while prior to it, it was regulated by means of a special Act (Law 105/1992). Also, the general discipline of obligations (in Book V) is a novelty since in the old Code only rules concerning particular institutions and contracts were to be found, but no general theory of obligations part. In the same Book V we can find now most of the commercial contract, as a consequence of adopting the monistic theory and eliminating the Commercial Code. Another novelty is the explicit classification of liability into contractual and tort liability, while

under the old Code, the classification was made only by legal authors. To be sure, the distinction is made only in what definitions are concerned (Art. 1349 tort liability; Art. 1350 contractual liability), because in the chapter concerning the civil liability, only the tort one is regulated. The contractual liability, *i.e.* the consequences of a breach of a contract, is dealt with in a different chapter, the one concerning the enforcement of obligations, in a section called “performance of obligations by equivalent”. This way of organizing the fields can be seen as a continuity element with the old Code. It is, thus, surprising that even though the contractual liability is defined as a category of the civil liability (together with the tort liability), the regulation itself of this category follows the traditional conception of the old Code and is dealt with as a way of performing the contracts by equivalent.

Some novelties are to be found also in Book III concerning the goods. For the first time, the Civil Code defines and regulates the public property. Also the so-called “natural” and “legal” easements, taken by the old Code from the Code Napoleon, disappeared in the new Code (due to the criticism in literature), and were replaced by the “legal limitations” of the property right in the chapter “Legal limitations of the private property right”.

As for the language, already the statement of reasons of the new Code took note that the old one, adopted in 1864, was much outdated, this being one of the reasons the drafters believed a new Code was necessary. The terminology also brings some novelties, some of which being, of course, unconceivable in 1864: “organ transplant”, “sharing time property”, “standard clauses”, “unusual clauses”, “electronic contracts”, “hardship”, etc.

Many observations can be made concerning the new terminology. Among them, we must note that it is inappropriate to use the same term, “state of necessity”, with three completely different meanings. Art. 1361 defines the state of necessity as one of the cases diminishing the liability for one’s own act. But the state of necessity is also treated as a limitation of the right to property, in Art. 621, as well as a concept used to define a particular vice of consent, in Art. 1218, in the sense that a contract can be void if one party took profit of another one’s “state of necessity”.

**Has the reform brought certain institutes or provisions that can be considered as original, i.e. they do not exist in other states?**

There are no absolutely original institutes, which would not exist in other countries.

**Has the reform also touched the proportion of the autonomy of will and protection of the weaker contractual party? Which institutes restrict the autonomy of will? Under what criteria are the mandatory norms distinguished from non-mandatory norms?**

Due to the influence of the European law, as mentioned in the very statement of reasons, the new Civil Code contain several provisions meant to protect the party that is economically weaker. These provisions are stipulated in the Book V on obligations and concern the formation of contract, the standard clauses, the diminishment of the penalties, and the moral damages. The authors included in the same category other provisions of the Code, such as the hardship (*clausula rebus sic stantibus*).

The old code didn't contain any provisions concerning the **pre-contractual phase**, an approach that was consistent with the principle of consensualism, according to which the simple meeting between demand and offer created the contract and, as such, there was no need to regulate the pre-contractual phase. This conception is now deemed as outdated. As a consequence, the new Civil Code includes a thorough regulation of the creation of the contract (Art. 1182 - 1203). Art. 1182, paragraph 3, allows for the "fill-in" of a contract with the so-called "secondary elements" when the parties agreed on the essential elements of the contract, but not on the secondary ones. In such a circumstance, the judge is entitled, upon request from one of the parties, to "fill-in" the contract with the secondary elements.

Art. 1183 mentions the requirement that negotiations have to be made in good-faith. The third paragraph of the article exemplifies the bad faith in negotiations with the hypothesis in which a party starts or continues negotiation without a genuine intent of concluding the contract. The fourth paragraph provides for the liability of the party that starts, continues or breaks negotiations in bad faith. The text offers some criteria for estimating the damage: the expenses made for negotiating, the loss

of other opportunities, and so on. The legal literature correctly qualified this liability as being a tort liability.<sup>378</sup> Although the Art. 1183 doesn't provide this expressly, the authors have been of opinion that breaching the good faith obligation can be a reason to cancel the potentially abusive clauses in the contracts between consumers and professionals.<sup>379</sup>

***Within the same framework of the rules concerning the contract formation, for the first time it is mentioned the confidentiality obligation in the pre-contractual negotiation (Art. 1184).***

The obligation to inform the contractual parties<sup>380</sup> is another one of the means introduced by the new Civil Code in order to protect the weaker party. As the Code Napoleon, the old Code mentioned the requirement of a valid consent for the validity of a contract, but the traditional means of protecting such consent have been criticized.<sup>381</sup> The regulation of consent vices, whose prove was difficult and could be made only after the contract was done, was considered insufficient. The means of preventing the vices are deemed to be more efficient and one of such means is the **obligation to inform**.<sup>382</sup> The new Code contains some implicit regulations of the obligation to inform (in the field of the *dolus*, as well as in the field of guarantee against eviction), while the explicit regulation is to be found in the special laws concerning the consumer protection.

The **hardship in contracts** (*clausula rebus sic stantibus*) is regarded by the Romanian authors as a limitation of the binding force of the contracts.<sup>383</sup> Under the old Code, the Romanian legal literature recognized the right

<sup>378</sup> A.-A. Moise, in *Baias/Chelaru/Constantinovici/Macavei*, (Editori), Noul Cod civil. Comentariu pe articole, Editura C.H. Beck, Bucuresti 2012, Art. 1184, note 6.

<sup>379</sup> L. Popa/I. Popa/S.I. Vidu, *Tratat elementar de drept civil. Obligatiile conform noului Cod civil*. Universul Juridic, Bucuresti, 2012, p. 171.

<sup>380</sup> See *Chr. Alunaru*, III. Kapitel, C. „Rechtlicher Schutz der Willenserklärung. Vorbeugungsmaßnahmen zum Schutz der Willenserklärung. Aufklärungspflicht der Vertragsparteien“, in *Alunaru/Botos*, *Das Kaufrecht in Rumänien nach dem neuen ZGB, Nomos – facultas.wuv*, Wien, 2013, p. 60 - 65.

<sup>381</sup> *Fr. Terré, Ph. Simler, Yv. Lequette*, *Droit civil. Les obligations*. Dalloz, Paris, 2005, 255.

<sup>382</sup> I. Fl. Popa, *Dolul si obligatia de informare în contractele sinalagmatiche*, in ”Dreptul” Nr. 7/2002, p. 70 - 81; V. Pătulea, *Obligatia de informare în formarea contractelor*, in *Revista de Drept Comercial* Nr. 6/1998, p. 77 ff.

<sup>383</sup> L. Popa/I. Popa/S.I. Vidu, *Tratat elementar de drept civil. Obligatiile conform noului Cod civil*. Editura Universul Juridic, Bucuresti, 2012, p.152.

of the parties to re-equilibrate the contract through specific clauses inserted in the contract. But the doctrine was, in principle, against the possibility of the judge to intervene in the contracts in order to re-establish the equilibrium of the parties' obligations, considering that such an intervention would be contrary to the principle of the binding force of the contract.

The modern legal systems allow re-adapting the contracts by the courts in cases of disequilibrium between parties obligations due to the changes of the economic conditions. This is why the new Civil Code expressly regulates the hardship ("impreviziunea") in Art. 1271, based on Art. 6. 2. 1.–6. 2. 3. of the UNIDROIT Principles, and on 6.111 of the PECL and Art. III.-1-110 of the DCFR (*Variation by court on a change of circumstances*). The Article 1271 provides for the obligation to re-negotiate the contract in case of a change of circumstances that renders the obligation of one party excessively difficult. In case the negotiation fail, the court can either modify the contract or cease it.

The way hardship is regulated by the Romanian law is as an exception to the principle of monetary nominalism. The latter is recognized in the first paragraph of the Article 1271, according to which "The parties are bound to perform their obligations, even if their performance has become more burdensome". However, if the performance has become excessively more burdensome due to a change of circumstances, the parties are under obligation to re-negotiate in order to adapt the contract or put an end to it. If parties do not reach an agreement within a reasonable period, the court may either amend the contract in order to better distribute the loss between the parties or decide to put an end to it.

According to the recent Romanian legal literature, the **theory of the abusive clauses** is another limitation of the principle of binding force of the contract. This theory is used mainly in consumers' law but the function of limiting the effects of potentially abusive clauses is also realized by some other institutes existing in the civil Code, such as those of standard clauses (Art. 1202) and unusual clauses (Art. 1203). As mentioned in the statement of reasons, the purpose of regulating standard and unusual clauses is the protection of weaker parties. The unusual clauses are those providing for the benefit of the one proposing them the limitation of liability, the possibility

of unilaterally terminating the contract, the suspension of obligations, or those providing against the other party the loss of some rights, the limitation of the right to defense, the applicable law, the tacit renewal, etc. Such clauses are effective only if expressly accepted by the other party.

**The reduction of the amount of the penalty** is another provision favoring the weaker party. The contractual penalty clause is regulated in Art. 1538, according to which "The penalty is the clause stating that the debtor bounds himself to do a certain thing in case of non performance of the principal obligation". The contractual penalty clause it is not new in the Romanian Civil Code, but the novelty brought by the 2009 Code is the possibility of reducing the amount of the penalty, provided for by Art. 1541. Such reduction is possible only in two cases: when the main obligation was partially performed and such performance created a benefit for the creditor and when the penalty clause is excessive.

The **moral damages** are cited in the statement of reasons of the new Code among the tools for protecting the weaker party, but there is only one Article in this sense, the Art. 1531, according to the first paragraph of which "the creditor has the right to full compensation of the damage caused by the breach of the contract", while the third paragraph expressly mentions that "the creditor has also the right to moral damages".

## **7.4 Experience with Exercising the New Regulation in Practice**

**Is there any experience with exercising the new legal regulation in practice? Which provisions showed to be most problematic?**

According to Art. 3 of the Law implementing the Civil Code (Law 71/2001), the acts concluded and the facts committed before the entry into force of the new Code cannot generate other effects than those provided for by the law in force at the time of their occurrence. As a consequence, even today, most of the cases in courts are dealt with on the basis of the old Civil code. The case-law based on the new Civil code is, as such, not very relevant. The situation is different in what the new Civil Procedure Code is concerned, whose application already generated practical issues.

**Are some provisions being interpreted significantly different from their lingual expression or from the original intention of the lawgiver?**

Until now, no such situation has been encountered.

**Has the legal certainty become significantly lower after the new regulation entered into force, e.g. as for predictability of court decisions? Have there been taken any measures with this respect?**

The numerous inadvertencies and lack of correlations in the texts of the new Civil Code, that we signaled in different occasions,<sup>384</sup> brought to criticism and uncertainty concerning the application of the law in courts. Until now, no measures to remedy such fears, through amending the Civil Code, have been taken.

## 7.5 New Civil Code

**What is the position of the civil code within the scope of private law? Is there also any separate commercial law codification or are the commercial law provisions included in the civil code? Are any special provisions in the civil code applying solely to businesses? Does the civil code also regulate family law issues?**

The new Civil Code of 2009 has adopted the monist view, regulating private law relationships in a single code. Consequently, the legal relationships concerning persons, family, commercial obligations and private international law are reunited. Book I, entitled “Persons”, replaces the special laws which were previously regulating the matter, especially Decree no. 31/1954 concerning natural and legal persons and Decree no. 32/1954 on the implementation

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<sup>384</sup> *Chr. Alunaru*, Erwägungen zum neuen rumänischen Zivilgesetzbuch, in ”Österreichische Notariatszeitung” Nr. 05/2010, Manz Wien, p.131 - 143; *Chr. Alunaru*, Zum neuen rumänischen Zivilgesetzbuch – Vertragsrechtlicher Teil, in *European Review of Contract Law*, Vol. 6 Nr. 2/2010, de Gruyter Berlin/New York, p.197 - 216; *Chr. Alunaru*, Das rumänische Zivilrecht in den zwei Jahrzehnten nach der Revolution von 1989”, in *Kilometer Null. Politische Transformation und gesellschaftliche Entwicklungen in Rumänien seit 1989*, Hrsg. Thede Kahl/Larisa Schippel, Frank & Timme, Berlin 2011, p.423 - 470; *Chr. Alunaru*, Nowy rumunski kodeks cywilny, in ”Kwartalnik prawa prywatnego” Nr. 3/2011 published by Polska Akademia Umiejetnosci, Krakau, p.605 - 633; *Chr. Alunaru/L. Bojin*, XXII Romania. Legislation, Cases, Literature, in ”European Tort Law, Yearbook 2009”, De Gruyter, Berlin – New York, 2010, p. 525 - 558.



of the Family Code and of the Decree concerning natural and legal persons. Book II “Family” replaces the Family Code (Law no. 4/1953). Book V, “Obligations”, regulates both civil and commercial legal relationships, many of the contracts traditionally considered commercial being included here. This meant the removal of the civil – commercial law duality after a 120 years tradition. The Commercial Code, inspired by the Italian one, was repealed. Consequently, only civil legal relationships will exist, regardless of the fact that the parties are merchants or not. The doctrine speaks of a “commercialization” of civil law (a transformation of civil obligations into commercial obligations) and also of a “publicization” (generalization) of commercial law. The increase in knowledge of the population has as a consequence the fact that more and more non-merchants use commercial contracts. This monist view is meant to remove the past difficulties regarding the legal nature of various legal relationships, which was of great importance for determining the applicable law and the competent court.

The disappearance of the Commercial Code and the inclusion of many provisions concerning commercial relationships in the new Civil Code has demanded clarifications regarding the legal subjects of these provisions. Thus, according to Article 3 of the Civil Code, “The provisions of this Code are also applicable to relationships between professionals, as well as to relationships between professionals and any other civil law subjects. Are considered professionals all those who operate an enterprise. It is considered operation of an enterprise any systematic exercise by one or more persons of an organized activity consisting in production, administration or alienation of goods or of provision of services, irrespective of the profit or lack thereof.”

Article 8 of Law no. 71/2011 on implementation of the Civil Code brings additional clarifications: “The notion of <<professional>> provided under Article 3 of the Civil Code includes categories of merchants, entrepreneurs, economic operators, as well as any other person authorized to conduct economic or professional activities, as these notions are provided for by the law on the date of entry into force of the Civil Code. In all normative acts, the phrases <<commercial acts>> or <<commercial deeds>> are replaced by <<activities of production, commerce or provision of services>>.”

Regarding the private international law relationships, Book VII, entitled “Private international law provisions”, replaces almost entirely the provisions of Law no. 105/1992 on regulation of private international law relationships.

**What is the structure of the civil code? How many parts or chapters does the civil code consist of? How are the parts and chapters entitled and how are they subdivided?**

The old Civil Code of 1864 had, as its French model, only three books: I. On persons, II. On goods and various modifications of property, III. On various ways of obtaining property. The latter book contained 19 titles: succession, donations and wills, general rules on contracts as main source of obligations, various special contracts (titles IV to XVII), enforcement of obligations and extinctive and acquisitive prescription.

The new Civil Code comprises 2664 articles, structured in 7 books and a preliminary title. The books are entitled:

- I. Persons
- II. Family
- III. Goods
- IV. Successions and liberalities
- V. Obligations
- VI. Prescription, extinction and calculation of terms
- VII. Private international law

The preliminary title comprises general principles of civil law, legal relationships to which they apply, application in time of the law, interpretation and effects, as well as the publicity of legal rights, acts and deeds. Article 4 on priority application of international human rights treaties and Article 5 on priority application of European Union law stand out as entirely new.

**Book I “Persons”** comprises 5 titles: Title I. General provisions; Title II. Natural person (3 chapters: Civil legal capacity of the natural person, Respect due to the human person and its inherent rights, Identification of the natural person); Title III. Protection of the natural person (4 chapters: General provisions, Guardianship of the minor, Protection of the judicially declared incapacitated, Curatorship); Title IV. Legal person (6 chapters:

General provisions, Establishment of the legal person, Civil legal capacity of the legal person, Identification of the legal person, Reorganization of the legal person, Termination of the legal person); Title V. Defence of non-patrimonial rights.

**Book II “Family”** comprises 5 titles: Title I. General provisions; Title II. Marriage (7 chapters: Engagement, Conclusion of marriage, Subsequent formalities of the conclusion of marriage, Nullity of marriage, Personal rights and obligations of spouses, Patrimonial rights and obligations of spouses, Dissolution of marriage); Title III. Kinship (3 chapters: General provisions, Filiation, Adoption); Title IV. Parental authority (4 chapters: General provisions, Persons who have the obligation of maintenance and the order in which it is due, Conditions of obligation of maintenance, Establishment and performance of obligation of maintenance).

**Book III “Goods”** comprises 8 titles: Title I. Goods and real rights in general; Title II. Private property (5 chapters: General provisions, Accession, Legal restrictions of private property, Common property, Property held periodically); Title III. Dismemberments of property rights (4 chapters: Leasehold, Usufruct, Use and habitation, Easements); Title IV. The fiduciary; Title V. Administration of the property of others (4 chapters: General provisions, Kinds of administration, Rules of administration, Termination of administration); Title VI. Public property (2 chapters: General provisions, Real rights of public property); Title VII. The land book (4 chapters: General provisions, Registration of rights, Notation of rights, deeds and legal relationships, Rectification of registration in the land book); Title VIII. Possession (4 chapters: General provisions, Vices of possession, Effects of possession, Possessory actions).

**Book IV “Succession and liberalities”** comprises 4 titles: Title I. General provisions on succession (2 chapters: General provisions, General conditions of the right to inherit); Title II. Heirship (3 chapters: General provisions, Representation, Heirs); Title III. Liberalities (4 chapters: Common provisions, Donation, Will, Successional reserve, Devolution of succession and reduction of excessive liberalities); Title IV. Transmission and partition of succession (4 chapters: Transmission of succession, Vacant succession, Family memories, Partition of succession and report).

**Book V “Obligations”** comprises 10 titles: Title I. General provisions; Title II. Sources of obligation (4 chapters: Contract, Unilateral act, Licit legal deed, Civil liability); Title III. Modalities of obligation (3 chapters: General provisions, Condition, Term); Title IV. Complex obligations (3 chapters: Divisible and Indivisible obligations, Solidary obligations, Alternative and facultative obligations); Title V. Performance of obligations (3 chapters: Payment, Enforcement, Protection of the creditor’s right); Title VI. Transfer and alteration of obligations (4 chapters: Assignment of claims, Subrogation, Delegation, Novation); Title VII. Extinction of obligations (5 chapters: General provisions, Compensation, Confusion, Release, Impossibility of performance); Title VIII. Restitution of prestations (3 chapters: General provisions, Modes of restitution, Effects of restitution on third persons); Title IX. Various nominated contracts (20 chapters: Contract of sale, Contract of exchange, Supply contract, Repurchase contract, Lease contract, Works contract, Contract of association, Contract of carriage, Contract of Mandate, Agency contract, Intermediation agreement, Contract of deposit, Contract of loan, Current account contract, Current banking contract and other banking contracts, Insurance contract, Annuity contract, Maintenance contract, Gaming and wagering contract, Transaction); Title X. Personal guarantees (3 chapters: General provisions, Fidejussion, Autonomous guarantees); Title XI. Privileges and real guarantees (6 chapters: General provisions, Hypothecs, Exercise of the hypothecary rights, Pledge, Right of retention).

**Book VI “Prescription, extinction and calculation of terms”** comprises 3 titles: Title I. Extinctive prescription (4 chapters: General provisions, Period for prescription, Course of prescription, Reaching the prescription term); Title II. General regime of extinction terms; Title III. Calculation of terms.

**Book VII “Private international law provisions”** comprises 2 titles: Title I. General provisions and Title II. Conflicts of law (9 chapters: Persons, Family, Goods, Succession, Legal act, Obligations, Bills of exchange, promissory notes and checks, Fiduciary, Extinctive prescription).

**Does the civil code include provisions on connection between private and public law? Or if the civil code does not include any such express provisions, what approach to this issue is taken by legal theory and practice? For instance, the Sec 1 para 1 of the new Czech Civil Code prescribes that exercising of private law shall be independent from exercising of public law; however most of the theorists do not share this approach and consider it unsustainable.**

According to the Romanian doctrine, the Civil Code, as well as the entire civil law, are part of private law. However, for the first time, the code contains provisions regulating public property, which belongs to the State and the territorial-administrative units (Title VI Public property of Book III Goods). The title contains regulations regarding the object of public property, characteristics, restrictions, acquisition, termination and protection of public property. The real rights of public property – administration, concession and free use – are completely different rights than those of private property – leasehold, usufruct, use, habitation and easements.

The rules applicable to public property are derogatory from the rules applicable to the Civil Code, which generally regards only private property.

**Does the civil code include many procedural provisions or does it keep the procedural provisions on minimum level with respect to lucidity of the laws?**

The old Civil Code also comprised certain procedural provisions, as, for example, the ones concerning evidence of the civil legal act. These procedural provisions were removed from the new Civil Code as the Civil Procedure Code was adopted during the same period.

The new Civil Code did keep a minimum of procedural provisions, from which we mention, for example, the procedure for naming the guardian by the court (Articles 118 - 119 Civil Code).

**Does the civil code include certain provisions which could be considered as its style features? For instance the Sec 7 and 16 of ABGB**

claims its allegiance to natural law rationalism, the Sec 1 of the Swiss civil code gives power to judges to bridge legal loopholes by using a principle that they would determine if they were lawgivers.

In spite of the introduction of the provisions regarding the land book, of the principle of handing over the good in order to transfer the risk of loss, of obligativity of authentic act for certain contracts and other provisions who limit the consensuality principle, the new Civil Code has kept the **consensuality principle** as a cornerstone: “The real rights are established and transmitted through the agreement of parties, even if the goods were not handed over” (Art. 1273 para 1), or Art. 1674 on sale: “Except the cases provided by the law or if the parties have not wished otherwise, the property is transmitted to the buyer from the moment of the conclusion of contract, even if the good was not handed over or the price has not yet been paid.”

The consensuality principle is a fundamental principle, specific to Romanian law, as it signifies much more than the liberty of form, provided under § 883 ABGB.<sup>385</sup> From this principle it follows that a contract of sale is at the same time an obligational and a real act. The duality of the real act is lacking (“die Zweiaktigkeit des sachenrechtlichen Rechtsgeschäfts - § 380 ABGB)<sup>386</sup> from the Austrian system, or the separation principle (*das Trennungsprinzip*) - “die systematische Trennung zwischen dem Verpflichtungsgeschäft und der dinglichen Rechtsänderung“ (systematic separation between the obligational act and modification of the legal relationship on a real plane) as it is called in German law.<sup>387</sup> Consequently, the principle of abstraction of real legal acts (“*Abstraktionsprinzip*“)<sup>388</sup> also lacks from the German law.

Compared to the Austrian civil law, the “modus“ for acquiring real rights is lacking, namely, the handover (remittance of the good) for movable goods and registration in the land book for immovable property.<sup>389</sup>

<sup>385</sup> For the liberty of form in obligational legal relationships see: *H.Kozjol/R.Welser*, Bürgerliches Recht II, Manz Wien, 2001, p. 12.

<sup>386</sup> *H. Kozjol/R.Welser*, Bürgerliches Recht II, Manz Wien, 1996, p. 4 - 62.

<sup>387</sup> *Cristian Alunaru*, Aplicabilitatea, in dreptul civil român, a principiului abstractizării din teoria germană a drepturilor reale in “Dreptul” nr. 1/2000, p. 42-54.

<sup>388</sup> *F.Baur/R.Stürner* Sachenrecht, Editia 17, Editura C.H.Beck, München 1999, § 5, marginal note 40 et seq.

<sup>389</sup> For details *H. Kozjol/R.Welser*, Bürgerliches Recht II, Editura Manz, Wien, 1996, p.4, 107.

The consensualist system of the Romanian civil law, taken from French law, shows a distancing from the principles of roman law, where the transmission of property was made only by the remittance of the good (*"Traditionibus dominia rerum, non nudis pactis transferuntur"*). In the consensualist system, the handing over of the good is subsequent to the transmission of property, having only the purpose of ensuring possession.

Restrictions brought to this principle by the introduction of the obligativity of registration in the land book of the immovable property (Art. 557 para 4 and Art. 885 para 1) do not essentially modify the principle as, on the one hand, they refer only to a category of goods and, on the other hand, according to Art. 56 of Law no. 71/2011 on implementation of the new Civil Code, the implementation of these provisions is deferred for an indefinite time. Therefore, only after the completion of cadastral works for each territorial-administrative unit and opening of the land books for the respective property, according to Law on cadastre and real estate publicity no. 7/1996, will they be implemented.

In conclusion, in spite of restrictions brought by the new Civil Code to this principle, we consider that the consensuality principle is representative for the Romanian civil law, delimiting it from the German and Austrian system.

### **Does the civil code expressly set forth any principles of private law or does the civil code leave it to theory and judicial decisions?**

In the preliminary title of the new Civil Code, several civil law principles are enumerated. Thus are stated: the sources of civil law, the priority application of international human rights treaties and European Union law, the application in time of the law (non-retroactivity of the law), territoriality and extraterritoriality, interpretation, prohibition of analogy in the cases where the derogating laws restrain the exercise of a right or provide civil sanctions, compliance with public order, presumption of good-faith, *error communis facit jus*, publicity of rights and legal acts etc.

The general principles of civil law are not, however, reduced to the ones expressed by the preliminary title. In the course of history, the legal literature has quoted fundamental principles of civil law, including latin sayings from roman law, which are still unanimously recognized by doctrine and

are invoked before courts, such as: *resoluto iure dantis resolvitur ius accipientis; nemo plus iuris ad alium transferre potest quam ipse habet; nemo auditur propriam turpitudinem allegans* etc.

**Which role is assigned to judges and their decisions by the civil code? Does the civil code recognize the approach that judges have the authority to make law? How can the legal loopholes be bridged? Are judicial decisions understood as sources of law? Does the civil code often call upon courts to interfere with the relationships of substantive law with their judicial constitutive decisions?**

The decisions of judges are not recognized by the Civil Code as sources of law. According to Article 1 of the Civil Code, the sources of civil law are laws, customs and general principles of law. In the cases not provided for by the law, customs are applicable and, in lack thereof, legal provisions regarding similar situations and where there are no such provisions, general principles of law. In the matters regulated by law, customs are applicable only to the extent to which the law expressly refers to them.

According to Art. 514 of the new Civil Procedure Code, in order to ensure the unitary interpretation of the law by all courts, the Prosecutor-General of the Prosecutor's Office attached to the High Court of Cassation and Justice, *ex officio* or at the request of Ministry of Justice, the Directing College of the High Court of Cassation and Justice, the directing colleges of the Courts of Appeal and the attorney-general have the duty to request the High Court to decide on legal issues that have been differently judged by the courts. The procedure is called "appeal in the interest of the law" and is binding for the courts from the date of publication in Romania's Official Journal, part I (art. 517 Civil Procedure Code). Even if at first sight it might appear as a judgment which is source of law, in fact, it is a uniform interpretation of a law, which remains the source of law. The source of law in this case is not the judicial decision, as it does not fill a legal gap.



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## 8 SLOVAKIA

*Anton Dulak*

### 8.1 Preparation of the Private Law Reform and its Materialization

#### **How long has the reform, including the preparatory works, been going?**

In 2014 it has been 50 years since the Civil Code (Act No. 40/1964 Coll., as amended), still representing the basis of legal regulation of private relations, came into effect. The socio-economic changes after 1989, particularly the transition to market economy, necessitated also changes in the legal system, including the private law sphere. The new conditions brought about considerations on recodification of the Civil Code which, even though present also in the past<sup>390</sup>, were given a new impulse after 1989. As soon as in 1990, an expert commission under the then government of the ČSFR comprising well reputed Slovak and Czech experts in civil law was constituted with the goal to elaborate a new Czechoslovak Civil Code. The lack of time triggered by the extent of necessary changes in the legal system resulted in provisional solution of the legal regulation of the private relations via extensive amendment of the Civil Code (Act No. 513, Coll) in 1991. Nevertheless, the preparations of a new Civil Code continued until the Czechoslovak state ceased to exist.

Elaboration of section-by-section wording of the Civil Code (Government Bill of the Civil Code No. 1046, 1998) already under the new situation of the independent Slovak Republic in 1989 represents a new stage in the recodification preparations. The proposal passed the interdepartmental commentary procedure and the comments were incorporated. It was also subject of scientific debate at the scientific conference *Lubyho právnické dni* (Luby's Days of Law). In the new legislative period the preparations did not proceed.

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<sup>390</sup> See e.g. LAZAR, J.: K stavu problémom a perspektívam základnej občianskoprávnej úpravy. *Právny obzor* vol./1989, p. 388-398.

Only to the end of following legislative period in 2002, the “Legislative Intent of the Civil Code”<sup>391</sup> was submitted and approved by the government of the Slovak Republic. Under the Executive Resolution No. 827 as of 7<sup>th</sup> August, 2007 the final version of the new Slovak Civil Code should have been ready by August 2005. However, this project in view of elaboration of section-by-section wording has not been completed.

In compliance with the next Programme Declaration of the Slovak government, the task to recodify the Slovak private law became an integral part of the legislative tasks frame plan for the years 2006 - 2010. For this purpose, a recodification commission for preparation of a new Civil Code under the Ministry of Justice was set up in 2007. After intensive preparations, the commission elaborated a legislative intent and presented it for extensive nationwide debate. Conference papers were summarised and published.<sup>392</sup> Following the interdepartmental procedure, the government by its Resolution No. 13 of 14<sup>th</sup> January, 2009 approved the Legislative Intent which thus became the basis for section-by-section wording. In the period 2010-2012, the recodification preparations were slowed down as the government did not incorporate the recodification of the private law into either its programme declaration or legislative tasks frame plan. The situation has changed after the early elections in 2012. The new government has reintroduced the recodification of the Civil Code into its legislative tasks frame plan for the years 2012-2016.

### **What were the reasons for the reform?**

Even prior to socio-economic changes in 1989, jurisprudence had indicated the need for changes in the private law sphere. The requirements related to creation of private rules were divided into two groups according to the criterion whether they could be put into practice within the framework, and on the basis of existing “narrow” conception of civil law, or whether they ignited considerations on crucial conceptual changes going beyond the limits of then accepted understanding of the Czechoslovak civil law expressed mainly through the extent of relations regulated by the Civil

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<sup>391</sup> Published in Annex to the journal *Justičná revue* vol. 8-9/2002.

<sup>392</sup> LAZAR, J. (ed.): *Návrh legislatívneho zámeru kodifikácie súkromného práva*. Bratislava, MS SR 2008.

Code. The prevailing view was that the mentioned defects, imperfections and weak points of the valid Czechoslovak Civil Code could be disposed of only via recodification. The entire conception of the basic civil regulation was subjected to strong criticism.<sup>393</sup>

The revision of the Civil Code and the adoption of the Commercial Code in 1991 were evaluated as reasonable legislative strategies<sup>394</sup> and a positive step towards approximation of the private law to the conditions of market economy.

The intention to remove many imperfections of the Civil Code through broad and very extensive regulation within the Commercial Code turned out to be an absolutely improper and conceptually impertinent legislative strategy<sup>395</sup> which, in long-term perspective, constituted an imbalanced state between the general and special private law.

The necessity to terminate the legislatively temporal character of the basic private regulation constituted on fundamental deformations arising from the codification of property and related relations in the sixties of the 20<sup>th</sup> century was highlighted in multiple considerations on the need for recodification.<sup>396</sup> Altogether five codes were adopted in this area, i.e. the Civil Code, the Economic Code, the Code of International Trade, Labour Code, and Family Act. The main deviation from even then generally accepted principles of codification of property relations and thus also from the middle and east European standards was found in the adoption of the Economic Code and also in acceptance of the economic law as a separate legal disci-

<sup>393</sup> See LAZAR, J.: K stavu, problémom a perspektívam základnej občianskoprávnej úpravy. Právny obzor vol. 5/1989, p. 388-398.

<sup>394</sup> See PLANK, K.: O potrebe a spôsobe okamžitej novelizácie Občianskeho zákonníka. Justičné revue vol. 2/1991, p. 11 and foll.

<sup>395</sup> LAZAR, J.: Otázky kodifikácie súkromného práva. Iura Edition, 2006. ISBN 80-8078-128-1., p. 9-10.

<sup>396</sup> See e.g. ZOULÍK, F.: Problematika rekodifikácie súkromného práva v České republice, Právní praxe č. 2/1995, p. 126 and foll., also Příčiny a principy kodifikace soukromého práva v České republice, IN: Kodifikace a dekodifikace soukromého práva v dnešním právním vývoji. Praha, Karolinum 1998, p. 21 and foll., PLANK, K.: Konceptia rekodifikácie občianskeho práva hmotného v Slovenskej republike, Justičná revue vol. 4/1996, p. 1 and foll., LAZAR, J.: Východiská a koncepčné otázky návrhu slovenského Občianskeho zákonníka. Justičná revue vol. 12/1997, p. 16 and foll., KNAPPOVÁ, M.-ŠVESTKA, J.: Znovu ke stavu a perspektívám českého soukromého práva, Právní rozhledy vol. 6/1998, p. 269 and foll.

pline (under the socialist regime interpretation it represented an instrument of directive governance).<sup>397</sup> In this respect, Czecho-Slovakia represented a distinction compared to other socialist states where private legislation adhered to preceding developments. Considerations on private law codification focused, inter alia, on stipulating optimal conception of the new private law in the Civil Code. The ideal conception was defined as the one, which, under the Slovak reality in view of its traditions and legal developments, would best correspond with the modern tendencies of the European private law.<sup>398</sup>

The still ongoing recodification procedure of the Civil Code formulates the main reasons leading to the necessity of reopening work on the Legislative Intent adopted in 2009. First out of these reasons is the current and urgent need for recodification of the Civil Code because of diversity, internal inconsistency and incomprehensibility caused by huge bulk of amendments passed after 1989, as well as by the extensive amendment of the Civil Code in 1991. Recodification should definitely resolve the provisional state lasting since 1991. Furthermore, it should remove lack of conception at adoption of amendments implementing the European legislation into the Civil Code, as well as respond to and harmonize the regulations of basic private relations with the current developments of the European private law. Eventually, recodification is reasoned by the fact that the Civil Code of 1964 does not, to a large extent, correspond with requirements imposed on a modern code of the 21<sup>st</sup> century.<sup>399</sup>

### **Have there been elaborated any studies identifying the most crucial problems with exercising the former legal conditions in practice?**

In the course of separate stages of the recodification preparations including the contemporary one, the basic strategic as well as content issues to be comprised in the new Civil Code have referred to both theoretical sources and application practice. It can be stated that well known Slovak and Czech

<sup>397</sup> LAZAR, J.: Otázky kodifikácie súkromného práva. Iura Edition 2006, p. 9.

<sup>398</sup> LAZAR, J.: Otázky kodifikácie súkromného práva. Iura Edition 2006, p. 12.

<sup>399</sup> LAZAR, J.: Návrh legislatívneho zámeru kodifikácie súkromného práva, Materiály z odbornej konferencie, Ministerstvo spravodlivosti Slovenskej republiky, Bratislava: EUROKODEX, Poradca podnikateľa, spol. s r. o., 2008, ISBN 978-80-89363-14-8, p. 27.

specialists in civil law even before the radical change of the social and political situation in November 1989 in their expert scientific discourse posted and reasoned the need and necessity of private law recodification, particularly recodification of the Civil Code of 1964. We must not forget that, to express such ideas and views, both civil braveness and high degree of scientific courage were required.

After 1989 the preparatory legislative work on the new Czechoslovak and later Slovak Civil Code have referred exclusively to publications of several authors among which the complete works of prof. Lazar must be mentioned.<sup>400</sup>

### **How was the reform organized?**

Under the Slovak reality, the recodification preparations of the new Civil Code (new organization of private law) were derived from political decisions, i.e. the decision to include the pertinent issue into the plan of legislative tasks. This inclusion had been preceded by adoption of the Programme Declaration of the Government of the Slovak Republic.

The Ministry of Justice is the authority responsible for the recodification work, the ongoing one including, and for this purpose a Recodification Commission was established. The Commission established in 2007 exercises the current recodification work. The Minister of Justice on the advice of the Chair of Commission appointed the Commission members. The current members were drawn from the teachers of the Slovak faculties of law, further from the officials of the Ministry of Justice, General Prosecution Service of the Slovak Republic, representatives of advocacy, notaries public, etc. The Recodification Commission, at commencement of its work, elaborated a Proposal of the Legislative Intent, which was submitted for public comments. After incorporation of the comments the Proposal of the Legislative Intent was debated and approved by the Cabinet of the Slovak Republic. The approved Legislative Intent represents an ideological ground for

<sup>400</sup> Pozri LAZAR, J.: Otázky kodifikácie súkromného práva. Iura Edition 2006, which represents a set of selected publications related to private law recodification chronologically arranged to provide a picture of recodification issue in historical perspective reflecting both the views and adopted legislative solutions. Author's purpose was to encompass changes, shifts, deepening and extending of scientific argumentation within separate stages of the legislative procedure.

the section-by-section wording. The wording is being drafted by the pertinent work group which, within the stipulated work time schedule, submits it to the members of the Commission for comments.

**Were any critical remarks raised by representatives of legal theory or practice taken into account?**

Since the beginning of the recodification work it has been obvious that the contents of the new Civil Code will impact a lot of private law disciplines and thus ignite a debate on the need and extent of changes. The relevant areas of private law, mainly business law, labour law, family law, and international private law became areas of such a “collision” of interests.

Resolution of the mutual relation between the Civil and Commercial Codes represents one of the long-term and crucial problems of recodification. There are views<sup>401</sup> that the entire conception of the Civil Code should derive from the determination whether the private law recodification should focus on preparation and promulgation of a single private law...or the existence of rights within separate branches of law will be retained. It is necessary to mention that the standpoints to this issue have been developing. Theoretical works before 1989 admitted a possibility to elaborate two modern codes – the Civil Code as a general legal regulation and the Commercial Code which, in relation to the Civil Code, would be in the position of *lex specialis* and would regulate specific commercial issues.<sup>402</sup>

This model idea on the relation between *lex generalis* (the Civil Code) and *lex specialis* (the Commercial Code) was abandoned upon adoption of the Commercial Code and amendment of the Civil Code in 1991. Non-conceptual and uncoordinated character of legislative work was subjected to criticism.<sup>403</sup> Adoption of the Commercial Code caused new problems

<sup>401</sup> SUCHOŽA, J.: Kľukaté cesty procesu rekodifikácie súkromného práva v Slovenskej republike. IN Husár, J. (Ed.). (2008). *Právo a obchodovanie*, Zborník z vedeckej konferencie doktorandov konanej 7. 6. 2007 v Košiciach, p. 210.

<sup>402</sup> KNAPPOVÁ, M.-KNAPP, V.-LAZAR, J.-ŠVESTKA, J.: Nad koncepcií československého občianskeho práva. *Právnik* vol. 8/1990, s. 676-689. Cited following LAZAR, Ján. *Otázky kodifikácie súkromného práva*. Iura Edition, 2006. ISBN 80-8078-128-1, p. 43, 47-48.

<sup>403</sup> LAZAR, J.: Základné aspekty nového občianskeho a obchodného práva. *Acta facultatis iuridicae*, Bratislava, PF UK, XV., 1994, p. 77 and following.

– the endeavour to eliminate the imperfections of the Civil Code through a special regulation in the Commercial Code resulted in a situation when the special regulation in the Commercial Code took over some tasks, which should have been performed by the Civil Code. In his article published in 1991, the author outlined the need to foster a “broader” conception of civil law.<sup>404</sup> Among the three basic solutions of the relation between the Civil Code and the Commercial Code the author gives precedence to the continuance of the relation between general and special legal regulation, while not opposing the option to introduce some commercial characteristics into the civil law. Under commercialization the author understands such a solution, where the Civil Code would govern the property relations of the commercial persons too, while the Commercial Code would regulate only very specific relations which could not be encompassed even under a very broad conception of Civil Code. However, the author further alleges that under our circumstances and in view of our historical legislative developments, introducing commercial characteristics into civil law would hardly represent a proper solution.<sup>405</sup>

Tendencies to introduce commercial characteristics into civil law as a means to solve the relation between the Civil Code and the Commercial Code appeared also in the following periods. In one of his later articles in 1993<sup>406</sup>, the author states that more arguments in favour of introduction of commercial characteristics into the civil law appear today than the case was in the past. In support of his allegation it is mentioned, that this conception has been becoming more and more attractive and that several European specialists in civil law<sup>407</sup> consider the uniform regulation of the basic institutes of the civil and commercial laws a modern and with European integral tendencies more corresponding solution than is the traditional understanding

<sup>404</sup> LAZAR, J.: Úvaha o zmenách v systéme občianskeho práva. *Justičná revue* vol. 2/1991, p. 30-33.

<sup>405</sup> Cited according to LAZAR, Ján. *Otázky kodifikácie súkromného práva*. Iura Edition, 2006. ISBN 80-8078-128-1, p. 53.

<sup>406</sup> LAZAR, J.: Aktuálna úvaha o postavení občianskeho práva v česko-slovenskom systéme práva. *Právnik* vol. 12/1993, p. 1048-1057.

<sup>407</sup> See LAZAR, J.: *Medzinárodné sympóziu o kodifikácii holandského občianskeho práva*. *Právny obzor* vol 10/1990, p. 915.

of the relation between the Civil Code and Commercial Code oriented towards conceptual solution of the relation between *lex generalis* and *lex specialis*.

The idea to introduce broader commercialization to the Civil Code took precedence also in the governmental Bill of the Civil Code in 1996. The comment to the Bill states that this solution represents enhancement of the conception of a broad merger of civil and commercial laws with some modifications.<sup>408</sup> The obvious orientation towards the, so-called, monist conception does not, however, mean that, at search for an optimal solution, other options were ignored. As late as in 2001, jurisprudence kept the question of pertinence of either of these conceptions still open.<sup>409</sup> It is the contractual system or, alternatively, its form or its operation, which play, according to the author, the major role in the considerations on the optimal quality of respective conceptions.<sup>410</sup> Jurisprudence has commenced to tackle the idea of pertinence of the monist model, even if in its modified version.<sup>411</sup>

Also the Legislative Intent of 2009 expressly stipulating “it is necessary to consider the monist model more pertinent” enshrines this idea. It adds, however, that “... upon evaluation of all the domestic and external experience, as well as historical traditions, it is not possible to speak about commercialization of the civil law in its very sense, but only about a necessary and useful integration of law of contracts.”

It is necessary to mention that the monist model is opposed by several representatives of the commercial law. Mamojka<sup>412</sup>, e.g. permanently refuses any changes of the contemporary state alleging that the commercial law

<sup>408</sup> LAZAR, J.: *Koncepcia, zásady a inštitucionálne novoty Návrhu slovenského Občianskeho zákonníka*. Zborník z konferencie V. Lubyho právnických dní, Bratislava, Vydateľské oddelenie PF UK 1999. Cited pursuant to LAZAR, Ján. *Otázky kodifikácie súkromného práva*. [s.l.]: Iura Edition, 2006. ISBN 80-8078-128-1, p. 99 - 100.

<sup>409</sup> LAZAR, J.: *K niektorým koncepčným otázkam rekodifikácie súkromného práva*. *Právni praxe* č. 1-2/2001, s. 87-93. Cited pursuant to LAZAR, J.: *Otázky kodifikácie súkromného práva*. Iura Edition, 2006. ISBN 80-8078-128-1., p. 146.

<sup>410</sup> The same source, p. 147.

<sup>411</sup> LAZAR, J.-BLAHO, P. (eds.): *Základné zásady súkromného práva v zjednotenej Európe*. Iura Edition 2007, p. 268.

<sup>412</sup> MAMOJKA, M.: *K Správe ministra spravodlivosti SR o zámere a aktuálnom stave rekodifikačných prác súkromného práva*. Minutes from the 47th. Session of the Constitutional Committee of the National Council of the Slovak Republic 10. - 11. 6. 2008.



has been a separate legal discipline for ages “and there are no problems in its application”. Others assert that, by promulgation of the Labour Code, 2001 (Act No. 311/2001 Coll., as amended), the idea of the so called extensive Civil Code has acquired a new dimension whereby the enhancement of the monist conception has been disputed.<sup>413</sup> Temporary argument in favour of dualistic conception referred to the fact that the proposal of the Czech Civil Code also reflected the idea of two separate codes. Another representative of commercial law asserts that the dual character of regulations, insufficiency in their coordination established at their constitution, as well as their vagueness and ambiguity cause problems in application practice.<sup>414</sup> Nevertheless, Mamojka also admits that there exists a need to unite and simplify those legal institutes, which “are indeed senselessly redundant or distinctively different”.<sup>415</sup>

The application of the relation between the Civil Code and the Labour Code raises further questions. The sponsors in their preceding recodification work incorporated the employment contract into the structure of named contracts governed by the Civil Code.<sup>416</sup> The later proposal of Legislative Intent, approved by the Resolution No. 827 as of 7<sup>th</sup> August 2002 (Document No. 5376/2002) of the Cabinet of the Slovak Republic stipulates that the Civil Code will define employment contract as a specific type of contract for work, and will refer to special regulation within the Labour Code.

The contemporary wording of the Legislative Intent (item 3.3) holds that reasonable idea to apply the relation between the Civil Code as *lex generalis* and the Labour Code as *lex specialis* more consistently, has not been exhausted by inclusion of s1(4), Labour Code. The possibilities of subsidiary usage of the Civil Code in respect to several institutes which otherwise fall under the scope of general private law, and are in a specific form encompassed in the first part of the Labour Code, are not sufficient. It is mainly

<sup>413</sup> See SUCHOŽA, J.: Křukaté cesty procesu rekodifikácie súkromného práva v Slovenskej republike. IN: HUSÁR, J. (ed.): Právo a obchodovanie, Zborník z vedeckej konferencie doktorandov konanej 7. 6. 2007 v Košiciach, 2008, p. 208.

<sup>414</sup> OVEČKOVA, O.: Regulačné možnosti obchodného práva v súčasnosti. IN: Suchoža, J. & Husár, J. (Eds.) (2010). Obchodné právo a jeho širšie kontexty. ) Univerzita Pavla Jozefa Šafárika v Košiciach - Právnická fakulta, p. 3.

<sup>415</sup> Mamojka, work cited in note Nr. 23, p. 1520.

<sup>416</sup> Vládny návrh 1046 z roku 1996, štvrtá hlava šiestej časti, § 733.

the regulation of acts in law, invalidity of acts in law, regulation of unjust enrichment, preclusion, passage of time and related statutory time periods. Closer link between general private law and individual labour law is omitted also in regulations of other issues.

Some labour law specialists object the aforementioned views asserting that all labour relations have a monolithic and specific character requiring a uniform and complex legal regulation, where no space should be given to elements and rules of market economy, and thus labour relations have nothing in common with other private law relations.<sup>417</sup>

In another article, an outstanding specialist in civil law alleges that the relation between the Civil Code and the Labour Code is currently being evaluated by the labour law scholars. This evaluation has just commenced.<sup>418</sup> The author states that stipulation of the optimal relation between the Civil Code and the Labour Code should follow only upon assessment of several year experience with the subsidiary performance of the Civil Code in relation to the general part of the Labour Code, taking into consideration the hybrid character of the labour law absorbing elements of both the private law and the public law.<sup>419</sup> According to Barancová, labour law, in view of its character, falls under the scope not only of the private but also of public law, while, in view of the number of the sources of labour law, the public law sources take obvious precedence... and thus “ the complete separation of the Civil Code from the Labour Code under the market economy conditions, irrespective of the hybrid character of labour law, can be considered an out-of-date and hardly acceptable model”. The author finds the incorporation of employment contract into the Civil Code a relevant

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<sup>417</sup> LAZAR, J.: Koncepcia, zásady a inštitucionálne novoty Návrhu slovenského Občianskeho zákonníka. Zborník z konferencie V. Lubyho právnických dní, Bratislava, Vydavateľské oddelenie PF UK 1999 IN: LAZAR, Ján. Otázky kodifikácie súkromného práva. Iura Edition, 2006. ISBN 80-8078-128-1, p. 102 - 103.

<sup>418</sup> BARANCOVÁ, H.: Vzťah Občianskeho zákonníka a Zákonníka práce. IN: LAZAR, J.: Návrh legislatívneho zámeru kodifikácie súkromného práva. Ministerstvo spravodlivosti SR, 2008. ISBN 978-80-89363-14-8, p. 153.

<sup>419</sup> Ibid.

distortion of the unity of types of contract under labour law, which are, in view of their subject-matter, qualitatively different from the contracts under civil law.<sup>420</sup>

As far as family law is concerned, the sponsor of the Legislative Intent of 2007 states that family relations represent an integral part of the basic civil regulation. According to Lazar, the new systematic incorporation of family law into the Civil Code Bill has not ignited substantial objections or comments in expert legal circles.<sup>421</sup> Eventually, the views on incorporation of international private law vary both on the national and international scenes. Under the Legislative Intent of 2007, regulation within a special enactment proved to be fully pertinent and there are no substantial reasons to incorporate the substance of international private law into the Civil Code being drafted”.<sup>422</sup>

**Which laws have been prepared or adapted in the course of the reform? For instance, if there was adapted a new civil code as a part of the reform, was such a civil code being prepared separately or were there any other laws being prepared together with it? These “other laws” could be not only brand new laws, but also already existing laws, which had to be amended as a result of the passage of the new civil code.**

The Legislative Intent in its wording responds to this question as follows: companies, cooperatives, competition law, Commercial Register, intellectual property law, crucial regulation of the individual labour law and international private law will be excluded from the Civil Code regulation... the Commercial Code with indicated subject-matter jurisdiction will be retained, as well as the Labour Code, Act on International Private and Procedural Law, as well as special legislation regulating copyright and related

<sup>420</sup> The same source, p. 159.

<sup>421</sup> The same source.

<sup>422</sup> LAZAR, J.: Konceptcia, zásady a inštitucionálne novoty Návrhu slovenského Občianskeho zákonníka. Zborník z konferencie V. Lubyho právnických dní, Bratislava, Vydavateľské oddelenie PF UK 1999 IN: LAZAR, Ján. Otázky kodifikácie súkromného práva. [s.l.]: Iura Edition, 2006. ISBN 80-8078-128-1, p. 104 - 105.

laws, industrial and business rights falling under the scope of intellectual property. At the current stage of the preparation of the new Civil Code, the wording the Legislative Intent of the Companies Act is being drafted.

**How long was or has been the period of *vacatio legis* set by the lawgiver?**

The Legislative Intent does not expressly solve the duration of the *legis vacatio* period. However, there are considerations on eighteen month statutory period to get acquainted with the contents of the enacted code prior to its coming into effect.<sup>423</sup>

## 8.2 Foreign and European Models

**Was the reform inspired by any foreign civil codes? Is there obvious influence of a single foreign code or was the inspiration taken from several sources? If there were more sources, is the final outcome consistent, as for both its content and terminology?**

It is the method of comparison with several foreign civil codes, which is broadly used at drafting of the Civil Code. Since the commencement of the preparations, the idea not to copy any of the enactments and not to follow any model code has been pursued.<sup>424</sup> It is admitted, however, that in view of structuring and formation of the concrete legal institutes as well as at formulation of provisions, the new Slovak legal regulation should more or less refer to the middle-European tradition represented mainly by ABGB and BGB. Also the newly adopted Civil Code of the Czech Republic represents a certain source of inspiration.<sup>425</sup>

**If adopting foreign models, was the lawgiver inspired mainly by actual law in action or did he only copy and rephrase the text of such foreign models?**

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<sup>423</sup> The duration of *legis vacatio* was handled by the previous Recodification Commission in its Legislative Intent, 2002. The then proposed statutory period was stipulated at six months.

<sup>424</sup> Legislative Intent, p. 20.

<sup>425</sup> LAZAR, J., - BLAHO, P. (Eds.): *Základné zásady súkromného práva v zjednotenej Európe*. Iura Edition 2007, p. 277.

In the procedure of preparation of the new text of the Slovak Civil Code, the texts of foreign legislative regulations represent an ideological ground for formulation of separate legal institutes. Case law serves as inspiration for the sponsors only to an extent in which it provides generally acceptable rule enforced by, e.g. the Court of Justice.

### **Was the reformed inspired by some European projects, e.g. Common framework of reference?**

The Legislative Intent highlights the effort to prepare a “modern domestic private law code having European dimensions which, on this ground, would reach a high standard of convergence with the civil codes of other EU member states, first of all with the neighboring states under transition...”<sup>426</sup>

At creation of the text of separate institutes, the Legislative Intent of the Civil Code makes reference, by way of inspiration, to the proposal of the “General Framework of Reference”. As far as the so called private initiatives, i.e. UNIDROIT – principles of international business contracts, PECL – principles of European law of contracts, PETL – principles of European law of delict, etc., even though not legally binding, they still influence the preparation of the Slovak Civil Code... the fundamental principles, as well as some basic rules encompassed therein will, under the Intent, be directly transposed into the pertinent provisions of the new Code, particularly to law of contracts and rights to remedy. The preparatory work also follows more recent initiatives of the EU bodies, i.e. Proposal of the Regulation of the European Parliament and Commission on Common Purchase Right.<sup>427</sup>

### **How has the reform adjusted to the EU law?**

In case of directives adopted by the EU bodies on consumer protection, the Legislative Intent proposes to incorporate these directives, alternatively principles and concrete provisions, directly into the Civil Code, if these

<sup>426</sup> Expressly mentioning the Czech Republic, Poland and Hungary.

<sup>427</sup> Brussel 11.10.2011. KOM (2011) 635 in final wording.

represent, in view of their contents, a relatively stable group of legal relations irrespective of the dynamic development of the common market and besides... are vitally important for enhancement of consumer protection.<sup>428</sup>

### 8.3 The Subject Matter Aspects of the Reform

#### **Which fundamental changes to the content have been brought by the reform as compared with the previous regulation?**

One of the major changes brought by the proposed solution (Legislative Intent) rests in removal of the dualistic model represented by the current Civil and Commercial Codes. A solution not introducing commercialization to the civil law in its very sense, but providing only necessary integration of law of contracts. In comparison with the currently valid regulation, the new one will also contain basic principles of private law upon which the Civil Code is principally constituted. A substantial change is purported in view of the regulation of contractual capacity of an artificial person. The direct conduct of stipulated persons (bodies) on behalf of an artificial person will be replaced by the new construction, i.e. representation of artificial person. Crucial change is also planned at deliberations on invalidity of legal acts, where the focus will shift to relative invalidity. Substantive family law will become a part of the new Code and community property will be given a new regulation. Another substantial modification relates to legal regulation of termination of marriage by divorce. In regulation of chose in possession, the institute of possession will be redone and a new right, i.e. right to build, will be introduced. Reintroduction of the principle “superficies solo cedit” will have a long-term impact. Not many institutional alterations are braced for within the proposed solution in the area of succession. Substantial modifications in view of contents and structure are expected in relation to unification of the general law of contracts. Under the new private Code, there should be a single and uniform system of contracts.

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<sup>428</sup> LAZAR, J.: Rekodifikácia slovenského občianskeho zákonníka vo svetle aproximácie práva (Príspevok na medzinárodnej konferencii o aproximácii práva konanej 23. a 24. Novembra 1998 v Bratislave. IN: Teória a prax aproximácie práva. Bratislava, Vydavateľské oddelenie PF UK 1999, p. 33-38. Cited according to LAZAR, J.: Otázky kodifikácie súkromného práva. Iura Edition, 2006. ISBN 80-8078-128-1., p. 139.

Should there any exceptions be required in cases of commercial legal deeds or at consumer contracts, these modifications will be regulated together with the general institute of private law. It is considered a pertinent and reasonable solution for the Civil Code to contain commercial, as well as consumer contracts. In the compensation for damage regulation, tendencies and needs for harmonization with the EU law will be taken into account.

**Does the new regulation keep continuity with the previous regulations or is it rather discontinuous? If so, to what extent is it discontinuous? As for the extent of continuity or discontinuity, consider not only the content, but also the language and terminology.**

It is stressed in the Legislative Intent<sup>429</sup> that adoption of the new Civil Code does not mean that all institutes and provisions encompassed in the recodified area of private law will be abolished without any exception and replaced in full extent. If some of the provisions or even entire institutes of the valid law, enshrined either in the Civil Code, Commercial Code, or Family Act are compliant with the modern methodological criteria, abstract enough, and first of all have proven effective in view of their subject-matter and contents in long term perspective in practice, and are not conflicting with the European standards, it is reasonable and pertinent to take them over to the new Code. Also the text of the Code should ensure continuance of the future system. The Legislative Intent does not expressly mention it, but the aim is to use the unequivocal Slovak legal terminology which has been used in practice for a long time, and the basis of which was set forth by Š. Luby. According to the author of the idea: "... it is not our intention to uselessly experiment in terminology issues only to serve the purpose of alleged modernity and novelty..."<sup>430</sup>

**Has the reform brought certain institutes or provisions that can be considered as original, i.e. they do not exist in other states?**

The Legislative Intent of the Civil Code does not contain any proposal of an institute or provision which could be considered an exceptional solution not existent in another state.

<sup>429</sup> Legislative Intent of the Civil Code, p. 20.

<sup>430</sup> LAZAR, J., - BLAHO, P. (Eds.): *Základné zásady súkromného práva v zjednotenej Európe*. Iura Edition 2007, p. 278-279.

**Has the reform also touched the proportion of the autonomy of will and protection of the weaker contractual party? Which institutes restrict the autonomy of will? Under what criteria are the mandatory norms distinguished from non-mandatory norms?**

At stipulating the value orientation of the prepared Code, the Legislative Intent refers first of all to general human values, e.g. individual freedom, equality, human dignity, etc. The new Code should primarily be established on the best traditions of democratic jurisdictions...prioritizing the principle of free individual autonomy of persons.<sup>431</sup> At the same time, the Legislative intent addresses the necessity of existence of social elements in private law. It expressly stipulates that...thus the Slovak private law Code will retain social character in the outlined areas as its creators are bound to pursue this requirement by the unequivocal tendencies of the European private law, as well as by the Constitution of the Slovak Republic, which prefers “social” to “free” market economy (Article 55, Constitution of the SR)

It is also stated that the principles of the European law of contracts focused on protection of a contractual party in less favorable position, will in no way affect mutual contractual relations arising between entrepreneurs as there exists no social need for a special protection of any of these contractual partners within the framework of private law.<sup>432</sup>

Social elements should play a vital role in the field of family law and in regulation of relations between entrepreneurs and consumers. In the interest of the party in less favorable position, also the traditional principles should be modified, taking into consideration the principles of the European private law, i.e. non-discrimination principle, solidarity principle, justice, protection of credence, cooperation principle, etc.

The autonomy of the will of private persons should be expressed in one of the initial statutory provisions, where it is proposed to take over the solution so far regulated by the Civil Code. Pursuant to this rule, at setting forth their mutual rights and duties, the persons can deviate from the statutory regulation, unless expressly prohibited thereby, or the implicit character of the provision prohibits such a conduct.

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<sup>431</sup> Legislative Intent of the Civil Code, p. 18.

<sup>432</sup> The same source, p. 19.



## 8.4 Experience with Exercising the New Regulation in Practice

In view of the state of the preparations and still pending work on recodification of the Civil Code, it is not possible to assess the impact of the proposed changes on the application practice.

## 8.5 New Civil Code

**What is the position of the civil code within the scope of private law? Is there also any separate commercial law codification or are the commercial law provisions included in the civil code? Are any special provisions in the civil code applying solely to businesses? Does the civil code also regulate family law issues?**

The initial considerations highlighting the necessity of recodification of the Civil Code relied on the need to reconsider the entire conception of the basic civil regulation.<sup>433</sup> In the area of property, the need to define relations between civil law and economic law, alternatively international trade law<sup>434</sup>, became most urgent and stressing the unity of all the property relations of commodity and monetary character, became a repeated issue. Following the changes in 1989, when the ideological reasons for ignoring the “private” character of certain legal relations had disappeared, an open debate on legal dualism was commenced, i.e. a debate on division of law into private and public. It was reminded in this context that civil, commercial, and labour laws, as separate legal disciplines, represent the very basis of private law. It was further alleged, that, irrespective of the aforementioned

<sup>433</sup> See LAZAR, J.: K stavu problémom a perspektívam základnej občianskoprávnej úpravy. *Právny obzor* vol. 5/1989, p. 398.

<sup>434</sup> KNAPPOVÁ, M.-KNAPP, V.-LAZAR, J.- ŠVESTKA, J.: Nad koncepcií československého občianskeho práva. *Právnik* vol. 8/1990, p. 676-689. Cited according to LAZAR, J.: *Otázky kodifikácie súkromného práva*. Iura Edition, 2006. ISBN 80-8078-128-1, p. 30

common basis, several groups and sub-groups of these property (together with personal and private property) relations indicate some differences and thus necessitate separate civil legal regulation.<sup>435</sup>

The fostered „broad“ conception of civil law was supplemented by another reason for change, i.e. by the fact, that the valid civil law does not enjoy such a position within the system of private law, it would deserve under the market economy framework.<sup>436</sup> That was one of the reasons why, at evaluation of the applicable legal regulation, the fact that the Civil Code has not become and couldn't have become a central and integrating private code, out of which all special private regulations derive, was given as one of the critical reasons for recodification of the Civil Code.<sup>437</sup>

The approved Legislative Intent thus establishes a basis for the conception of a uniform (integrated) Civil Code comprising also commercial obligations. Companies, cooperatives, competition law and Commercial Register should be excluded from the Civil Code regulation.

Under Legislative Intent, the substance of family law will become a part of the new Code, and Family Act No. 36/2005, Coll. will be repealed.<sup>438</sup>

**What is the structure of the civil code? How many parts or chapters does the civil code consist of? How are the parts and chapters entitled and how are they subdivided?**

The Legislative Intent of the Civil Code anticipates the following structure of the Code:

**Part One: General part**

Chapter One: Introductory provisions

Chapter Two: Persons

- Division 1: Natural persons

<sup>435</sup> LAZAR, J.: Vzťah občianskeho, obchodného a pracovného práva s osobitným zreteľom na záväzky zo zmlúv. (Príspevok na vedeckej konferencii v rámci II. Lubyho právnických dní, Trenčianske Teplice, 27.-29. septembra 1994). IN: LAZAR, J.: Otázky kodifikácie súkromného práva. Iura Edition 2006, p. 72 - 73.

<sup>436</sup> LAZAR, J.: Úvahy o zmenách v systéme občianskeho práva. Justičná revue č. 2/1991, s. 30 a nasl.

<sup>437</sup> Legislative Intent of the Civil Code, p. 12 - 13.

<sup>438</sup> Legislative Intent of the Civil Code, p. 22.

- Division 2: Artificial persons
- Division 3: Representation

#### Chapter Three: Legal facts

- Division 1: Legal acts
- Division 2: Legal events
- Division 3: Time
  - Subdivision 1: Determination and calculation of time
  - Subdivision 2: Passage of time
  - Subdivision 3: Preclusion

### **Part Two: Family Law**

#### Chapter One: Marriage

- Division 1: Conclusion of marriage
- Division 2: Nullity of marriage
- Division 3: Rights and duties of spouses
- Division 4: Community property
- Division 5: Dissolution of marriage

#### Chapter Two: Parents and children

- Division 1: Determination of parenthood
- Division 2: Adoption
- Division 3: Rights and duties of parents and children
- Division 4: Edificatory and sanctioning measures

#### Chapter Three: Guardianship and custodianship

- Division 1: Guardianship
- Division 2: Custodianship

#### Chapter Four: Maintenance duty

- Division 1: Maintenance duty of parents towards children
- Division 2: Maintenance duty of children towards parents
- Division 3: Maintenance duty among other relatives
- Division 4: Maintenance duty between spouses
- Division 5: Maintenance duty between ex-spouses
- Division 6: Maintenance and covering costs of an unmarried mother

### **Part Three: Right- in-rem**

Chapter One: Possession

Chapter Two: Right of ownership

Chapter Three: Right-in-rem to an alien chattel

- Division 1: Right to build
- Division 2: Easement
- Division 3: Security right
- Division 4: Retention right

### **Part Four: Law of Succession**

- Division 1: General provisions
- Division 2: Contractual succession
- Division 3: Testimonial Succession
- Division 4: Intestate Succession
- Division 5: Confirmation of succession and settlement of successors
- Division 6: Protection of entitled successor

### **Part Five: Law of Obligations**

Chapter One: General part

- Division 1: Basic provisions
  - Subdivision 1: Constitution of obligations
  - Subdivision 2: Contract
  - Subdivision 3: Consumer contract
- Division 2: Joint rights and joint duties
- Division 3: Changes in the person of creditor and debtor
- Division 4: Changes in the contents of obligation
- Division 5: Securing claims
- Division 6: Discharge of obligations

Chapter Two: Obligations resulting from contracts and other legal acts

- Division 1: Conveyance of ownership contracts
  - Subdivision 1: Purchase contract
    - Subsection 1: General provision on purchase contract
    - Subsection 2: Ancillary understandings at purchase contract
    - Subsection 3: Purchase of an enterprise

- Subsection 4: Special provisions on retail purchase
- Subdivision 2: Exchange of consideration contract
- Subdivision 3: Donation deed
- Division 2: Contract for work
  - Subdivision 1: General characteristics of contract for work
  - Subdivision 2: Special provisions on bespoke products
  - Subdivision 3: Special provisions on adjustment and repair
  - Subdivision 4: Construction of a building
  - Subdivision 5: Special business law provisions
- Division 3: Contracts on giving a chattel for usage
  - Subdivision 1: Lease contract
    - Subsection 1: General provisions
    - Subsection 2: Lease of a flat
    - Subsection 3: Lease of a house
    - Subsection 4: Lease of non-housing premises
    - Subsection 5: Sublease
    - Subsection 6: Lodging contract
    - Subsection 7: Lease of a means of transport contract
    - Subsection 8: Business lease of a personal chattel
    - Subsection 9: Tenancy contract
    - Subsection 10: Lease contract with a purchase option
  - Subdivision 2: Leasing contract
  - Subdivision 3: Consumer contract on the right to use a building or its part non-perpetually
  - Subdivision 4: Rental Contract
- Division 4: Loan and credit contracts
  - Subdivision 1: Loan Contract
  - Subdivision 2: Credit contract
  - Subdivision 3: Consumer credit contract
- Division 5: Contracts of procuration
  - Subdivision 1: Mandatum contract
    - Subsection 1: Consignment contract
    - Subsection 2: Contract of procuration of a journey
  - Subdivision 2: Agency contract
  - Subdivision 3: Contract of business representation
  - Subdivision 4: Contract of control

- Division 6: Transportation contracts
  - Subdivision 1: Dispatch contract
  - Subdivision 2: Contract of transportation of persons
  - Subdivision 3: Contract of cargo transportation
  - Subdivision 4: Contract of means of transport operation
- Division 7: Banking contracts
  - Subdivision 1: Contract of opening of an accreditive
  - Subdivision 2: Contract of a current account
  - Subdivision 3: Contract of a depository account
  - Subdivision 4: Contract of collection
  - Subdivision 5: Contract of banking deposit of a chattel
- Division 8: Insurance contracts
- Division 9: Licensing contracts
- Division 10: Contract of bailment and storage
  - Subdivision 1: Contract of bailment
  - Subdivision 2: Contract of storage
- Division 11: Contracts of support
  - Subdivision 1: Contract of financial support
  - Subdivision 2: Contracts of advancement
- Division 12: Contract of association
- Division 13: Bidding and games
- Division 14: Obligations from unilateral legal acts
  - Subdivision 1: Public promise
  - Subdivision 2: Promise to compensate

Chapter Three: Obligations resulting from causing damage and unjust enrichment

- Division 1: Obligations resulting from causing damage
  - Subdivision 1: Basic provisions
  - Subdivision 2: Obligation to compensate damage
    - Subsection 1: Damage
    - Subsection 2: Causation
    - Subsection 3: Liability grounds
    - Subsection 4: Exclusion from liability
    - Subsection 5: Damage caused by several persons
    - Subsection 6: Ways and extent of remedy
- Division 2: Obligations resulting from unjust enrichment

Part Six: Transitional, final and cancelling provisions

- Chapter 1: Transitional provisions
- Chapter 2: Cancelling provisions and effect of the Code

**Does the civil code include provisions on connection between private and public law? Or if the civil code does not include any such express provisions, what approach to this issue is taken by legal theory and practice? For instance, the Sec 1 para 1 of the new Czech Civil Code prescribes that exercising of private law shall be independent from exercising of public law; however most of the theorists do not share this approach and consider it unsustainable.**

Drafting of the new Civil Code, as reflected in the Legislative Intent, relies on the fact that one of the major consequences of the social, political, and within their framework also legal changes after November 1989, was the return to legal dualism of the public and private laws as it is common in the European civil law countries. The draft of the section-by-section wording stipulates the position of the Civil Code in the very first section, § 1, defining it as a general and basic private law regulation. It is not anticipated that the Code will specify the concept of private law in relation, inter alia, to public law. This presumption rests on the theoretical knowledge that today, irrespective of extensive and principal changes in the jurisdiction or jurisdictions, there still does not exist a complex and clearly defined dualism of private and public laws, it exists only in broad strikes.<sup>439</sup> Critical comments to the text of the Civil Code in the Czech Republic became also a ground for an engaged approach.<sup>440</sup>

<sup>439</sup> LAZAR, Ján. Otázky kodifikácie súkromného práva. [s.l.]: Iura Edition, 2006. ISBN 80-8078-128-1, p. 65.

<sup>440</sup> Například podľa Pelikánovej je presná hranica medzi súkromným a verejným právom “obtížně nalezitelná” ... definice už úplně nemožná a kromě toho není v kódeu potřebná”. PELIKÁNOVÁ, I.: Návrh občanskoprávní kodifikace z pohledu Evropských společností. IN: Švestka, J. - Dvořák, J. - Tichý, L. (eds.): Sborník statí z diskusních fór o rekodifikaci občanského práva. Praha ASPI, a.s. 2006, p. 82.

**Does the civil code include many procedural provisions or does it keep the procedural provisions on minimum level with respect to lucidity of the laws?**

At preparations of the new Civil Code there is a tendency to minimize the procedural provisions. For example, at regulation of the position of a guardian ad litem, this institute, unlike the situation abroad where it is considered procedural, is proposed not to be subject to family law regulation but rather to procedural one.<sup>441</sup> Provisions on consumer protection are handled alike. Referring to procedural character of some of the transposed provisions of the European law, the idea that detailed regulation of consumer protection be encompassed in a special law, takes precedence.

**Does the civil code include certain provisions which could be considered as its style features? For instance the Sec 7 and 16 of ABGB claims its allegiance to natural law rationalism, the Sec 1 of the Swiss civil code gives power to judges to bridge legal loopholes by using a principle that they would determine if they were lawgivers.**

In the Legislative Intent of Civil Code, there is no intention to lay down provisions correlating with Sec 7 and 16 of ABGB or Sec 1 of Swiss Civil Code.

**Does the civil code expressly set forth any principles of private law or does the civil code leave it to theory and judicial decisions?**

According to Legislative Intent, the new regulation will contain also basic principles of private law whereupon Civil Code is principally constituted. It is anticipated that the principle of autonomy of disposal will be laid down as one of the main principles of the civil regulation.<sup>442</sup> Furthermore, the principle of equality of all persons in rights and duties will also be incorporated. It is also proposed to set forth the principle of prohibition of law abuse and the principle of compliance of law with general public policy. Also the principle of reliance on legally relevant conduct of a person, as well as the principle of reliance on legitimately acquired rights should be incorporated. Besides principles expressly stipulated within the framework of the wording of the legal rule, there are also other principles proposed

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<sup>441</sup> Legislative Intent of the Civil Code, p. 63-64.

<sup>442</sup> Legislative Intent of the Civil Code, point 2.2, p. 39.



which deepen the ideological ground and values of the new Civil Code. These principles should express also high respect of the general private law to personality and freedom of a human being. These are particularly:

- a) every person has a right to have his life, health, as well as honour, dignity and privacy protected;
- b) given promise is binding and contracts should be performed;
- c) property right enjoys statutory protection and only law can stipulate how property arises and is being discharged;
- d) nobody can be refused what was granted to him under law. The aforementioned principles have basic interpretative importance. Under Intent, at the end of Catch 1, the duty to construe and apply separate provisions of the Code in a constitutionally conform way and to strictly respect the basic principles will be laid down.<sup>443</sup>

**Which role is assigned to judges and their decisions by the civil code? Does the civil code recognize the approach that judges have the authority to make law? How can the legal loopholes be bridged? Are judicial decisions understood as sources of law? Does the civil code often call upon courts to interfere with the relationships of substantive law with their judicial constitutive decisions?**

Legislative Intent of the Civil Code does not anticipate a stipulation whereby the decisions of the courts be connected to setting up legal rules. The Slovak jurisprudence remains steady in its position that courts, by their rulings, do not create law, however, the promulgated general holdings and court experience have a persuasive value at usage of civil rules in interpretative and application practice.<sup>444</sup> However, there are some contemporary tendencies disputing this view.<sup>445</sup>

In the new Civil Code, it will be stipulated that if, at making use of certain private law regulation, there is neither a provision concerning a concrete case, nor there exists a provision on a related case, the fair and just ruling, in view of the entire sense of the jurisdiction in question, as well as in view

<sup>443</sup> Legislative Intent of the Civil Code, p. 40, point 2.8 and 2.9.

<sup>444</sup> LAZAR, J. A kol.: Občianske právo hmotné 1, Bratislava: Iuris Libri 2014, p. 87-88.

<sup>445</sup> See, e.g. DULAK, A.: Súdny precedens a náuka (občianskeho) práva. IN: Postavenie precedensu v našom právnom prostredí, Bratislava: Univerzita Komenského, Právnická fakulta, 2013, p. 5 - 13.

of the basic constitutional and general legal principles as laid down herein, should be followed. First of fall, a principle stating that, if there is no express regulation, an analogy, i.e. *analogiae legis*, should be applied. The novelty is contained in resolution of the, so called, legislative loop holes. If the analogy is not applicable, the case must be tried in view of the basic principles of the rule of law contained in the Constitution as well as in regard to the general legal principles encompassed in the Civil Code.

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## 9 SLOVENIA: CHRONOLOGY OF DEVELOPMENT OF PRIVATE LAW IN SLOVENIA

Ana Vlahek – Klemen Podobnik

### 9.1 Historical, political, economic and legal background of Slovenia<sup>446</sup>

A brief presentation of historical, political, economic and legal background of Slovenia is focal to understanding the evolution of private law in Slovenia<sup>447</sup>. Namely, the territory of today's Slovenia that stretches in-between the Alps in the northwest, the Adriatic Sea in the southwest, the Pannonia plane in the northeast, and the Dinarides in the southeast, had been part of many European countries before Slovenia gained independence in 1991 and had thus been - consecutively or even concurrently - under several different political, economic and legal regimes.

Slavic peoples populated the current territory of Slovenia in the 6<sup>th</sup> century AD. In the 7<sup>th</sup> and 8<sup>th</sup> centuries AD, the northern part of Slovenia belonged to the Slavic State of Carantania which was later annexed to the Frankish empire. Since that time Slovenian territory or its parts had been part of the Holy Roman Empire, the Illyrian Provinces, the Habsburg Monarchy, the Austrian Empire (and subsequently Austria-Hungary), the State of Slovenes, Croats, and Serbs (Sl. *Država Slovencev, Hrvatov in Srbov - Država SHS*), the Kingdom of Serbs, Croats, and Slovenes (Sl. *Kraljevina Srbov, Hrvatov in Slovencev - Kraljevina SHS*), the Kingdom of Yugoslavia (Sl. *Kraljevina Jugoslavija*), the Democratic Federal Yugoslavia (March 1945 - November 1945, Sl. *Demokratska federativna Jugoslavija - DFJ*), the Federal People's Republic of Yugoslavia (1945 - 1963, Sl. *Federativna ljudska republika*

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<sup>446</sup> We would like to thank doc. dr. Matija Damjan (Institute for Comparative Law at the Faculty of Law in Ljubljana, IPP-PF, <http://www.ipp-pf.si/>) and dr. Bojan Godeša (Institute for Contemporary History, Ljubljana, INZ, <http://www.inz.si/>) for their valuable assistance to our research.

<sup>447</sup> Based on *Kramberger & Vlahek*, pp. 15 - 24.

*Jugoslavija - FLRJ*) and of the Socialist Federal Republic of Yugoslavia (1963 - 1991, Sl. *Socialistična federativna republika Jugoslavija - SFRJ*). A large part of western Slovenia belonged to Italy between the two world wars and was reunited with Slovenia in 1947 (partly in 1975).<sup>448</sup>

After the second world war and until its independence Slovenia was one of the six constituent republics of Yugoslavia (in SFRJ named Socialist Republic of Slovenia, Sl. *Socialistična republika Slovenija - SRS*; in FLRJ named People's Republic of Slovenia, Sl. *Ljudska republika Slovenija - LRS*). The economic foundation of the new country was state ownership, created on the basis of different revolutionary measures, particularly nationalization. The legislative competence was divided between the federation and the republics. Each republic had its own executive, legislative, and judiciary bodies. The competences of the republics and their partial independence were further reinforced by the amendments to the Yugoslav Constitution in 1971. Notwithstanding its socialist denomination, the political system in Yugoslavia (called "self-management") was, at least after the major constitutional changes in 1953, different from that of the countries under the Soviet rule. Yugoslavia was not a member of the Warsaw Pact and played a leading role in the Non-Aligned Movement. Although industry was state-owned, it was not subjected to full-blown central planning after 1965; enterprises were left with significantly more autonomy than those in the Warsaw block states, and were market oriented; "social ownership" replaced the "state ownership"; the enterprises were (supposed to be) managed by workers rather than by state officials, etc.<sup>449</sup> In these circumstances, the political and economic transition that took place in 1990s in the Eastern Europe was arguably a smaller shock for Yugoslavia than for other communist and socialist countries. The majority of legislation adopted before independence could, for example, be used in the new social order without many amendments having been introduced.

The economy in Slovenia developed rapidly after the second world war, particularly in the fifties when the country was heavily industrialized.

<sup>448</sup> A series of further details as to Slovenian history as of the 19th century is presented in the following chapters of this article.

<sup>449</sup> Cf. *Pleskovic & Sachs*, pp. 192 - 193.

The processing industry was evolving fast, various new consumer goods were offered on the market and first traces of consumerism could be detected. Agriculture was lagging behind, people started migrating to the cities seeking job opportunities. In the sixties, the industrial growth fell by 50 % due to the economic and political crisis induced by the discrepancies of the system of self-management. State funds which amounted to around 75 % of all funds in Yugoslavia were invested mainly in the primary sectors of industry – coalmines, iron works and cement factories. Undertakings lacked resources for adequate investments and progress, imports grew, exports declined and the Yugoslav *dinar* was devaluated. Eventually, social and economic reforms strengthening decentralization and productivity were implemented enabling Slovenia to start moving towards the market economy. Processing industry within electrics, chemicals, paper and food, was at its peak leaving aside the traditional Slovenian textile, wood and leather industries. The percentage of citizens active in agriculture fell under 20 %. At the end of the sixties, Slovenia had also intensified its presence in international trade developing ties mainly with the then Member States of the European Economic Community and with the socialist countries (barter trade only), less with the developing countries, which did not go hand in hand with the ideology of the central communist regime which tried to suppress the commodity exchange with the West. Another economic crisis starting at the end of the seventies and lasting through the mid-eighties hit Yugoslavia due to the devaluation of the currency resulting from the intensified trade deficit, and low work efficiency caused by sunk investment coupled with unnecessary bureaucratization of industry and trade. In addition, a large foreign debt enabling a non-proportional standard of living was amassed. Foreign currencies and oil were lacking, the unemployment rate had risen, and Yugoslavia almost went bankrupt. The gap between the ideas of economic stabilization based on market economy and trade liberalization on one hand, and the ignorant persistence with the concept of centralized economy on the other, was insurmountable. Tensions between the republics were amplified – those more economically developed (Slovenia, Croatia) opted for more autonomy and fair distribution of resources adequate to the productivity of each of the republics, while the others led by the regime

itself insisted on the solidarity principle condemning the allegedly selfish attempts of the northern republics. With deteriorating economic position, recurrent riots, growing nationalism and contradictory ideas of how to manage the state lacking efficient economic and political reforms, Yugoslavia was at its breakdown.

Between 1989 and 1991, the amendments to the Slovenian Constitution were adopted reflecting the growing demands for the democratization of the society as well as the drive for independence. The prefix “socialist” was erased from the official name of the Republic in 1990. The national plebiscite on independence was held on 23 December 1990. 88.5% of the population with the right to vote, and 95% of those actually voting, voted for independence. In April 1991, the first free elections were held seeing the centre-right coalition win. As in the six month period after the Slovenian plebiscite, no agreement was reached among the former republics to form kind of a loose confederation, the plebiscite decision was implemented in the constitutional act adopted by the Slovene National Assembly and independence was declared on 25 June 1991. An armed attack by the Yugoslav army on Slovenia followed. After a ten-day war in June and July 1991 between the Yugoslav army and the Slovenian territorial defence and police forces, the Yugoslav army gradually left its positions in Slovenia. Establishment of full independence was thereby enabled. Starting with Croatia in June 1991, Slovenia had been internationally recognized by several states and international organizations in 1991 and 1992, the most important being the recognitions of Germany and the EC in December 1991 and January 1992. In May 1992, Slovenia became the 176<sup>th</sup> UN Member State. Slovenia joined the EU in May 2004 and adopted the euro in January 2007 that replaced the Slovenian *tolar*.

In the 1990s after its independence, Slovenia has experienced a stable political and economic transition from the centralized socialist regime of self-management to a democratic social order and market economy. By introducing its own currency in October 1991 it achieved monetary independence which enabled it to avoid the hyperinflation present in the rest of Yugoslavia in 1992.<sup>450</sup> Private initiative flourished, new businesses were launched, the services sector evolved. It has, however, not been immune

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<sup>450</sup> *Pleskovic & Sachs*, p. 191. See also *Juhart: Currency regulation*.

to transition anomalies. The processes of privatization,<sup>451</sup> denationalization and implementation of structural reforms were delayed due to political disagreements on their implementation, and the economy has long suffered from a high level of state control. In recent years in times of political and economic instability in Slovenia, a large part of Slovenian politicians and population are opting for retention of state control (in particular of focal (though often ineffective) enterprises) by referring to a so-called national interest.<sup>452</sup> Joining the EU in 2004 and adopting the euro in 2007 as well as implementing reforms to improve the business environment, have enabled the opening of Slovenian market and greater foreign participation in Slovenian economy, but have not had all the desired effects. High taxes, administrative barriers, politicization of civil service, inefficient court system,<sup>453</sup> inflexibility of the labour market coupled with the fact that Slovenia is a small market all tend to refrain foreign capital from investing to Slovenia.<sup>454</sup> As of end of 2008, the world economic crisis has had additional negative impact on Slovenian economy which slid into recession due to a decrease in domestic consumption initiated by budget expenditure restrictions, inability to implement economic reforms, etc. The construction sector, for example, having increased (too) rapidly prior to the crisis and led to soaring infrastructure investments, collapsed in 2010 and 2011 leaving thousands of workers unemployed and projects unfinished. Businesses have been insolvent to a great extent; payment indiscipline is at its peak. Controversial management buyouts, unsecured politically motivated bank loans and similar corruptive activities, too, have been detected in the last few years and are to date in the centre of daily reports leaving citizens somewhat disappointed with the functioning of the state. The euro crisis and the inability to tackle with the recession have also contributed to growing distrust in the financial system and to lower consumption.

<sup>451</sup> See *Grilc & Juhart; Gregorič & Brežigar Masten & Zajc: From social to private ownership firms...; Brežigar Masten & Gregorič & Zajc: Power struggle: cooperation or competition?...*

<sup>452</sup> See also *Kovač & Možina*, para. 16.

<sup>453</sup> See *Dimitrova-Grajzl & Grajzl & Zajc; Gregorič & Zajc & Simoneti*.

<sup>454</sup> See also *Bugarič: Law and development in Central and Eastern Europe...; Bugarič: The Europeanization of National Administrations in CEE; Kovač & Možina*, para. 16.

The Republic of Slovenia is a democratic republic. Its legal and political organization is determined by the Constitution of the Republic of Slovenia of 23 December 1991 (amended six times to date - in 1997, 2000, 2003, 2004, 2006 and 2013).<sup>455</sup> The major difference to former constitutions of Slovenia when being a Yugoslav republic is the organization of the state as instead of the principle of the unity of power, the new constitution introduced separation of powers.

Slovenia traditionally belongs to the Romano-Germanic, i.e. the civil law legal family. The main sources of law are written laws adopted by the National Assembly. Case-law of Slovenian courts is an important interpretative instrument, but is – in contrast to case-law of the CJEU which is an important source of EU law applied in Slovenia as of May 2004 – officially not a binding source of law, save the so-called “legal opinions” and “principled legal opinions” adopted at plenary sessions of the Supreme Court of RS. These are formally binding on all the panels of the Supreme Court, but not on the lower courts.<sup>456</sup> Legal theory also has considerable influence on Slovenian law and court practice.<sup>457</sup>

## 9.2 Evolution of private law in Slovenia

### 9.2.1 Period 1812 - 1918

The presentation of evolution of private law in Slovenia starts in 1812, the year of the entry into force of the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch – ABGB*) in the Austrian Lands of the Habsburg Monarchy. ABGB is one of the milestones of evolution of private law in Europe which has had a massive impact on legislation in Central and Eastern Europe, including Slovenia. Between the entry into force of the ABGB and the collapse of the Habsburg Monarchy in 1918, the territory of Slovenia formed part of the Austrian Empire and later

<sup>455</sup> *Sl. Ustava Republike Slovenije (URS)*, OJ RS No. 33I/1991, with further amendments, available at (in English): <http://www.us-rs.si/en/about-the-court/legal-basis/>

<sup>456</sup> Despite this lack of a formal binding power of case-law, the courts are obliged to be aware of the case-law in similar cases. They should either take the same position or provide reasonable legal argumentation if they decide to depart from it. For further details, see *Štajnpišler: Precedenčni učinek sodnih odločb pri pravnem utemeljevanju*, pp. 90 - 114; *Galič*.

<sup>457</sup> *Štajnpišler: Sodna praksa kot dejavnik pri sodnem odločanju : sociološki vidiki*.



Austria-Hungary with ABGB of 1811 regulating the area of civil law (the general part of civil law, family law, property law, inheritance law, law of obligations). The three ABGB Teilnovellen of 1914, 1915 and 1916 drafted under the influence of the German BGB were also enforced in the Slovenian territory. The Allgemeines Handelsgesetzbuch - AHGB of 1862, the Allgemeines Grundbuchsgesetz - AGBG of 1871, Zivilprozessordnung of 1896, Exekutionsordnung of 1897, Konkursordnung of 1914 and other legislation relevant for regulating private legal relationships also applied to the territory.<sup>458</sup>

Between 1809 and 1815, however, a large part of the Slovenian territory, e.g. Istria, region of Goriška, Carniola and parts of Carinthia, formed part of Napoleon's Illyrian provinces having their seat in Ljubljana. The French Code civil of 1804 and Code de commerce of 1807 as well as other French legislation were in force there from the beginning of 1812.<sup>459</sup> Following the Congress of Vienna the Austrian Empire regained control of the province and after the French left Slovenian territories in 1815, the ABGB started to apply there as well.<sup>460</sup>

Until Prekmurje (a North-East region of today's Slovenia which formed part of Transleithania in contrast to all other Slovenian territories that formed part of Cisleithania) was reunited with other Slovenian territories in 1919 in accordance with the Paris Peace Conference and became part of Kingdom of Serbs, Croats and Slovenes in 1920 in accordance with the Peace Treaty of Trianon,<sup>461</sup> Hungarian private law was in force there most of the time (not between 1853 and 1861 when ABGB was fully enforced in Hungary by the Austrian Emperor).<sup>462</sup> Despite several attempts, Hungary did not adopt its civil codification until 1960.<sup>463</sup> Instead, Hungarian judge-made law based mainly on Hungarian customary law, principles of the law of pandect, ABGB, BGB and other foreign civil codifications coupled with

<sup>458</sup> *Brus: Veljavna ODZ in druge avstrijske zakonodaje...*, pp. 95 - 96.

<sup>459</sup> [Http://www.ukom.gov.si/si/projekti/arhiv\\_200\\_let\\_ilirskih\\_provinc/ilirske\\_provinc\\_1809\\_1813/](http://www.ukom.gov.si/si/projekti/arhiv_200_let_ilirskih_provinc/ilirske_provinc_1809_1813/)

<sup>460</sup> In May 1815 in Carniola and the Villach county, in October 1815 in Istria and the Goriška region. Bežek & Regally, p. 1; Vilfan, pp. 419 - 420.

<sup>461</sup> The region of Slovenian Porabje with Slovene populace, however, remained and still forms part of Hungary as was set out by the Peace Treaty of Trianon of 1920. *Nešovič & Prunk*, pp. 56 and 74.

<sup>462</sup> *Loufši*, p. 510; *Vékás; Olechowski*, pp. 8 - 12.

<sup>463</sup> For further details, see *Vékás*.

a few Austrian and Hungarian laws regulating individual civil law institutes applied in the Kingdom of Hungary.<sup>464</sup> Although officially repealed almost in its entirety in 1861, ABGB still had an important influence on Hungarian judiciary and legal theory at least up until the end of the 19th century when German private law gained importance.<sup>465</sup> After the reunification of Prekmurje with Slovenia, the law in force in other Slovenian parts was expanded to Prekmurje.<sup>466</sup> Authors refer to two acts declaring the expansion that were issued by the authorities in the Kingdom of Serbs, Croats and Slovenes in September and October 1919 after Prekmurje was occupied by Yugoslav army in August 1919.<sup>467</sup> The expansion during the occupation is said to be in line with Article 43 of the Annex to the 1907 Hague Convention respecting the laws and customs of war on land.<sup>468</sup> The reason for such decision was supposedly lack of officials trained in Hungarian language and Hungarian law.<sup>469</sup>

### 9.2.2 Period 1918 - 1941

On 29 October 1918, a new independent State of Slovenes, Croats and Serbs comprising the territories of South Slavic peoples living under former Austria-Hungary was established by the National Assembly of Slovenes, Croats and Serbs with its seat in Zagreb.<sup>470</sup> The Austrian government lost control

<sup>464</sup> *Brus: Veljavna ODZ in druge avstrijske zakonodaje...*, p. 96; *Radovčič*, p. 256; *Vékás*.

<sup>465</sup> *Vékás*.

<sup>466</sup> *Vilfan*, p. 506; *Krek & Škerlj*, p. 21; indirectly also *Čulinovič*, p. 562, fn. 400. *Radovčič*, on the other hand, states that in the old Yugoslavia, Hungarian law was applied in Prekmurje. *Radovčič*, pp. 255 - 256.

<sup>467</sup> Notice by the Department of Justice in Slovenia of 18 September 1919, No. 3784, approved by the Regulation of Ministry of Justice on 10 October 1919, No. 17369. *Krek & Škerlj*, p. 21; *Brus: Veljavna ODZ in druge avstrijske zakonodaje...*, p. 97, referring to *Lapajne*, p. 326; *Brus: Die Witregelung und Ausserkraftsetzung...*, p. 39, referring to *Krek & Škerlj*, p. 21.

<sup>468</sup> »The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.« As expansion of law as in force in other Slovenian parts is said to be in line with this article, respect of Hungarian laws was obviously claimed to be absolutely prevented.

<sup>469</sup> *Krek & Škerlj*, p. 21.

<sup>470</sup> *Nešovič & Prunk*, pp. 16 - 18. A large part of Carniola was assigned to Austria (and still is part of Austria) in 1920 after the plebiscite in zone A of the Klagenfurt valley where approx. 59 % of the populace voted for Austria, not Yugoslavia, assigning thereby the whole valley (zones A and B) to Austria. *Nešovič & Prunk*, pp. 54 - 55. Slovenian Littoral area was assigned to Italy in 1920, but was to a large extent reunited with Yugoslavia in 1947. See also *Perovšek*.

of a large part of Slovenian territory on 31 October 1918 when Slovenian politicians declared a formation of a National Government of the State of Slovenes, Croats and Serbs within the newly established federative state.<sup>471</sup> The Slovenian National Government which held legislative and administrative control over the Slovenian territory, opted for continuity of former law already in its manifest declaring the establishment of the government, and had confirmed it also in its further regulations issued in November 1918.<sup>472</sup> ABGB and other Austrian legislation therefore further applied in Slovenia. The State of Slovenes, Croats and Serbs, however, existed only for one month as on 1 December 1918 it merged with the Kingdom of Serbia (comprising also the former Kingdom of Montenegro) establishing thereby the Kingdom of Serbs, Croats and Slovenes with Belgrade as its capital.

The Kingdom of Serbs, Croats and Slovenes which was formed in December 1918 (renamed Kingdom Yugoslavia in October 1929) and lasted until 1941, declared continuity of law in its territory.<sup>473</sup> Different legal regimes in different parts of the Kingdom existed.<sup>474</sup> Of all legal areas, private law was the one area of legislation more or less directly based on ABGB which - at the time - stood as the most modern and perfected piece of legislation in those territories. Thence, in the Slovenian parts of the Kingdom (most possibly including Prekmurje as of 1919), ABGB (including *Teilnovellen*) and other Austrian legislation applied. Same was in Dalmatia while in other parts of today's Croatia which were part of the Kingdom (excluding Međimurje), ABGB without *Teilnovellen* applied.<sup>475</sup> In the Bosnian-Herzegovinian legal territory, a combination of ABGB based judge-made law (within property law) and church canons and customary rules / Sharia law (mainly within family and inheritance law) applied. In the Serbian legal territory (part of territories of today's Serbia and of the FYRM) the Serbian Civil code of 1844 applied

<sup>471</sup> For detailed analysis of the events, see *Peronšek et al.: Slovenska novejša zgodovina*.

<sup>472</sup> *Brus: Veljava ODZ in druge avstrijske zakonodaje...*, p. 96; *Brus: Die Witregelung und Ausserkraftsetzung...*, pp. 38 - 39.

<sup>473</sup> That was declared also in the first constitution of the Kingdom of 1921, OJ of the Kingdom No. 142 A. *Brus: Die Witregelung und Ausserkraftsetzung...*, pp. 39 - 40; *Nikolić*, p. 82.

<sup>474</sup> The presentation of the regimes is based on *Vilfan*, p. 506; *Nikolić*, pp. 82 - 83; *Radovič*, pp. 255 - 256.

<sup>475</sup> In addition, autonomous Croatian property law before the unification and canon law applied in Croatia and Slavonia. *Nikolić*, p. 82.

which was basically a shortened and to some extent amended version of the ABGB. In the southern part of Vojvodina (today in Serbia), ABGB was applied as *ius particulare* and was supplemented by legislation of the Kingdom. In the Montenegrin legal territory, former Montenegrin law applied, i.e. the Danilo I's Code of 1855 and the General Property Code of 1888 (based on Montenegrin customary law), as well as Montenegrin family and inheritance customary law.<sup>476</sup> In Međimurje (today part of Croatia), northern part of Vojvodina (today part of Serbia) as well as in Prekmurje – there most possibly only until 1919 (today part of Slovenia),<sup>477</sup> Hungarian law applied which, at least in part, also closely resembled ABGB. ABGB was therefore to a great extent the common denominator of private law in the Kingdom.

As having six different legal regimes throughout the Kingdom was an obstacle to its efficient functioning, unification of law was one of the goals set in the Kingdom but could hardly be achieved due to rapid government changes.<sup>478</sup> In contrast to public law that was unified in the 1920s, private law remained scattered.<sup>479</sup> As it was in fact very similar in all the legal regimes of the Kingdom and did as such not pose particular problems for the authorities which were faced with political and economic crisis which were more important to be dealt with,<sup>480</sup> it was only in the mid 1930s (following the personal dictatorship of Alexander I of Yugoslavia in 1929 and the decree of the new constitution in 1931 resulting also in intense unification of the Kingdom renamed to Kingdom Yugoslavia) that the private law codification process gave its first tangible results. A set of acts regulating private law (mainly procedural law)<sup>481</sup> was enacted during the rule of King Alexander who was called also Alexander the Unifier. Codification activities were similarly intense with regard to substantive private law where texts of new Yugoslav civil code and commercial code were drafted but had never entered into force.<sup>482</sup>

<sup>476</sup> Radović, pp. 255 - 256. See also Olechowski, p. 14.

<sup>477</sup> Radović and Nikolić, to the contrary, list Prekmurje as the territory where Hungarian law applied all of the time during the old Yugoslavia. Radović, pp. 255 - 256; Nikolić, p. 83.

<sup>478</sup> Brus: *Veljava ODZ in druge avstrijske zakonodaje...*, p. 98; Brus: *Die Witregelung und Ausserkraftsetzung...*, pp. 40 - 41.

<sup>479</sup> Nikolić, p. 85; Brus: *Veljava ODZ in druge avstrijske zakonodaje...*, p. 98.

<sup>480</sup> Radović, pp. 256 - 257; see also Brus: *Die Witregelung und Ausserkraftsetzung...*, pp. 46 - 48.

<sup>481</sup> For a detailed analysis see Brus: *Die Witregelung und Ausserkraftsetzung...*, pp. 41 - 46.

<sup>482</sup> For a detailed analysis of drafting the new Yugoslav civil and commercial code, see Brus: *Die Witregelung und Ausserkraftsetzung...*, pp. 46 - 49.

A pre-draft of the new civil code of the Kingdom of Yugoslavia was published in 1934 and sent to interested parties for commenting, but the attempts to finalize and enforce it failed due to several negative opinions as to its substance and form,<sup>483</sup> and eventually due to national and international political events of the time.<sup>484</sup> The same fate awaited the draft commercial code of 1937. As was typical of the majority of the new Yugoslav legislation, the pre-draft civil code was based on ABGB.<sup>485</sup> Already at the outset of the codification process that started in 1921 the drafters opted for a pragmatic solution of basing the new code (the purpose of which was – as declared by the government – primarily to unify, not to reform private law in the Kingdom) on the ABGB<sup>486</sup> as ABGB was applied directly or indirectly in a large part of the Kingdom and - despite being more than hundred years old - still had high reputation and offered modern solutions.<sup>487</sup> After disagreements occurred as to the extent of the revision of the text of the ABGB, the codification group decided in 1922 to base the text on the ABGB including its Teilnovellen and to allow for its revision only in certain fields such as inheritance and family law. When drafting the pre-draft of the code of 1934, this decision was, however, not complied with entirely as various other foreign codes, their drafts and other texts were taken into account in the codification process.<sup>488</sup> Lawyers educated in Roman legal systems were more prone to larger revisions while those closer to Germanic legal systems opted for fewer amendments.<sup>489</sup> Although the new civil code was never finalized and enforced, a series of commentaries of its pre-draft, articles and discussions as to its substance were issued before the second world war broke out in Yugoslavia in 1941.<sup>490</sup> Before the war, another text

<sup>483</sup> *Nikolić*, p. 86.

<sup>484</sup> *Radovič*, p. 261; *Brus: Die Witregelung und Ausserkraftsetzung...*, p. 48.

<sup>485</sup> The draft commercial code was, for example, based on Austrian AHGB and GmbHG but was largely influenced by German AktG and HGB. *Brus: Die Witregelung und Ausserkraftsetzung...*, p. 49.

<sup>486</sup> *Radovič*, pp. 257 - 261.

<sup>487</sup> *Ibid.*

<sup>488</sup> *Radovič*, p. 259.

<sup>489</sup> *Ibid.*

<sup>490</sup> *Radovič*, p. 261; *Brus: Die Witregelung und Ausserkraftsetzung...*, p. 48.

of a new Yugoslav civil code was supposedly drafted by a group of young professors of law at the Belgrade University, but their work, too, was terminated because of the war.<sup>491</sup>

In the Littoral area of Slovenia which was part of the Kingdom of Italy between 1920 (Peace Treaty of Rapallo signed between the Kingdom of Italy and the Kingdom of Serbs, Croats and Slovenes determining the border between the two Kingdoms cutting a large part of ethnic Slovenian territory and populace out of the Kingdom of Serbs, Croats and Slovenes) and 1947 (Peace Treaty of Paris returning a large part of Slovenian Littoral area to Yugoslavia following its *de facto* reunification in 1945),<sup>492</sup> Italian law (including Codice civile of 1928) was in force. Same goes for part of the Free Territory of Trieste which came under *de facto* Yugoslav sovereignty in 1954 in accordance with the London Memorandum. After reunification, Italian law was abrogated there and existent federal Yugoslav and republic Slovenian legislation were extended to these territories.<sup>493</sup>

### 9.2.3 Period 1941 - 1945

During the second world war, Slovenian territory was divided between Germany, Italy and Hungary. Germany occupied approximately three

<sup>491</sup> *Nikolić*, p. 87.

<sup>492</sup> Slavia Friuliana, Resia and the Kanal valley (later also zone A of the Free Territory of Trieste – *de facto* in 1954, formally in 1977 after the entry into force of the Treaty of Osimo of 1975) were, however, assigned to Italy.

<sup>493</sup> As to the Littoral Area: Order on the extension of validity of constitution, laws and other legal acts of the Federal People's Republic of Yugoslavia to the territory which came under Yugoslavia in accordance with the peace treaty with Italy (Sl. *Ukaz o razširitvi veljavnosti ustave, zakonov in drugih predpisov FLRJ na ozemlje, ki je po mirovni pogodbi z Italijo priključeno FLRJ*), OJ FLRJ No. 80/1947; and Order on the extension of validity of constitution, laws and other legal acts of the People's Republic of Slovenia to the territory which came under Yugoslavia in accordance with the peace treaty with Italy (Sl. *Ukaz o razširjenju veljavnosti ustave, zakonov in drugih pravnih predpisov LRS na področje, priključeno po mirovni pogodbi z Italijo k ozemlju FLRJ*), OJ LRS No. 39/1947. As to Slovenian parts of the Free Territory of Trieste that came under Yugoslavia: Law on extension of validity of constitution, laws and other legal acts of the LRS to the Capodistriian territory (Sl. *Zakon o razširitvi veljavnosti ustave, zakonov in drugih predpisov LRS na koprsko območje*), OJ LRS No. 43/1954; Law on the validity of constitution, laws and other federal legal acts on the territory under civil administration of FLRJ (Sl. *Zakon o veljavi ustave, zakonov in drugih zveznih pravnih predpisov na ozemlju, na katero se je z mednarodnim sporazumom razširila civilna uprava FLRJ*), OJ FLRJ No. 45/1954; and Regulation on implementation of laws and other federal legal acts on the territory under civil administration of FLRJ (Sl. *Uredba o izvajanju zakonov in drugih zveznih pravnih predpisov na ozemlju, na katero se je razširila civilna uprava FLRJ*), OJ FLRJ No. 56/1954. *Kerestes*.

quarters of Slovenia (Lower Styria, a small territory of Prekmurje, Upper Carniola and parts of Carinthia) with a population of approx. 900.000 inhabitants. Italy annexed the province of Ljubljana with approx. 350.000 inhabitants, while Hungary occupied a large part of Prekmurje.<sup>494</sup>

ABGB remained in force in a large part of the Slovenian territory under German occupation.<sup>495</sup> That was also the law in force in the annexed Austria.<sup>496</sup>

<sup>494</sup> See *Lemkin*, pp. 243, 261 – 262; *Brus: Die Witregelung und Ausserkraftsetzung...*, pp. 51 - 52; *Ferenc: Sodstvo pod okupacijo...*

<sup>495</sup> As Slovenian territories occupied by the Germans had not been formally annexed to the Reich (for detailed analysis of different views on whether a *de facto* annexation took place or not, see *Čulinović*, pp. 128 - 131), German law was not enforced there *en bloc* (*Ferenc: Sodstvo pod okupacijo...*, p. 77; *Žnidarič: Okupacijska uprava...*, p. 26; differently *Čulinović*, pp. 93 - 94). Instead, heads of civil administration of these territories (or their commissioners) could implement German law in these territories by issuing orders. In the occupied zone Lower Styria (including a small part of Prekmurje which was eventually under German, not Hungarian occupation), the law of the Upper Styria was enforced in 1942 and 1943 by the head of civil administration of Lower Styria. ABGB continued to apply there as it was established that ABGB was applied there already in Yugoslavia and that thus almost no fundamental amendments of private law need take place. *Ferenc: Sodstvo pod okupacijo...*, pp. 77 - 81, 84; see also *Brus: Die Witregelung und Ausserkraftsetzung...*, p. 52. In the occupied territories of Carniola and Carinthia which were under the administration of the Carinthia District (Gau Kärnten), the commissioner there issued in 1942 a decree on the implementation of German legal rules on the occupied territories stating that private law (save the law on rents, labour law and law on inheriting farms), commercial, exchange and cheque law, and land registry law is deemed invalid if it contravenes German law in these fields, whereby law must always be applied in accordance with special circumstances of that time. *Ferenc: Sodstvo pod okupacijo...*, p. 93; *Brus: Die Witregelung und Ausserkraftsetzung...*, p. 52. After the Slovenian territory under Italian occupation (Province of Ljubljana and Slovenian territory which was under Italy as of 1919) came under German occupation in 1943 after capitulation of Italy, legal continuity (under the proviso that the law does not contradict the measures for safeguarding the area, and that no new legislation of the commissioner exists) was declared there by the new German commissioner in charge of the Operational Zone of the Adriatic Littoral meaning that in principle, rules as in force on these territories under the Italian occupation further applied (Decree of 15 October 1943 on the organization of civil administration in the Adriatic Littoral). *Čulinović*, p. 153; *Ferenc: Sodstvo pod okupacijo...*, p. 97; *Brus: Die Witregelung und Ausserkraftsetzung...*, pp. 51 - 52.

<sup>496</sup> In Austria, ABGB (in contrast to the AHGB and other private law legislation, which was replaced by German law) remained in force (with the exception of parts of marriage law - where new German Ehegesetz was enacted in 1938 and replaced relevant parts of BGB and ABGB - and some other private law institutes) also after its annexation. If Volksgesetzbuch was enacted it would had for sure been enforced also in the Austrian territory. See, for example, *Hamza*, pp. 330 - 331; *Olechowski*, p. 16; *Rahmatian*; *Brus: Veljava ODZ in druge avstrijske zakonodaje...*, pp. 99 - 100. For further details as to introduction of German law in Austria, see *Lemkin*, pp. 25 - 26, 110.



Legislation in force in Slovenia before being occupied by Italy (including ABGB) continued to apply also after the Italians occupied a part of Slovenian territory (annexed to Italy one month later as Province of Ljubljana) in April 1941,<sup>497</sup> and possibly even after the annexation<sup>498</sup> of Province of Ljubljana to Italy in May 1941.<sup>499</sup>

In the territories under Hungarian occupation as of April 1941 (a large part of Prekmurje that was first occupied by the Germans in April 1941 and soon handed over to Hungarians who first implemented military administration in April 1941<sup>500</sup> and civil administration in August 1941 and eventually

<sup>497</sup> Mussolini ordered in April 1941 that on these territories legal rules of civil, commercial, bill of exchange and criminal law in force continue to apply unless decided otherwise by the Italian authorities by issuing specific provisions (Article 1 of the order). OJ of Royal Civil Commissioner for the occupied Slovenian territory No. 35 of 30 April 1941, available at: <http://www.sistory.si/publikacije/prenos/?target=pdf&urn=SISTORY:ID:208>. See also *Ferenc: Sodstvo pod okupacijo...*, pp. 94 - 95; *Brus: Die Witregelung und Ausserkraftsetzung...*, p. 51; for a detailed analysis of Italian occupation, see *Čulinović*, pp. 131 - 152.

<sup>498</sup> According to Victor Emanuel's Order of 3 May 1941 on the establishment of Province of Ljubljana which became an integral part of the Kingdom of Italy, the Province of Ljubljana, administration of which is to be regulated by royal orders issued on the proposal of the Duce, will have its own autonomous regulation due to being densely populated by Slovenes and having regard to racial characteristics of the population, geographical position of the territory and special local needs (Article 2). Article 7 further stated that the royal government is authorised to publish on the territory of the province the constitution and other laws of the Kingdom of Italy as well as to issue rules required to alling such laws with the existent legislation and the regulation issued on the basis of Article 2. OJ of the Kingdom of Italy for the Province of Ljubljana No. 37 of 7 May 1941, available at: <http://www.sistory.si/publikacije/prenos/?target=pdf&urn=SISTORY:ID:208>. See also *Ferenc: Sodstvo pod okupacijo...*, p. 95; *Brus: Die Witregelung und Ausserkraftsetzung...*, p. 51.

<sup>499</sup> According to some Slovenian authors, ABGB applied in this territory also after the annexation (see, for example, *Brus: Veljava ODZ in druge avstrijske zakonodaje...*, pp. 99 - 100; indirectly also *Brus: Die Witregelung und Ausserkraftsetzung...*, p. 51), while some authors state that Italian private law (Codice civile of 1942) was enforced there (see, for example, *Keresteš*). As Province of Ljubljana was under Italy only between 1941 and 1943 having a specific status within the Kingdom that left judicial posts there at least at the beginning mostly intact, it is somewhat hard to imagine that Italian private law was enforced and applied there. This could be also in line with Lemkin's statement that as »[...] cases arising in the Slovene territory require a particular knowledge of local law, a special branch for the appeal of cases from the province of Ljubljana has been created within the Court of Appeals in Fiume.« (*Lemkin*, pp. 245 - 246). Following in particular Mussolini's order of April 1941 and the king's order of May 1941 referred to above, the most plausible interpretation is that pre-occupation legislation was in principle applied. To the authors' knowledge no Italian legislation within civil law was published in the Province of Ljubljana in accordance with Article 7 of the king's order.

<sup>500</sup> Order of 11 April 1941 on the implementation of military administration on the occupied Yugoslav territories. Text available in *Agnes & Miletić*, p. 44.



annexed the territory to Hungary in December 1941<sup>501</sup>) Hungarian private law<sup>502</sup> was most possibly reintroduced after the annexation of Prekmurje in December 1941.<sup>503</sup> According to § 3 of Law on Reincorporation of the Recovered Southern Territories into the Hungarian Holy Crown and their Unification with the Country, which was passed in Hungarian Parliament in December 1941, the department in charge of these areas had the right to take every measure necessary to integrate the administration, jurisdiction, economy and in general the whole legal system of Prekmurje into the Hungarian legal system. Čulinović states that through this law (that had declared continuity of state regulation as was in force prior to October 1918), Hungarian legal system was expanded to the annexed territories.<sup>504</sup> Talking to one of the judges active in Prekmurje after the second world war confirms the position that Hungarian law was introduced there during the war. That would accord to (i) Hungarian attitude to restore in the »liberated« Prekmurje as they saw their occupation of Prekmurje, as soon as possible and to the greatest extent as possible the overall status as in force prior to 1919 (including by dividing in administrative terms Prekmurje in two parts and annexing them to two existent Hungarian administrative units – a style that was not practiced by Italians and Germans who retained Slovenian territories as separate administrative units),<sup>505</sup> (ii) Hungarian position on the historical evolution of Prekmurje and its inhabitants, as well as (iii) their attitude towards ABGB (in force in Prekmurje after Trianon).<sup>506</sup> It is possible, however, that no measures were in fact taken by the competent authority and that continuity of private law (also of ABGB) was thereby enabled.

<sup>501</sup> Law XX/L 941 of 16 December 1941, in force as of 27 December 1941, concerning the Reincorporation of the Recovered Southern Territories into the Hungarian Holy Crown and their Unification with the Country. See also *Ferenc: Madžari kot okupatorji*, p. 47; Čulinović, pp. 578 - 580.

<sup>502</sup> Still Hungarian customary private law based mainly on the last Hungarian draft Civil code of 1928 which was influenced strongly by the ABGB. *Lenkovics*, pp. 49 - 51; *Török*, pp. 11 - 14.

<sup>503</sup> Čulinović, pp. 562, 579. The private law system in force under the Hungarian occupation was most plausibly retained also during March and October 1944 under the double German-Hungarian regime. For further details, see Čulinović, pp. 582 - 584.

<sup>504</sup> Čulinović, pp. 578 - 579.

<sup>505</sup> *Ferenc: Madžari kot okupatorji*, p. 48.

<sup>506</sup> See *Ferenc: Madžari kot okupatorji*, pp. 47 - 48; *Fujš*, pp. 65 - 66; *Olechowski*, p. 11.

### 9.2.4 Period 1945 - 1991

After the second world war, legal continuity was broken by the Yugoslav authorities.<sup>507</sup> Legislation on the invalidation of all legislation issued before 6 April 1941 and under the occupation of Yugoslavia was enacted.<sup>508</sup> Legislation issued by the military occupiers and their assistants during the occupation was proclaimed null, i.e. invalid *ab initio*,<sup>509</sup> while pre-occupation legislation, i.e. that valid on 6 April 1941, was proclaimed as having lost its legal power.<sup>510</sup> With regard to the latter, however, two important, or rather, focal exceptions were introduced: a) individual provisions of pre-occupational legislation were to be applied if declared so by the Chairmanship of the People's Assembly of Yugoslavia or by any of the chairmanships of the people's assemblies of the republics within their legislative competences, whereby the chairmanship in question declares the necessary amendments;<sup>511</sup> b) legal rules of pre-war legislation (if not already declared applicable by the respective chairmanship) could be applied as »legal rules« (Sl. *pravna pravila*) in relations not regulated by legislation in force and only under the proviso they did not go against the valid federal and republic constitutions, laws and other legal acts issued by the competent institutions

<sup>507</sup> See Brus' critique of such decision in *Brus: Veljava ODZ in druge avstrijske zakonodaje...*, pp. 101 - 103.

<sup>508</sup> Decree on setting aside and invalidation of all legal acts issued during the occupation by the occupants and their assistants (Sl. *Odlok o odpravi in razveljavljenju vseh pravnih predpisov, izdanih med okupacijo po okupatorjih in njihovih pomagačih*, OJ DFJ No. 4/1945; later replaced by Law on invalidation of legal rules enacted prior to 6 April 1941 and during the hostile occupation (Sl. *Zakon o razveljavljenju pravnih pravil, izdanih pred 6. aprilom 1941 in med sovražno okupacijo*), OJ FLRJ No. 86/1946.

<sup>509</sup> Article 1 of the Law on invalidation of legal rules enacted prior to 6 April 1941 and during the hostile occupation.

<sup>510</sup> Article 2 of the Law on invalidation of legal rules enacted prior to 6 April 1941 and during the hostile occupation.

<sup>511</sup> Article 3 of the Law on invalidation of legal rules enacted prior to 6 April 1941 and during the hostile occupation.

of the new state, or against the principles of constitutional order of the federation and its republics.<sup>512</sup>

In contrast to »ordinary legislation« issued by the Yugoslav legislator, the »legal rules« were not entirely binding as the judges were not obliged to apply them if they produced good reasons for doing so.<sup>513</sup> In absence of good reasons being produced, pre-war legislation was to be applied, albeit merely as »legal rules«. This interpretation was set out in one of the judgments of the Supreme Court of Yugoslavia in 1951 addressing in detail the issue of application of the »legal rules«.<sup>514</sup> Such regime enabled continuity of private law in Yugoslavia, which would have otherwise be left without any civil legislation and would face drafting entire private law anew already in the post-war years. In fact, most of private law relationships had long after the war been resolved by applying pre-war law as »legal rules«.<sup>515</sup> When citing such rules in the judgments, the courts could, for example, not use the wording »paragraph 922 ABGB«, but »legal rule of paragraph 922 of ex ABGB«, sometimes adding the phrase »which is not contrary to cogent rules and social morality« or »which has already been enacted by the court practice« or similar.<sup>516</sup>

In the People's Republic of Slovenia, ABGB stood as focal »legal rules« within private law. After 1947 when Slovenian Littoral area came under Yugoslavia (as well as a part of the Free Territory of Trieste which was

<sup>512</sup> Article 4 of the Law on invalidation of legal rules enacted prior to 6 April 1941 and during the hostile occupation. According to Article 5, new legislation could not be issued on the basis of such legal rules, case-law and interpretation of such rules issued by the courts and other state institution in the old Yugoslavia could also not serve as a tool for interpreting these legal rules. Article 6 further states that unsolved legal relationships that had arisen under the laws of old Yugoslavia or during the occupation shall be resolved under the valid law of the FLRJ. According to Article 7, court decisions in private law matters issued after 6 April 1941 remain in force, while if any of such decisions relies on legal rules issued by the occupying forces or their assistants or on pre-war legal rules that contravene the new legislation, every person (or a competent state institution) may in a period of one year initiate court proceedings for solving his or her case anew in accordance with the current law (in these cases, rights granted by the initial decision – save rights of maintenance of children, parents and other person, or of those unable to work – may not be enforced). See also *Štampilhar*, pp. 8 - 9.

<sup>513</sup> For details, see *Brus: Veljava ODZ in druge avstrijske zakonodaje...*, pp. 100 - 103.

<sup>514</sup> *Brus: Veljava ODZ in druge avstrijske zakonodaje...*, pp. 102 - 103.

<sup>515</sup> See also *Pakiž* and *Končina - Peternel*.

<sup>516</sup> *Strohsack*, p. 15. For a detailed analysis of application of ABGB by Slovenian courts, see *Končina - Peternel*.

*de facto* under Yugoslavia as of 1954), federal Yugoslav legislation as well as legislation of the People's Republic of Slovenia – including the legal rules of the ABGB – started to apply there as well.<sup>517</sup> Italian law issued after 6 April 1941 (e.g. Codice civile of 1942) on the reunited territory was explicitly declared null,<sup>518</sup> while Italian law issued prior to 6 April 1941 was proclaimed as having lost its power. »Legal rules« that could be applied in this territory under the conditions of the Law of 1946 on invalidation of legal rules enacted prior to 6 April 1941 and during the hostile occupation, were, however, interpreted as relating (only) to legislation in force on the rest of the territory of the People's Republic of Slovenia, i.e. ABGB and not Italian private law in force prior to 1941.<sup>519</sup> Such solution has without doubt contributed to legal uniformity and legal certainty.

#### 9.2.4.1 family law

First post war activities of Yugoslav federal legislature within private law were in the fields of family law and inheritance law. Main federal Yugoslav acts regulating family law were enacted already in 1946 (Basic law on marriage,<sup>520</sup> Law on adoption<sup>521</sup>) and 1947 (Basic law on relationship between parents and children),<sup>522</sup> while a further federal Law on guardianship<sup>523</sup> was enacted in 1965. Additional two new acts were enacted by the People's Republic of Slovenia in 1950 (Law on property relations between spouses),<sup>524</sup> and 1960 (Law on foster carers).<sup>525</sup> The federal Yugoslav Law on inheritance was enacted in 1955.<sup>526</sup> Once these acts were enforced, ABGB paragraphs on family and inheritance law could not had applied anymore.

<sup>517</sup> *Brus: Veljava ODZ in druge avstrijske zakonodaje...*, pp. 104 - 105; *Keresteš*.

<sup>518</sup> This was set out in the Obligatory Interpretation of the Chairmanship of the People's Assembly of the Federative People's Republic of Yugoslavia which was issued in 1947 in order to resolve the issue of legal regulation in former Italian territories, OJ FLRJ No. 96/47. See also *Keresteš*.

<sup>519</sup> See also *Brus: Veljava ODZ in druge avstrijske zakonodaje...*, p. 105; *Brus: Die Witregelung und Ausserkraftsetzung...*, p. 57. Differently *Keresteš*.

<sup>520</sup> OJ FLRJ No. 29/46.

<sup>521</sup> OJ FLRJ No. 30/46.

<sup>522</sup> OJ FLRJ No. 104/47.

<sup>523</sup> OJ FLRJ No. 16/65.

<sup>524</sup> OJ FLRJ No. 20/50.

<sup>525</sup> OJ LRS No. 34/60.

<sup>526</sup> OJ FLRJ No. 20/55.

The ratio behind the decision to reform family law first lied in the fact that family law of the ABGB was obsolete. It is possible that a decision to codify only family law was taken under the Soviet influence where family law was to be divided from core property relations emphasising thereby primarily personal relations between the family members.<sup>527</sup>

In 1976, the Socialist Republic of Slovenia (SRS) enacted its own republic family and inheritance laws which are both still in force in the Republic of Slovenia. The activities of the SRS within these fields were fostered after the amendments to the Yugoslav Constitution reinforced in 1971 the competences of the republics – enactment of family and inheritance law, for example, came under the jurisdiction of the republics.<sup>528</sup> Until such legislation was enacted, federal legislation further applied as republic legislation.<sup>529</sup>

The enactment of the new republic Law on Marriage and Family Relations in 1976 (Sl. *Zakon o zakonski zvezi in družinskih razmerjih - ZZZDR*)<sup>530</sup> which entered into force on 1 January 1977, was fostered by longstanding efforts to modernise family law in Slovenia that had for almost 30 years not been substantially revised and aligned to the amended nature of social relationships, in particular to transformation of the institute of family and its position in the society.<sup>531</sup> The reform activities first took place on the federal level but were transferred to the republican level after 1971 where the expert commission appointed by the Republic committee for health and social insurance prepared a draft law on family relations.<sup>532</sup> The law was enacted by the Assembly of SRS in March 1974 and put in public discussion, revised and finally enacted in 1976.<sup>533</sup> Two focal issues were to be resolved with regard to the new legislation: first, should family law be drafted in one or more acts, and second, which social relationships should be regulated in the new family law.<sup>534</sup> Slovenian legislator opted for inclusion of all fam-

<sup>527</sup> Novak et al.: *Kodifikacija civilnega prava*, pp. 15 - 16.

<sup>528</sup> Amendment XLIII, para. 14 to the Constitution of the SRS, OJ SRS No. 51/75.

<sup>529</sup> Article 19 of the Constitutional Law for implementing the Constitution of SRS, OJ SRS No. 7/74.

<sup>530</sup> Enacted by the Assembly of the SRS on 26 May 1976, OJ SRS No. 15/76.

<sup>531</sup> Zupančič: *Zakonska zveza in družinska razmerja*, p. 7.

<sup>532</sup> Published in *Občan*, Ljubljana, 1974, No. 2 (17. January 1974), p. 9. Zupančič: *Zakonska zveza in družinska razmerja*, pp. 7 - 8.

<sup>533</sup> Zupančič: *Zakonska zveza in družinska razmerja*, p. 8.

<sup>534</sup> Zupančič: *Zakonska zveza in družinska razmerja*, pp. 8 - 9.

ily law that was previously set out in the four federal laws and two republic laws into one act emphasizing thereby that family law constitutes one legal field and enabling thereby a conceptual as well as practical unification of family law.<sup>535</sup> The title of the law was eventually amended from Law on family relations to Law on marriage and family relations but neither of the titles represented the whole substance of the law that regulated, *inter alia*, also adoption, guardianship, foster care as well as the out-of-marriage partnership.<sup>536</sup> The latter institute was one of the main features of the new republic law as it opted for a total legal equality of marriage and out-of-marriage partnership (according to Slovenian law, the latter is formed out-of-register and is proven *ex post facto*).<sup>537</sup> The law was in general considered quite liberal at the time of its enactment (and still is liberal in comparison to certain foreign jurisdictions).<sup>538</sup> The law was amended in 1989,<sup>539</sup> 2001<sup>540</sup> and 2004<sup>541</sup> when the acts amending the law were issued, as well as with some other acts regulating issues relevant also for the law on marriage and family relations. The Constitutional Court of RS has also assessed some of its provisions in 2003, 2007, 2011 and 2012.<sup>542</sup> As will be presented in more detail below, a new Family Code (Sl. *Družinski zakonik - DZ*) was enacted by the Assembly of RS in June 2011 but has not entered into force after the referendum failed in March 2012.

#### 9.2.4.2 Inheritance law

The 1976 Slovenian Law on Inheritance (Sl. *Zakon o dedovanju - ZD*)<sup>543</sup> was based on the federal Inheritance law of 1955 (same was true for inheritance legislation in other republics and in the two Yugoslav provinces)<sup>544</sup>

<sup>535</sup> Ibid.

<sup>536</sup> Zupančič: *Zakonska zveza in družinska razmerja*, p. 15.

<sup>537</sup> For further details, see Zupančič: *Zakonska zveza in družinska razmerja*, pp. 10 - 13.

<sup>538</sup> For details as to its substance, see Zupančič: *Zakonska zveza in družinska razmerja*, pp. 9 - 36.

<sup>539</sup> OJ SRS No. 1/89. For details as to its substance, see Zupančič: *Zakonska zveza in družinska razmerja*, pp. 37 - 97.

<sup>540</sup> OJ RS No. 64/01.

<sup>541</sup> OJ RS No. 16/04.

<sup>542</sup> Decision No. U-I-312/00-40 of 23. April 2003, Decision No. U-I-328/05-12 of 18. October 2007, Decision No. U-I-85/10-10 of 13. October 2011, Decision No. U-I-30/12-12 of 18 October 2012.

<sup>543</sup> OJ SRS No. 15/76.

<sup>544</sup> Zupančič & Žnidaršič Skubic, p. 39.

which was in force as federal law until the end of 1971 (with the exception of procedural and conflict of laws provisions which were derogated later).<sup>545</sup> After the power to enact inheritance legislation was shifted from the federal to the republican level,<sup>546</sup> the federal law of 1955 was gradually derogated and replaced by republican laws on inheritance. In the meantime, the federal law was in force in the republics as their own law.<sup>547</sup> New rules on conflict of laws as to various republic inheritance, family and status legislation were enacted in 1979.<sup>548</sup> The general position of the republics was that the federal law was of very good quality and that republic inheritance laws are to be drafted on its basis. Following such position, the republic laws and laws of autonomous provinces deviated from the former federal law only in certain details.<sup>549</sup> One of the characteristics of inheritance regime in Yugoslavia (regulated in both federal and republic legislation) immanent to the political system of the time was that only a set amount of immovables could stay in the ownership of the heirs.<sup>550</sup>

Slovenian Law on Inheritance was enacted in 1976 and entered into force on 1 January 1977. It contains substantive provisions as well as provisions on inheritance proceedings. Already in 1973, Slovenian legislator enacted the Law on inheritance of agricultural land and private agricultural holdings in order to prevent division of agricultural land in Slovenia.<sup>551</sup> In contrast to federal regulation of inheritance that was incorporated into one law, Slovenian legislator parted with the principle of uniformity of inheritance law regulation.<sup>552</sup>

The Law on Inheritance of 1976 is still in force in Slovenia. As of its enactment, it was amended a couple of times (in 1978, 1994 and 2001), Constitutional Court of RS also assessed constitutionality of some of its provisions in 1994, 2000 and 2013.

<sup>545</sup> *Finžgar*, p. 103; *Zupančič: Dedno pravo*, p. 22.

<sup>546</sup> In 1971 as to substantive inheritance law and in 1974 as to procedural inheritance law, while rules on conflict of laws remained in force until a federal law on conflict of laws in certain matters was enforced in 1983.

<sup>547</sup> *Ibid.*

<sup>548</sup> Law on solving conflict of laws and jurisdiction in status, family and inheritance matters, OJ SFRJ No. 9/79. *Zupančič: Dedno pravo*, p. 22.

<sup>549</sup> *Finžgar*, pp. 104 - 112; *Zupančič: Dedno pravo*, p. 22.

<sup>550</sup> *Finžgar*, pp. 104 - 105.

<sup>551</sup> OJ SRS No. 26/73, repealed by the Constitutional Court of RS in 1994. See also *Zupančič: Dedno pravo*, pp. 24, 25 - 26, 222 - 233.

<sup>552</sup> *Finžgar*, p. 104.

### 9.2.4.3 Law of obligations

The federal Yugoslav Law on Obligations (Sl. *Zakon o obligacijskih razmerjih - ZOR*)<sup>553</sup> was passed only in March 1978 and entered into force on 1 October 1978 regulating legal relationships arising on or after 1 October 1978. Until then, the »legal rules« of ABGB applied in the Slovenian territory.<sup>554</sup> These were and still are applied also with regard to all legal relationships that had arisen before 1 October 1978. The ratio behind the lack of legislative activities in this area in Yugoslavia for more than 30 years was that the legal rules of the ABGB were in general still fit for regulating contractual relationships. As ABGB was 150 years old, the judges applied its rules with creativity and issued decisions which were inspired by modern approaches within the law of obligations, in particular within tort law.<sup>555</sup> Apart from the Law on Obligations, acts containing customs in certain fields (e.g. in construction services<sup>556</sup> and sale of goods<sup>557</sup>) were of importance in commercial practice. It must be stressed that the new federal law regulated only those matters that were important for the functioning of the Yugoslav market while other matters (such as *donatio*, *commodatum*, *societas*...) were left for the republic regulation. Namely, the Yugoslav constitution set out that the federation is to regulate basics of obligational relationships (general part of obligations) and contractual and other obligational relationships within trade of goods and services. As the Socialist Republic of Slovenia (as was the case in other parts of Yugoslavia) did not pass any republic laws, ABGB applied as »legal rules« with regard to these issues all up until 2002 when the new Slovenian Code of Obligations (Sl. *Obligacijski zakonik - OZ*)<sup>558</sup> entered into force. It must be stressed that the new Slovenian Code of Obligations of 2002 did not derogate all provisions of the Yugoslav Law on Obligations of 1978 – e.g., the chapters on banking contracts remained in force.<sup>559</sup>

<sup>553</sup> OJ SFRJ No. 29/1978, with further amendments.

<sup>554</sup> See Article 1106 of the Law on Obligations.

<sup>555</sup> *Ilešič*, pp. 24 - 25.

<sup>556</sup> Special construction customs, issued by Chamber of Commerce of Yugoslavia, OJ No. 18/77 of 1 April 1977.

<sup>557</sup> General customs for the sale of goods, issued by Plenum of the State Arbitration, 18 January 1954, OJ FLRJ No. 15/54.

<sup>558</sup> OJ RS No. 83/2001, with further amendments.

<sup>559</sup> Article 1061 of the Code of Obligations.



The new federal Law on Obligations of 1978 was based on a Draft of the code of obligations and contracts (called »sketch«, Sl. »skica«) drafted in 1969 by Mihailo Konstantinović, a renowned professor of law at Belgrade University. The draft was very modern, based on foreign models, in particular on Swiss, French, Austrian and Italian law, and it paid due regard to unification processes at the time, i.e. the Hague Uniform Law on International Sale of Goods. During the codification process, the sketch was amended to such extent that Konstantinović supposedly refused to further partake in the codification process.<sup>560</sup> The Law of Obligations as eventually enacted was still a modern piece of legislation in force for decades in Yugoslavia and even later in the independent republics.

The Law on Obligations consisted of the Book 1 - General Part<sup>561</sup> and Book 2 – Contracts.<sup>562</sup> The General Part contained the provisions that would otherwise be included in the general part of a civil code. The main feature of the Law on Obligations of 1978 - mirrored in the Slovenian Code of Obligations of 2002 - was monism with some specific rules for commercial contracts. Contracts were thus regulated irrespective of who the parties to the contracts were. If any, only the difference in regulation of civil contracts on one hand, and commercial contracts on the other, was implemented, and was manifested in a way that certain concepts were regulated differently for commercial contracts.<sup>563</sup> Specific regulation of consumer

<sup>560</sup> *Možina: Uvodna pojasnila*, pp. 63 - 64.

<sup>561</sup> With the following titles: basic principles of obligations, origin of obligations, effects of obligations, termination of obligations, various types of obligation, change of creditor or debtor.

<sup>562</sup> Regulating contract of sale, contract of exchange, sales order, loan contract, loan for use contract - commodatum, lease and rental contract, contract for work, construction contract, contract of carriage, licence contract, contract of deposit, contract of storage, contract of mandate, commission agency contract, commercial agency contract, brokerage contract, shipping contract, contract on control of goods and services, contract on package travel, travel agency contract, allotment contract, insurance contract, pledge, surety, transfer order, bank money deposit, securities deposit, bank account, safe deposit box contract, credit contract, credit contract on the basis of pledging securities, letters of credit, bank guarantee, settlement.

<sup>563</sup> To name a few: regulation of statute of limitations for contractual claims; regulation of interest; regulation of assignment of claims; regulation of suretyship; relevance of business customs, usages and practice; relevance of the price determination for the validity of the sales contract; regulation of time limits for notifying the seller of the defected goods; etc. The definition of commercial contracts is provided in Article 13 of the Code of Obligations.

contract on the other hand, was not provided. Some of the more general concepts of the Yugoslav Law on Obligations of 1978 (as well as of the Slovenian Code of Obligations of 2002), are nevertheless in particularly aimed at protecting the consumers.<sup>564</sup>

It must also be stressed that former Yugoslavia was a CISG member state as of 1988, while Slovenia succeeded to CISG in 1993 with the effect as of its independence in 1991. In cases in which CISG applies, the Law of Obligations of 1978 does not apply. As of 1996, Slovenia is also a party to the Convention on the Limitation Period in the International Sale of Goods, while former Yugoslavia acceded to the Convention in 1978.<sup>565</sup>

The Law of Obligations of 1978 was amended three times (in 1985, 1989, 1999) before the new Code of Obligations was enacted in 2001 derogating the majority of its provisions. Constitutional Court of Yugoslavia also assessed it once in 1989.<sup>566</sup>

#### 9.2.4.4 Property law

The federal Law on the Basic Ownership Legal Relations entered into force on 1 September 1980. Until then, those »legal rules« of ABGB applied that were in line with the new post-war system of state (later called public) property.<sup>567</sup>

Similar to the system of obligations, the federal Law on the Basic Ownership Legal Relations of 1980 (Sl. *Zakon o temeljnih lastninskopravnih razmerjih* - ZTLR)<sup>568</sup> regulated only issues that were in the opinion of the Yugoslav legislature relevant for the functioning of the Yugoslav market: basic principles, ownership, real easements, pledge and mortgage, possession, rights of foreigners, applicable law in case of conflict of laws of the Yugoslav republics / autonomous provinces. Issues outside it (e.g. personal

<sup>564</sup> Here are some examples: regulation of usurious contracts and *laesio enormis*; producers' strict liability for damage caused by dangerous products; protection when general contractual terms are used; nullity of a contractual limitation or exclusion of liability for defects in case the seller abused her position and imposed such limitation or exclusion on the buyer; a general compulsory 1-year warranty for conformity of goods coexisting with the general scheme of remedies for non-performance of the sales contract; etc.

<sup>565</sup> For further details, see *Schlechtriem & Možina*, p. 1.

<sup>566</sup> Decision of 12 July 1989, OJ SFRJ No. 45/89.

<sup>567</sup> *Jubari & Tratnik & Vrenčur*, p. 47.

<sup>568</sup> OJ SFRJ No. 6/80, amended only once in 1990, OJ SFRJ No. 36/90.

easements, neighbourhood law) were left to be regulated by the republics / provinces. Until such legislation was passed, the »legal rules« of ABGB applied. With regard to some of the property law related issues, that was the case all up to 1 January 2003 when the new Slovenian Code of Property Law (Sl. *Stvarnopravni zakonik* - SPZ) entered into force.

The federal Law on the Basic Ownership Legal Relations was influenced by the public property regime of Yugoslavia manifesting in such way that, in principle, land was in public property while buildings could be in private property whereby the owners of the buildings had the right to use the land in public property (Sl. *pravica uporabe*). The *superficies solo cedit* principle thus did not apply and was restored only after the independence of the Republic of Slovenia, explicitly only in 2003 with the new Slovenian Code of Property Law. Apart from containing such public property – specific provisions (e.g. land in public property could not be obtained by acquisitive prescription; ownership was to be exercised in accordance with the public interest; the right to use the land which was in public property followed the ownership status of the building on it), the federal law set out a classic civil-law system of property law.<sup>569</sup> It was based on ABGB but included also modern, mainly German solutions (e.g., the objective concept of possession was implemented).<sup>570</sup>

In Slovenia, property law was further regulated in various specific pieces of legislation: federal Ownership of Parts of Buildings Act of 1959,<sup>571</sup> substituted in Slovenia in 1976 by a similar republic act,<sup>572</sup> republic Non-litigious Civil Procedure Act of 1986 which regulated also some of property law related instruments of substantive nature,<sup>573</sup> republic Agricultural Land Act of 1979 which set maximum surface land area individuals could own,<sup>574</sup> etc. The land registry regulation was schizophrenic: old Austrian land registers were used, legal rules of the Land Registry Act enacted in 1930 in the Kingdom of Serbs, Croats and Slovenes were applied next to some novel

<sup>569</sup> For further details, see *Žuvela*.

<sup>570</sup> *Juhart & Tratnik & Vrenčur*, p. 47.

<sup>571</sup> OJ FLRJ No. 4/59, with further amendments.

<sup>572</sup> OJ SRS No. 19/76, with further amendments.

<sup>573</sup> OJ SRS No. 30/86, with further amendments, still in force.

<sup>574</sup> OJ SRS 1/79, with further amendments.

legislation regulating specific land registry issues, e.g. registration of divided co-ownership, registration of ownership on buildings on land in public property, etc.

### 9.2.5 Period post 1991

After the independence of the Republic of Slovenia in 1991, former legislation – unless set out otherwise – continued to apply *mutatis mutandis* as Slovenian legislation until Slovenian own legislation is enacted under the proviso that it did not contravene the Slovenian legal order.<sup>575</sup> In the first years after independence, judges and academia as well as the government opted for continuity of differentiation of civil law as was its status prior to independence and were – in contrast to the majority of foreign civil law codification processes – not keen on any civil law codification. As will be presented in detail in the last chapter, drafting activities of new Slovenian civil codification started only in 2001, remained within academic debate and did not result in any legislative change taking place.

#### 9.2.5.1 Law of obligations

In 2001, a new Code of Obligations was passed. It entered into force on 1 January 2002, i.e. almost eleven years after the independence of Slovenia. Until 1 January 2002, the Yugoslav federal Law of Obligations of 1978 applied (it is, in fact, still in force as to some contracts)<sup>576</sup> as its provisions were almost entirely in line with the new constitutional order of the Republic of Slovenia.<sup>577</sup> Slovenian legislature was thus under no particular pressure to draft a completely new Slovenian law of obligations.

Soon after Slovenia's independence, a study group organized within the Faculty of Law of University of Ljubljana was contracted by the Ministry of Justice with the task of drafting a study for enacting a new Slovenian code of obligations.<sup>578</sup> The work was finalized in 1994 and forwarded to professional public for commenting. The position of the study group was

<sup>575</sup> Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia, OJ RS No. 1/91-I.

<sup>576</sup> These chapters are, however, not of particular relevance due to the very general regulation of these contracts which are now regulated in more detail in specific legislation (e.g. consumer credits).

<sup>577</sup> *Ilešič*, pp. 26 - 27.

<sup>578</sup> *Ilešič*, p. 27.

that: the Yugoslav Law of Obligations of 1978 regulated law of obligations properly and was well accepted in practice which is why its basic concepts are not to be fundamentally amended; only minor amendments, mainly of terminological nature, were to be made, and new contracts and other institutes which were lacking in the federal Yugoslav code,<sup>579</sup> were to be incorporated; drafting the code anew would take years if not decades; Slovenian law of obligations, although almost entirely copy-pasted from Yugoslav Law of Obligations, should be drafted in the form of a new code; the new code should regulate only law of obligations, partial regulation of private law should thus be retained; drafting of a new Slovenian civil code would take too much time, it is essential that the code of obligations is enacted while the process of codification of whole private law into one civil code may take place at a later stage; until then, the code of obligations should contain the general part of civil law.<sup>580</sup> Such reasoning was also confirmed by Slovenian lawyers at various conferences and other meetings in the following years.<sup>581</sup> The following issues were, however, yet to be resolved: should the code which follows the monistic system, widen the scope of specific rules on commercial contracts; should consumer contracts be regulated in the new code or outside it; should modern –ing contracts continue to be left outside the code.<sup>582</sup>

Provisions of the new Code of Obligations of 2002 were eventually almost entirely copy-pasted from the federal Yugoslav Law on Obligations of 1978. Contracts that were not included in the federal law were added, a few institutes, however, such as betting contracts, are still not regulated in it, and thus the »legal rules« of ABGB could still apply in this scope in Slovenia today. Further, part on formation of contracts was in part amended under the influence of the CISG. A few traces of the former socialist regime mirrored in the wording of some of the articles were erased, some terminological

<sup>579</sup> E.g. chapters on *societas*, *commodatum*, gift where legal rules of ABGB applied; chapters on two contracts that were previously regulated in the Law of Inheritance but should due to their substance be regulated in the law of obligations (contract on delivery and distribution of property and contract of lifelong maintenance); chapter on contract of subsistence which was contracted in practice.

<sup>580</sup> *Ilesič*, p. 27.

<sup>581</sup> *Ilesič*, p. 29.

<sup>582</sup> *Ilesič*, p. 30.

inconsistencies were resolved. A few existent problematic provisions of the federal law were, on the other hand, not dealt with sufficiently, while some of the amendments that were made were not well thought out.<sup>583</sup> The new code still consisted of a general part and a part on contracts which does not regulate any modern contracts. Monism coupled with some specific rules for commercial contracts was retained. Regulation of consumer contracts was left outside the code.

In the last decade or so, the monism of Slovenian contract law coupled with partial dualism of civil and commercial contracts, has morphed into the triade of civil (C2C) – commercial (B2B) and consumer (B2C) contracts, whereby consumer contracts are set out in special legislation that deviates to a great extent from the general scheme of the Code of Obligations. As in other parts of Europe and elsewhere, in Slovenia, too, the *laissez faire* and *caveat emptor* doctrines have been relativized by realizing that insistence on the inviolable principle of autonomy of the parties is particularly unfair in B2C relationships, where one party is economically stronger, more experienced and in a privileged bargaining position from the outset, all this enabling it to abuse its power at the expense of the weaker consumer. The evolution of consumer protection in Slovenia has been most intense in the last ten to fifteen years. It went hand-in-hand with the evolution from communist to capitalist regime and was additionally motivated by the activities of Slovenia to align its legislation to the European consumer acquis.

The focal piece of legislation in the field of consumer protection in Slovenia is the Consumer Protection Act of 1998 (Sl. *Zakon o varstvu potrošnikov - ZVPot*). Its provisions are mandatory, the parties can therefore not derogate from them (at least not to the detriment of the consumer). With regard to those questions that are not covered by the Consumer Protection Act, the Code of Obligations of 2002 applies. Surprisingly, Slovenian courts often erroneously apply the Code of Obligations instead of the Consumer Protection Act in B2C and other relationships regulated in the Consumer Protection Act.<sup>584</sup> So far, the Consumer Protection Act has been amended five times - in 2002, 2004, 2007, 2009 and in 2011. The majority of the

<sup>583</sup> For further details, see *Možina: Uvodna pojasnila*, pp. 65 - 68.

<sup>584</sup> See *Možina: Kaj je narobe z Zakonom o varstvu potrošnikov?*

amendments have implemented the EU consumers' directives.<sup>585</sup> The most extensive amendment was made in 2002 before Slovenia joined the EU in 2004. The latest amendment of the Consumer Protection Act was enacted in May 2014. It encompasses the implementation of the new Directive 2011/83/EU (which amends Directive 93/13/EEC on unfair terms in consumer contracts and Directive 1999/447EC on certain aspects of the sale of consumer goods and associated guarantees, and derogates in the entirety Directive 85/577/EEC on doorstep selling and Directive 97/7/EC on distance selling), which was due on 13 December 2013. The amendment entered into force on 13 June 2014 – the last day of the implementation deadline. Apart from implementation of the novelties set out in Directive 2011/83, some further amendments were made, e.g. implementation of Directive 2002/65/EC on distance marketing of financial services was improved, etc. Apart from the Consumer Protection Act, further specific consumer legislation was enacted in order to implement two other EU consumers' directives: Directive 2005/29/EC on unfair commercial practices was implemented by the enactment of the Act of 2007 on Consumer Protection against Unfair Commercial Practices,<sup>586</sup> while Directive 2008/48/EC on consumer credit agreements has been implemented by the enactment of the Consumer Credit Act of 2010.<sup>587</sup> The consumers are also in focus of the Protection

<sup>585</sup> Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, as amended by Directive 1999/34/EC; Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises; Directive 90/314/EEC on package travel, package holidays and package tours; Directive 93/13/EEC on unfair terms in consumer contracts; Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts; Directive 97/7/EC on the protection of consumers in respect of distance contracts as amended by Directive 2007/64/EC; Directive 97/55/EC amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising; Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers; Directive 98/27/EC on injunctions for the protection of consumers' interests, as amended by Directive 2005/29/EC; Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market; Directive 2002/65/EC concerning the distance marketing of consumer financial services, as amended by Directive 2007/64/EC.

<sup>586</sup> OJ RS No. 53/07.

<sup>587</sup> OJ RS No. 59/10, with further amendments. The previous Slovenian Consumer Credit Act was enacted already in 2000 but was replaced by a new Consumer Credit Act in 2010 in order to implement the EU directive.

of Buyers of Apartments and Single Occupancy Buildings Act of 2004<sup>588</sup> that applies irrespective of the type of relationship but is in fact aimed at protecting weaker parties, in particular the consumers.

Although being more or less modern in substance, the current regime of consumer contracts in Slovenia is schizophrenic, and should undoubtedly be made more concise, clear and user-friendly. As the law stands now, it is far from a complete and coherent system of consumer protection. First, there are at least two sets of laws regulating B2C contracts: the Consumer Protection Act as *lex specialis* and Code of Obligations as *lex generalis*; some of the concepts are regulated in only one of these acts, some in both, of which some are regulated similarly, and some differently. Provisions on warranty, product liability and general contractual terms as well as on sales, services contracts and package travel can, for example, be found in both acts, and it is sometimes - despite the *lex specialis derogat legi generali* doctrine - not clear which of the provisions are to be applied. This is in particular so where the regulation of the Consumer Protection Act is incomplete. A more synchronized and coordinated approach to regulating consumer contracts should be applied when the Consumer Protection Act was drafted. In our view, it would be more appropriate if the substance of the Consumer Protection Act and other consumer legislation was inserted into the Code of Obligations. Further, some of the chapters of the Consumer Protection Act (i.e. chapters on warranty, on liability for damage caused by dangerous products, and on advertising of the goods and services) apply not only to B2C contracts, but also to B2B and C2C contracts. Thirdly: as the Consumer Protection Act is basically a result of EU directives' implementation, its provisions are to be read together with the directives and their interpretation by the CJEU; this is at times difficult as some of the concepts set out in the Consumer Protection Act are regulated differently from the directives. In these cases, it is often not clear whether such difference is a result of improper implementation or, for example, of the intention of the Slovenian legislator to guarantee higher protection for consumers as

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<sup>588</sup> OJ RS No. 18/04.



enabled by some of the directives. The inappropriate structure, language inconsistencies and substantive flaws of the Consumer Protection Act also call for a reform of Slovenian consumer legislation.<sup>589</sup>

In 2012, Law on the Prevention of Late Payments<sup>590</sup> was enacted in Slovenia implementing Directive 2001/7/EU on combating late payment in commercial transactions. The law applies next to the Code of Obligations and to the Statutory Default Interest Rate Act<sup>591</sup> making Slovenian system of interests further ambiguous. The law of obligations is regulated also in some further specific legislation outside the Code of Obligations' chapter on interest, e.g. in the Notaries' Act,<sup>592</sup> Road Transport Contracts Act,<sup>593</sup> Railway Transport Contracts Act,<sup>594</sup> Maritime Code,<sup>595</sup> Agricultural Land Act,<sup>596</sup> Housing Act,<sup>597</sup> Act on Business Buildings and Business Premises (in force as of 1974),<sup>598</sup> Compulsory Motor Third-Party Liability Insurance Act,<sup>599</sup> etc.

#### 9.2.5.2 Property law

After the independence, the classical system of property law was to be fully reintroduced. The transition from the system of public to private property was, however, slow and is - at least in practice - still not entirely implemented.<sup>600</sup> The processes of denationalization, transformation of public to private ownership, and privatization marked the first post-independence era.<sup>601</sup> The implementation of classical principles and instruments into the unique public property based system was not thought through enough and has led to some serious problems of the property law regime in Slovenia. One of the most problematic novelties was giving land register and data

<sup>589</sup> See also *Možina: Kaj je narobe z Zakonom o varstvu potrošnikov?*

<sup>590</sup> OJ RS No. 57/12.

<sup>591</sup> OJ RS No. 56/03, with further amendments

<sup>592</sup> OJ RS No. 13/94, with further amendments.

<sup>593</sup> OJ RS No. 126/03, with further amendments.

<sup>594</sup> OJ RS No. 61/00, with further amendments.

<sup>595</sup> OJ RS No. 26/01, with further amendments.

<sup>596</sup> OJ RS No. 56/96, with further amendments.

<sup>597</sup> OJ RS No. 69/03, with further amendments.

<sup>598</sup> OJ SRS No. 18/74, with further amendments.

<sup>599</sup> OJ RS No. 70/94, with further amendments.

<sup>600</sup> For further details, see *Damjan: Lastninjenje nekdanjih dobrin v splošni rabi...; Damjan: Zapleti pri lastninjenju...*

<sup>601</sup> *Juhart & Tratnik & Vrenčur*, pp. 49 - 50.

incorporated therein the importance it had never had before what led to heavy distortions between the factual status and the incorporated status of immovables.<sup>602</sup>

The new Slovenian Code of Property Law (Sl. *Stvarnopravni zakonik - SPZ*)<sup>603</sup> was passed only in 2002 and entered into force on 1 January 2003. It is based on the Yugoslav federal Law on the Basic Ownership Legal Relations of 1980 (ommitting, of course, the public property related provisions) with some ABGB and BGB based solutions added. Personal easements, neighbourhood law, superficies,<sup>604</sup> land debt, divided co-ownership, etc. were regulated anew. Some conceptual amendments were also made (e.g., the principle of *superficies solo cedit* was fully reintroduced, objective concept of possession based on BGB was implemented).<sup>605</sup>

The new code was modern and remained unamended until 2013 when the whole chapter on land debt was repealed after it was claimed to be abused by the businessmen facing criminal charges and damages claims in order to safeguard their property from enforcement and/or confiscation. Under heavy media and political criticism, the instrument of land debt was erased from the Code of Property Law with effect as of 6 November 2013. Land debts registered or at least successfully applied for registration before that are, however, still valid. In view of property law professors and practising lawyers, existent or, if needed, novel measures against the abuse of land debt could have been applied instead of simply erasing land debt from Slovenian property law even before one single proceedings aiming at claiming and proving the abuse were initiated.

Various specific property law related legislation was enacted in Slovenia before and after the new Code of Property Law was enacted. The Housing Act of 1991<sup>606</sup> (replaced by a new Housing Act in 2003)<sup>607</sup> was, for example, of particular importance being *lex specialis* as regards divided co-ownership

<sup>602</sup> For further details, see, e.g., *Vlahsek: Priposestvanje lastninske pravice; Damjan & Vlahsek*.

<sup>603</sup> OJ RS No. 87/02 and 91/13.

<sup>604</sup> For further details on the application of superficies (which was – next to the land debt – one of the two new proprietary rights implemented into Slovenian system by the Code of Property Law), see *Vlahsek: Stvarna pravica...*

<sup>605</sup> For further details on Slovenian property law, see *Kramberger & Vlahsek*.

<sup>606</sup> OJ RS No. 18/91-I, with further amendments.

<sup>607</sup> OJ RS No. 69/03, with further amendments.

first to the legal rules of the former federal law of 1980 and later to the Code of Property Law. New land registry legislation was enacted in 1995<sup>608</sup> (replaced in 2003 by a new Land Registry Act)<sup>609</sup> modernizing the land registry and enabling its computerization. Before joining the EU in 2004, Slovenia had to amend its Constitution in order to open fully the market of immovables to citizens of the EU.<sup>610</sup>

### 9.2.5.3 Family law

As has been emphasized in the previous chapter, the Law on Marriage and Family Relations of 1976 (Sl. *Zakon o zakonski zvezi in družinskih razmerjih - ZZZDR*)<sup>611</sup> which was enacted by the Assembly of the Socialist Republic of Slovenia and entered into force on 1 January 1977, is still in force in the Republic of Slovenia as Slovenian legislation.

In 2005, the Registration of a Same-Sex Civil Partnership Act<sup>612</sup> was enacted enabling homosexual partners to register their partnership in Slovenia as of July 2006. It regulates the prerequisites and the procedure for registering the partnership (intentionally not denoted as marriage), legal consequences of such registration, ways of termination of the partnership and rights and obligations of the partners afterwards, while the most disputed questions, such as adoption of children, were left outside the act.

A new Family Code (Sl. *Družinski zakonik - DZ*) was enacted by the Assembly of RS in June 2011 but has not entered into force after the referendum fail in March 2012. It has been in the centre of political debate since, in particular because of the definition of family and the regulation of same-sex partnerships.

### 9.2.5.4 Inheritance law

Within the law of inheritance, too, the legislation enacted in 1976 in the Socialist Republic of Slovenia, i.e. the Inheritance Act, has to date remained in force in the Republic of Slovenia. In addition to the general Inheritance Act, further specific legislation regulating inheritance law was enacted.

<sup>608</sup> OJ RS No. 33/95, with further amendments.

<sup>609</sup> OJ RS No. 58/03, with further amendments.

<sup>610</sup> For further details, see *Vlabele: Pridobivanje lastninske pravice...*

<sup>611</sup> Enacted by the Assembly of the SRS on 26 May 1976, OJ SRS No. 15/76.

<sup>612</sup> OJ RS No. 65/05.

In 2005, the Registration of a Same-Sex Civil Partnership Act<sup>613</sup> was enacted enabling homosexual partners to register their partnership in Slovenia as of July 2006. It regulates, *inter alia*, the inheritance regime of same-sex partners.<sup>614</sup> Further, inheritance of certain agricultural immovables (the so-called protected farms) is regulated in the Inheritance of Agricultural Holdings Act<sup>615</sup> with the aim of preventing fragmentation of protected farms, and enabling their acquisition in the least burdensome way possible, thereby making subsistence of such farms feasible.<sup>616</sup> Inheritance of denationalized assets is also subject to specific legislation, i.e. the Denationalization Act.<sup>617</sup> Some further legislation regulating notary, property rights, obligations, etc., is of relevance in inheritance law matters.

In 2012, a new inheritance act was drafted by the Ministry of Justice and Public Administration<sup>618</sup> with the aim of enabling faster and more efficient regulation of rights and relations in this field (in particular by broadening

<sup>613</sup> OJ RS No. 65/05.

<sup>614</sup> Those who had registered their partnership are entitled to inherit his or her partner's estate. In July 2009, the Constitutional Court of RS ascertained that Article 22 of the aforementioned act, which sets down rules on inheritance between homosexual partners, is not in accordance with the Slovene Constitution, and instructed the legislature to abolish the discordance in six months. Until then, general rules on inheritance between spouses apply to registered homosexual partners. The unconstitutional provisions provided that homosexual partners cannot, unless they are testamentary heirs, inherit their partner's separate property; only his or her community property (his or her part in it) can be inherited by his or her partner. Further, Article 22 provided that homosexual partners are not obligatory heirs and deprived them of some further rights ensured to heterosexual partners.

<sup>615</sup> OJ RS No. 70/1995, with further amendments.

<sup>616</sup> For further details, see *Zupančič & Žnidaršič Skubic*, pp. 291 - 314.

<sup>617</sup> OJ RS, No. 271/1991-I, with further amendments. Probate procedure regarding denationalized assets may be carried out only after conclusion of the denationalization procedure and is unconnected to the probate procedure that had been performed regarding the decedent's non-nationalized property. According to the Denationalization Act, inheritance of denationalized assets is introduced at the moment the decision on inheritance of the decedent's non-nationalized assets is final, whereas inheritance of denationalized assets is acquired at the moment the decision on the denationalization is final. In 1998, the Slovenian legislature amended such regulation by equating *delatio* and *acquisitio* to the moment of finality of the decision on denationalization, while in 2001, the Constitutional Court, despite strong critique among legal theory and case law, invalidated the amendment. For further details, see *Zupančič & Žnidaršič Skubic*, pp. 317 - 336.

<sup>618</sup> No. EVA 2014-2030-0010, available at (in Slovene): [http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/PDF/zakonodaja/121127\\_predlog\\_ZD\\_1\\_medresorsko.pdf](http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/mp.gov.si/PDF/zakonodaja/121127_predlog_ZD_1_medresorsko.pdf).

the power of notaries in inheritance matters). The draft has been criticized by the leading Slovenian professor of inheritance law Karel Zupančič. It has to date not been enacted.

### 9.3 Attempts of drafting the first Slovenian civil code

As has been shown in the preceding chapter, the current Slovenian legislation, in particular that regulating obligations, is schizophrenic, hard to handle and far from the 10 commandments style. As Plato had stated, the laws »[...] should be few in number: many laws lead to disputes and distortions«. It is thus interesting why no intense drafting activities leading to a civil code have taken place in Slovenia. Only one study group, the activities of which are presented in detail below, has so far faced the challenge of codifying Slovenian private law. One of the reasons behind the general reluctance is undoubtedly tradition. The judges and the lawyers in general are used to such system stemming from the previous Yugoslav regulation. When celebrating the 10th anniversary of the enactment of the Slovenian Code of Obligations, the conclusion of the lawyer's conference Slovenian Days of Civil Law was that no codification was needed. The status quo has still been retained. In contrast to almost all other states in the region, Slovenian private law is still particularized and it seems that it will remain so also in the future.

In 2001, a working group under the auspices of the Department for Civil and Commercial Law of the Faculty of Law in Ljubljana was entrusted with a formidable task of creating a new Slovenian Civil Code. The core of the group was made up of members of the Department itself, with several out-house experts (Supreme Court justices, attorneys) also having been involved. This was not a government - driven project, in spite of the fact that it was partly funded by the government. The causes or underlying reasons that spurred the idea of trying to persuade the general legal public that a codification of civil law in Slovenia was necessary at the time still elude reasoned judgment.

Let us reiterate that the project actually took off in the midst of the legislative "big bang" which resulted in a new Code of Obligations, a new Code

on Property Law and a new Maritime Code, not to mention several new basic pieces of legislation in the fields in company law, copyright, industrial property, competition, etc. This of course rationalizes a hesitant position by the government that was not keen on serious structural reforms in the shape of a codification of civil law as a whole. Thence, the faith of the project we have embarked on was actually sealed at its beginning. With hindsight and taking into consideration all the circumstances, such a task could by some be characterized as an exercise in style; while this might seem correct *prima vista*, the project did, however, result in a useful scientific piece of academic writing, which might serve as a basis for the actual codification process, if it ever comes to life.

Three years of research have been spent in a meticulous analysis of several existing civil codifications from different jurisdictions, identification and definition of probable European law influences and evaluation of potential solutions offered by the Lando Commission and the von Bar Study Group on a European Civil Code. Which existing codifications does one choose as a starting point of a new national codification of civil law? Primarily, ABGB and BGB were identified as main methodological instruments as the Slovenian legal system historically leans on and learns from the Austrian and German legal traditions. To these, the Swiss *Zivilgesetzbuch* (ZGB) was added, while the French Code civil and Italian Codice civile - despite their intermittent use in Slovenia - were set aside. Adjoined to the old venerable codes lurked two more modern pieces of codified civil law, namely the Dutch Civil Code and Code civil du Quebec. The said codes represented a new, modernized approach to the process of codification of civil law and were therefore scrutinized in depth.

After the primary analysis, the most important initial decision was to be made – which legal fields were to be included and which should be left out and how are they to be regulated?<sup>619</sup> There was little doubt regarding the field of contract law – due to a new-born Code of Obligations, we have not paid extensive additional attention to the field, except for a reiterated strong belief that modern types of contracts (the so-called –ing contracts) are not to be codified as their future development might thus be dangerously hin-

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<sup>619</sup> Summarized from *Novak et al.: Kodifikacija civilnega prava*.

dered. The same decision was taken regarding the field of law of property as the brand new Code of Property Law was in parliamentary procedure at the time. The preceding pieces of new legislation were therefore to be incorporated into the code itself as separate books with little or no alterations. Law of inheritance and family law were also perceived as undisputed consistent parts of a modern civil codification.

Civil procedure law and company law were seen as absolutely unwelcome for many different reasons. The group has concluded already *ab initio* that procedural rules should not form a consisting part of private law codification as its regulatory function places it into the sphere of public law. However, a level of interdependence between the procedural and material norms were recognized and thus the working group concluded that an effort to retain consistency of procedural and material norms was to be taken during the creation of the code.

As far as corporate law is considered, initial conceptualizations were influenced by the uncovering of the fact that the Dutch legislator decided to include the field of corporations into the new Dutch Civil Code.<sup>620</sup> A bold decision of the Dutch was in time however deemed inappropriate for the Slovenian legal environment. The reasons were manifold, it is, however, impossible to overemphasise the strong bond with the German legislative tradition in the field of company law. In addition, the Dutch concept saw the light of day in the mid-seventies, before the main harmonization push endeavoured by the European Commission in the area of company law. The working group concluded that the area of corporate law is still “vulnerable” to the potential further processes of harmonization efforts in Europe and was as such not suitable for codification. A codification should namely, by definition, remain unchanged for longer periods of time, thus nurturing legal certainty and the rule of law – implementing potential harmonization instruments of European secondary legislation to the field of codified corporate law would endanger these aims through constant changes to the code as a whole.

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<sup>620</sup> Titles 4 (*Naamloze vennootschappen*) and 5 (*Besloten vennootschappen met beperkte aansprakelijkheid*) of the Second Book of the Dutch Civil Code.

The field of intellectual property remains separate from civil law codifications throughout the geographic area used as a comparator. It is to be underscored that the creators of the Dutch civil code initially thought of incorporating the area into the code, but abstained from it due to reasons much shared with our working group. Regulation of intellectual property has namely little in common with civil law itself – the contract part of copyright law is thus actually the only fragment of the whole legal field related to civil law in any way. On the other hand, the issues of patents, design models and trademarks (industrial property rights) radiate towards the public law sphere and are thus inappropriate for codification into a civil law code from the outset.

The same fate awaited the field of transport law. Due to the fact that Slovenia has already adopted a systematic Code on Maritime Law by the time and that all other types of transport were also regulated by separate pieces of legislation, the remaining issue was whether to incorporate into the book of obligations of the emerging civil code a subchapter on general rules on contract of carriage. The working group reached a positive decision on this issue and acted the same regarding the question of provisions of civil compensation for breach of personality rights.

The area of consumer protection was scrutinised in detail and eventually the decision not to include it into the codification project was reached unanimously. The main reason for such decisiveness was an analysis of the German example, whereby the inclusion of some consumer protection rules into the BGB and AGBG (e.g. *Haustürgeschäftewiderrufsgesetz*, *Verbraucherkreditgesetz*, *Fernabsatzgesetz*) with certain other parts of the regime (e.g. *Produkthaftungsgesetz*) remained outside of the code appreciably lowered the level of clarity of the field as a whole.

The working group also reached consensus regarding the potential inclusion of private international law into the codification: as all of the comparable jurisdictions regulate the said area of law in separate pieces of legislation and Slovenia got its new act on conflict of laws rules in 1999, private international law was not to form part of the civil law codification.

As far as foreign codes influencing the working group in its mandate, leaving the ubiquitous BGB and ABGB aside, one should emphasize the importance



of the Dutch civil code, in particular regarding the methodology of division of contents between the different separate books of the code. The Dutch example was also welcome because of the achieved balance between legal certainty and stability (brought as a result of codification) on one hand and flexibility, necessary because of ever-changing and novel legal instruments, on the other. In addition, we were impressed by the breadth of influences the Dutch civil code borrows from: (historically) it leans towards the French codification of civil law, but acknowledges the influences of German and Anglo-American legal systems and the autonomous *lex mercatoria*.

On the other hand, the provisions of the Code civil of Quebec on the administration of property of others (*l'administration du bien d'autrui*) were found to be unique compared to other analysed codifications and were, after careful consideration, incorporated into the table of contents of the future book on real property rights. A specialized subchapter of the kind was not found in the BGB and was not (not even in the form of specific provisions) included in the french Code civil. Obviously, in the case of Code civil of Quebec the legislature opted for a rather interesting and apparently rarely present solution, and tried to cover the generalities of the management of other's assets and the rights and duties of the manager in various management positions in a single, comprehensive set of rules. All provisions are based on the principle of diligence. It should be noted that the provisions set forth under the title on the administration of the property of others represent only the general principles, while other special norms of the Code civil quebecois govern specific forms of administration, such as: child custody (*la curatelle*: art. 262), tutorship of an absentee (*la tutelle à l'absent*, art. 87), dissolution and liquidation of legal persons (*la liquidation des personnes morales*: art. 355), provisions on administration of undivided property (*l'administration du bien indivis*, art. 1027), substitution (*la substitution*: art. 1224), management of business of another (*la gestion d'affaires*: art. 1482), storage contract (*le depot*: art. 2280), mandate (*mandat*: art. 2130). As already mentioned, the regime of administration of property of others offered in Code civil of Quebec was perceived as unique, but the working group thought appropriate considering the inclusion of some its general provisions on property management either in Book IV on Property in General or in Book VI on Real Property Rights.

Taking into consideration the above conclusions regarding legal areas that were to be codified and carefully evaluating the experience from comparative jurisdictions, the working group produced draft versions of the following works: Book I of the Code (General Part of the Civil Law), entailing the general part of the civil law (general principles, phenomenology etc.), Book II (Law of Persons) which was to marginally erode the existing corporate legislation, as it was to regulate some of the more important general issues of legal persons (e.g. legal personality, piercing of the corporate veil, name and seat, etc.), and Book IV (Property Law), where the general principles and definitions of property (but not ownership) relations are regulated. Book III remained mainly untouched, as it represented the area of family law, already codified in a separate act, same goes for Book V (Law of Inheritance) and Books VI (Real Property Rights), VII (Law of Obligations in General) and VIII (Law of Particular Contracts), where we have decided to include into the Code the recently adopted Code of Obligations, Code of Property Law and the already familiar Inheritance Act.

During the run of the project, we have organized conferences and symposia, published the results and almost preached on the necessity to reform/codify. Almost no-one listened. The legislature seemed totally apathetic, the judiciary felt that any new structural incursion into the present state of affairs would wreak havoc on the level of legal certainty; the non-participating academics reacted as if they were simply jealous. When drafting this presentation, we could not even find one printed copy of the finalized project at the law school library and other offices. This bears testimony of its position in the mental framework of today's lawyers. Is it really that unnecessary?

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