

PRIVATE LAW SECTION

Czech Private Law at the Beginning of the Third Millennium

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I.

Epoch-making discoveries in various spheres of human thinking, accompanied with reassessment of all previous knowledge, create an image of the current era at the beginning of the third millennium. Labeling it, we often use words like modernity, post-modernity or others. The quantum era of information that has arisen from the field of technical research, namely of the computer science, conquered a considerable part of modern thinking and it seems that there is no sphere of human activity left without its influence.

Yet, it appears that there exists an oasis in the middle of today's chaos in order and order in chaos, which has been spared from being flooded with modernity, and its substantial part rests in still waters of traditionalism that goes two thousand years back. Deep streams of modern philosophy, sociology, quantum mechanics and computer science do not violate its peace. This sphere is shielded from the turbulent social turmoil and upheavals by its appeals to traditional values, vital for the on-going existence of our world and protected as the basic mission. Without such values, this world would – in the opinions of traditionalists – undoubtedly cease its existence.

Although such characteristics might apply to numerous fields of human activity, it is law that is meant here. More precisely, it is that part of the legal system that is most tightly connected to the two-thousand-year old tradition of Roman law. Throughout the history of civilized Europe, it has retained its basic set of instruments and the basis of its conception, as originated in the classical Roman law of antiquity – namely private law.

II.

There are two contradictory tendencies which may be identified as affecting the area of private law in the Czech Republic. The first tendency is marked by the need to overcome the legacy of socialistic orientation of the law between 1950–1989 and the necessity to harmonize the Czech law with the law of the European

Union, serving as the precondition for the admission of the Czech Republic to the European Union. This tendency presented legislative bodies with the need of reconstruction of the current private law legislation. The second tendency in private law consists, with respect to its loyalty to traditionalism, in the resistance of any efforts to modernize it and bring it in harmony with the state of today's science and technology.

At first sight private law in the Czech Republic has, in the past decade, been going through a period of remarkable turmoil that seems to be far from finished. Yet, the dimensions of changes in the area of private law can already be described; moreover, it is already possible to see what limits the attempts at modification of Czech private law may reach and, most importantly, what limits will not be breached.

The change of the social system, connected with the removal of the state-governed economy and the restoration of market economy after 1989, eventually provoked the necessary change in both the contents and the system of private law. It was, above all, necessary to clear private law of its political and ideological focus that aimed at reaching the targets of real socialism. This stage was completed between 1990–1992 and as a result, private law has started regulating social relationships among private individuals in a way typical of traditional trends of development of private law in central Europe, introduced namely by the Austrian General Civil Code (1811) and the German Civil Code (1900). These changes were consulted neither with members of the public nor at an interdisciplinary forum. They presented a mechanical return to institutes from previous legal regulations and did not reflect the developmental tendencies and changes in social relationships that occurred in the meantime and there is no doubt about their further development. As a consequence, extensive changes of the Civil Code (Act No. 40/1964 Coll.), the Labor Code (Act No. 65/1965 Coll.) and the Family Act (Act No. 109/1964 Coll.) have taken place. The then Commercial Code (Act No. 109/1964 Coll.), which had served the purposes of socialistic state-governed economy, would not hold under the new circumstances and therefore it was substituted with a new Commercial Code (Act No. 513/1991

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Coll.). The only part of private law system that has remained unchanged and retains its original form is a law regulating the area of international private law (Act No. 97/1963 Coll.).

The above mentioned changes resulted in adjusting the main codes of private law to the immediate needs and orientation of the Czech society. Nonetheless, there has also been a secondary effect, the loss of internal organization and philosophical coherence of the private law system as a whole. Thus, even though the current Czech private law offers partial solutions of legal situations, it cannot persuasively stand for a balanced harmonized system reflecting the values of today's society.

III.

Already during this time, it was obvious that the situation created by the changes of most codes of private law and, in particular, by the adoption of the new Commercial Code in the first half of the 1990s, could not, in the long run, bring a satisfactory solution. Private law of the Czech Republic, as it is currently regulated, does not actually represent anything else but the grafting of legal institutes for regulating relations in a market economy onto the conceptual and systematic basis of socialist branches of law. On the one hand, it was found that if private law is freed from the ideological basis and orientation, it may play its role in various social conditions in a relatively flexible manner and under the most diverse social conditions. On the other hand, it has become apparent that the lack of a homogeneous legal and philosophical basis and the exaggerated adherence to a traditional set of legal instruments resulted in a schizophrenic and inconsistent state of private law. We are witnessing that actual social relations are found to be beyond the scope of regulation given by traditional private law codes. Such situations require a prompt pragmatic reaction of both law-making and law-applying bodies in the form of exceptions to rules, exceptions to exceptions to rules, etc. What is even worse, social relations are (mainly in the case of some activities of global character) governed by rules that are actually not a part of the system of private law itself, as it is traditionally understood. They are influenced by the interests of parties and are asserted without any clear rules set in advance. The response of private law norms to the consequences of change in social relations is troublesome and complicated but, most importantly, non-systemic and lacking a conception. There are even cases to which the law has not been able to respond at all.

Correspondingly, case to case solutions in regulating social relationships, that use traditional legal techniques on the basis of traditional conception of private law, highlight the technical character of legal adjustments that have been and are to be carried out.

Disputes in a form of discussions have been taking place since the very beginning of the present system of private law of western and central Europe.

IV.

It was already at that time that, in the area of private law, the need was felt to react to the inconsistency of legislative solutions adopted and initiate – after a period of sufficient preparation – a fundamental reconstruction of private law as a whole. The first team of experts working on the re-codification of private law was formed at the beginning of the 1990s. Soon after, the first projects for the future civil law code were introduced. At the same time, members of the professional public focused predominantly on discussing the following issues:

- a) the fundamental form of the private law system
- b) harmonizing the Czech private law with the law of the European Union

Other issues connected to the reconstruction of private law only complement the two priorities listed above.

One might object that today, given that the new basic civil law code has not yet been discussed in the Parliament, it is still too soon to start evaluating. Despite that, the general conception of private law, passed by the Government on April 18th 2001 in the form of the intended subject matter of the new civil code, is currently being finished.

The new civil code builds on the basic and insufficiently surpassed division of law into private and public law. This starting point was gained after a hard struggle between creators of the conception and totalitarian traditions of classifying the law according to types of the regulated social relations. This classification did not recognize private law as an independent legal discipline. The contents of private law have been remarkably extended. At first, there are the issues related to the fundamental status of an individual reaching from legal capacities, the right to the protection of personal rights and regulation of intellectual property rights to the matters related to participation of an individual in groups of special legal importance (family). Secondly, there is the regulation of proprietary rights among individuals (ownership, obligations, succession).

Among the individual branches of social relations from the area of private law that are to be found present in the new civil code in significant extent, there are, above all, those relations regulated by the norms of family law, commercial law, labor law and international private law. At this point, we are actually facing the biggest difficulty in passing the new civil code, which is caused by the efforts to create a common uniform code that would cover at least some parts

of all the branches mentioned. Here, we can trace both reasons partly common to all the branches and reasons different for each.

A common reason is represented by the long-lasting refusal to view private law as a whole and to introduce a homogeneous conception of private law, which was typical of socialist or, even better, Soviet conception of the system of law.

Special reasons that are different for each branch presented the greatest challenge in putting the common civil law code through.

Family Law. In European circumstances, family law is sometimes viewed as a special branch of private law, sometimes it is considered to be the integral part of civil law. Creators of the new Czech civil code adopted the idea of unity of civil and family life. They argue that family relations are more of a private character and at the same time, they refuse any stronger but just necessary influence of the state power on them. 1) (Cf. Eliáš, K., Zuklínová, M., *Principy a východiska nového kodexu soukromého práva*, Linde Praha a.s., 2001, ISBN 80-7201-303-0, pp. 26-28)

Commercial Law. Today's Europe generally considers commercial law as a part of private law. Nevertheless, because of numerous state interventions in this area, it partly requires a special legal regulation. Possibly as a result of the negative experience with the independent existence of both commercial and civil codes from 1992 until the present, the new Czech civil law code, often called a commercialized civil code, aims at unifying the regulation of civil relationships and commercial relations to the largest possible extent. As well as in family and labor law, regulation related to the area of public law that enables state interventions and regulation of company law that is included in the second commercial code of 1991 will be regulated separately.

Labor Law. Similarly to family and commercial law, labor law was burdened with the reaction to its totalitarian conception that showed the tendency to use labor force on the basis of general duty of employment. After a period of aroused emotions, the situation has settled and the proposed civil code shall stay independent alongside the labor code that deals with the area of employment relations. Nevertheless, there is a new legal aspect of applying the civil code as a general means of regulation to all cases that are not covered by specific provisions of the labor code.

International private law. Although it was originally assumed that the area of international private law would be incorporated into the framework of the new civil code, it still operates in a form of an independent collision act. Eventually, the proposed civil code counts with a creation of a separate code that would regulate it.

Civil law. Being a part of the new system, civil law will be turned into general private law that will be

applied if there is no specific norm that would regulate particular private relationship.

The system of the proposed civil code is built upon three traditional cornerstones of European private law: family, ownership and contract. 2) (Cf. Carbonier, J., *Flexible droit*, Paris: L.G.D.J.) Correspondingly to this approach and using the methods of the civil code of Czechoslovakia that was proposed in 1937 but never put into practice, the current proposal of the civil code consists of five parts:

The first part includes the subject matter and basic principles of civil law, regulation of legal status of natural and legal persons running a business, representation, general definition of the subject matter of legal relations, i.e. of 'things' in the legal sense, legal facts and statutory bar.

The second part regulates family relationships, particularly marriage (Chapter I), kinship (Chapter II), guardianship, custodianship and other forms of child care (Chapter III) and it also includes the controversial and frequently discussed institute of registered partnership (Chapter IV).

The third part is devoted to absolute proprietary rights. It comprises proprietary rights, i.e. possession, ownership, easement (Chapter I), and surprisingly, inheritance law (Chapter II).

The fourth part is the largest one as it covers the whole system of obligations. Chapter I provides the general regulation of obligations, their creation, change, extinction and security. Chapter II gives the set of 12 types of contractual obligations. Chapter III deals with tort obligations that are mostly focused on the liability for damage and liability for non-material harm. Lastly, Chapter IV regulates other types of obligations, such as quasi-tort and quasi-contractual ones.

The fifth part completes the contents of the civil code with transitional and concluding provisions.

In comparison to the previous state of affairs, the new proposal implements the following principal novelties:

- establishment of a single regime for a 'thing' in the legal sense; living animals are not included here any more
- reintroducing the *superficies solo cedit* principle
- providing a single regime for natural and legal persons and completion of the Civil Code with a part regulating foundations and corporations
- reintroducing the obligatory regime of an exclusively civil law marriage instead of the former possibility to choose between a civil law marriage and a religious wedding
- strengthening the protection of underage children
- introducing the legal regime of partnership of persons of the same sex

- consolidation of the functional elements of co-ownership
- extending the possibility to acquire ownership from a non-owner
- reintroducing traditional classification of easements
- supplementation of inheritance law with some traditional institutes, such as inheritance contract, etc.
- uniting the general typology of contractual obligations in the civil code; less frequent and specific types of obligations are covered by specific acts, e.g. Commercial code
- establishment of the concept of liability for non-material harm (e.g. psychological suffering) 3) (Cf. Eliáš, K., Zuklínová, M., pp. 286–288)

The project for the new Czech civil code shows obvious limitations. Among the most significant ones, we can trace a remarkable degree of traditionalism, partiality to methods and instruments of regulation used in the past and eventually, its little respect to the dynamic development of social relationships or techniques of their realization. Yet, provided it is passed, the new civil code will represent a remarkable step forward in unification and efficiency of private law both in the Czech Republic and the European Union. Its fundamental goal is implementing the concept of free person, as well as protection of his freedom and of his right to attend to his own development and happiness in such a way as does not damage any other, following a Latin saying: *honeste vivere, neminem laedere, suum cuique tribuere*.

Although it might be objected that it is still too early to pass judgements, it is never too early to raise certain objections to the grand-scale intention of recodifying Czech private law. From the very beginning, it was more than obvious that, despite the well-meant intentions of those involved in the discussions over the conception of private law (Karel Eliáš, Irena Pelikánová, Jiří Švestka, František Zoulik, Antonín Kanda and others, including representatives of family law, labour law, etc.) and some of the expressly made, clear and timely demands to have the sense of this regulation clearly spelled out, the sense is not only not directly included but also difficult to extract. The formalism of the legal regulation and the formalism manifested in legal practice form one of the strong and living attributes of private law. The often confrontational nature of the findings arrived at by general courts and the opinions of the Constitutional Court turn out to be some of the products of such a development.

It seems, however, that such a tendency is not necessarily an inevitable one. By contrast, it appears that this tendency has not been and still is not ge-

nerally accepted in comparable legal cultures. Thus, for instance, French private law is still grounded in general principles, even formulated *extra legem*, which are not directly provided for in legislation and which are often used to deal with complex legal issues of the present time (cf. for instance the role of abuse of law – *l'abus des droits* – in the law of commercial companies and generally in property law).

The weakening of the value system of private law has some other consequences: the loss of the systemic coherence of private law. Integrating features give way to a practice oriented at deconstructing the system of private law, thereby significantly weakening the holistic function of the private law regulation. The burning need on the part of legislators and courts to strengthen, step by step, the authority of private law as a whole and establish its position as a uniformly operating and unifying social phenomenon is not balanced out by actual practice, which goes in the direction of partial solutions while disregarding the state of the whole. The attempts to strengthen features of safety and eliminate partial risks of modern social relations are performed at the expense of the safety of the system as a whole and the elimination of general risks.

Rapid and extensive changes in the regulation of private law diminish the authority and the internal acceptance of norms of private law, as they are presented at an ever-increasing pace to the members of this society. An important factor, by means of which the legal rules could obtain their authority without the necessary power-based enforcement, has been lost: the conviction, on the part of the majority of the addressees of the respective system of norms, of the necessity to observe such norms and their effect in practice.

The content of private law relations, as the core of private law regulation itself, has become a victim to the frequently criticized post-modern deconstruction and fails to look for points of departure from the post-modern skepticism where other social sciences look for them: in finding general trends of development of social relations, in analyzing their effect on the relation between trust and safety on the one hand and risks on the other hand, and in formulating some general requirements for the shape of private law regulation, i.e. the delimitation of social values needing legal protection, the specification of the degree to which private law should bear on their regulation, their systematic arrangement and their transfer into a normative shape.

CONCLUSION

Vis-à-vis the above-stated tendencies, the reality of the modern world of social relations appears to drag private law too much into the service of its everyday needs. Law as an important cultural phenomenon is gradually disappearing from the current world and its

place is being taken up by a complicated, highly structured and functionally more and more limited set of legal rules which lack a sufficiently coherent orientation to the technical aspect of regulating relations, all to the detriment of supporting the goal of law as a functionally arranged and normatively oriented set of values aimed at achieving a harmonious development of a society comprising multiply emancipated individuals.

Private law has, as a result of the tendencies of modernity, come to face a double pressure:

a) The practical life and the requirements aimed at changing the regulated social relations take it to regulate social relations with the use of legal instruments and legislative techniques which, however, move away from simple models and points of departure of the elementary shape of private law, thereby becoming pragmatic and difficult to orientate in. It is increasingly difficult to identify in them the axiological aim of legal regulation. As a result, the realization and implementation of norms of private law often turns out to be, mainly in judicial practice, self-serving: decisions frequently do not ask or answer the question who should, in a given case, be provided protection by the law or the court. Private law is becoming a set of rules whose actual meanings and goals are rarely investigated and proved and do not become a part of a decision.

b) Private law follows its own value system, which is not private law itself but the values forming the image of personality of modern people. The values of private law are, above all, the values of human individuals. Identifying the value system of law means defining the characteristics of human individuals in the philosophical, sociological and psychological sense and in its multi-layered character as shaped from

the antiquity until the present. The substance of this characterization has not been affected by modernity; what is changing, though, is the emphasis on its individual structural parts, i.e. the shape of the final model of the modern human person, capable of actively accepting the modernity and actively transforming it within the spirit of fundamental human values. Modernity thus does not rule out but, on the contrary, confirms the necessity for the private law to return to its most fundamental social prerequisites and aims. Its own (functional) sense is to prevent or, as the case may be, remove (deal with) the risks present in the operation of social relations. The point of departure, upon which it bases its procedures, is the presumption of trust in the social relations regulated by private law. The legal expression of trust is the a priori responsibility on the part of each individual for its own behaviour towards others and equity, understood here as the legal equivalent of honesty.

At the same time, however, the protection and the renewal of the relation of trust are the final aims of regulation in the field of private law. The easing of risks or, as the case may be, dealing with the consequences, then forms the means with trust in the regulated relations being the alpha and omega of private law. Subduing the current shape of legal regulation, in its atomized and complex shape, to the social mission of private law may, at first sight, seem to be an insurmountable task. In my opinion, however, we should step out of the shadow cast by the current shape of private law and return to its actual sense as it transpires (respecting the order of the values stated) from the famous maxim which tends to be forgotten in practice: *Iuris praecepta sunt haec: Honeste vivere, neminem laedere, suum cuique tribuere.*