A comment on the re–codification of the civil law

To the starting points and trends of the development of the Czech civil law after the admission of the CR to the EU.

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There is no doubt that civil law is one of the cardinal sectors in all historical types of law; it is characterized through its independence in comparison with other sectors. Its role and function had been historically formed in the times of the dominance of the theories that justify the dualism of law employing the view of interest (see the form ascribed to Ulpian: *"Publicum ius est, quod ad statum rei romanae spectat; privatum, quod ad singulorum utilitatem."*) and ending in division of law into the public and private ones. The develop-

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ment of social links and their structure, though, gradually and unavoidably dissipated the original sharp confines between the private and public laws (even if it is still possible to meet the constructs disregarding this fact in both the legal theory and judicature). The interference of public authority into the typically private law relations securing the socially required degree of legal protection, the protection of the less well–off ones may be the proof such situation. (For further illustration we may cite constituent effects of carrying out of the evidence of real estates for the development of factual law relations – originally serving exclusively for fiscal purposes, the choice among different conceptions of starting miscellaneous authorizations, especially for business – as freelance work, notification, registration and state authorization, consumer protection etc.). The integration of the Czech Republic into the European structure creates a suitable occasion for the contemplation over a number of questions that are connected with the preparation of the Civil Code, where its factual competence belongs as well (especially in relation to the subject of the civil law). It is first of all the question of using the positive experience of other European countries, because the binding norms of EU concern the subject of the civil law only in marginal matters.

The mentioned drifts of events were naturally reflected in the discussions on the definition of the civil law concept. It is observed that generally accepted solution has not been found yet. The justified definition of the civil law concept is narrowly connected wit the definition of the concept of other sectors, especially in the sectors where there is a tradition to rank them in the "bosom" of the private law, i.e. primarily in the family, labour, and commercial laws.

In the Czech milieu the whole problem is even more complicated through the conceptual shifts connected with the social changes that arose in 90s of the last century and that lead radical changes in the Czech judicial code. It has been a common knowledge that the previous concept of civil law accentuated the construction that lead to the regulation of legal relations connected to the area of personal consumption of the citizens, and the other relations, first of all the relations of production, distribution and redistribution were dealt with outside the sphere of the civil law. Therefore the concept of the civil law was defined as a set of legal norms that modified the social relations connected with ownership that arise among citizens, and between the citizens and the organizations, and between the citizens and the state, i.e. the spheres of satisfying personal needs of citizens when using the monetary–goods relations. Even though the elimination of the narrow consumer orientation of the civil law formed in such a way during the period mentioned led to some changes in the concrete legal regulations, it did not eliminate all the deformations. The point of intersection of the tendencies mentioned is the contemporary dismal state of fragmented, full of gaps, and little functioning tangle of different civil law regulations, which can only be remedied through an elaborate conceptual codification of the civil law.

It is absolutely essential to respect the conceptual diversity in the framework of the codifying work and through this also a relative independence of justice and its system on the one hand, and the legislation and its manifestation, i.e. legal regulations, as well as the connections and structure of the legal regulations on the other hand. Jurisprudence and its system are unbiased categories, and it is possible to reveal the system through cognitive human activities more or less successfully. Legislation, on the other hand, may only react to the social need of legal correction of the social relations being developed, and the result of such activities is the complex of legal regulations. This complex, as well as the object of the correction and methodology of individual regulations, may reflect even some subjective elements, including the influence of tradition, and therefore it is of a subjective–objective nature. It enables, in the end, a discussion on whether a particular material will be regulated through a separate regulation, or on creating complex institutes in the secondary structure, etc. This is the reason why the complaints on missing legislation, that are so frequent in the media and on the political scene, show only a conceptual confusion and an absence of adequate knowledge, as well as misunderstanding of the regulative function of the law. These findings mean e.g. that the family law cannot be a part of the structure of the civil law (compare the last objective aim of the civil law, and the published bill of the civil law), and for the same reasons it is not possible to put a sign of equality between the civil law a the civil code. To have the full picture it is necessary to take into account also the system of pedagogical disciplines that can reflect other features.

At the present state of the development of the civil law theory it is possible to qualify the civil law as a complex of legal rules that define the personal and property status of individual subjects (persons), regulate the basic financial circumstances among them, legal principles that the juristic and physical persons follow at their interrelations, both personal and property ones, that are based on the mutually equal status, and also the legal means of rise, securing, change and the end of the rights and duties connected with such relations, and sanctions for the violation of the subjective rights and duties derived from the method of the equality of the subjects. It is obvious that the matter in question is very extensive, and a question arises whether it must necessarily be incorporated into one single regulation or whether it may be divided according to further criteria into a number of mutually interrelated regulations. This interrelation may be of varied nature, there might be regulations that are on the same level of importance or the regulations that

are concerned with the relation of generality and speciality; at the same time the historical experience of a number of European countries with the forming of codes of law is also projected to the problem. I want to emphasize clearly, that I consider any discussion on this level a distraction, a manifestation of diverse political games, because the quality of the legal work must be on the first place. To the same category I rank the considerations whether the code of commerce should be maintained even after the commercial has been codified and in what form. (If there should a new codification or amendment should take place.) For the application practice the quality of legal regulation is far more important.

From all the above-mentioned reasons I consider as utterly necessary to respect the following postulates:

a) All aspects that are common to relations that form the subject of the civil law must be treated consistently, on principle in one only regulation (e.g. the qualification of the term of the civil law relation, description of its elements, including representation, the regulation of legal facts, objective rights, general part of obligations).

b) To judge consistently the importance of the specific features of certain relations, that manifest the diversity in the legal status of their subjects, and after having ascertained sufficient degree of integration of diversity proceed to the modification of specificities, which may be ranked complexly in an instruction that regulates the aspects that belong to the a) group or in a separate code (e.g. modification of property relations in marriage or in the intended registered partnership, the influence of gaining the business licence on the status of the physical and juristic persons in the undertaking relations).

With regard to thus formulated requirements it is obvious that I do not refuse special instruction that regulate the relations among business people, relations among family members, relations among the employees and employers, but only to an extent that is justified through the diversity of such legal relations, where such diversity is not only an ad hoc set of peculiarities, but is biased to be integrated in a proper way. In no case, though, should such special modification be performed through codes, due to the respect for the traditional status of this kind of legal regulations.