Some notes on a draft of the new civil code

THE PROS AND CONS OF THE NEW CIVIL CODE

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I. INTRODUCTION[1]

There has been a professional debate going on in the Czech Republic for several years concerning the future conception of civil law and the related issue of drafting a new code[2] to replace the existing regulation, which is no longer suitable.

There is a general agreement that the deficiencies of the current regulation in the field of civil law have to be dealt with not by means of further amendments but by means of "a structural change, i.e. a new codification of private law as a whole"[3]. This is because the current Civil Code and the entire conception of private law significantly deviates from the standards of the continental legal culture as well as the local pre-WWII legal traditions.

The discussions concerning the new conception of civil law have not been concentrated into the past few years – quite on the contrary: certain attempts at the improvement of the situation in the field of private law

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[2] Eliáš, K., Zuklínová M.: Principy a východiska nového kodexu soukromého práva [Principles and Points of Departure for the New Private Law Code], Linde, Praha 2001, p. 107: "*The Civil Code will be reformed in the spirit of a complete recodification. Its content (by preferring a uniform value system), systematic arrangement, selection of terminology, as well as the organization and form of the individual normative provisions will create an overall framework and normative base for the entire area of private law.*".

[3] Knapp, V., Knappová, M., Kropáč, L.Švestka, J.: Nad stavem a perspektivami soukromého práva v České republice [Reflections on the Situation and Perspectives of Private Law in the Czech Republic]. Právní rozhledy č. 3/1995, cf. also Kanda, A.: Několik kritických poznámek k rekodifikaci soukromého práva [Some Critical Comments on the Recodification of Private Law]. Právní rádce č. 2/1999, p 5 and subsequent pages.

may be observed as early as the 1990s. However, more than 15 years have passed without the re–codification of either private law or other legal disciplines, most notably criminal law. Legislators have limited their attention merely on amending the existing regulations, amending the new amendments, etc. Some acts and codes have been amended as many as fifty times and this has resulted in a significant complexity and disorientation on the part of both the lay public and legal professionals.[4]

This said, it might be supposed that the re–codification of the individual branches of law, primarily private law, could lead to a stabilization of the legal system, the renewal of trust in the rule of law and the reinstitution of legal certainty.[5]

The crucial question, however, is whether it is possible and necessary to perform a codification at all, especially with view to the fact that certain phenomena can be perceived in the society which might be best labelled as "favouring de–codification".[6] These include the fast pace of changes, the existence of special legal regulations due to their specificity or group interests, the effect of EC law, etc.

II. ATTEMPTS AT RE–CODIFICATION IN THE FIELD OF PRIVATE LAW

The situation in the area of private law is not currently very satisfactory in the Czech Republic. There is a substantial fragmentation of private law to be found in various legal regulations, which is the result of past times – the so–called "socialist re–codification" in the 1960s. This mainly followed ideological aims, while disregarding such principles as the division into private and public law, the arrangement and internal relatedness of the entire system of private law, etc.

Presently the most important legal instruments regulating private legal relations include the Civil code, the Commercial Code, the Labour Code, the Family Act and the Act on International Private and Procedural Law. In addition, this area is governed by many other legal regulations.

The issue is made more complex by conceptual changes which affected the Czech system of law in the 1990s. The previous conception of civil law concerned mainly legal relations arising in the area of citizens' "personal consumption"; while other legal relations were regulated outside of the field of civil law[7]. The socialist basis of the Civil Code remained unchanged despite its numerous amendments. A conceptual change was brought about by the so–called "major" amendment of the Civil Code (No. 509/1991 Sb.), which modified the Civil Code to the new social situation in the Czech Republic after 1990. However, the amendment was meant, from the very beginning, to serve merely as a temporary tool to be replaced in the future with a complex legal regulation of private law.[8]

The current legal regulation may be characterized by the absence of any systematic structure. However, I believe that the idea of a system is important and forms one of the main reasons why private law should be codified.[9] It cannot be doubted that this is a crucial issue requiring immense care, consistency and responsibility in the process of drafting such codification. The new legislative regulation should function as a fundamental norm and a unifying feature for the entire area of private law.

The first attempt at re–codifying private law (referred to as "the first proposal" below) was made as early as 1994–97. It was characterized by the effort to make the regulation of private law as broad as possible, and included the regulation of business relations (though it intended to provide a special regulation for business companies), fundamental provisions about employment contracts and employment in general, private rights and rights to non–tangible estate, securities, insurance agreement and the protection of the weaker contracting party. It clearly demonstrated the effort to overcome the fragmentation of private law, so characteristic for the previous regulation.

As regards the structure of this proposal, it was based on the pandect system and the division of law into absolute and relative.

[4] More details in GERLOCH, A.: Několik poznámek k rekodifikaci soukromého práva [Some notes on the recodification of private law]. Acta Universitatis Carolinae – Iuridica 1–2, Praha 2003, p. 28, cf. also Pelikánová, I. Kodifikace českého soukromého práva, zejména vzhedem k úpravě obchodních vztahů [Codification of Czech private law, mainly with respect of the regulation of business relations], Bulletin advokacie, 3/2003, p. 41.

[5] For a similar opinion, cf. Gerloch,: ibid, 28.

[6] Cf. ZOULÍK, F: Úvaha o systému soukromoprávního kodexu, Pocta Martě Knappové k 80. narozeninám, [A reflection on the system of the code of private law, Tribute to Marta Knappová on the occasion of her 80th birthday] p. 446.

[7] The concept of civil law was defined as a set of legal norms arising between citizens themselves, between citizens and organizations or citizens and the state, and the areas of satisfying citizens' personal needs in relations based on the exchange of money and goods, cf. FIALA, J.: Poznámka ke kodifikaci občanského práva [A note on the codification of civil law], in: Východiska a trendy vývoje českého práva po vstupu České republiky do Evropské unie, Masarykova Univerzita 2005, Brno, p 131.

[8] Nowadays, the key legal regulations in the field of private law include, above all, the Civil Code, the Labour Code, the Commercial Code and the Family Act, but the legal regulation is scattered in many other legal regulations governing relations in private law.

[9] For a similar opinion see ZOULÍK. F.: ZOULÍK, F.: Pocta Martě Knappové k 80. narozeninám [Tribute to Marta Knappová on the occasion of her 80th birthday], Praha: Aspi, 2005, p. 449.

Part I: General part

Absolute rights: Part II: Personal rights and rights to non-tangible estate, Part III: Property rights

Relative rights: Part IV: Obligations *ex contractu*, Part V: Securities, Part VI: Obligations *ex delictu*, Mixed absolute and relative: Part VII Family law, Part VIII Inheritance law

The virtue of this proposal consisted in its attempt at unification and systemic continuity, which was connected with the desire to overcome the said fragmentation of the existing legal regulation.

Critics of this conception, including professor K. Eliáš – the originator of the current (i.e. second) proposal of the new civil code, objected mainly to the "encyclopaedic" character of the proposal, which was manifested in the fact that all private law institutes were meant to be included in a single code.

After 2000, the re-codification attempts have found their tangible outcome in the legislative intent of the civil code, as accepted by the decision of the Government of the Czech Republic on the approval of the legislative intent of the civil code (codification of private law) No. 345/2001 of 18 April 2001.

Professor Karel Eliáš, professor at the Faculty of Law at the University of West Bohemia in Pilsen, was appointed as the main drafter of the new bill of the civil code.

The first draft version of the general part of the civil code, divided into individual sections, came in 2002, soon after followed by the special part of the proposed new code. Subsequently, this version was submitted for discussion to the re-codification committee of the Ministry of Justice of the Czech Republic[10], which resulted in further modifications of both the general and the special parts. It was already at this early stage that the main drafter made it possible, by publishing the general part in professional journals and on the Internet, for other legal professionals to get involved in the formulation of this key legal norm by means of submitting their comments.

In spring 2005, the draft version of the new civil code was published in the form accepted by the Ministry's re-codification committee and submitted to legal professionals for a wider discussion. At present, this version of the new civil code is the focus of numerous professional conferences held not only in the academic environment of individual Czech faculties of law and the Academy of Sciences of the Czech Republic, but also in many other institutions; the main drafter – professor Eliáš – is welcoming to discussions about individual contested points.

The aim of the codification – a publicly declared one – is to establish discontinuity, i.e. to cancel the existing Civil Code No. 40/1964 Sb., as subsequently amended, and replace it with a new code meant to serve as a unifying feature for the entire area of private law.

The purpose of the civil code as the fundamental code of private law is to embrace the complete regulation of general civil law and provide general principles applicable for private law. The application of the codification of private law will be extended mainly into the sphere of family law, business law and, to a limited extent, also employment law.

The proposed version is based on the structure of the 1937 Czechoslovak civil code, while taking into account modern trends perceptible in the codifications of private law abroad (e.g. in the Netherlands and Quebec). Its conception departs from the monistic approach of a commercialised civil code, which was determining for the first proposal of the civil code in 1996.

Together with the coming into effect of the new Civil Code, a new Act on Commerce was supposed to come into effect too, replacing the existing Act No. 513/1991 Sb. (the Commercial Code), as subsequently amended. This new law should, from now on, include mainly the legal regulation of business companies and associations, as well as some other issues. The majority of provisions regulating business obligations should be cancelled. As a result, the duality of the law of obligations, treated both in civil law and business law, should be removed.

The regulation of employment relations should be preserved in a separate regulation, but it should be subsumed under the system of private law as a special legal regulation, as opposed to the general regulation provided for in the proposed version of the new civil code (i.e. the relation of *lex specialis – lex generalis*). In this way, the current faulty situation should be removed, namely the existence of the Labour Code as an entirely independent legal norm without any systematic connection to other branches of private law, which is a unique conception without any parallel among European legal systems[11].

The Act on the International Private and Procedural Law should be unaffected by the re-codification, although the original proposal also included the regulation of conflict of laws.

The Family Act No. 94/1963 Sb. should be abolished in its entirely. The regulation of family law should, under the proposed legal regulation, be subsumed in the code.

[10] This commission consists of professionals from the field of civil law, appointed from among university teachers and the individual legal professions – judges, attorneys-at-law, notaries public, etc.

[11] Some months ago, the governing Social Democratic Party, supported by deputies from the Communist Party, succeeded, despite the resistance of other parliamentary parties, in passing a "new" Labour Code. This, however, is hardly compatible with the conception proposed in the draft version of the new civil code.

As stated above, the conception anticipates the existence of independent business and employment acts and a whole range of other special laws, e.g. on copyright law, law of cheques and bills of exchange, etc.

As regards the structural arrangement, the draft version is divided into the following sections:

Part I. General part, Chapter I. The subject matter of regulation, principles, Chapter II. Persons, Chapter III. Representation, Chapter IV. Subject of legal relations, Chapter V. Legal facts, Chapter VI. Limitation of actions.

Part II. Family law; Chapter I. Matrimony, Chapter II. Family and kinship relationship, Chapter III. Guardianship and other forms of care for minors, Chapter IV. Registered partnership

Part III. Absolute property rights; Chapter I. Property rights, Chapter II. Inheritance law

Part IV. Relative property rights; Chapter I. General provisions on obligations, Chapter II. Obligations ex contractu, Chapter III. Obligations ex delictu, IV. Obligations arising due to other legal reasons

Part V. Common, transitional and final provisions

The merits of the proposal include its connectedness to constitutional instruments (mainly the Charter on fundamental rights and freedoms) and international documents. Positive acceptance has also met the explicit formulation of principles of private law, the refinement and development of the legal regulation on the protection of personal rights[12], and the emphasis which is placed on the imperativeness of this fundamental code.

The discussion of this proposal has also seen many critical opinions concerning both the conceptual and the structural conception, as well as its content.

The proposal has been attacked as having an insufficient internal structure, namely that its arrangement is not easy to explain in terms of a common differentiating criterion. Opponents have also raised the objection that the system is being justified by a certain value scheme expressing the principles of private law, which some authors consider to be a dated conception[13]. Other criticism has been directed to the fact that the proposed version does not codify everything that falls within the scope of private law. The critics have also claimed that the systematic placement of the protection of personal rights into the general part of the civil code is questionable[14].

There is another controversial issue – namely the new terminology introduced by the draft version of the new civil code and aimed to establish discontinuity with the legal regulations from 1950 and 1964. However, there are some voices, getting stronger recently, which caution that the current legal terminology should be kept – in the event that such terminology is customary, unless it can be reliably and factually proved that the use of certain expressions is in conflict with the conception of the draft proposal and private law as such.[15]

Other critical comments are directed to the fact that the proposal does not yet deal with the connection between the new civil code and other legal regulations.[16]

As regards the content, I am not going to dwell on it in detail due to the limited scope of this contribution. However, I would like to mention at least some of the novelties introduced by the draft proposal of the new civil code, e.g.:

- extension of the protection of personal and personality rights,
- extension of the general regulation of legal persons (the current regulation has 7 provisions), inclusion of legal regulation of corporations and foundations in the civil code,
- unification of the concept of a 'thing' in the legal sense
- return to the principle of "superficies solo cedit",
- unification of the legal regulation on the limitation of acts (in currently valid law, there is

[12] The personal rights of natural persons (and similarly those of legal persons) are thus becoming – next to traditional property rights – another pillar of private law. This modern trend is respected by the proposed draft of the new civil code. More information is provided in Švestka, J., Zoulík, F., Knappová, M., Mikeš, J.: Nad vývojem i současným stavem rekodifikace českého soukromého práva [On the development and the current situation concerning the re-codification of Czech private law], Acta Universitatis Carolinae – Iuridica 1–2, Praha, 2003, p. 69.

[13] Cf. Zoulík, F.: Pocta Martě Knappové k 80. narozeninám, Praha: Aspi, 2005, p. 451.
Note: According to Eliáš, the draft proposal should clearly express "the fundamental principles on which private law is built. The provisions of the proposal follow the protection of an individual human being, its personal rights and position, family and property, including the regulation of what is to happen to its property after death, also with an emphasis on the binding nature of a promise...". I.e. there is the triad family – property – contract, cf. Eliáš, K.: Principy a východiska nového kodexu soukromého práva [Principles and Points of Departure for the new codification of private law], Praha: Linde, 2001, p. 74.

[14] E.g. rights to intangible property are left in a special regulation without a clear connection to the code, cf. Zoulík, F.: op. cit., p. 452.

[15] Cf. Gerloch, A.: Několik poznámek k rekodifikaci soukromého práva. Acta Universitatis Carolinae – Iuridica 1–2, Praha 2003, p. 30.

[16] Cf. Švestka, J., Zoulík, F., Knappová, M., Mikeš, J.: Nad vývojem i současným stavem rekodifikace českého soukromého práva, Acta Universitatis Carolinae – Iuridica 1–2, Praha, 2003, p. 71.

a separate regulation of this concept in Civil Code, Commercial Code and Labour Code,
- contains a new regulation of joint ownership,
- renews the building right etc..

The proposal further aims to unify the institutes of the law of obligations, mainly its rationalization and the removal of duplicities.

III. SOME NOTES ON THE PROPOSED REGULATION OF LEGAL PERSONS

Under the approved legislative intent, the first part of the draft proposal of the new civil code should also contain the general regulation of the position of legal persons, including the positive specification of the legal regime of associations and foundations as special legal forms of subjects of private law.

The Dutch regulation is conceived of in a similar manner and, in this connection, it appears to be very inspiring as it provides a good base for a well functioning civil society in the Netherlands. In my opinion, the Dutch civil code is currently one of the most modern and most thoroughly formulated codes of civil law in the world.

The draft proposal of the new civil code contains a relatively extensive general part, which is common for all legal persons; with 'legal person' defined in Section 22, subsection 1 as follows: "A legal person is any person identified as such by the law." The proposal thus aligns itself with the theory of legal fiction and considers the legal person to be a purposeful creation of law.

The proposal sets the legal regime of legal persons in a general manner, as well as the specification of the regulation of the corporate and foundation types of legal persons, include the legal forms of associations, foundations, endowment funds and institutions (ústav). The current Act No. 227/1997 Sb. on Foundations and Endowement Funds should be cancelled as well, and the legal regulation of foundations should serve as *lex generalis* for legal persons of the foundation type. There is also the intention that the Act No. 83/1990 Sb. on Citizens' Associations should be cancelled, the regulation of associations should be shifted into the Civil Code and the legal form of association should serve as a general regulation for legal persons of the corporation type. The proposal also anticipates the cancellation of the Act No. 248/1996 Sb. on Public benefit institutions. However, public benefit institutions founded previously will be able to continue their existence and will be regulated by the existing legal regime, while newly founded beneficiary societies will have the legal form of "institutions".

The term 'foundation' [fundace in Czech] is not a synonym for 'foundations' [nadace in Czech], but a general designation of some property base devoted to a specific social purpose. The new code defines a foundation [nadace] as a legal person established under private law by a purposeful unification of property which should, by its fruits, serve permanently to a useful goal. The permanent character is what distinguishes foundations from endowment funds. The main difference between foundations and endowment funds on the one hand and institutions on the other consists mainly in the purpose for which they are established. Foundations and endowment funds are characterized by the accumulation of financial means which are then, by means of foundation contributions, provided to third parties for the performance of services beneficial to the public. Institutions, by contrast, are characterized by a purposeful unification of property which may be subsequently used for the direct performance of services (activities) beneficial to the public. In the Netherlands, the legal form of a foundation is used in all of these cases; so this is a specifically Czech situation, although "institutions" – "Anstalten" in German – occur in the legal systems of some other European countries, too.

As regards corporations, the proposal takes over some aspects from the currently valid legal regulation of associations (Act No. 83/1990 Sb.). Others features are "borrowed" from the legal regulation of cooperations and other business companies, which is, in my opinion, not a good thing. However, many debatable issues have already been discussed with the main drafter of the proposal and subsequently modified in such a way that they correspond to the needs of the non-profit sector.

A novelty which was successfully included in the proposal is, among other, the definition of the establishment of an association as a legal person. The current legal regulation, which is based on the registration principle for the establishment of associations[17] is replaced by the principle of the freedom of establishment. It is not uninteresting to note that the draft proposal has found inspiration for this conception in the Dutch regulation.

The proposal also anticipates the definition of what a 'public benefit' is understood to be – there should be a separate law dealing with issues related to the 'public benefit' status, its acknowledgment, etc. But this issue has not been entirely clarified yet. Neither the current Civil Code nor any other legal regulation contains an explanation of what 'public benefit' is. This is, therefore, an entirely new term which needs to be delimited. This, however, is quite difficult.[18]

You may be surprised to find out that from the point of view of taxes, the Czech legal system *does*

[17] In the case of trade union organizations and employer organizations, this principle is modified, due to the fact that the Czech Republic is bound by international agreements of the International Labour Organization, by the evidence principle.

not distinguish between a public and a private company, thereby providing public advantages also to private activities or, to put it another way, legal persons which exert solely private activities. Tax advantages are conditioned by the *legal form*, not the purpose of establishment – or activity – really performed by a given legal person. At the same time, individual tax laws are not uniform and sometimes are even chaotic in setting up the group of subjects which enjoy tax advantages. Another paradox is that a certain type of activities, more specifically "sport" (even professional sport, i.e. performed on a commercial basis) is declared by a special law[19] to fall within the scope of 'public benefit' even without there being a systematic or any other reason with view to other types of activities which are, in their character, in the scope of 'public benefit' without any dispute.

A problem encountered in the current legal practice is the absence of a unified subsidy policy on the part of the state for subsidies provided from public resources.

It clearly follows from what has been said so far that there is an indisputable need for a certain correction in this area. The question remains, however, in what manner is should be carried out, whether this should be done on the general level or, similarly to the regulation here in the Netherlands, merely on the level of fiscal law.

The discussions on the meaning of the term 'public benefit', the establishment of the status of 'public benefit' in the Czech legal system and other related issues have been going on various levels for some time and will certainly continue in the future.

V. CONCLUSION

There is a general agreement that a new code should provide a unification of the entire area of private law. It should formulate the fundamental principles and be sufficiently general in order to resist pressures at being amended. Most important and decisive, however, is the quality of the proposed code and its applicability in practice. Its conception, structure and content, as well as everything else, should be simply a means of achieving such a quality. In spite of that, the final shape of the new code of private law is presently still being discussed among professionals, legislators and politicians. We will still have to wait for some time before the final version is ready.

[18] For a similar opinion, see CHOLENSKÝ, R.,: Když se řekne veřejná prospěšnost právnické osoby [What 'public benefit' of a legal person is]. Právní fórum, *2*, 2005, č. 5, přfl. Via iuris, č. II/2005, pp. 25–29.

[19] Cf. Act No. 115/2001 Sb., on the Support of Sport, as amended by Act No. 219/2005 Sb.