Hungarian Journal of Legal Studies 62 (2021) 3, 185–197
DOI: 10.1556/2052.2021.00329

AKADÉMIAI KIADÓ

The influence of the *Ius-naturale* conception of ABGB on the regulation of personality protection and compensation for non-proprietary damage in the Czech Civil Code

JITKA MATĚJKOVÁ*, ONDŘEJ PAVELEK and BOHUMIL VÍTEK

Department of Law and Social Sciences, Mendel University in Brno, Czech Republic

ORIGINAL RESEARCH PAPER

Received: March 2, 2021 • Accepted: August 11, 2021
Published online: April 1, 2022

ABSTRACT

In 2014, a fundamental reform of private law took place in the Czech Republic. It was a revolution in private law. The reform of Czech private law was also to some extent contributed to by the pressure of the neighbouring more advanced legal systems in which the Czech legislator sought inspiration, especially the ABGB and its basic principles. Czech private law has been influenced since at least 1811 by the ABGB; this regulation affected Czech private law even in the first half of the twentieth century. This paper aims to answer the question how the *ius-naturale* conception of ABGB affected the Czech Civil Code of 2012 (the reform of private law in 2012) in the field of compensation for non-pecuniary damage, and to what extent and in which institutes this influence manifested itself. The area of compensation for non-pecuniary damage was deliberately chosen – this area is related to the protection of human personality. Personality rights then reflect the theory of natural law, which was suppressed in Czech private law during the second half of the twentieth century.

KEYWORDS

private law, personality protection, compensation, non-proprietary damage, Czech Civil Code

* Corresponding author. E-mail: jitka.matejkova@mendelu.cz

1. INTRODUCTION

Historical development in twentieth-century Europe was fundamentally influenced by the two World Wars with the subsequent division of the continent by the Cold War. This fact was then significantly reflected in legal development. The rule of totalitarian regimes led to the role of law in society being discredited through both disregard for the material content of legal rules, and by 'unlimited interpretation' that accepted 'quasi' or 'pseudo-natural law'. The law was thus abused by state power to promote ideological interests.[1] Individualistic civil rights were either ignored in totalitarian states, or hypocritically and propagandistically reinforced in their own new constitutions (e.g. the Soviet Constitution of 1936), without being taken seriously by the state power even for a moment. For example, in electoral law there is a paradoxical situation involving what has been the subject of political struggle for many generations – universal suffrage based on democratic principles, which has been reduced to the mere mandatory confirmation of candidates selected by the 'state party'.[2] Unfortunately, the experience Czech citizens have had of the negative and even tragic effects of totalitarian regimes on society, culture, economy, and law is devastating. Even in private law, after the epoch of great codifications in the nineteenth century the following events unfolded from the contradiction between democratic and totalitarian legal systems. Communism proclaimed a sharp discontinuity with the current 'bourgeois conception of property and family relations', which was subsequently reflected in new legislation, in which a clearly dominant role was assigned for the interests of the state, or Communist Party. In general, there was more or less a denial of private law and the declaration of all relations as 'public', supported mainly by the theory of the supremacy of collective interests over the individual. At the same time, privatization and bureaucratization were not only reflected in property relations (these were governed by civil as well as other codes, such as the Land Code) – the ubiquitous interest of the state also being reflected, for example, in new family law.

Czech civil law did not change fundamentally until the adoption of the new Czech Civil Code in 2012, which entered into force on 1 January 2014. For many legal professionals, lawyers, judges, and civil servants, it was a big shock, as Czech civil as well as private law had experienced a real revolution. True, this did not happen until more than twenty years after the regime change in 1989, but the important thing is that it did happen. New legal institutes appeared in the Czech Civil Code, replacing those of the period of socialism that were enforced as the result of the implementation of Soviet legal science. From this point of view, the reluctance of some lawyers – both practitioners and academics – to give up some of these institutes of socialist law was surprising. It was of course also pressure from more advanced neighbouring legal systems that fuelled the reform of Czech Private Law (particularly the German *Bürgerliches Gesetzbuch* (BGB) and, more importantly, the Austrian *Allgemeines burgerliches Gesetzbuch* (ABGB).

Undoubtedly also important was the process of the Europeanization of Czech Private Law, including the influence of extraordinary projects such as the Principles of European Tort Law (PETL). The historical circumstances and traditions of the period in which ABGB was in force in the Czech lands also contributed to the change. It was the so-called *Brünner Commission* (Brno Commission) that started work on creating a new code of civil law based on the ideas of

[1] Seltenreich (2004) 803–10.

[2] Seltenreich (2004) 804.

natural law.[3] A new concept of compensation for non-proprietary damage – i.e., claiming in the event of interference with personal rights – was adopted in the new Czech Civil Code as a fundamental change. It was the whole concept of the protection of personal rights, including rules governing compensation for interference with personal rights and the right to compensation for non-proprietary damage, which was fundamentally influenced by foreign legal systems, particularly by ABGB, including the natural law principles on which it is built.

2. METHODOLOGY

The paper aims to find answers to the following two questions: 1. How did the *ius-naturale* conception of ABGB affect the Czech Civil Code of 2012 from the point of view of personal rights protection and compensation for non-proprietary damage? And, 2. To what extent is this influence relevant to the Czech law? As this paper is concerned with the Czech and Austrian laws, most of the sources come from these countries.

Principally, the paper uses a comparative method to determine the basic theoretical concepts of personal rights protection and compensation for non-proprietary damage not only in Czech private law, but also in Austria,[4] while the influence of ABGB in Czech Private Law is evident in many areas, including the law of inheritance.[5] In the area of personal rights protection, this involves not random inspiration but rather the long-term trend to inspiration associated with this code. The comparative method is traditionally very important in Czech private law, and seems to be even more accentuated at present – particularly due to efforts to modernize the latter and, basically, to cut it off from the previous socialist law and return to the 'bottom' of traditional European codes of private law. The new Czech Civil Code of 2012 essentially follows ABGB, which was in force in what was then Czechoslovakia until 1950, when it was replaced by the Socialist Civil Code. This is associated with the trend to the Europeanization of private law and the influence of foreign doctrine and case law, which – as, for example, Husa points out – occurs in the states of the former Eastern Bloc.[6] In Central Europe, legal comparison is of great importance, being relatively common. The inspiration of Austrian courts by German case law and doctrine is obvious.[7] To a large extent, the Czech legal doctrine also finds inspiration in Austrian and German legal areas. Since 2011, the Czech Supreme Court has referred directly to the decisions of the (Austrian) Supreme Court of Justice (OGH) in twelve fundamental judgements and to the decisions of the (German) Federal Court of Justice (BGH) in nine judgements.

3. BASIC METHODOLOGICAL APPROACH TO LAW

There are a number of theoretical approaches to the law that have a major impact on private law. The natural law approach, derived from ancient Greek philosophy, may be mentioned as the

[3]Lucke (2012) 7–38.

[4]Gordley and von Mehren (2006) 15.

[5]Horák et al. (2019) 333–48.

[6]Husa (2015) 9–11.

[7]Gelter and Siems (2014) 35–85.

first one. It still persists or returns even if abandoned or rejected, as it is frequently in legal science. This is called the return of natural law. The Czech Civil Code based on natural law theory may be taken as proof of this. Natural law theories exist independently of the government. They are discussed as summaries of certain legal principles or general legal provisions of high value. The theory of natural law is limited, and content is criticised in terms of its meaning.

Legitimacy is the key concept on which the natural law approach is based. 'However, there are a number of approaches to legitimacy and, here natural law does not do very well'.[8] Henceforward, there are considered to be several natural law theories – for example, naturalistic or theological conception, or rationalist conception, which differ mainly in their explanation of the origin of natural rights.

Positive law consists of written rules and regulations enacted by government; it originated around the middle of the nineteenth century, and natural law is often contrasted with this. 'The approach of positivists limits the subject of legal science to knowledge of the content of legal rules and does not consider the study of the origin of law in society and its operation as a task of legal science, but as a task of sociology'.[9] It is necessary to answer the question whether the conduct of certain entities is lawful or not, as far as legitimacy is concerned. The positivist law approach in its extreme form has its shortcomings; it can be reduced to a narrow concept of legality that lacks an examination of whether a legal rule is correct. Then, 'the guidance of the correctness and justice of law is lost'.[10]

The adoption of politically legal declarations proclaiming the natural right to life, liberty, and the equal limitation of rights with respect to the rights and interests of others was the result of the rationalist justification of natural law. The Declaration of the Rights of Man and the Citizen was the undoubtedly most important such document in Europe. It influenced many countries by defining individual and collective rights at the time of the French revolution in 1789. The declaration defined a single set of individual and collective rights for all individuals, and was influenced by the doctrine of natural rights. These natural rights are held to be universal and valid at all times and in all places. Stressing the role of law, 'it came to be a starting point for legal-positivist concepts' organically related to rational law, starting at the turn of the nineteenth century.[11]

4. NATURAL LAW THINKING AT PRESENT

'Whether the law not only sizes up and judge's human behaviour, but whether the law itself is judged, whether something stands above the positive law that allows the addressees to say – yes, it has been legally accepted, but it is immoral, unjust…. But, in the name of what do we take the liberty to say this. The reasons must be real and profound'.[12] There are as many ideas about natural law as there are authors. Therefore, it is unreasonable to formulate the normative

[8]Gerloch (2013) 206.

[9]Knapp (1995) 9.

[10]Gerloch (2013) 208.

[11]Gerloch (2013) 218.

[12]Gerloch (2013) 228.

content of natural law. Natural law theorists do not seek to justify their ideas in the empirically available reality, but rather in imperatives such as God's will or reason, which are beyond empirical verification. The specific possibilities for the empirical verification of the validity of natural law and the application of the natural law approach can perhaps only be measured based on a number of instances of the application of these rules in the reasoning of relevant cases; the Constitutional Court, the Supreme Court, and, in particular, the European Court of Human Rights. The empirical analyses in law appear mainly in connection with criminal law. However, such analyses also aim at private law – e.g. in cases of non-pecuniary damage.[13]

The content of legal and moral rules then relates to the following natural conditions: 'human vulnerability, approximate equality, limited altruism, limited resources, limited understanding, and willpower'.[14] Hart sees reasons for the minimum common content of morality and law in human vulnerability, approximate equality, limited altruism, limited resources, and limited understanding, and willpower. According to Dworkin, 'legal principles are also those that do not have a sufficient institutional form but apply due to their content because they are part of a socially valid general morality'.[15] Dworkin's theory of legal principles was formulated as an argumentative critical instrument aimed at Hart's legally positivist conception. Dworkin introduced a new argument into the eternal debate between legal positivism and *ius naturale*, which can be described as *a structural argument*. Legal principles are referred as those principles that do not have sufficient institutional support. This means that they are not stipulated by the constitution, laws, legal customs, or doctrines. However, 'they are part of political or social morality, being in force through their content'.[16]

The differentiation between natural and positive law is losing its relevance at the present time. Consequently, there is no dispute as to the essence of law. Nevertheless, this phenomenon is accepted and individuals abide by it. Moreover, it is recognisable that the process of globalization and Europeanization are also significantly reflected in law. There are also some other influences (such as the emergence of social networks, the pluralisation of law, multi-centrism, liberalization, the transformation of state regulatory mechanisms, etc.) that change not only the structure of legal order, but also the content of the fundamental concepts.

5. THE INFLUENCE OF NATURAL LAW THEORY ON PRIVATE LAW

The protective role of law is significant. Accordingly, the protection of human rights and interests can be defined as being of utmost importance. Formerly, legal theory sought criteria for the systematic organization of law. Modern legal theory generally accepts the difference between private and public law, defining 'private law as the part of the legal system that contains provisions based directly on personal or property relations'.[17] Samuel von Pufendorf (1632–1694), Christian Thomasius (1655–1728), and Christian Wolf (1679–1754) were among the strongest

[13]Darshi De Saram and Tang (2005) 645, Doron (2013) 604.

[14]Gerloch (2013) 228.

[15]Dworkin (2013) 405.

[16]Holländer (2006) 144.

[17]Havránek (2008) 431.

supporters of this thought-process regarding private law. The content, system, and interpretation of private law were thus perceived to be affected by natural law. It was especially the idea of personal and property freedom that found fertile ground in private law.[18] Numerous rules of private law were included in the orders of monarchs of emerging Central European states and later in the acts passed by assemblies and nascent parliaments. Later, monarchs' orders, such as statutes, decrees, etc., and parliamentary resolutions were extended, for example, by regulations issued by city founders, city councils, or created by the decision-making activities of courts. The large-scale codifications of the late medieval and early modern time are indispensable components of the study of historical private law.

It was not until the eighteenth and nineteenth centuries that law codification was divided according to the fields of law, such as the Civil Code, Criminal Code, etc. Private codes – law books – as well as scientific legal treaties are also a valuable source of knowledge for private law.[19] The Austrian ABGB was the last stage of the codification efforts in private or civil law legislation. It followed the French Napoleonic *Code Civil* of 1804. Being a sophisticated process, the codification of private law progressed at different speeds in European countries, inspired by different sources of law, with Roman law prevailing.[20] During the reign of Maria Theresa in the first half of the eighteenth century, attempts to codify civil law appeared in the Czech lands. A multi-volume *Codex Theresianus* was compiled by a codification commission; Professor Azzoni from the Faculty of Law in Prague also took part in this work. Regulations were to be designed to 'prioritize what is in harmony with innate freedom. It is not just relentless duty to be taken into account, but justice, too, along with particular decency'.[21] Natural rights played a major role in the preparation of ABGB.[22] Being an outstanding example of coping with natural rights,[23] this code came to be one of the most important regulations of modern private law.[24]

This modern approach of ABGB was particularly evident in the unique provision of its 'Article 16, which was conceived very broadly and is still one of the key provisions of the entire code'.[25] This provision on the natural (innate) rights of an individual became a sort of symbol of freedom and equality and the basis for building a liberal society and protecting individual liberty in a number of European codes.[26] Such a new extent of using natural rights was initially supported by Joseph II, who accepted the ideas of the Enlightenment and supported the fundamental freedoms, being influenced by persons in his entourage such as Karl Anton von Martini, who rejected the abuse of power and considered the death penalty to be appropriate only for the most serious crimes. However, Joseph II was not alone, as the desire to change the legal system was also shared by other rulers such as Frederick II the Great, and Catherine II the Great.[27]

[18]Kocher (1978) 29.

[19]Urfus (2001) 131.

[20]Higgins (1905) 95–105.

[21]Sojka (2009).

[22]Grossi (2010) 91–92.

[23]Chloros (1958) 609–22.

[24]Borchard (1916) 570–82.

[25]Urfus (2001) 131.

[26]Škrubej (2013) 1063–80.

[27]Lucke (2012) 7–38.

The provision of Article 16 of ABGB was influenced by Kant's philosophy. By the end of the nineteenth century, however, this provision was perceived as a basic principle of the entire code rather than as a provision that could often be used in practice. Nonetheless, this changed at the beginning of the twentieth century when the majority doctrine tended to conclude that this provision could serve as a basis for the protection of all personal rights. Some academics speculated that this provision could serve as a real basis for the development of private personal rights, especially dignity and freedom. The way the courts interpreted this provision highlighted its importance for the protection of personal rights.[28] As this provision has remained unamended, it can be concluded that this clause makes sense; it was also used by the Czech legislators, for that matter.[29] The undeniable advantage of this provision is that it gives judges the leeway to refer to natural law if any other option fails.[30]

After the disintegration of Austro-Hungarian Monarchy, in the period of the so-called First Czechoslovak Republic, the monarchy was perceived as a symbol of the lack of freedom. However, ABGB was so significant that every effort to re-codify private law was always made with ABGB in mind. In the end, ABGB remained in force until 1950. While after the Second World War in Western Europe, particularly in the then West Germany, natural law regained its importance, in Czechoslovakia of the time one form of totalitarianism was replaced by another,[31] and this was associated with the fundamental suppression of human rights and rejection of the principles of natural law in relation to protecting the personal rights of an individual – their freedom, life, and privacy.

Thus, a new Civil Code was adopted in Czechoslovakia in 1950, no longer based on ABGB, disrespecting its natural law principles. On the contrary, it was influenced by the Soviet legal doctrine. The 'Sovietization' of private law was disseminated throughout all the so-called Soviet satellites.[32] The Civil Code of 1950 was hence adopted during a very tragic period when there was systematic violation of human rights and the abolition of natural law principles. The Civil Code did not contain any provisions for personal rights protection or reference to natural rights. A certain, albeit slight improvement was made in 1964 when a new Civil Code was adopted, which stayed in force until 2014 in a rather modified form, already placing more emphasis on the protection of personal rights. This partial departure was due to events that had been taking place in other Eastern-Bloc states; notably, in the Soviet Union where the Communist party at its twentieth Congress arrived at the conclusion that it was necessary to reform Soviet civil law. Hungary and Poland then followed suit, reforming their civil laws as well.[33] However, a major move towards the protection of personal rights and other regulations aimed at modernizing the Czech legal system did not occur until later.[34] Still, the 1964 Civil Code adopted a rather reserved attitude towards both personal rights protection and compensation for non-proprietary damage. It follows from the explanatory memorandum to it that a court ought to preferably

[28]Oliphant, Pinghua and Lei (2018) 30–34.

[29]Damm (2002) 851.

[30]McGrath and Koziol (2014) 714–17.

[31]Gödecke (2014) 271–301.

[32]Rudzinski (1956) 216–43.

[33]Grzybowski (1961) 253–65.

[34]Coogan et al. (1997) 495–508.

compensate non-proprietary damage in immaterial form, such as in the form of a statement (possibly published in the daily press).

6. PRINCIPLES OF PERSONAL RIGHTS PROTECTION

The protection of personal rights is part of the Czech Civil Code and consequently of all private law; it also has implications for Labour and Family Law. The Czech Constitutional Court, for example, resolved a dispute between an employee and an employer concerning the employee clandestinely recording what the employer was saying in an interview about terminating the employee's employment. In its decision of 9 December 2014, ref. II. ÚS 1774/14, with reference to the protection of personal rights, the Constitutional Court concluded that, being fully justified by the interest in the protection of a weaker party in a legal relationship that is in danger of serious harm (including a loss of employment), recording is admissible. Thus, the regulation of personal rights protection and its main principles in the Civil Code are applicable to the entirety of private law. The same goes for ABGB and the provision of its Article 16, which is generally applicable, being a general clause of the entirety of private law.

Private law provides protection for a person as a human being as it follows directly from the provision of Article 3 para 1 of the Civil Code. The provision is based on respect for a person's natural right to the pursuit of happiness. There is an evident connection to the general clause formulated in Article 16 of ABGB and the emphasis on the natural rights of an individual such as protection of life, health, feelings, privacy, and dignity, which are all of other than a proprietary nature. The right to the protection of personal rights belongs to an individual for life, being indefeasible, not subject to the statute of limitations, inalienable, and unassignable. It acts absolutely, i.e., *erga omnes*. The regulation of personal rights also reflects the key principles of private law. First of all, the *neminem laedere* (do harm to no-one) principle. This means that if the *actus reus* does no harm, the injured party will not be damaged. This principle is then also reflected in tort law as part of the general precautionary obligation stipulated by Article 2900 of the Civil Code: everybody shall take the action necessary under private law to prevent injury.

The new Civil Code is also based on autonomous will, which is reflected in the possibility of voluntarily (freely) restricting one's rights as part of the protection of personality rights – for example, giving consent to capturing and disseminating the image of a person. However, this principle is limited by other principles – public order and the prohibition of law enforcement contrary to good morals. In this context, the Civil Code also adopted a principle based on the European Convention on Biomedicine, which stipulates the principle of non-commercialization of one's own body. This principle is then reflected in the provisions of Article 112 and Article 493 of the Civil Code, which prohibit the human body or part thereof from being regarded as things, thus making them eligible subjects of civil relations. Pursuant to Article 493, for example, [the h]*uman body and its parts, even if separated from the body, shall not be regarded as things.* Regarding the main functions of legal order, the principle of the protection of the 'weaker' party is also necessary. The 'weaker' party may, for example, be a patient taken to a medical facility without giving their consent. The absence of such consent may be due to the patient being unconscious or may be justified by the protection of public order or safety if the patient puts themselves in danger or people in their vicinity. In the event of a weaker party, the protection of a person's fundamental rights must take precedence. This is also related to the principle of non-abuse of rights, which is often reflected in the protection of a weaker party.

Although these principles were already part of the previous Civil Code of 1964, their actual implementation was often questionable such as in the event of privacy protection. The necessary changes of the code were partially implemented after 1990, but it was only with the adoption of a new code of private law that the regulation of personal rights protection became more transparent and, above all, its importance was strengthened with reference to ABGB. The legislators' inspiration from ABGB was intentional. The rationale was that ABGB was in force in the Czech lands until 1950 and, as mentioned above, from its adoption onwards it emphasized the protection of personal rights as part of the *ius naturale* concept. For this reason, ABGB was considered a very important source of inspiration.

In Article 16 of ABGB there is a general clause, according to which 'everybody has innate rights recognizable by reason itself, and, as such, is to be regarded as a person'.[35] This is also the basic rule of interpretation for other ABGB provisions.[36] The influence of the natural law concept is evident in the regulation of a reparation payment by Article 1325 ABGB as a claim in the case of interference with a person's natural right to health. The right of a person to life and health is one of the fundamental rights, and is protected by ABGB.[37] Protection of personality rights is stipulated by Article 16 as well as other sections of ABGB.[38] However, the regulation of personal rights protection by ABGB is not as comprehensive as in the Czech Civil Code. There, it is broken down into separate provisions based on Article 16 of ABGB. Compared to ABGB, the regulation of personality protection is rather extensive and, to a certain extent, based on case-law too, as the legislators were inspired by the extensive established practice of the Czech courts, which in turn follows the practice of the European Court of Human Rights.

Concerning the explicit existence of natural rights, which is a novelty compared to the previous regulation in the Civil Code of 1964, Article 19 of the Civil Code stipulates that

> 'every human being has innate, natural rights recognizable by reason itself and feeling, and is therefore regarded as a person. The law only sets the limits of the application of natural human rights and the method of their protection. Natural rights cannot be alienated or waived; if this happens, it is not taken into account'.

The new Civil Code thus established a doctrine that originated in legal theory; namely, that the legal personality of a human being is a consequence of the personality of the human being as such. This provision must then be interpreted in accordance with Article 10 (1) of the Charter of Fundamental Rights and Freedoms. Article 10 (1) of the Charter declares that 'everyone has the right to respect for [their] human dignity, personal honour, reputation and the protection of their name'. The new Civil Code in Article 3 para 2 letter (a) provides that 'everyone has the right to the protection of his or her life and health, as well as freedom, honour, dignity and privacy'. Article 81 para 2 of the Civil Code then lists the personal rights protected; these include 'human life and dignity, health and the right to live in a favourable environment, human dignity, privacy and expressions of a personal nature'. In addition to this list, family life and the human body are also protected, including the so-called post-mortem protection of a person. However,

[35] Winiwarter (2013).

[36] Urfus (2001) 131.

[37] Šustek (2011) 348–49.

[38] Danzl et al. (2011) 1.

in its protection of personal rights, the Civil Code is supplemented by acts of Parliament, such as Act No. 198/2009 Coll., the Anti-Discrimination Act, Act No. 46/2000 Coll., the Press Act, and Act No. 82/1998 Coll., concerning the liability of the state for damage caused in the exercise of public power.

6.1. The nature of compensation for non-proprietary damage

As mentioned above, personal rights in the Czech Civil Code are regulated in more detail than in ABGB. The Czech Civil Code uses a demonstrative list of personal rights, which increases legal certainty, as this list can serve as a suitable guide for judges. The Czech Civil Code also regulates claims in more detail in the event of the violation of personal rights, specifically by the provisions of Article 82 and Article 2956.

Pursuant to Article 82, an individual whose personality has been violated has the right to demand that the unauthorized interference should be refrained from or its consequences eliminated. The exercise of such a right is conditioned by unlawful conduct and the potential of such conduct to interfere with personal rights. The provisions of Article 2956 of the Czech Civil Code then directly stipulate compensation for damage to natural human rights. The legislators explicitly, following the example of ABGB, use the term 'natural rights', which is more evidence of the influence of ABGB's natural law theory on the Czech Civil Code. The exercise of the right to compensation of both proprietary and non-proprietary damage is conditioned by an unlawful act, damage caused, and causal relation. The provision of Article 2957 of the Civil Code also lays out the criteria to be considered by the court if damage is caused to the injured party:

> 'The manner and amount of reasonable satisfaction must be determined in such a way as to include the redress of circumstances worthy of special consideration. These include harm caused intentionally, particularly by using deception, threats by abusing the injured party's dependence on the wrongdoer, by worsening the consequences of the interference by making it public, or by discriminating against the injured party on the basis of their sex, health, ethnic origin, religion, and for other serious reasons. The injured party's fear of loss of life or serious damage to health must also be taken into account if such a fear was initiated by a threat or other cause.'

The above list implies that the court must consider all the relevant circumstances, and evokes a tendency to punitive damages due to circumstances being taken into account such as the use by the wrongdoer of trickery. The above list is more or less based on the pre-existing practice of the Czech courts related to personal rights protection, although regard for the practice of the Austrian courts can also be observed, which also takes into account a number of such circumstances when deciding about claims for compensation for non-proprietary damage.[39]

The legislation governing compensation for non-proprietary damage in Czech private law of the second half of the twentieth century was strongly influenced by positivist law; this is especially evident from compensation for damage to health and from the rules regulating reparation money. While in ABGB it has always been clear that reparation money will also be claimed in the case of violation of personal rights, such as damage to health, which is of a non-proprietary nature, in the Czech law of the second half of the twentieth century the situation was

[39] Ronovská and Pavelek (2016) 29.

not so unambiguous. Attempts of Czechoslowak lawyers to claim reparation money for damage to health were rare.[40]

Compensation for non-proprietary damage was, for example, also refused by Soviet legal science which so adversely affected Czechoslovak law in the second half of the twentieth century. This was due to the general tendency to play down the importance awarded human liberty. The Civil Code of 1950[41] did not contain any provisions for protecting a person's life, health, privacy, dignity, and freedom. In that period, this was a major difference from ABGB, which was still in force. The Socialist Code only provided for reparation money in its Article 355 as compensation for non-proprietary damage, personal injury, or compensation for disfigurement. The grievous fact, and one that gives a true picture of the entire code, was that the code did not regulate the protection of personal rights. The entire concept of compensation for non-proprietary damage was then designed along these lines. It was not until the 1960s that a change was made. Nevertheless, this change was actually intended to narrow the space of judges for reasoning, as this was considered dangerous. Therefore, legislators opted for a specific method of determining the amount of compensation for non-proprietary damage using fixed amounts to be ascertained on the basis of exact methods. This concept was applied most frequently in the sphere of compensation for non-proprietary damage to health.

In 1965, a by-law was adopted according to which reparation money was to be determined according to a number of points. For example, a broken leg was worth 50 points. Each point was associated with a certain price. This method of compensation for non-proprietary damage to health persisted in the Czech Republic until the new Civil Code of 2014. Also peculiar was the fact that the amount of compensation was not laid down by the law but rather determined by a by-law issued by the Ministry of Health. This was justly criticised by professional lawyers, and then also reviewed by the Constitutional Court. Critics pointed out that the system violated the dignity of the injured party, making it impossible to effectively take into account all the circumstances of a particular case. The system was based on a specific method of compensation – e.g., a certain number of points were attached to a headache, with this number then multiplied by the price of one point, which was only CZK 250 in 2012. This was also a violation of the right to human dignity. The aftermath of the socialist law can be seen in the fact that a by-law was again adopted in 2001 that copied more or less the original one, differing only in the value of one point to allow for the current economic situation. A clear violation of the principle of human dignity was the fixed amount of compensation determined by law. Pursuant to Article 444 of the Civil Code, fixed amounts were defined to determine the amount of compensation for non-proprietary damage in the event of death.[42]

In other aspects concerning the rights of an individual, such as privacy, dignity, and honour, however, such fixed amounts were never set, and if part of civil law protection were subject to discretion. Thus, no fixed amounts regarding the amount of compensation for non-proprietary damage were determined in the case of interference with the privacy of an individual.

[40]Erm (2013) 18.

[41]Law No. 141/1950 Coll., Civil Code.

[42]Pavelek (2019) 31.

7. CONCLUSION

Since 1811 at least, Czech private law has been influenced by ABGB legislation. The latter inspired Czech private law in the first half of the twentieth century as well; the government bill of 1950 for the Czechoslovak Civil Code is an outcome of this process. In the second half of the twentieth century, Czech private law deviated from the original ABGB and its natural law ideas, inclining towards Soviet positivist and formalistic legislation, which initially saw the existence of private law and natural rights as 'problematic'. This was most noticeable in the regulation of compensation for non-proprietary damage, which the Soviet legal science considered a bourgeois relic and an effort to commercialize human feelings. A change was then made, with compensation for non-proprietary damage being calculated based on fixed amounts, which led to the violation of human dignity. Finally, the Civil Code of 2012 definitively incorporated the natural law concept of ABGB, strengthening the protection of human rights and cancelling use of fixed sums to assess (damage to) human health. Thus, the Czech Civil Code, which is the basic code of all private law at present, recognizes the existence of natural rights, and along these lines also approaches the protection of the human personality.

REFERENCES

Borchard, E. M., 'Some Lessons from the Civil Law' (1916) 6 University of Pennsylvania Law Review and American Law Register 570-82.

Coogan, J. R. et al., 'Central European Law' (1997) 2 The International Lawyer 495-508.

Damm, R., 'Klassik und Moderne der Rechtsperson' ('Classic and modern of the legal entity') (2002) 4/5 Archiv für die civilistische Praxis 841-79.

Danzl, K. H., 'Der Ersatz ideeller Schäden in Europa und im ABGB am Beispiel des Angehörigenschmerzengeldes' (The replacement of non-material damage in Europe and in the ABGB using the example of relatives pain benefit) in Fischer-Czermak, C., Hopf, G, Kathrein, G. and Schauer, M., *Festschrift 200 Jahre ABGB* (MANZ Verlag Wien 2011), 1633-66.

Darshi De Saram, D. and Tang, S. L., 'Pain and suffering costs of persons in construction accidents: Hong Kong experience' (2005) 6 Construction Management and Economics 645-58.

Doron, I. 'Older Europeans and the European Court of Justice' (2013) 42 Age and Ageing 604-608.

Dworkin, R., *Taking Rights Seriously* (A & C Black 2013).

Erm, D., *Vorteilsanrechnung beim Schmerzensgeld - ein Betrag zur Fortentwicklung des Schadens (ersatz) rechts* (The imputation of benefits in compensation for pain and suffering - an amount for the further development of the law on (compensation for) damages) (VVW GmbH 2013).

Gelter, M. and Siems, M. M., 'Citations to Foreign Courts—Illegitimate and Superfluous, or Unavoidable? Evidence from Europe' (2014) 1 The American Journal of Comparative Law 35-86.

Gerloch, A., *Teorie práva* (*Theory of law*) (Aleš Čeněk 2013).

Gödecke, P., 'Criminal Law after National Socialism: The Renaissance of Natural Law and the Beginnings of Penal Reform in West Germany' in Wetzell, R. F. (ed), *Crime and Criminal Justice in Modern Germany* (Berghahn Books 2014) 271-301.

Gordley, J. and von Mehren, A. T., *An introduction to the comparative study of private law* (Cambridge University Press 2006).

Grossi, P., *A History of European Law*. Chichester (John Wiley and Sons Ltd 2010).
Grzybowski, K., 'Reform of Civil Law in Hungary, Poland, and the Soviet Union' (1961) 3 The American Journal of Comparative Law 253-65.
Havránek, J., 'Teorie práva' ('Theory of law') in Havránek, J. et al. (eds), *Právo soukromé a veřejné* (Aleš Čeněk 2008) 430-52.
Higgins, A. P., 'The Making of the German Civil Code' (1905) 1 Journal of the Society of Comparative Legislation 95-105.
Holländer, P., *Filosofie práva* (Philosophy of law) (Aleš Čeněk 2006).
Horák, O., Daduová, A. and Osina, P., 'Czech inheritance law and the significance of tradition' (2019) 4 Lawyer Quarterly 333-48.
Husa, J., *A new introduction to comparative law* (Hart Publishing 2015).
Chloros, A. G., 'What Is Natural Law?' (1958) 6 The Modern Law Review 609-22.
Kocher, G., *Österreichische und deutsche Privatrechtsgeschichte* (Austrian and German legal history) (Böhlau Verlag 1978).
Knapp, V., *Teorie práva* (Theory of law) (C. H. Beck 1995).
Lucke, H. K., 'European Natural Law Codes: The Age of Reason and the Powers of Government' (2012) 1 University of Queensland Law Journal 7-38.
McGrath, C. P. and Koziol, H., 'Is Style of Reasoning a Fundamental Difference Between the Common Law and the Civil Law?' (2014) 4 Rabels Zeitschrift für ausländisches und internationales Privatrecht 709-49.
Oliphant, K., Pinghua, Z. and Lei, Ch., *The Legal Protection of Personality Rights: Chinese and European Perspectives* (Brill 2018).
Pavelek, O., *Náhrada nemajetkové újmy na zdraví a při usmrcení* (Compensation of Immaterial Damages on Health and Death) (Masaryk University, Faculty of Law 2019) <https://is.muni.cz/th/x6ud6/> accessed 18 May 2020.
Ronovská, K. and Pavelek, O., 'Zur Festellung der Höhe des Schmerzengeldes und erschwerter gesellschaftlicher Eingliederung der Tschechischen Republik nach der Neukodifizierung das Privatrechts ab 1. 1. 2014' (Determination of the amount of compensation for pain and suffering and the more difficult social integration of the Czech Republic after the new codification of private law from January 1, 2014) (2016) Zeitschrift für Vertragsgestaltung, Schuld- und Haftungsrecht.
Rudzinski, A. W., 'Sovietization of Civil Law in Poland' (1956) 2 American Slavic and East European Review 216–43.
Seltenreich, R., 'Právní vývoj ve 20. století' (Law development in the 20th century) in Collective of Authors of Faculty of Law CU (eds), *Dějiny evropského kontinentálního práva* (Linde 2004) 803-10.
Sojka, D., *Codex Theresianus* (Masaryk University 2009).<http://is.muni.cz/elportal/estud/praf/ps09/codex/web/index.html> accessed 5 May 2015.
Škrubej, K., 'Austrian general civil code (1812) and the Slovenes: The blinding legacy of legal monism' (2013) 5-6 Zbornik Pravnog Fakulteta u Zagrebu 1063-80.
Šustek, P., 'Ochrana života a zdraví ve Všeobecném občanském zákoníku (Život jako újma?)' (Protection of life and health in the General Civil Code (Life as a loss?)) in Dvořák, J. and Malý, K. (eds), *200 let Všeobecného občanského zákoníku* (Wolters Kluwer 2011) 348-49.
Urfus, V., *Historické základy novodobého práva soukromého* (Historical foundations of modern private law) (C. H. Beck 2001).
Winiwarter, J.M. (transl.), *General Civil Code: For All the German Hereditary Provinces of the Austrian Monarchy - Primary* Source Edition (BiblioLife 2013 [Lechner 1866]).