



REFORM OF PRIVATE LAW IN THE CZECH REPUBLIC¹

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ABSTRACT

This chapter presents the reform process of private law in the Czech Republic, specifically focusing on the significant and successful wave of recodification achieved in 2012. Previous attempts at modernising Czech civil law, as well as the major elements of the reform, and their effects on various branches of law, such as commercial, consumer, labour, and family law, are documented. Furthermore, the main sources of inspiration, and some legal transplants utilised during the reform are presented apart from the major challenges faced in their implementation (including erroneous translation, and misunderstanding the conceptual models of foreign rules, the adaptation of which was desired). The transformations of case law under the new rules are also touched upon. Finally, later amendments and corrections enacted to complement the 2012 reform are presented.

Keywords: Czech Republic, civil law reform of 2012, Civil Code, legal transplants, case law.

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1. INTRODUCTION

The reform of private law was undertaken in the Czech Republic in 2012. This chapter focuses on the content of the new Civil Code in the Czech Republic and its impact on private law. The chapter begins with a description of the reform of civil law in the Czech Republic (section 2). Understanding the scope and impact of the reform requires at least a brief mention of the problems to which the private law reform responded. From this perspective, it is interesting to note how private law reform has already affected previous regulation (section 3). The new civil law is largely influenced by foreign sources. Section 4 mentions the several challenges resulting from this. As almost ten years have passed since the new Civil Code came into effect, it is possible to attempt an analysis of the approach adopted by courts to the new Civil Code (section 5). Finally, the chapter would be incomplete without at least a brief discussion of the amendments to the Civil Code (section 6).

2. CIVIL LAW REFORM IN THE CZECH REPUBLIC

The long process of implementing private law reform, which started in 1990 in Czech Republic was completed only by 2012. The first draft of the current new Civil Code² could not be adopted due to the elections in 2010. However, after certain revisions, the second attempt to adopt this draft in 2012 was successful.³ Act no. 89/2012 Coll., the Civil Code (hereinafter ‘CzeCC’), Act no. 90/2012 Coll., on Business Companies and Cooperatives, and Act no. 91/2012 Coll., on Private International Law were adopted. The adoption of these regulations has resulted in the repeal of hundreds of other regulations. The Civil Code alone repealed 258 of them. Hundreds more had to be amended. Several new fundamental regulations had to be adopted too.

2 Chamber of Deputies Journal no. 835 (5th electoral term).

3 For more about the recodification efforts, see Melzer, Tégl et al., 2013, p. 21.

The enforcement of these acts was postponed to 1 January 2014. This postponement of the Civil Code and thus of the private law reforms had two effects. The first was that it prepared society for the fact that private law would change significantly as of 1 January 2014. The second impact was the continued effort to delay or even cancel the reforms altogether.

The preparation for the reform required adopting further regulations that would follow up on the reform. However, these were not prepared in advance. For example, one may mention Act no. 256/2013 Coll., the Land Registry Act, and Act no. 304/2013 Coll., the Legal Persons Registry Act. Furthermore, regulations implementing the Civil Code have been adopted, for example, Regulation no. 351/2013 Coll., which determines the amount of default interest and costs associated with a claim, or Regulation no. 366/2013 Coll., on the regulation of certain matters relating to flat ownership. Subsequent amendments have also been made to procedural law (No. 292/2013 Coll. and no. 293/2013 Coll.) or tax regulations (e.g., no. 344/2013 Coll.). In some cases, draft bills prepared for previous codes were used (such as Act no. 67/2013 Coll., on certain issues related to using apartments and non-residential premises in residential houses). Although there was almost a two-year-long *vacatio legis*, the time for preparation was relatively short in some cases, especially in the case of implementing regulations since their adoption happened at the very last minute in 2013.

In the meantime, extensive training of judges, prosecutors, and other judicial personnel was organised within the Judicial Academy of the Czech Republic.⁴ Other professionals were trained by the Czech Bar Association or private agencies. The postponed effectiveness gave room for the creation of the first commentaries, or at least some of their volumes.⁵ Several matters have been discussed in-depth in other scholarly publications.

Postponed enforcement allowed for continuing efforts to suspend the reform. Proposals to postpone the enforcement were already being

4 Project Education of judges and prosecutors in the field of recodification of private law (CZ.1.04/4.1.00/80.00002) (1.6.2012 – 31.5.2015).

5 E. g., Melzer, Tégl, 2013; Spáčil, 2013.

made before the adoption. For example, during the Senate discussion, an effort was made to postpone the date to 1 January 2016. Similar attempts were made after the adoption too by various interest groups, for example, tenants, farmers, judges, or the Czech Bar Association. The key arguments were an alleged underestimation of the preparation process for the new Civil Code, absence of expert literature, and the need for revision of the adopted Civil Code.⁶ This was to a certain extent facilitated by the then-ongoing political instability in the Czech Republic. In 2013 (28 August 2013), the Chamber of Deputies was dissolved, and a few months later, snap elections took place (in October 2013). Owing to this, some implementing regulations were adopted in the form of statutory measures of the Senate, such as the tax regulations. The last proposal to postpone enforcement was submitted in October 2013.⁷ As it failed to push for expedited consideration, it was subsequently withdrawn.

2.1. THE NEW CIVIL CODE

The new Civil Code contains 3081 provisions divided into five parts (books) – I. General, II. The Family Law, III. Absolute Property Rights, IV. Relative Property Rights, and V. Common and Transitional Provisions.

Book I., the General Part (§ 1–654), is divided into titles that regulate the scope of the regulation and its basic principles, persons, representation, objects and their division, and legal facts.

Book II., The Family Law (§ 655–975), is divided into the following titles: Marriage, Family Relationship and Relation by Affinity, and Guardianship and Other Forms of Care for a Child.

Book III., Absolute Property Rights (§ 976–1720), contains the following titles: General Provisions, Rights *in rem*, and the Law of Inheritance.

Book IV., Relative Property Rights (§ 1721–3014), includes the following titles: General Provisions on Obligations, Obligations Resulting

6 Resolution of the 6th Assembly of the Czech Bar Association of 11 October 2013 [Online]. Available at: <https://www.cak.cz/assets/zaverecna-usneseni-snemu-cak.pdf> (Accessed: 6 August 2024).

7 Chamber of Deputies Journal no. 5 (6th electoral term).

from Juridical Acts, Obligations Resulting from Delicts, and Obligations Resulting from Other Legal Reasons

Book V., Common, Transitional, and Final Provisions (§ 3015–3081), contains two titles: Common Provisions and Transitional and Final Provisions.

The systematic structure of the Civil Code is similar to traditional civil law codifications, such as the BGB. There is a notable emphasis on person and personal relations, which is the reason for the extensive regulation of persons in the General Part and the systematic placement of the regulation of family law right in Book II.⁸ The structure did not cause much controversy. The only question raised was whether the General Part is even necessary, since some of the other civil codes, for example, the Austrian one and the Dutch one, do not have any.⁹ Some authors questioned its exigency, seeing a tendency towards simplification in its inclusion.¹⁰

2.2. POSITION OF COMMERCIAL LAW

The original concept of the new Civil Code was based on the belief that the existence of a separate Commercial Code has a number of advantages, particularly, the separation of regulations concerning only entrepreneurs, for example, the definition of a business, entrepreneur, procuration (*Prokura*), or business corporations. The dualism of private law was therefore to be preserved. The regulation in the previous Commercial Code, no. 513/1991 Coll. (hereinafter '*CzeComC*'), was only to be reduced. More specifically, the aim was to remove unjustified duplicities within the field of obligations. Nevertheless, certain specifics would have to be retained in the new Commercial Act. In the area of obligation law, this included, for example, the possibility of limiting damages, excluding the possibility to withdraw from a contract on grounds of distress or grossly unfair terms. It was assumed that

8 Eliáš, 2000, p. 327.

9 Ibid.

10 Švestka, Dvořák, Tichý, 2006, p. 80.

the new Commercial Act would regulate dispositions with a business, commercial agency, or a silent partnership.¹¹ However, this concept was not entirely enforced. These issues are now regulated in the Civil Code. The notion of a trade, that is, a commercial obligation as a special legal relation between entrepreneurs, has been abandoned.¹² A special law, Act no. 90/2012 Coll., on Business Companies and Cooperatives, regulates only these types of legal entities.

2.3. POSITION OF CONSUMER LAW

In the case of consumer law too, the original concept was not sustained, although in a different way than in the case of commercial law. The initial draft of guidelines of the Civil Code offered two possible solutions: to either reserve the entire regulation of consumer law to a special act or to incorporate the traditional private law directives in the new Civil Code.¹³ The first alternative was chosen for the consequently adopted guidelines of the CzeCC. Consumer law, including the implementation of Directives 85/577/EEC, 97/7/EC, and 93/13/EHS, was supposed to be enacted in a separate statutory regulation, as was done in Austria and other countries. The Civil Code should have contained only general provisions on the protection of the weaker party.¹⁴ The instability of legislation in this area, the need for frequent amendments, and the close connection to public law were the main reasons for this choice. It should not be overlooked that, at that time, discussions were being held on a comprehensive revision of consumer law in the EU, which, in a limited form, eventually led to the adoption of Directive 2011/83/EU on consumer rights.

11 Guidelines of the Civil Code, 2001, p. 11; Eliáš, 2000, p. 327; Eliáš, Havel, 2002, p. 249.

12 For more detail see: Pelikánová, 2013, p. 39.

13 Guidelines of the Civil Code, 2001, p. 70.

14 Guidelines of the Civil Code, point 1.2.3.1 (endorsed by Government Resolution no. 345 of 18 April 2001) [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/vecny_zamer_OZ_2000.pdf (Accessed: 12 September 2024).

This concept faced criticism in the expert literature.¹⁵ In particular, it was argued that the protection of the weaker party is an integral part of a modern civil code, which needs to be incorporated into its system and cannot be retrieved from it into special acts, as confirmed, for example, by the Draft Common Frame of Reference (DCFR).¹⁶ In addition to the expert arguments, political considerations leaning towards facilitating adoption in the Chamber of Deputies also had an impact. As a result, in 2008, the regulation of consumer contracts was incorporated into the Civil Code.

The Civil Code therefore contains a general regulation of consumer contracts (§ 1810 CzeCC), including the regulation of sale of goods to consumers (§ 2158 CzeCC) and the regulation of timesharing (§ 1852 CzeCC). However, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights was implemented quickly and with simplifications during the discussion in the Chamber of Deputies. The regulations of unfair commercial practices¹⁷ or consumer credit¹⁸ remained outside the Civil Code.

2.4. POSITION OF LABOUR LAW

The approach to labour law in Czech private law was, and still is, marked by the historical burden of a completely separate Labour Code from the year 1965.¹⁹ Even the mere idea that labour law could be a special regulation of general private law was extremely difficult to envisage, let alone force.²⁰ In fact, this was achieved only through the intervention

15 For example, Švestka, Dvořák, Tichý, 2007, pp. 29, 59.

16 Lavický, 2007, p. 848.

17 Act no. 634/1992 Coll., on Consumer Protection.

18 Act no. 257/2016 Coll., on Consumer Credit.

19 Act no. 65/1965 Coll., Labour Code.

20 The new Labour Code, Act no. 262/2006 Coll., was based on the unique principle of delegation. According to § 4, the Civil Code applied to employment relationships under this Act only if this Act expressly so provided.

of the Constitutional Court.²¹ From the very beginning, there was, some weariness regarding the incorporation of labour law into the Civil Code. Integration was perceived as inappropriate for political, practical, and technical reasons. The interplay of private and public law aspects in the modern regulation of labour relations and the need for a special law, albeit with a subsidiary application of the Civil Code, were emphasised,²² and this is exactly what happened. Act no. 262/2006 Coll., the Labour Code, was retained as a special law. The Civil Code, in regulation of employment contract, refers to the regulation in a special act. Thus, in practice, it contains one single provision, which has led to some absurdities, such as the employee's position in compensation for personal injury being worse than under the general private law.²³

2.5. POSITION OF FAMILY LAW

Following the example of the traditional German or Austrian codes, family law was to be an integral part of the new Civil Code. This corresponded, *inter alia*, to the emphasis on the human person and the importance of non-pecuniary relations. The regulation of family law in a special law was perceived as a manifestation of totalitarian legal

21 Constitutional Court, no. 116/2006 Coll. The Constitutional Court concluded that the principle of delegation regulated in Section 4 of the Labour Code is contrary to the requirements of the rule of law. It breaks the basic functional links to general private law and at the same time introduces a considerable degree of uncertainty into employment relations, since explicit references cannot cover all necessary situations that may arise in employment relations.

22 Guidelines of the Civil Code, 2001, pp. 14, 25.

23 In the specific case, The Constitutional Court found a contradiction with the requirements of equality (the claim under the Labour Code was 25% of the claim under the Civil Code), whereas correction was achieved by constitutionally conforming interpretation of the regulation in the Labour Code (Constitutional Court, ref. no. II ÚS 2925/20). The legislator had already addressed this issue through the amendment of the Labour Code in Act no. 205/2015 Coll., albeit not providing a comprehensive solution.

tendencies.²⁴ At that time, family law was regulated in a separate statute²⁵ and not in the Civil Code. The incorporation of family law into the Code was perceived mostly conciliatorily, with both positive and negative consequences mentioned.²⁶ Among the arguments against the inclusion, we can mention the connection of the matter with public law, necessity of state interference, and the practicality of regulating all issues in one law, which would be precluded by integrating family law into the Civil Code.²⁷

2.6. POSITION OF INTERNATIONAL PRIVATE LAW

Right at the outset, the question of whether the Civil Code should also encompass the regulation of private international law was brought up. The draft of the guidelines of the Civil Code reckoned with the inclusion of Book V, which would be devoted to conflict-of-law provisions.²⁸ Prof. Eliáš defended this concept primarily on the basis of a systematic viewpoint and a practical approach.²⁹ Notwithstanding that, this idea failed to be pushed. For example, Prof. Kučera objected that regulation in a separate act is more modern and more practical due its linkage with the regulation of international procedural law.³⁰ Mentioned examples that served as inspiration were the regulations in separate acts from Austria (1978), Switzerland (1987), and Italy (1995). Taking a cue from these examples, Act no. 91/2012 Coll., on Private International Law, was adapted simultaneously with the Civil Code as an independent statute.

24 The Guidelines of the Civil Code, point 2.3.1 (endorsed by Government Resolution no. 345 of 18 April 2001) [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/vecny_zamer_OZ_2000.pdf (Accessed: 12 September 2024).

25 Act no. 94/1963 Coll., on Family.

26 Švestka, Dvořák, Tichý, 2007, pp. 110, 114.

27 Ibid., p. 98.

28 The Guidelines of the Civil Code, 2001, p. 23.

29 Eliáš, 2000, p. 327.

30 The Guidelines of the Civil Code, 2001, p. 127.

2.7 OTHER QUESTIONS

The original concept of the Civil Code was based on the idea of not including the regulation of intellectual property, industrial rights, and securities owing to the dynamic nature of the Code. The all-embracing concept of the Civil Code, or codification megalomania, was being rejected. A certain compromise was sought instead.³¹ As a result, the Civil Code contains the general regulation of securities (§ 514 CzeCC). Intellectual property remained regulated outside the Code, within special laws; however, the Code regulates licence contract (§ 2358 CzeCC) and the creation of a incorporeal work (§ 2631 CzeCC).

3. REASONS FOR PRIVATE LAW REFORM AND ITS IMPACT ON THE FORMER LAW

There were many reasons for the reform of private law. The prevailing one was the impossibility of building a modern system of private law on the remainders of the Civil Code dated 1964 (hereinafter ‘CzeCC 1964’) and the Commercial Code dated 1991 without replacing them. Unlike mere amendments, reform clearly indicates a discontinuity of the general approach towards private law.

The CzeCC 1964 emphasised proprietary relationships; thus, for example, the Code had only a limited regulation of statutory positions of natural persons and limited regulation of immaterial damages. Private law suffered from the absence of general rules on legal persons. The CzeCC 1964 contained only seven provisions on this issue. The rules in CzeCC 1964 were considered mostly mandatory, for example, the flat tenancy of spouses or default interests. The breach of any statutory rule led predominantly to absolute invalidity of the contract. Moreover, there was need for a uniform private law. The CzeCC 1964 and the CzeComC contained unjustifiable differences in the regulation of obligations, for example, different regulations of surety, *pactum de contrahendo*, set-off, and performance. Moreover, even after 20 years discussions were still

31 Eliáš, 2000, p. 327.

ongoing about the scope of their application, for example, on unjust enrichment, insurance contracts.³²

The situation was slowly changing in legal practice, thanks to the influence of Constitutional Court case law, more progressive rules implemented in the CzeComC, and drawing inspiration from the Allgemeines bürgerliches Gesetzbuch (ABGB). Nevertheless, some issues were destined to remain unresolved without legislative action (e.g., absence of a regulation, mandatory character of rules, low damages in case of personal injury, etc.).

The discussions surrounding the new civil law began to intensify in the year 2000.³³ During the preparation process, addressing the problematic aspects of the former, then-effective, regulation was unavoidable. It is therefore hardly surprising that the preparation of the new Civil Code had an impact on the old regulation, leading to both modifications of earlier legislation and shifts in the approach of case law.

3.1. LEGISLATION

In 2011, an amendment to the old Civil Code was adopted, namely, Act no. 132/2011 Coll., effective as of 25 May 2011. Its aim was to partially liberalise the regulation of the lease of an apartment. Changes in the overall conception of private law relations and an exhaustive rectification could be expected only with the completion of the reform, which was supposed to create an overall framework and a normative basis for the entire private law in terms of content (by preferring a uniform value system), systematic arrangement, choice of terminology, and arrangement and form of individual normative constructions. Nevertheless, even before the adoption of the new Civil Code, as a partial step in that direction, an amendment that ensured partial compensation for the unequal position of landlord and tenant was adopted.³⁴ Therefore, in accordance with the

32 See Chamber of Deputies Journal no. 362 (6th electoral term), pp. 562 et seq.

33 The reform was formally launched in 2000. In that year, JUDr. Otakar Motejl, who was minister of justice at that time, charged Prof. Karel Eliáš and Doc. Michaela Zuklínová with the preparation of the new Civil Code.

34 Chamber of Deputies Journal no. 188 (6th electoral term).

forthcoming recodification (even in terms of wording), for example, the regulation of housing compensation was removed, regulation of unilateral rent increases was added, and the scope of the transfer of lease in case of death of the tenant became more restricted.

3.2. CASE LAW

Regarding case law, two areas can be mentioned where settlement pursuant to the old legislation has changed, *inter alia*, thanks to the influence of the new Civil Code. One of them is the protection of bona fide acquirer in the case of acquisition from a non-owner, the other is the problem of a double lease of the same object.

Going by the case law, the higher courts had long been refusing to recognise the protection of good faith in acquisitions from a non-owner, except for cases explicitly listed in the law. The law expressly allowed the acquisition of title from a non-owner only in the case of transfer from an unlawful heir, in the case of purchase of movable property between entrepreneurs, or by prescription.³⁵ Attempts to extend the protection of good faith to other cases, for example, in the case of transfer from a person registered in the land registry, were unsuccessful for a long time.³⁶ Such protection was only enforced under the previous regulation thanks to repeated interventions by the Constitutional Court.³⁷ The latter justified its approach, *inter alia*, by an explicit regulation in the new Civil Code. According to him, the legislator was aware of the inadequacy and injustice (unconstitutionality) of the previous regulation. The form of the new legal regulation reflects the fundamental criticism made by the Constitutional Court, thus supporting its legitimacy and correctness.³⁸

In the context of the regulation contained in the CzeCC 1964, in the version in force until 31 December 2013, the court practice had long

35 See § 485 CzeCC 1964, § 446 CzeComC.

36 E.g. Supreme Court, ref. no. 31 Cdo 1168/2013; Supreme Court, ref. no. 29 Cdo 2066/2013-179.

37 Constitutional Court, ref. no. III. ÚS 705/16.

38 Constitutional Court, ref. no. I. ÚS 2219/12, points 10 and 48.

been settled in the opinion that a prerequisite for the valid conclusion of a lease agreement is the fact that the object is legally free, that is, the leased object is not subject to the right of use of another person.³⁹ Otherwise, the second lease agreement was absolutely invalid for the initial impossibility of performance pursuant to § 37 (2) of the CzeCC of 1964.⁴⁰ This approach faced criticism in the scholarly literature.⁴¹ The new Civil Code takes a different stance rejecting this approach. Rejecting this idea in relation to the old legislation was established only through a ruling of the Constitutional Court, specifically ref. no. II ÚS 4235/18 of 13 September 2019. The latter refers to a different solution in the new Civil Code (§ 1760 and 1763). Consequently, under its influence, the Supreme Court changed its approach as well.⁴²

4. LEGAL TRANSPLANTS IN THE CIVIL CODE

The main goal of civil law reform was to overcome the remnants of socialist law and return to traditional regulation.⁴³ It is therefore obvious that the preparation of the new private law was often based on finding templates for the new regulation. However, the models to draw inspiration from were many.

The original assignment included the instruction to draw inspiration primarily from the governmental draft of the Civil Code from 1937. The draft aimed to reform and unify civil law in the former Czechoslovakia. The content of this draft was predominantly founded on the provisions of the ABGB. It was never enacted.⁴⁴ Another significant inspirational source was the regulation within the CzeComC, which significantly influenced the present-day regulation of the law of obligations.

39 Supreme Court, ref. no. 26 Cdo 916/2001.

40 Supreme Court, ref. no. 3 Cdon 120/96, ref. no. 26 Cdo 1767/2009, ref. no. 26 Cdo 2033/2004 and ref. no. 26 Cdo 4217/2010.

41 For example: Fiala, et al., 2009, p. 202; Švestka, et al., 2009, p. 1877.

42 Supreme Court, ref. no. 31 Cdo 3679/2020.

43 Chamber of Deputies Journal no. 362 (6th electoral term), p. 569.

44 For more details, see Kober, 2021.

However, many other inspirational sources were also involved. Since solutions typical for a given legal culture were sought, it is evident that the inspiration primarily came from the codes of neighbouring countries, such as the BGB (e.g. in the matter of torts, dissent, auction, legal status of animals), the ABGB (e. g., law of succession), or the Polish Civil Code (e.g., land registry, material publicity).

The explanatory report accompanying the Civil Code also refers to the ZGB (gaps in law in § 10 CzeCC, application of general rules on obligations to other private rights and duties in § 11 CzeCC), Codice Civile (assignment of contract, family enterprise) or the Quebec Civil Code [trusts, adhesion contracts (§ 1798 CzeCC), subcontractor's responsibility for a work (§ 2630 Czech)]. Some changes are derived from the Dutch Civil Code (such as the healthcare contract).

When drafting the new Civil Code, legislators sought inspiration from various similar projects throughout the European Union. No comprehensive solution was transformed as a whole. UNIDROIT Principles 2010 were reflected, for example, in case of surprising clauses in standard terms (§ 1753 CzeCC) or resolving a battle of forms (§ 1751 CzeCC). The Draft Common Frame of Reference (DCFR) was considered, for example, in case letters of confirmation (§ 1757 CzeCC) or the rebuttable presumption of a public offer [§ 1732 (2) CzeCC]. The newly introduced rules on pre-contractual liability (§ 1728 CzeCC) were inspired by the European Contract Code.

One should also not forget international treaties. For example, rules regarding mentally disabled people were largely influenced by the UN Convention on the Rights of Persons with Disabilities and resulting obligations on the part of the Czech Republic were implemented in the Czech legislation. Further, certain treaties of the International Labor Organization (no. 138/1973) were implemented apart from aspects taken from the Convention on the Rights of the Child.

We might interpret this as a resignation to perform a truly innovative activity, a reluctance to seek new solutions. Despite this, from a practical point of view, the adoption of established functioning models has proved successful. Such an approach enables overcoming a long period of uncertainty regarding new regulation by referring to existing case law and literature related to the model regulation. In this respect,

inspiration from Germany or Austria is more practical, as opposed to that from Quebec.

Nonetheless, using foreign models also comes with inherent drawbacks. First is the language barrier, which can often lead to inaccurate translations and misunderstanding the foreign institutes. Another problem may be the limited possibility to grasp the development of the law over time, whether in statutes or in case law.

4.1. BAD TRANSLATION

The Czech legislator drew inspiration from the Italian Codice Civile when regulating the assignment of contracts in § 1897 of the CzeCC.⁴⁵ § 1898 and § 1899 CzeCC are therefore concerned with regulating the liberation of the assignor.

The wording was adopted from art. 1408 of the Italian Codice Civile. This provision states that the assignor is liberated from his duties once the assignment becomes effective against the assigned party. However, if the assigned party has declared their refusal to release the assignor, it can enforce performance against the assignor if the assignee fails to fulfil the assumed obligation. In such a case, the assigned party must notify the assignor within 15 days from the date of the default; any failure to do so makes the assigned party liable for eventual damages caused by such default.⁴⁶

The Czech legislator split this regulation into two provisions and altered the diction in a manner that creates the impression that the assigned party could refuse the liberation of the assignor within 15 days of becoming aware of the assignee's default. § 1899 (1) mentions the possibility of making a declaration refusing the liberation, and § 1899 (2) sets a time limit for making a *declaration*. Scholarly literature attempts to rectify this mistake through interpretation, aiming to align the regulation with the Italian model. This includes, among other things, interpreting § 1899 (2) of the CzeCC as the time limit for a call

45 Chamber of Deputies Journal no. 362 (6th electoral term), p. 1007.

46 Mališová, Zimnioková, 2021, p. 780.

for performance, rather than a time limit for declaring the refusal of liberation.⁴⁷

4.2. MISUNDERSTANDING THE MODEL REGULATION

Misunderstanding the model regulation could be demonstrated on the regulation of so-called family enterprise, laid down in § 700 of the CzeCC. Under Czech law, a family enterprise is characterised as a special form of business (§ 502 CzeCC), thereby making it an object of relations and a collective ‘thing’ (*universitas rerum*).⁴⁸ However, the Italian regulation in art. 230bis of the Codice Civile, which served as a template for the Czech regulation,⁴⁹ understands the concept of a family enterprise in a much broader sense. It perceives it more as a type of business activity rather than a business itself.⁵⁰ Here, too, there are evident attempts to wider use of the institute and to emphasise the family community, not the business as such.⁵¹

4.3. DISREGARD FOR CHANGES

In certain instances, drawing inspiration from foreign and historical models resulted in overlooking the development in the area in the country of origin of the pertinent rule. We may mention three different examples from the new Civil Code.

47 Petrov, Výtisk, Beran, 2023, § 1899 points 4 and 5; Mališová, Zimnioková, 2021, p. 780.

48 Králíčková, Hrušáková, Westphalová, 2020, p. 114; Petrov, Výtisk, and Beran, 2023, point 2.

49 Chamber of Deputies Journal no. 362 (6th electoral term), p. 719.

50 Melzer, Tégl, 2016, p. 220.

51 Králíčková, Hrušáková, Westphalová, 2020, p. 114; Melzer, Tégl, 2016, p. 226.

4.3.1. Takeover of property

The Czech legislator decided to regulate the takeover of property in § 1893 CzeCC. The source of inspiration here was the Governmental Draft of the Civil Code of 1937 and the regulation of takeover of assets, business, or enterprise in § 1256 et seq. (i.e., § 1409 ABGB – *Veräußerung des ganzen Vermögens einer Person*).

As a result, the Czech regulation, specifically in § 1893 (2) CzeCC, includes a rule of reversal of burden of proof in cases of transfers to close persons; moreover, the liability of a close person for debts is not limited by the value of the property taken over. While the reversal of the burden of proof remained in § 1409 (2) ABGB, the absence of limits has been repealed in the ABGB since 1982.⁵² In Germany, the whole institute of takeover of property in § 419 BGB was repealed in 1999⁵³ as creditor protection was already sufficiently ensured through regulations governing ineffectiveness. The introduction of the institute into the Czech legal system has been criticised partly for this reason.⁵⁴

4.3.2. Succession in personal injury claims

In response to previous regulation,⁵⁵ the Czech legislator sought to ensure that personal injury claims would not extinguish upon the death of the injured party. The § 1475 (2) CzeCC states, following the example of the German and Austrian approach, that claims extinguished by the death of the creditor are not part of the estate unless they have been recognised or filed with a public authority.⁵⁶ However, the pertinent German provision (§ 847 (1) BGB) was repealed in 1990.⁵⁷ In Austria, the

52 § 187 of the Third Amendment of the ABGB was repealed by Act no. 370/1982 BGBl. [Insolvenzrechtsänderungsgesetz, 1982] due to its apparent inadequacy.

53 Art. 33 (16) Einführungsgesetz zur Insolvenzordnung (BGBl. I 1994 S. 2911) in force since 1.1.1999.

54 Čech, Flídr, 2014, p. 24.

55 § 579 odst. 2 CzeCC 1964.

56 Supreme Court, ref. no. 25 Cdo 3556/2016.

57 Gesetz zur Änderung des Bürgerlichen Gesetzbuchs und anderer Gesetze (BGBl. I 1990 S. 478).

same interpretation previously held by former Czechoslovak and Austrian courts was abandoned in 1996.⁵⁸ Personal injury claims do not extinguish upon the death of the creditor and pass to the heirs.⁵⁹

4.3.3. Exclusion of private annuities from execution

Pursuant to § 2705 CzeCC, if annuity is provided gratuitously, the payor has the right to reserve in the annuity contract that the beneficiary's creditors may not subject the beneficiary's benefits to execution or insolvency proceedings. Said provision is a novelty inspired by § 519 of the Swiss OR and art. 2377 CCQ.⁶⁰ However, Switzerland abandoned this rule in 1997.⁶¹

5. THE NEW CIVIL CODE IN THE CASE LAW

Private law reform was opposed by many while being adopted, with the judiciary being the most vocal. In the early years, one could find strong condemnation of the new civil law in specific decisions.⁶² However, now, after ten years, clearly the courts have learned to work with the new civil code. At present, we do not witness any longing for the old regulation in the judiciary anymore. The new private law is commonly applied and does not pose any major problems.

When analysing the case law under the new regulation, we can identify various interesting approaches to the new Civil Code. In fact, they all point to a single fact. When it comes to the new Civil Code, while the wording and intentions of the legislator are one thing, the practical implementation of the Code is a different ball game altogether. It may differ in numerous cases.

58 OGH, ref. no. 6 Ob 2068/96.

59 Doležal, 2016, p. 74.

60 Chamber of Deputies Journal no. 362 (6th electoral term), p. 1080.

61 BG of 16. 12. 1994, in force since 1.1.1997 (AS 1995 1227; BBl 1991 III 1).

62 District Court in Prague 8, ref. no. 25 C 110/2012 (...whereas as of 1.1.2014 unfortunately the unsuccessful Civil Code no. 89/2012 Coll. came into force ...).

5.1. THE SAME WORDING, DIFFERENT CONCLUSIONS

We first focus on the approaches where case law arrived at different solutions despite the regulation remaining the same under the new Civil Code. Since the Supreme Court considers these decisions to be new, as they concern different legislation, changes in the case law are made without these cases being submitted to the plenary session for decision.

An example that can be cited here is the regulation of contractual penalty, which builds on the regulation contained in the Commercial Code. The rules governing court moderation of contractual penalty in § 2051 CzeCC are essentially the same as those in § 301 CzeComC. Previously, courts deciding on moderation of contractual penalty assessed the amount only in light of circumstances apparent at the time of contract conclusion.⁶³ Such an approach has been abandoned. Nowadays, the court deciding on moderation does not examine the reasonableness of the clause stipulating the contractual penalty, but focuses on the total amount of the claimed contractual penalty. The court considers the manner and circumstances under which the breach of contractual obligation secured by the contractual penalty occurred and the extent to which it affected the interests of the creditor covered by the contractual penalty.⁶⁴ This change is also connected to the fact that moderation is now permitted even after set-off.⁶⁵ The Supreme Court newly allows such review,⁶⁶ whereas it had been previously denied.⁶⁷

Another example might be the nature of public auctions under Act. no. 26/2000 Coll.⁶⁸ The courts previously refused, owing to the wording of this special regulation, to consider public auction a type of contract formation.⁶⁹ The new CzeCC did not amend this special regulation.

63 E.g., Supreme Court, ref. no. 23 Cdo 4784/2008.

64 Supreme Court, ref. no. 31 Cdo 2273/2022.

65 Kolmačka, 2019, section 57.

66 Supreme Court, ref. no. 31 Cdo 927/2016.

67 Supreme Court, ref. no. 32 Odo 1007/2006.

68 Hulmák, 2022, p. 115.

69 Supreme Court, ref. no. 22 Cdo 2960/2009; ref. no. 29 Cdo 66/2015; Constitutional Court, ref. no. I. ÚS 3969/12.

§ 1771 CzeCC only explicitly lists auction as a form of contract conclusion now, but the stated was true even under the previous regulation too. Nevertheless, the Supreme Court decided that public auctions under the special regulation are actually similar to the contracts now.⁷⁰ Recently, a new law addressing this matter in a more conceptual way was passed.⁷¹

5.2. DIFFERENT WORDING, SAME CONCLUSIONS

In certain instances, the legislator has chosen a different wording for the law to arrive at a different solution. Regardless of the modified wording, the courts continue to apply the conclusions they have reached in relation to the previous regulation.

An example is the revocation of a gift for ingratitude. The Supreme Court has long held that the revocation of a gift under the previous regulation⁷² has *ex nunc* effects.⁷³ The new regulation, however, provides for the possibility of withdrawing from the contract, that is, in principle with *ex tunc* effects.⁷⁴ Nonetheless, the Supreme Court continues to rule that the effects are *ex nunc*,⁷⁵ although it must be admitted that this opinion can be found in the literature as well.⁷⁶

Another example is the issue of subjecting the right to terminate a contract by notice to the limitation.⁷⁷ The Supreme Court has previously inferred that the right to terminate contract by notice is not subjected to the limitation.⁷⁸ The new regulation of limitation offers different solutions, including the limitation of competences (*Gestaltungsrechte*).⁷⁹

70 Supreme Court, ref. no. 27 Cdo 1045/2019.

71 Act no. 250/2023 Coll., on Public Auctions.

72 § 630 CzeCC 1964.

73 Supreme Court, ref. no. 33 Cdo 160/2022.

74 § 2005 CzeCC.

75 Supreme Court, ref. no. 5 Tdo 1307/2021.

76 Petrov Výtisk, Beran, 2022, § 2072, point 23.

77 Hadamčík, 2020, p. 590.

78 Supreme Court, ref. no. 26 Cdo 78/2010.

79 E.g., Lavický, 2022, § 611, point 16.

However, the Supreme Court continues to hold that the right to give a notice is not subject to the limitation.⁸⁰

5.3. DIVERSION FROM THE WORDING OF THE LAW

A separate group of cases consists of situations where the courts have directly refused solutions contained in the new Civil Code. Within the transitional provisions, § 3030 CzeCC prescribes the extension of application of Title I (i.e., the first fourteen provisions of the Civil Code) to rights and obligations that are otherwise assessed under the previous legislation. The Supreme Court limits the impact of this requirement by stressing that this rule cannot be interpreted as conferring true retroactive effect of Title I on previously established legal relations (i.e., before 31 December 2013). Title I must be applied in a way that it respects the previous legislation interpreted in compliance with the established case law.⁸¹

Another example may be the legislator's instruction in § 742(2) CzeCC to consider investments from the spouses' sole property to joint property of spouses and vice versa when dividing the joint property of spouses. According to this provision, the increase or decrease in the value of the acquired property after the investment was made must be considered. Here, the legislator responded to the case law on the previous legislation and expressly emphasised the requirement to consider the increase in value as well.⁸² However, the Supreme Court has held that the increase in the value of the property is to be considered only if the spouses have agreed so.⁸³ The court argued with a need for teleological reduction, since during marriage, spouses generally lend finances to each other without interest. Nevertheless such approach adopted by the Supreme Court was recently rejected by the Constitutional Court.⁸⁴

80 Supreme Court, ref. no. 33 Cdo 3037/2019.

81 Supreme Court, ref. no. 21 Cdo 3612/2014.

82 Chamber of Deputies Journal no. 362 (6th electoral term), p. 732.

83 Supreme Court, ref. no. 22 Cdo 1172/2022.

84 Constitutional Court, ref. no. Pl. ÚS 23/24.

5.4. INNOVATIVE APPROACHES

Pursuant to § 24 CzeCC, every individual is responsible for their own actions if they are capable of assessing and controlling them. Based on this principle, the Supreme Court has concluded that persons whose legal capacity is restricted cannot be held liable for the breach of their contractual obligation, nor can obligation be terminated by notice on these grounds.⁸⁵ As a result, such individuals are not even obligated to pay contractual penalties. This decision seems strange since the liability for breach of contractual obligation is objective under the new Civil Code (e.g., § 1924, 1968, 2913 CzeCC).

6. AMENDMENTS AND OTHER DEVELOPMENT

Private law, like other legal norms, must be constantly adapted to the needs and development of society. Certain rules, namely, law of inheritance or family law, are more rigid. Others are more susceptible to change, for example, consumer law, due to the introduction of digital technologies.

The development of private law never ends with the adoption of any civil law code. Discussions regarding possible legislative changes persist. Each codification is followed by the effort to decodify. Aforestated holds true for the CzeCC too. The first amendment to the CzeCC was adopted approximately three years after its entry into force.⁸⁶ The code has since then been amended nine times over a period of almost ten years. Other proposed amendments did not pass. Currently, seven amendments to the CzeCC are under consideration in Parliament.

85 Supreme Court, ref. no. 26 Cdo 2365/2022.

86 Act no. 460/2016 Coll.

6.1. ADOPTED AMENDMENTS

Of the adopted amendments to the CzeCC, the following two must be mentioned as they are substantial in modern Czech private law. First, modifications have been made to the regulation of children's liability in order to protect them from incurring debts.⁸⁷ Second, a significant amendment has been made to regulation of consumer protection.⁸⁸

In the regulation on legal capacity, the new Civil Code retained, with a few additions, the previous rules. The fundamental principle was the gradual acquisition of legal capacity by the child, depending on their intellectual and volitional maturity appropriate to their age.⁸⁹ A similar rule applied to tort capacity, with the level being fully dependent on the child's personality.⁹⁰ However, special protective provisions were lacking. In some cases, the Constitutional Court had to intervene. Children were burdened with inherited debts, debts incurred by their parents on their behalf, fines for fare beating,⁹¹ unpaid waste collection fees,⁹² or hospital bills.⁹³ The legislator has decided, following the example of the German regulation,⁹⁴ to limit the liability of minors while strengthening the liability of parents. The discharge of a pecuniary debt arising from a juridical act of a minor who has not acquired full legal capacity may be enforced only against property acquired by the minor before acquiring full legal capacity and property acquired by a juridical act relating exclusively to property acquired before acquiring full legal capacity; this does not apply to a pecuniary debt incurred in gainful activity. The parent who acted on behalf of the child or contested (to) the juridical act guarantees the fulfilment of a pecuniary debt, which

87 Act no. 192/2021 Coll.

88 Act no. 374/2022 Coll.

89 § 31 CzeCC.

90 § 2920 CzeCC.

91 Constitutional Court, ref. no. I. ÚS 1775/14 and ref. no. IV. ÚS 1669/14.

92 Constitutional Court, ref. no. Pl. ÚS 9/15. In this ruling, the Constitutional Court repealed the regulation, under which waste collection fees were paid by minors.

93 Constitutional Court, ref. no. II. ÚS 728/15. The Constitutional Court has ruled that it is the legal guardians, not the minors, who are obliged to pay the regulatory fees for health care.

94 § 1629a BGB.

was incurred by the child due to their juridical act performed before the acquisition of full legal capacity. The guarantor (the parent) cannot legally force the debtor (the child) to settle this debt.⁹⁵ This is followed by other statutory restrictions. For instance, the contractual penalty agreed by a person under the age of fifteen is deemed non-existent.⁹⁶ Further, procedural law has also been strengthened.⁹⁷

The problems related to consumer protection regulation have already been discussed above. Many of the shortcomings resulting from the implementation of the consumer protection directives were only remedied by Act no. 374/2022 Coll.⁹⁸ This act also implemented the directive on digital content,⁹⁹ the omnibus directive,¹⁰⁰ and the directive on consumer sale of goods.¹⁰¹

6.2. AMENDMENTS NOT ACCEPTED

After the adoption of the CzeCC, a technical amendment was drafted. The purpose of this draft was to exonerate the CzeCC from evident legislative errors.¹⁰² Typically, these were confusions in the names of

95 § 899a CzeCC.

96 § 2048 (2) CzeCC.

97 Šínová, 2022, p. 277.

98 E.g., Incorrect implementation of the Annex to the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, especially in terms of wording.

99 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

100 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council, regarding the better enforcement and modernisation of Union consumer protection rules.

101 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

102 Some of them in Eliáš, 2014, p. 27.

contracting parties, such as donor instead of donee,¹⁰³ principal instead of agent,¹⁰⁴ and pledgor instead of pledgee.¹⁰⁵ Another example is the conflicting double regulation of the consequences of merger of the creditor and the debtor in the case of creditor solidarity.¹⁰⁶ Subsequently, however, only some key, and often rather substantive, issues have been regulated in Act no. 460/2016 Coll.,¹⁰⁷ which were referred to as minor technical amendments.

One of the ideas that resonated strongly in Czech legal discourse after the adoption of the CzeCC was the creation of a consumer code. The less-than-perfect implementation of the consumer protection directives in the CzeCC contributed to some extent. It was also necessary to implement the new directives. Moreover at that time, a special law was already dedicated to this matter, though predominantly focusing on the public law aspects of consumer protection.¹⁰⁸ In addition, a certain tradition existed in this regard,¹⁰⁹ albeit with negative consequences. Guidelines of this code were drawn up. Even a major international conference on this topic was held in Brno.¹¹⁰ Nevertheless, this concept was later abandoned.

6.3. AMENDMENTS IN CONSIDERATION

Currently, there are two significant amendments in the legislative process, both concerning family law. First is a proposal in the Chamber of Deputies to legalise same-sex marriage, not only an already existing registered partnership, but also a fully-fledged marriage.¹¹¹ Second, is a

103 § 2072 (2) CzeCC.

104 § 2438 CzeCC.

105 § 1341 CzeCC.

106 § 1878 (2) and § 1948 CzeCC.

107 For a critical view of this amendment, see Eliáš, 2014, p. 24.

108 Act no. 634/1992 Coll., on Consumer Protection.

109 The CzeCC 1964 was originally adopted primarily as a regulation of services provided to citizens.

110 Principles of European Private Law in Application Practice – Code of Conduct for Consumers: Yes or No? Brno, 31 May and 1 June 2018.

111 Chamber of Deputies Journal no. 241 (9th electoral term).

proposal aimed at streamlining divorce proceedings in cases where the divorce is uncontested. The notary will settle these divorces. Furthermore, prohibition of corporal punishment for children is also explicitly declared.¹¹²

6.4. CHANGES IN REGULATION OF CO-OWNERSHIP

Special attention should be paid to the regulation of co-owners' pre-emptive right. This example serves as a good illustration of how, in some cases, there is encroachment on fundamental codes. Until 1992, the CzeCC 1964 stipulated the need for the consent of other co-owners when transferring ownership shares.¹¹³ In 1992, this rather stringent requirement was alleviated into a very broad-based pre-emptive right.¹¹⁴ This regulation was criticised.¹¹⁵ Therefore, in the new Civil Code, effective as of 1 January 2014, the legislator reserved this right to only a narrow set of cases.¹¹⁶ However, with the argument that such a regulation enables move-ins of outsiders into co-owned apartments without the consent of other resident co-owners, the previous regulation was fully reinstated in 2018.¹¹⁷ Simultaneously, the practical issues that such a step (backward) would bring (e.g., in the disposition of garage spaces) were pointed out. The legislator therefore repealed the general co-owners' pre-emptive right again, effective as of 1 July 2020.¹¹⁸

112 The amendment to the Civil Code on uncontested divorces is heading for the consultation process [Online]. Available at: <https://advokatnidenik.cz/2023/09/08/novela-oz-tykajici-se-nespornych-rozvodu-miri-do-pripominkoveho-rizeni/> (Accessed: 12 September 2024).

113 § 140 CzeCC 1964 in its original version (the exception was a transfer to a descendant or other co-owner; the exception was gradually expanded).

114 § 140 CzeCC as amended by Act. no. 509/1991 Coll. (the exception was a transfer to close relatives).

115 E.g., Švestka, Jehlička, 1994, p. 160 et seq.; Eliáš, 2005, p. 153; more conciliatory Spáčil, 2009, p. 396.

116 § 1124 and § 1125 CzeCC.

117 § 1124 CzeCC as amended by Act no. 460/2016 Coll.

118 § 1124 CzeCC as amended by Act no. 163/2020 Coll.

7. CONCLUSION

The recodification of private law in the Czech Republic in 2012 was not just an option, but a necessity. It was the only way to return the private law regulation to some standard form common in the neighbouring countries. The provisional solution of the early 1990s, built on the relics of the previous regulation, was no longer sustainable.

In retrospect, the adoption of the new Civil Code must be regarded as a great success. It is, of course, relative to what was already existing. Although it was not easy and various catastrophic scenarios were formulated, it is clear today that after 2012, private law in the Czech Republic is experiencing an unprecedented boom. This can be measured by the new opportunities and solutions in practice, the amount of literature, and knowledge of private law.

The new Civil Code is certainly not ideal, nor is it perfect. A number of mistakes have occurred in its preparation. No agreement is observed on the settlement of its application problems. These are left to be resolved in practice. Many problems emerged only after its adoption. In many cases, the subtle nuances of the various formulations used are only now discovered. The improper implementation of the various EU directives makes for a separate chapter. On the contrary, it is obvious that in the constant search for ideal wording, understanding of everything, and consensus in professional circles, there would have been no reform of private law in the Czech Republic even today.

The last chapter (6) reveals that although codification of private law has been implemented, this is no obstacle to continuing the search for new ideas or adapting old ones. Law reform must never end. However, nothing dramatic is now on the horizon.

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