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AN INTRODUCTION TO HISTORY OF CZECH PRIVATE LAW

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CONTENTS

1. INTRODUCTION

a) This publication was put together for the 200th anniversary of publishing the General Civil Code (ABGB) as well as in connection with the ongoing transformation of the Czech legal order, which, in 2011, grew into one of its decisive milestones: a proposal of a new Civil Code.

The presented draft of the Civil Code raises both emotions and contradictory reactions of lawyers. Some support it, some do not. The proponents of it claim that there is an imminent need for change of the current state of affairs, currently based on the very specific Civil Code, which had been drafted in the mid-1960s. They appreciate especially the efforts to restore the traditional institutes and approaches that are known from ABGB. The critics remind us that not every change, and that applies even to those changes that are needed, brings an improvement. Especially they are afraid that fast implementation of such a crucial change could cause chaos in legal practice and that some of the institutes to be newly restored have already been overcome. Aside from briefly informing readers from abroad about the main features of the development of private law in the territory of the Czech Republic, this presented work may be looked on as a contribution to such discussions and, moreover, it should make the readers acquainted with the circumstances of the creation of the "model" that stood as an inspiration for the proposed Code and it shall also show the context of further development of the matters that it had regulated.

This work was put together by academics of the Department of the History of State and Law of the Masaryk University of Brno, who participate in the grant task "The Development of Private Law in the Territory of the Czech Republic" and who are responsible for solving its main parts. In accordance with it, this publication is composed of relatively independent chapters that briefly deal with partial components of the development. A deeper analysis of it will be provided by the authors and their fellow workers in final outputs.

So that the issue that is researched be set into the correct historical context, we concentrated on medieval Czech law and the Czech law of the

early Modern Ages and the influence of Roman law on its private law institutes in the introductory provisions. The discussion on the development of civil law, which is accompanied by chapters on business and economic law (in its specific Czechoslovakian approach), family law and labor law, shall be regarded as the main part of this work. In the chapters concerning the legal branches that became independent from the originally uniform civil (private) law, we focused on the conditions and circumstances of their formation and the development of legal regulation. It was especially business law, which went through a very specific development – not only that we can find its traces in 1850s, but we should also remember its abolishment in 1950 and how it was replaced by so-called economic law in the early 1960s and its restoration in the early 1990s.

b) While researching the development of the modern private law in the territory of the today's Czech Republic, we can see several crucial milestones that had been derived from the development of law and from the fundamental political changes. There are no doubts that the "first mower" was origination of the Austrian codifications of the nineteenth century – the General Civil Code and the General Business Code. Another landmark is reflected by the development in politics and thus it is more or less symbolical. It is an establishment of independent Czechoslovakia. Especially it meant that law that was in force in the Czech lands, i.e. Bohemia, Moravia and the "Czech" part of Silesia, was directly confronted with the former Hungarian law effective in the eastern part of the republic, i.e. in Slovakia and Carpathian Ruthenia. This fact brought with it several practical difficulties. Therefore, shortly after the republic had been established, a process of unification of the legal order was tacked. Notwithstanding that no main codification was adapted, certain partial success was achieved. Especially, a Uniform Law for Bills of Exchange and Promissory Notes was adapted as well as partial regulation over adoption and publisher's agreement. There was also a partial unification of matrimonial law and labor law.

Although the short period of the Protectorate of Bohemia and Moravia was very specific, as for the development of the private law it was not of significant importance as it was in political history. The Protectorate authorities and the occupational power interfered essentially with the field of private law by its new laws, but there interferences were not important for

the post-war development. According to the conception of restoring legal order, the laws were adapted by the state bodies of the so-called second Czech-Slovakian Republic, the Protectorate of Bohemia and Moravia and of the Slovak state after the Munich agreement of 1938 had been signed were not regarded as a part of the Czechoslovakian legal order. After the war was over, most of them were no longer used. As an example of the laws of that period, we could mention racially motivated interferences with the field of matrimonial law or proprietary rights.

In the period of 1945–1948, despite the fact that some of the injustice of the previous period was redressed, further – long-term – encroachment upon proprietary relationships, especially confiscation of enemies' property and vast nationalization. Nevertheless, the Civil Code of 1811 remained to be the fundamental law of private law matters in the territory of the today's Czech Republic.

Another significant landmark, this time crucial, was that the Communist party gained power in 1948, which was followed by so-called "legislative two-year". These events set the direction of the development of the Czechoslovakian law in the next forty years. The term of "legislative two-year" means the period of 1949–1950, in which, in the context of the political change of 1949, and based on decisions made by the party's bodies, fast recodification of the Czechoslovakian legal order took place.

The newly adapted law unified the legal order and they openly established "people's democratic" law of the classes.[1] In this process, the branch of business law was almost abolished and, on the other hand, family law began to be regulated as an independent branch of law. Also labor law detached from the civil law. Nonetheless, labor law had not yet been codified. Certain preconditions for further codification of economic law were being gradually established. There were also new codifications of judicial pro-

[1] The law, which was established by the communists, after they had gained power, is labeled variously. All the terms are however, to certain extent, not precise. The term of "socialist law", which was established as an antithesis of capitalist law, is probably used most often. This basic term was then sub-classified into people's democratic law and socialist law *stricto sensu*, which was originated in the period of 1960-1965 by means of further recodification of the Czechoslovakian legal order. Today, even a term of "communist law" is used.

ceedings, criminal proceedings and "material" criminal law and also many other important laws, of which we could mention for instance regulation of all kinds of dispositional relationships or economic relationships.

Within the abovementioned forty-year period, a new complex recodification of law that took place in the early 1960s should be mentioned. It transformed the people's democratic law into socialist law. A clause, which was laid down in the Constitution of 1960 and which called on "creating socialism", was the impulse for the transformation. It was connected with the change of the class structure of society, in which the class of "*exploiters*" ceased to exist and all citizens became a "*working*" class. Civil law and family law were newly regulated. The lawgiver approached the civil code very briefly and proprietary relationships were also regulated by the new Economic code and the Code of International Trade. After years preparation works that had been many times interrupted, even the field of labor law got recodified.

The last milestone of the development of the Czechoslovakian private law is again connected with a political change – this time, it was so-called velvet revolution of 1989. As well as the establishment of the republic in 1918, the political change was only an impulse and the important changes in law took place later. Generally, they were completed after the end of Czechoslovakia (1992) and some of them are still open. Only one codification had been passed before the independent Czech Republic was established – new Business Code, which however, was prepared in hurry. Further changes of the period 1990-1992 were carried out mainly by amending old laws. Some of these amendments, nevertheless, were of significant importance and following the ideological essence of particular regulations.

Authors

2. PRIVATE LAW IN THE CZECH MIDDLE AGES

2.1 LEGAL PARTICULARISM AND PERSONALITY OF THE LAW

Important issue connected (not only) with the old Czech law, and therefore also with the private law, was legal particularism bases on the personality of law, in particular. Based on it the inhabitants were divided pursuant to their pertinence to the individual Estates or social groups governed by their own laws. On such estate particularism, which developed gradually, was based also the system of law in the Estates monarchy. Therefore, we have no unique private law here, but actually several private laws influencing each other nonetheless they existed basically autonomously side by side for the whole period being subject of this paper. Issues arising from the coexistence or subjects governed by different laws and causing the conflicts of the laws made it necessary for the conflict rules to occur and for the border determinants to be established.[2]

Amongst the individual particular laws, the Land Law (*Landrecht, zemské právo*) and the Town Law (*Stadtrecht, městské právo*) which both later became the basis for the unification of law, represented the most important ones. In the case of the Land Law two similar legal orders of the individual countries of the common state including nonetheless many differences in many aspects. With regard to the Town Law the situation is even more complicated. In this case we can speak about autonomous law of each and every town, whereas situation in each case can be even more complex due to the existence of side laws.[3] The important unification item was repre-

[2] In more detail to the individual areas of law and their sources e.g. VOJÁČEK, L. – SCHELLE, K. – KNOLL, V., *České právní dějiny*. Pilsen: Aleš Čeněk, 2010, p. 117–143.

[3] Specific is the situation of Prague agglomeration, where five towns of different standing existed in the studied period having different legal orders. To the side laws SVOBODOVÁ-

sented by both the provision of privileges of already existing towns to new ones as well as by the provision of legal advice by courts of these mother towns. Based on the above mentioned we can speak about legal circles connected with such towns, whereas at the end we can create the most basic division into two legal regions significantly influenced by the German law. As its law became the basis for the later codification, the Southern-German region is more important one.[4]

However, with regard to the number of subjects governing the country, beside the above mentioned basic legal groups there was very dominant differentiated area of vassal laws. Other important law was the mining law governing everything connected with the precious metals mining and mining business.[5] However, also feudal law as well as other areas of special regulation existed.

Specific status was provided to canonic law governing prelates in particular. However, some of its parts had important influence to the life of practically all inhabitants (e.g. family law).[6]

LADOVÁ, M., Zvláštní místní práva v Praze. In: *Pražský sborník historický*, Vol. 8, 1973, p. 95–179.

[4] E.g. PRASEK, V., *Organizace práv Magdeburských na severní Moravě a v Rakouském Slezsku*. Olomouc: E. Hölzel, 1900; MENDL, B., *Tak řečené norimberské právo v Čechách*. Prague: Česká akademie věd a umění, 1938; HAAS, A., Právní oblasti českých měst. In: *Časopis Společnosti přátel starožitností*, Vol. 60, 1952, p. 15–24; HOFFMANN, F., K oblastem českých práv městských. In: *Studie o rukopisech*, Vol. 14, 1975, p. 27– 67; KEJŘ, J., Das böhmische Städtewesen und das „Nürnberger Recht". In: *Der weite Blick des Historikers. Peter Johanek zum 65. Geburtstag*. Köln – Weimar – Graz: Böhlau Verlag, 2002, p. 113–124; ŽEMLIČKA, J.,Němci, německé právo a transformační změny 13. století. Několik úvah a jeden závěr. In: *Archaeolgia historica*, Vol. 28/03, 2003, p. 33–46.

[5] To the mining law see ZYCHA, A., *Das böhmische Bergrecht des Mittelalters auf Grundlage des Bergrechts von Iglau I.–II*. Berlin: Franz Vahlen, 1900; Overview of newer literature in JÁNOŠÍKOVÁ, P., Jihlavské horní právo. In: *Naděje právní vědy. Býkov 2006*. Pilsen: Aleš Čeněk, 2006, p. 253–261.

[6] KRAFL, P.,Církevní právo v Čechách a na Moravě ve 13.–15. století. In: *Sacri canones servandi sunt. Ius canonicum et status ecclesiae saeculis XIII–XV*. Prague: HÚ AV ČR, 2008, p. 81–123; NODL, M., Pronikání kanonického práva do českého prostředí, jeho recepce nařízeními církve a rezistence laického prostředí vůči kanonickým předpisům. In: *ibidem*, p. 651–659.

2.2 SELECTED INSTITUTES OF THE MEDIEVAL PRIVATE LAW

2.2.1 Legal Personality

Legal personality of natural persons, i.e. the capacity to gain legal acts and obligations, was deduced from several characteristics, whereas absence of any of them caused its loss. It regarded the standing of an individual in than society hierarchy, his maturity, honor integrity, and in certain cases also its sex.[7]

The standing of an individual in strictly hierarchized medieval society influenced in particular the possibility and extent of person's politic a property laws. Political rights belonged only to hands of members of privileged classes, whereas their extent was different based on the respective Estate. From this also ccthe possibility of suzerain ownership of real estate was deduced, whereas the basic item was the personal liberty of the individual. In particular, aristocrats, priests, and townsmen of royal towns belonged to the free and privileged inhabitants.

Maturity was the very important characteristic. Establishment of its fulfillment was done by examination of physical development of an individual, later by proof, that certain age limit was exceeded. The establishment of limit age was firstly used in Town Law, later than also in Land Law. Minors could get the maturity by royal grace, decision of the court, and wifes by marriage.[8]

Very important was the honor integrity, we could compare with goodwill or good reputation. Its los had fatal consequences for an individual in

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[7] ČÁDA, F., *Práva osobnostní u nás*. Prague: F. Čáda, 1928; VOJÁČEK, L. – SCHELLE, K. – KNOLL, V., *České právní dějiny*…, p. 144–148. The newest KNOLL, V., Legal personality of natural persons in the Czech medieval private law. In: *Journal on European History of Law*, Vol. 1, No. 1, 2010, p. 59–61.

[8] HORÁK, O. – ŠTACHOVÁ, N., „ein schöne iunckfraw … pey czwelff iaren alte". Problematika zletilosti a římskoprávní vlivy. In: *Acta historico-iuridica Pilsnensia*, Vol. 2007, 2008, p. 81–99.

both legal as well as social area. It was possible to loose honor due to some act or behavior disapproved by the society (*infamia facta*), or based on some legal act (*infamia juris*), usually judgment. It was possible to get the honor back either based on legal judgment or based on royal grace. Some people were considered honourless due to their origin, employment, or due to way of life.[9]

Certain importance for legal capacity had also the sex as in certain cases the rights of women due to than opinion that they are "weak" sex, inclined to sin. However, they were not significantly limited in private law area.[10]

Also other facts influenced the life of an individual, the absence of which however may not have fatal consequences for its legal capacity. Based on the infliction the mentally handicapped, deaf, or blind persons were limited to certain extent. To ensure their matters guardians were nominated for them. Foreigners[11] and persons of religion other than Christian were also partially limited.[12]

Beside the natural persons also other subjects had legal capacity, we could describe as legal entities. They included in particular towns,[13] professional corporations, different brotherhoods and associations and many cleri-

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[9] RAUSCHER, R., Urážka na cti podle českého práva zemského. In: *Naše právo a stát*. Prague: Všehrd, 1928, p. 41–53. See also JANIŠOVÁ, J., *Šlechtické spory o čest na raně novověké Moravě. Edice rokové knihy zemského hejtmana Václava z Ludanic z let 1541–1556.* Brno: Matice moravská, 2007.

[10] KOZÁKOVÁ, A., *Právní postavení ženy v českém právu zemském*. Prague: A. Kozáková, 1926.

[11] SELTENREICH, R., Právní status cizince ve středověkém a raně novověkém světě se zvláštním zřetelem k problematice měst. In: *Národnostní skupiny, menšiny a cizinci ve městech. Prague – město zpráv a zpravodajství. Documenta Pragensia*, Vol. 19, 2001, p. 17–24.

[12] ŠTĚPÁN, V., Die gesellschftliche und rechtliche Stellung der Juden in Mähren in der vorhussitischen Zeit. In: *Judaica Bohemiae*, No. 28, 1992, p. 3–21; PETERSEN, H., Die Rechtsstelung der Judengemeinden von Krakau und Prag um 1500. In: *Zeitschrift für Ostmitteleuropa-Forschung*, Vol. 46, No. 1, 1997, p. 63–77. See also PĚKNÝ, T., *Historie Židů v Čechách a na Moravě*. Prague: Sefer, 2001.

[13] E.g. ADAMOVÁ, K., „Kladení" svobodných nemovitostí měšťany a městy do zemských desek. In: *Právněhistorické studie* (hereinafter referred to as "PHS"), Vol. 22, 1979, p. 205–211; KEJŘ, J.,*Vznik městského zřízení v českých zemích*. Prague: Karolinum 1998.

cal subjects as monasteries, churches as well as individual altars or *bona fabricae*.[14] In this case we can differentiate corporations, the important characteristic of which was personal item, and foundations, the basis of which was property. These subjects had legal capacity based on either privilege granted by entitled person or based on rights transferred to them by founding person.

2.2.2 Family Law

Family law, the issue of marriage in particular, was fully influenced by Christianity and canonic law in the Middle Ages.[15] Disputes between the husband and wife belonged to the jurisdiction of clerical courts. However, Christian principles as monogamy or indissolubleness were enforced, despite massive support of ruler, only slowly during the 10th and 11th century. Preferred and prevailing form of conclusion of marriage became clerical and public marriage and other forms were not tolerated. The marriage was considered sacrament and as such it was indissoluble. It was only possible to dissolve unconsumed marriage, otherwise only separation from table and bed were possible. Besides legal divorce, the marriage only elapsed by death of either husband or wife. The marriage was declared invalid due to later discovered serious obstacles to its occurrence.[16] Partially different regulation of marriage was introduced by reformed churches

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[14] VANĚČEK, V., *Základ právního postavení kláštera a klášterního velkostatku ve starém českém státě (12.–15. stol.). Část 1.–2.* Prague: V. Vaněček, 1933, 1937, 1939; VANĚČEK, V., *Dvě studie k otázce právního postavení kláštera a klášterního velkostatku ve starém českém státě*. Prague: V. Vaněček, 1938; ZILYNSKÁ, B., Záduší. In: *Facta probant homines*. Prague: Scriptorium, 1998, p. 535–548; BOROVSKÝ, T., *Kláštery, panovník a zakladatelé na středověké Moravě*. Brno: Matice moravská, 2005.

[15] KLABOUCH, J., *Manželství a rodina v minulosti*. Prague: Orbis 1962; VESELÁ, R., *Rodina a rodinné právo. Historie, současnost, perspektivy*. Prague: Eurolex Bohemia, 2005. Nověji VOJÁČEK, L. – SCHELLE, K. – KNOLL, V., *České právní dějiny*…, p. 148–155.

[16] NODL, M., Rituál rozvodu. In: *Stát, státnost a rituály přemyslovského věku*. Brno: Matice moravská, 2006, p. 113–134; WESTPHALOVÁ, L., Historicko-právní pohled na rozvod manželství. In: *Pocta Eduardu Vlčkovi k 70. narozeninám*. Olomouc: UPOL, 2010, p. 461–471.

for their members as of 15th century.[17] Special regulation of course applied to the persons of non-Christian beliefs.[18]

By conclusion of marriage the woman left her family for the family of her husband, passed under his protection as well as power. She was asked to obey and keep fidelity towards her husband. She was not fully dependent of him. She was given certain protection against his despotism under certain circumstances.[19]

Similar rules applied to the conjugal property law. Important institute was the dowry. Dowry of the bride was brought into the marriage by the wife having legal title to it. It became property of her husband and he was able to dispose with it freely. For the case of death the husband provided for a widow dowry for his wife which amounted to two and half amount of the bride's dowry. Beside this, an institute of morning gift (*Morgengabe*, *jitřní dar*) existed. Women had no possibility to dispose with husband's property without his knowledge, but she kept her freedom in certain matters, in particular with regard to the own property.[20]

Children lived under father's power and prior to maturity they had no capacity for legal acts which was made on their behalf by their father. In the case that after his death there were no living non-division (*nedíl*) relatives they were replaces by guardian or guardians. Regulation of guardianship undergo complicated development generally moving from the powerful guardians who were unlimited possessors of orphan's property to the loyal guardians, the primary aim of whom was to protect needs and interests of orphans and who were responsible for damages caused by their

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[17] KEJŘ, J., O manželském právu husitů. In: *Právník*, Vol. 92, 1953, p. 50ff.

[18] DAMOHORSKÁ, P., Vývoj manželského a rodinného práva v judaismu. In: *PHS*, Vol. 40, 2009, p. 379–391.

[19] MAREČKOVÁ, M., K osobně právnímu postavení žen v manželství v raném novověku. In: *Kniha 2008*, Martin: Slovenská národná knižnica, 2008, p. 405–408.

[20] KAPRAS, J., *Manželské právo majetkové dle českého práva zemského*. Prague: Královská česká společnost nauk, 1908; BENDOVÁ-BEDNÁŘOVÁ, L., K problematice věna a obvěnění v českém středověkém a raně novověkém právu. In: *Právo, ekonomika, manegement*, Vol. 1, No. 3, 2010, p. 130–134.

guardianship. Beside the administration of property they also had to take care of the education of their wards.[21]

Also the institute of family non-division (*nedíl*) is connected with the family law. It is an old custom governing ownership relations within the family. We can see its decline as late as due to economic development and increasing individualism in the era of EstatesState. It was composed of blood relation persons, whereas each member had right to the whole common property, however, any of them was able to dispose with any of its part individually. Non-division property was not part of inheritance and was therefore kept as a whole for generations to come. Originally it included the whole property of the family members excluding their private things. Later it included only immoveables together with things necessary for their use. Titles connected with non-division regarded not individually acquired property of the individual members. Similar regulation regarded the individual types of non-division (paternal, fraternal, uncle's, widow's, or maternal) as well as resignation to it.[22]

2.2.3 Law of Succession

The development of the law of succession[23] was prevented fgor a long time by either existence of the institutes of non-division (*nedíl*) and *bona*

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[21] KAPRAS, J.,*Poručenství nad sirotky v právu českém*. Prague: Bursík a Kohout, 1904; SLAVÍČKOVÁ, P., Právní podstata poručnické správy sirotků v raném novověku. In: *Acta Universitatis Palackianae Olomucensis. Facultas philosophica. Historica*, No. 34, 2008, p. 45–52.

[22] KADLEC, K., *Rodinný nedíl čili zádruha v právu slovanském*. Prague: K. Kadlec, 1898; KADLEC, K., *Rodinný nedíl ve světle dat srovnávacích dějin právních*. Brno: K. Kadlec, 1901; RAUSCHER, R., *Dědické právo podle českého práva zemského*. Bratislava: PF UK, 1922, sep. p. 9–29; RAUSCHER, R., *O rodinném nedílu v českém a uherském právu zemském před Tripartitem*. Bratislava: Učená Společnost Šafaříkova, 1928; VANĚČEK, V., Právní problematika českého nedílu jako středověkého bezpodílového spoluvlastnictví. In: VANĚČEK, V., *Dějiny státu a práva v Československu do roku 1945*. Prague: Orbis, 1976, p. 508–518.

[23] RAUSCHER, R., *Dědické právo podle českého práva zemského*. Bratislava: PF UK, 1922; SÝKORA, A., České zemské dědické právo 16. století. In: *Právník*, Vol. 146, 2007,

vacantia of the ruler, based on which he had right to the ownership of persons who died without successors, or successors of whom had no title to the heritage.[24] In the case of vassals, the right of *bona vacantia* was enforced by the nobility.

Therefore, at the beginning the *ab intestatio* succession applied. Pursuant to Land Law until the 1310, the heir of the father was the son, and if there was no son, the daughter. If there was no daughter either, the heir was the closest relative, whereas the men had precedence. As of the 1310 until the end of the 1440s in the case there were no sons or daughters, the heir were the closer heirs until the fourth grade, again with precedence of men. As of the 1497 if there were no heir and the testator did not made any will during his life nor for the case of his death, the closest relative excluding the foreigners, first men, then women, with precedence of men became heirs. If there were no above mentioned heirs, the inheritance passes based on *bona vacantia* rule to the ruler. Pursuant to the Town Law in the Southern-German area, the wife and children of the testator inherited the property in ratio of 1:2.[25]

Free disposition with property for the case of death was limited for a long time. One of the institutes used was acting between living persons with effects for the case of death (*donatio mortis causa*). These were predominantly agreements for the benefit of clerical subjects. Another possibility was hand over or waiver of the right to the ownership for the case of death of the provider or other person stipulated by him, in the case of which unilateral transfer of ownership occurred. For a long time the individual king's consent was necessary for free disposition (in Land Law until the 15th century). Actual impossibility of free disposition was evaded by simulated promissory notes registered into the country records (survivorship

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p. 803– 817; VOJÁČEK, L. – SCHELLE, K. – KNOLL, V., *České právní dějiny*…, p. 155–159.

[24] ČELAKOVSKÝ, J., Právo odúmrtné k zpupným statkům v Čechách. In: *Právník*, Vol. 21, 1882, p. 1–16, 73–89, 109–128; HAAS, A., Omezení odúmrti a vdovská třetina v starém českém městském právu. In: *PHS*, Vol. 17, 1973, p. 199–218; KNOLL, V., Intestátní dědická posloupnost a odúmrť v českém středověkém právu zemském. In: *Acta historico-iuridica Pilsnensia 2011*, Pilsen: Aleš Čeněk, in print.

[25] KNOLL, V., Intestátní dědická posloupnost…, in print.

records; *nápadní zápisy*). It was possible to make the will (*testament*), i.e. unilateral legal act made by testator, in which he provided for what shall happen with his ownership in the case of his death, in writing in presence of witnesses, or, as the case may be, by registration into official books. In Town Law the situation was different in each town. Generally the free disposition with property in the case of death diffused sooner, than in Land Law.[26]

2.2.4 Rights in Rem

Regulation of ownership law was complicated in Czech country as well as in other parts of Europe. It got more complicated alongside with the development of the society.[27] Classification of things is connected with the ownership. Basic was the classification into moveables and immoveables, the legal regimes of which was in all legal categories regulated in a different way, in particular with regard to disposition with them. Greater attention was paid to immoveables representing the property basis of the society due to their economic importance.

We can speak about the ownership as unlimited ownership under the Roman law only with regard to certain moveables. In this case possession occurred by holding or accepting of thing and ceased to exist by its loss, destruction, or hand over.

With regard to the possession as such, i.e. actual power over the thing, direct possession and possession through other person were distinguished. Full acquire of ownership of immoveable occurred by undisputed prescription. Within Towns privileges good faith of possessor and legal title were required. Generally speaking the possession of immoveables arose from the

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[26] RAUSCHER, R., *O zvolené posloupnosti v českém zemském právu*. Prague: J. Kapras, 1921. To last wills and testament praxis enerally PEŠEK, J., Testamenty a pozůstalostní inventáře jako aktuální téma obecné a právní historie. In: *PHS*, Vol. 39, 2007, p. 25–31.

[27] To ownership and other in rem rights in general VOJÁČEK, L. – SCHELLE, K. – KNOLL, V., *České právní dějiny*…, p. 159–164. See also ŠTACHOVÁ, N. – HORÁK, O., Věc v právním smyslu: historicko-srovnávací úvaha. In: *Interakce českého a evropského práva*. Brno: MU, 2009, p. 405–435.

law itself based on legal facts or legal acts and ceased to exist by handing over or extinction.

Rulers "regale" arising from patrimonial concept of State played important role in the ownership of immovebles at the beginning. Ruler provided a part of his property to his faithful in the form of favors and fiefdom. However, we cannot exclude also existence of old family or tribal properties existing from pre-state period.[28]

Possession of highest quality, not deduced from anyone or anything and therefore unlimited, was called free. Ownership right to immoveables possessed in this way was connected with many rights and obligations, amongst which dominated the rule over people living on such land. These people belonged to their lords, they were subordinate to them from both legal and administrative point of view. Free estates could be possessed only by free people, i.e. nobility, individual clerical institutions, and later by royal towns and their townsmen. Transfers of such property were registered into the country register.

Pursuant to the theory of divided ownership the ownership was composed of superior ownership (*dominium directum*) a actual ownership (*dominium utile*). Superior owner could, under certain conditions, provide to the actual owner the right of use of the respective thing. The actual user's disposal with the things was limited by the superior owner. Feudal law and non-free possession of immoveables were based on this theory.[29] In the case of feudal possession there was feudal landlord on one side as superior owner of the provided feudum, and vassal on the other side, who become possessor of the feudum. Beside the material part the vassal relation had also its personal part represented by mutual liabilities of both parties. Non-

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[28] Issues of allodial titles, favors, fiefs, and feudal possession is subject of large discussions which still did not lead to final conclusion. See e.g. JAN, L., *Václav II. a struktury panovnické moci*. Brno: Matice moravská, 2006; ŽEMLIČKA, J., O „svobodné soukromosti" pozemkového vlastnictví. In: *Český časopis historický*, Vol. 106, No. 2, 2008, p. 269–308.

[29] URFUS, V., Středověké představy o děleném vlastnictví a jejich oživení na konci feudalismu. In: *Acta Univernisatis Brunensis. Iuridica*, No. 6, 1976, p. 183–201; URFUS, V., K obecnoprávní koncepci požívacího práva na konci feudalismu. In: *Acta Univernisatis Brunensis. Iuridica*, No. 9, 1979, p. 53ff; URFUS, V., Dominium a usus modernus pandectarum. In: *Acta Univernisatis Carolina. Iuridica*, No. 4, 1983, p. 297–319.

free possession of immoveables represented a basis of land-landlord relations. It was transfer of right of use to nobility's immoveable to the vassal, who uses it economically for which use he provides the nobility with different in kind or financial performances, or as the case may be, fulfilled other obligations. At the very beginning this regarded in particular the non-purchased possession (*ius slavicum*, *ius bohemicum*), which was usually possession until notice. More sure was the purchased ownership or emphyteutic (*ius teutonicum*, *Burgrecht*), which arrived alongside with the external colonization from German countries and which was hereditary.[30] Similar principle was used which grounding the towns, whereas the difference in contrast to countryside was that possession of non-free land changed into full free ownership in the Town Law.

Medieval law knew also easements alias servitudes, which can be divided into actual, immoveable-bound which were disposed with together with the immoveable and including e.g. right of path or hunt in woods, and personal for the benefit of some person. Actual easements ceased to exist by non-use, fusion of person of owner and entitled person, or by change making enforcement of such easement impossible. Personal ones ceased to exist by deaths of the entitled person.[31] Very interesting type of actual servitudes were "eternal pays" (*census*) representing the liability of the owner of the immoveable to pay to the entitled person regularly certain financial amount secured by mortgage. Census was transferable.[32]

Construction law and law relating to neighbors are also connected with the ownership of immoveables. It was regulated especially by Towns Privi-

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[30] E.g. PROCHÁZKA, V., *Česká poddanská nemovitost v pozemkových knihách 16. a 17. století*. Prague: ČSAV, 1963; TLAPÁK, J., K některým otázkám poddanské nezákupné držby v Čechách v 16.–18. století. In: *PHS*, Vol. 19, 1979; ČECHURA, J., Zákup na statcích vyšehradské kapituly ve 14. a 15. století. In: *PHS*, Vol. 34, 1997, p. 39–62; ŽEMLIČKA, J., Němci…, p. 33–46.

[31] See e.g. VANĚČEK, V., *České „kobylí pole" jako právní instituce*. Prague: ČSAV, 1959.

[32] ADAMOVÁ, K., Tzv. věčná (železná) zvířata a jejich funkce v hospodářském zajištění církevních institucí se zaměřením na české země (14.–19. století). In: *Acta Univernisatis Carolina. Iuridica*, No. 1–2, 1972, p. 127–155.

leges. General rule of freedom of action on own land applied. None was entitled to make any harm to another one by construction or emissions.[33]

2.2.5 Contract Law

We do not know much about the origins of the contract law[34] in our country. We can assume, it existed for a very long time in form of simple in kind exchange which started to change into monetary exchange in the 10th century. The most complex system of contract law existed in the Town Law based to certain extent on the Roman law system. Its development reached the top in form of Koldín's codification in which promise, exchange, purchase, donation, lease, association, mandate, borrowing, loan, custody, and pledge. In the case of promise free will of person providing such promise was essential characteristic. Purchase agreement represented, in contrast to exchange, monetary transfer of ownership to certain thing. Donation represented willing and free hand over of donation by the donor to the donee. Within the loan the lender provided to the borrower into possession inconsumable thing to be returned within specified time period. Borrowing represented similar institute however regarding to replaceable moveable things. The lease included the liability of the landlord to provide to the lessee a thing into the use and execution of some work. In the case of custody it was defined as entrusting of a thing representing demonstration of trust to the guardian. Mandate was a liability of the nominee to provide certain matter for the mandant. Association or brotherhood was grouping of two or more people for the purpose of purchase or other activities serving to simplify the administration of common property or for increase of profit. Generally, it was possible to enforce any and all agreed arrangements excluding the prohibited contracts. It was e.g. impossible to file a petition for debts from hazard. Forced liabilities were null.

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[33] EBEL, M.,*Dějiny českého stavebního práva*. Prague: ABF – Arch, 2007.
[34] Newer to the issue VOJÁČEK, L. – SCHELLE, K. – KNOLL, V., *České právní dějiny*…, p. 164–172.

Transfer of ownership was based on assumption that no one can transfer more than he owns. Transferred thing should be present by the transfer either demonstratively or accumulatively. The most detailed regulation regarded the alienation of immoveables connected with many formalistic things connected amongst other things with their records as any and all transfers had to be published first on the respective forums and later registered into the respective books. With regard to the clerical bans the interest bearing money lending was very complicated. Loan businesses between Christians were done in secret up to the 16th century using other legal institutes.[35]

Together with the development of the liabilities, also warranty for damages and other similar institutes was more and more extensively codified. This development was rather slow. First of all security institutes connected with guarantees for legal defects occurred, later then also for the actual defects. Also other institutes developed later, as e.g. institute of guarantee by own freedom (*ručení osobní svobodou*), lying (*ležení*), guarantee by honor and trust (*ručení ctí a vírou*), indemnification of damages (*braní v škody*), aval (*rukojemství*), guarantee by property (*ručení majetkem*) and contractual penalties (*smluvní pokuty*).[36]

2.3 INFLUENCE OF ROMAN LAW

Many important information regarding the development of the individual institutes of (not only) private law arise from the comparison with

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[35] URFUS, V., *Právo, úvěr a lichva v minulosti*. Brno: UJEP, 1975.

[36] KAPRAS, J., *K dějinám českého zástavního práva*. Prague: Sborník věd právních a státních, 1903; ČÁDA, F., *Ležení podle českého práva zemského*. Prague: J. Kapras, 1922; RAUSCHER, R., *K rukojemství v českém zemském právu*. Prague: J. Kapras, 1923; SATURNÍK, T., Věrovací slib a smlouva pod základem v právu českém. In: *Sborník věd právních a státních*, Vol. 41, 1941, p. 1–29; KNOLL, V. – VYKUSOVÁ, B., Zajišťovací instituty městského práva ve světle Koldínova zákoníku. In: *Soukromé právo v proměnách věků*, Brno: MU, in print.

Roman and canonic law. It helps us to find out the origins of certain institutes as well as reasons and ways of their changes.[37]

Infiltration of Roman law into younger legal orders occurred in two ways. The first one represented actual reception – direct reception of examples from Roman law into the domestic law. The second one was represented by indirect influencing of legal development through creators and users of law who used their knowledge of Roman law gained during university studies. It was "Romanisation" of actual domestic law. In our country which had no direct relation with culture of Roman law, as its territory was outside the borders of Roman Empire, we can rather follow the second above described method.

Romanisation of law, in contrast to its full reception, often manifested itself by merely influencing the external characteristics. One example is the use of Latin terminology of Roman law for absolutely non-Roman domestic institutes. Another demonstration of Romanisation was the application of system of Roman law relicts, whereas the content of it remained rather untouched by them. Humanists of the 16th century also often cited the Classical literature.[38] Roman law incentives were brought into the domestic law

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[37] Generally VOJÁČEK, L. – SCHELLE, K. – KNOLL, V., *České právní dějiny…*, p. 123–125. Newer DOSTALÍK, P., Rezeption des römischen Rechts in böhmischen Ländern im Mittelalter. In: VOJÁČEK, L. – SCHELLE, K. – TAUCHEN, J. et. al., Die Entwicklung des tschechischen Privatrechts, Brno: MU, in print. From older literature e.g. ČÁDA, F., K recepci v českém právu. In: *Právník*, Vol. 71, 1932, p. 8–44, 45–56; VANĚČEK, V., Pronikání římského a kanonického práva na území dnešního Československa od 2. poloviny 9. století do 1. poloviny 14. století. In: *PHS*, Vol. 12, 1966, p. 27–44; BOHÁČEK, M., Einflüsse des römischen Rechts in Böhmen und Mähren. In: *Ius Romanum medii aevi*, No. V/11, 1975, p. 149–162; URFUS, V., *Recepce římského práva a římskoprávní kultura za feudalismu a v počátcích kapitalismu*. Prague: SPN, 1987; URFUS, V., *Historické základy novodobého práva soukromého.* Prague: C. H. Beck, 2001.

[38] To the possibility of elaboration of work of these persons compare ČERNÝ, M., *Kuneš z Třebovle, středověký právník a jeho dílo.* Pilsen: ZČU, 1999; SVOBODA, J., *Stefano di Roudnice. Studio storico-giuridico delle Quaestiunculae*. Roma: Universita Lateranense, 2000; ČERNÝ, M., Ubertus z Lampugnana. Právník mezi Prahou a Milánem. In: *Sacri canones servandi sunt. Ius canonicum et status ecclesiae saeculis XIII–XV*. Prague: HÚ AV ČR, 2008, p. 385–389. To use of theoretical knowledge see e.g. KNOLL, V., Rybníky, rybníky, samé rybníky aneb kde všude jsem potkal římské právo. In: *Res – věci v římském právu*, Olomouc: UPOL, 2008, p. 21–29. To the impact of Roman law o praxis BOHÁ-

also by canonic law, which itself was extensively based on Roman law, in particular by priests acting as clerks or officers.[39]

Extent of influence of the individual legal categories by the Roman law was not the same. In particular Land Law resisted to any and all influence of "foreign" laws and enforced and protected traditional domestic law. On the other hand, the miner and mining law was open for the influence of Roman law as well as Town Law.[40] Romanisation of Czech law as a whole reached its peak within contemplated period in Koldín's Town Law[41] and later than in Renewed Country order.

ČEK, M., Das römische Recht in der Praxis der Kirchengerichte der böhmischen Länder im XIII. Jahrhundert. In: *Studia Gratiana*, No. 11, 1967, p. 273–304; BOHÁČEK, M., Římské právo v listinné praxi českých zemí 12.–15. století. In: *Sborník archivních prací*, Vol. 24, No. 2, 1974, p. 461–486; ŠTACHOVÁ, N.,Ke sporu…, p. 174–179; ŠTACHOVÁ, N., Obligační právo… .

[39] BOHÁČEK, M., Římské a kanonické právo v díle Všehrdově. In: *PHS*, Vol. 7, 1961, p. 147–199; VANĚČEK, V., Pronikání římského a kanonického práva…, p. 27–44; BOHÁČEK, M., Das römische Recht…, p. 273–304; KEJŘ, J., Pronikání kanonického práva do středověkého českého státu. In: *Revue církevního práva*, Vol. 3, 1997, p. 137–156; KRAFL, P., Církevní právo…, p. 81–123; NODL, M., Pronikání…, p. 651–659.

[40] BOHÁČEK, M., *Římské právní prvky v právní knize brněnského písaře Jana*. Prague: J. Kapras, 1924; HOBZEK, J.,*Majestas Carolina a římské právo*. Prague: J. Kapras, 1931; ŠTĚPÁN, J.,*Studie o kompilační povaze práv městských*. Prague: J. Kapras, 1940; BOHÁČEK, M., Římské a kanonické právo…, p. 147–199; BOHÁČEK, M., Das römische Recht…, p. 273–304.

[41] See also DOSTALÍK, P., Rezeption…. The last investiations show, that in this case it could also be a rather broad direct reception, see KNOLL, V. – DOSTALÍK, P., Krádež a vliv římského práva v českém městském právu. In: *Delicta privata a crimina publica v rímskom práve*. Košice: UPJŠ, 2010, p. 32–55.

3. ROMAN LAW INFLUENCE ON PRIVATE LAW

3.1 INTRODUCTION

Czech law, as well as most continental systems of law, has been significantly influenced by Roman law. Notwithstanding that the term "Roman law" seems to be very simple, reality is not as simple as it seems to be. The concept of Roman law could be looked on as law which was in force in the territory of Roman empire. This approach nevertheless brings a problematic point – when?

Roman state existed for several centuries and it is clear that law was developing during these years as the Roman society itself was. From the legal point of view, this term therefore does not apply to the entire period of the empire but rather to a period which, from the view of development of law, presents its top. However there are thought to be two such culmination points and thus it is important to pay close attention to whether, while using the term Roman law, the author meant "classic period", which principally means the first 250 years of the current era, or law from the times of the emperor Justinian even though it was *de facto* after the fall of the Roman empire. Aside from that the term Roman law is often used for law which was adapted and taken over in the Middle Ages on the grounds of Justinian's codification and its interpretation, for which terms "*ius commune*" in the territories of Italian influence or "*gemeines Recht*" in areas of German influence, are used. Moreover we should keep in mind that Roman law was not uniform in the classic era, but it rather consisted of several systems tied to one another and supplementing each other although often also contradicting one another – civil law, praetor law, and law *extraordinarie cognitionis*. In spite of the fact that in the era of Justinian already, there were no

differences between these systems, some compilers did not fully carry out their merger.[42]

In some aspects, the medieval world was highly inspired by Roman law, in others less. Nonetheless whether the systems of law chose one approach or another, Roman law was generally thought to be sort of criterion by means of which systems of law, or to be more precise its legal institutes, are compared. One should not forget Goethe's words addressing Roman law: *"Roman law is something still living, which is likening to a diving goose which from time to time dives under water but it does not get lost totally, it keeps coming back to us alive."*[43]

The development briefly described above led to a situation that Roman law was understood to be so-called *"gemeines Recht"* – general law in German speaking countries and so it was regarded as a source of law and it had not lost this position until certain codification procedures of civil law started in particular countries.[44] These new codifications were based on new system of private law which was created especially by German pandectists.

As the issue of Roman law influence in the Middle Ages is subject of one of the other chapters, we will not focus on that here anymore. We will only briefly mention a codification of urban law called Urban Laws of the Bohemian Kingdom by Christian of Koldin, which after the estates had been defeated and the new codification of land law had been adapted in 1627-1628 was used as secondary source of land law. Further, over the coming years, its coverage spread from Bohemia over Moravia and Silesia. Its provisions on property rights remained in force until the beginning of nineteenth century.

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[42] On their relationship see: RICCOBONO, S., Pravda o domnělých archaistických tendencích Justiniánových. (translated by Jan Vážný), In: *Časopis pro právní a státní vědu*, Vol. 15, 1932, p. 275–286.

[43] Quoted from BLAHO, P., Rímske právo a jeho vyústenie v současnom súkromnom práve. In: *Tradice a inovace v občanském právu*. Brno, Masarykova univerzita 2007, p. 12.

[44] Last time Switzerland in 1912. HEYROVSKÝ, L.: *Dějiny a systém římského práva soukromého*. Fourth edition, Praha: J. Otto, 1910, p. 102.

As of January 1, 1812, a new law, which had been influencing the branch of private law in our territory for over 150 years, entered into force. Passing of the General Civil Code (further to be referred to as ABGB) No. 946/1811 Coll. was preceded by more than fifty years of codification efforts, in which of course Roman law played an important role. The codification of private law which was to be in force all over the Habsburg monarchy was tackled in the time of rule of Maria Theresa and at the beginning there were numerous university professors of Roman law participating in these efforts.[45] Despite all that the influence of Roman law on the new code that was being developed was getting weaker partly in favor of natural law and local customs. This gradual abandonment may be clearly seen in the introductory provisions of the code; the original proposal intended to embody secondary application of general law, but this provision was later abandoned and replaced by a reference to natural law (Sec. 7);[46] interpretation tendencies stating that natural law is Roman law were rejected as well. Moreover an introductory patent to ABGB clearly stated in the Section 4 that general law shall no longer remain in force.[47] The legacy of Roman law may however be found in structural layout of the code itself (it was changed later); the structure was based on Gaius's and Justinian's structuring. Reflection of Roman law may also be identified in a number of provisions.

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[45] Azzoni was professor of Institutions in Prague, Holger was professor of Institutions in Vienna. VÖLKL, A., Die österreichische Kodifikation und das römische Recht. In: *Naturrecht und Privatrechtskodifikation: tagungsband des Martini – Colloquiums 1998*. Wien: Manz, 1999, p. 289. Karl Anton von Martini was also professor of natural and Roman law. ZWIEDINECK-SÜDENHORST, H. VON, Martini, Karl Anton Freiherr von in: *Allgemeine Deutsche Biographie*, herausgegeben von der Historischen Kommission bei der Bayerischen Akademie der Wissenschaften, Band 20 (1884), p. 510–512.

[46] On development of this provision see: OFNER, J.,*Urentwurf und Bearbietungsprotokolle des ABGB*, First part, Wien: Alfred Hölder, 1888, p. 23. VÖLKL, A., Die österreichische Kodifikation und das römische Recht. In: *Naturrecht und Privatrechtskodifikation: tagungsband des Martini – Colloquiums 1998*. Wien: Manz, 1999, p. 284–292.

[47] KOSCHEMBAHR-LYSKOWSKI, Zur Stellung des römischen Rechtes im allgemeinen bürgerlichen Gesetzbuche für Keiserthum Österreich. In: *Festschrift zur Jahrhundertfeier des ABGB*, First part, Wien: Manzsche k. u. k. Hof-Verlags- und Universitäts-Buchhandlung, 1911, p. 213et con.

The line which had been set up by ABGB was later followed by the codification of Czechoslovakian law which was being prepared (further to be also referred to as Syllabus), which was being developed at the beginning of the Twenties. Despite all that we are able to find certain diversion from the Roman law line. We can for example look at the concept of possession, which is understood as factual state in Roman law; the legal theory of the nineteenth century represented especially by A. Randa, who distinguished between possession of things and possession of rights, stands on the same ground.[48] Nevertheless the Syllabus stated that possession is a legal relationship and as for possession of things, it is just possession of proprietary rights. However, as it was shown by Boháček and others,[49] those changes are rather of terminological nature than factual. Moreover there was used some Roman law terminology in the Syllabus.[50] Nonetheless we can find deviations in many other places, not only in law of obligations which eliminated duplicity of liability of restaurateurs and shipmasters for things carried in, which was originally laid down in ABGB; it was reminiscence of double responsibility existing in Roman law that was based on *ex recepto* and *quasi ex delicto*. Similarly the legal institute of sequester, as a type of storage that was known in Roman law and may be found even in the French Code civil (III. book, XI. title, Chapter 3, Sec. 1955 at cons.), disappeared. A deviation may often be reflected in mere usage of terms; for instance, wording of the Section 608 of ABGB allows reminiscence of *universal fideicommissum* when mentioning "handing over of inheritance", while an amendatory act which was being prepared used term "passing inheritance", which is a crystal clear abandonment of the principle SEMEL

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[48] RANDA, A., *Držba. Právo vlastnické.* Praha: Aspi, 2008, (reprint of the original edition). It shall be however stated that the concept of possession of right is a concept of Justinian era; it was not known in the classical era. See BOHÁČEK, M., *K snahám o jednotnou konstrukci držby (zvláštní otisk z Randova Jubilejního památníku)*. Praha: Orbis, 1934, p. 10et con., especially p. 14.

[49] WEISS, E., Zeitschrichft für ausländisches und internationales Privatrecht 7, 1933, p. 539. Quoted according to: BOHÁČEK, M. c.d., p. 16.

[50] Sec. 244 of the Syllabus: „*Držitelem jest kdo vykonává právo pro sebe.*" BOHÁČEK, M., *c.d.*, p. 8.

HERES, SEMPER HERES.[51] The Syllabus of the proposed codification was published in 1937, but the legislative process was stopped due to the political events of 1938 and thus it never entered into force.

Communist regime brought with it significant changes in legislation. Between the years 1948-1989 there was mainly negative approach to Roman law and its institutes, which was based on the communist approach to private property, as protection of private property was the milestone of Roman law.[52] In many cases the well-tried concepts of Roman law as well as a number of legal principles welling up from Roman law were abandoned, e.g. SUPERFICIES SOLO CEDIT. In explanatory reports and comments on civil law (whether it refers to the so-called middle Civil Code No. 141/1950 Coll. or the so-called socialistic Civil Code No. 40/1964 Coll., which is still in force even though it has been amended many times) there may be found certain links to Roman law either in negative definitions or sometimes such a Roman law institute was taken over but its meaning was reversed.[53] Nevertheless as Roman law was strongly connected to lawyers' way of thinking and they often used it while preparing arguments despite the fact that its value was officially denied.[54] Institutes of Roman law were sometime even openly mentioned when for instance a right to inherit a building *superficies* was (mistakenly) explained as exemption from the principle SUPERFICIES SOLO CEDIT.[55] As an example of

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[51] See: VÁŽNÝ, J., Římské právní ideje v občanském zákoníku a osnově, In: *Časopis pro právní a státní vědu*, Vol. 16, 1933, p. 184 and 185.

[52]On law of the communist era see: BOBEK, M. – MOLEK, P. – ŠIMÍČEK, V. (eds.), *Komunistické právo v Československu.Kapitoly z dějin bezpráví.* Brno: Masarykova univerzita, Mezinárodní politologický ústav 2009.

[53] For example the Sec. 537 of the Act No. 141/1950 Coll. in provisions on will there was used the rule of so-called Falcidian quart, but in reversed ratio – wills can be done under this provision up to one quarter of net value of the inheritance. BLAŽKE, J., Odkaz v novém právu dědickém. In: *Právník*, 1951, p. 232–241.

[54] Here for instance is interesting to compare the likeliness of explanatory report and contract for work in the Sections 448 a 449 it is almost exact paraphrase of Cassius Longinus's line, which may be found in Gaius's Institutions GaI III/147. For more on that see: *Občanský zákoník*, Praha: Orbis, 1956, p. 287.

[55] NOVOHRADSKÝ, V., Opustienie zásady „Superficies solo cedit" a jeho dosledky. In: *Právny obzor* 1951, no. 4, p. 346.

"victory" of Roman law over communist law may serve us an originally abolished but later reestablished institute of possession and, further, positive prescription in the socialistic Civil Code No. 40/1964 Coll. The reason for abolishing this institute was actually the Roman law principle that possession is of factual nature, which was the main argument for not including it into the Civil Code, as it only regulates legal relationships.[56] Re-establishment of these two institutes (despite it was done in a very limited form) by an amendment in 1982 was done especially because it was required by practicing lawyers.[57]

After 1989, significant changes in Civil law have taken place, but the Civil Code of 1964 is still in force and the changes done only eliminated the most lurid problems. The proposed codification (further to be referred to as Proposal of the new Code) shall change the current state of affairs. ABGB, the Syllabus of 1937, and other Codes based on continental tradition may be defined as its main sources. Further there are even such Roman law institutes that were not in ABGB and the Syllabus of 1937. As an example, we can mention the return to limitation of the amount of bequest according to so-called Falcidian quart. The preparatory works on the Civil Code however also bring deviation from some today's Roman law institutes, as it states that fruits which fall from trees on neighbor's piece of land shall become property of the owner of such land; not the owner of the tree.[58]

Today civilists turn to Roman law especially due to its legal principles.[59] Nevertheless it is important to mention that they refer to Roman law very rarely and it can be found there where Latin terms are used.[60] The question

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[56] The author of this idea was especially professor Knapp. BLAHO, P.: Niektoré teórie o držbe a ich kritika.In: *Právny obzor*, Vol. 1972, No. 8., p. 772.

[57] BLAHO, P.: c.d., p. 759–773. SAMUELIS, L., O nadobudnutí vlastníckeho práva k nehnuteľným veciam vydržaním. In: *Socialistické súdnictvo*, 1974, No. 7, p. 16 and 22.

[58] For more on that compare the Sec. 961 of the proposal.

[59] For more on principles of civil law HURDÍK, J. – LAVICKÝ, P., *Systém zásad soukromého práva*. Brno: Masarykova univerzita 2010.

[60] See. FIALA, J. (ed.), *Občanské právo hmotné*. Brno: Masarykova univerzita a Doplněk, 2004, p. 15et con., KNAPPOVÁ M. – ŠVESTKA, J. – DVOŘÁK, J., *Občanské právo hmotné 1*. Fourth updated edition. Praha: ASPI 2005, p. 51et con., FIALA, J. – KINDL, M.

still remains whether these principles are really those of Roman law, since this law was in essence very casuistic and general abstract principles were not typical for Roman law of the classical era.[61] Roman law was even criticized by normative school for its lack of having certain legal theory.[62] As it was aptly stated by one Romanist of the first republic in reaction to this criticism, firstly it is important to create law and after that define its system.[63]

In spite of the fact that some of the sayings used today are really based on Roman law institutes, most of them have roots in jurisprudence and lines said by particular lawyers in respect to particular cases and they became general much later. These lines earned had not earned its universality until the empire was over, especially in the Middle Age and beginning of modern history.[64] The famous sentence PACTA SUNT SERVANDA may serve us as an example, for it had not been considered as general (universal) until the era of commentators.[65] The term *pactum*, which means agreement[66] did not have the meaning of *contractus*, i.e. contract although it is

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(ed.), *Občanské právo hmotné*. Second updated edition. Plzeň: Aleš Čeněk, 2009, p. 42 et con.

[61] Or at least in expressed form, certain features of abstraction may be concluded from the texts, e.g. idea of hierarchy of norms. VÁŽNÝ, J., Teorie římského práva a moderní právní věda. In: *Časopis pro právní a státní vědu*. Vol. XVIII/1935, p. 344–347. It is not usual that we find general definitions or that certain rule was applied generally. A fiction of fulfilling a condition, which had been formulated so by Ulpian could serve us as an example (D, 50, 17, 161). See BLAHO, P., Rímske právo a jeho vyústenie v současnom súkromnom práve. In: *Tradice a inovace v občanském právu*. Brno, Masarykova univerzita 2007, p. 13.

[62] For more on that see: WEYR, F., *Teorie práva*. Brno: Orbis, 1936. Weyr refers to H. Kelsen in respect to the finding that Romans were grate in practice but not so great in theory. However Vážný reminds us that this fact was already pinpointed by Romanists long time before Kelsen, e.g. O. Lenel. See VÁŽNÝ, J., Teorie římského práva a moderní právní věda. In: *Časopis pro právní a státní vědu*. Vol. XVIII/1935, p. 344.

[63] BOHÁČEK, M., *O vlivu římskoprávního myšlení na moderní právní vědu. Zvláštní otisk ze sborníku Pocta k šedesátým narozeninám dr. Alberta Miloty*. Praha: Self-published, 1937, p. 4.

[64] VÁŽNÝ, J.: Teorie římského práva a moderní právní věda. In: *Časopis pro právní a státní vědu.*Vol. XVIII/1935, p. 344.

[65] BARTOŠEK, M., *Encyklopedie římského práva*. Praha: Panorama, 1981, p. 417.

[66] BARTOŠEK, M., *Encyklopedie římského práva*. Praha: Panorama, 1981, p. 244.

often translated that way.[67] Another example of using Roman law terminology may be found in legal textbook from Prague, which says: *"quaternary of mutuality of rights and duties arising out of Roman law, i.e. do ut des, do ut facitas, facio ut des, facio ut facitas..."*[68] This classification was developed in Justinian's codification and not even in this time were they looked on as mutual duties in obligations – these were the efforts of Justinian's lawyers to unite the casuistic decision by classical lawyers into abstract schemes in such cases when one party fulfilled its obligation towards the other and expects the other party to act – those are so-called *innominatus*, i.e. real innominate contracts.[69]

It is clear that not even in a situation in which someone openly refers to Roman law the actual Roman law influence applies, as it may be mere misunderstanding of such a term. Further we shall keep in mind that the influence of Roman law could be apply to formal and material accord, but also only to formal accord; for instance, let's look at the example of the way of defining maturity (adulthood) by means of legal age. As opposed to Roman law which stated that girls became grown-ups at the age of twelve and boys at the age of fourteen, Czech urban law preferred higher age in this respect.[70] This example shows us also another problem. Analogous to society, even law is being developed and within this context we shall ask if our legal order was really influence by Roman law or if it simply get into certain stage of development and facing the same problems it solved it in

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[67] Certain originality of development of the approaches to this principle may be found in the fact today it is by some explained as general obligation from own acts. FIALA, J. – KINDL, M. et al., *Občanské právo hmotné*. Second updated edition. Plzeň: Aleš Čeněk 2009, p. 44.

[68] KNAPPOVÁ M. – ŠVESTKA, J. – DVOŘÁK, J., *Občanské právo hmotné 1*. Fourth updated edition. Praha: ASPI 2005, p. 51.

[69] Compare VÁŽNÝ, J., *Římské právo obligační část I-II*., second edition. Brno: Čs a S. Právník 1946, p. 110–116.

[70] HORÁK, O. – ŠTACHOVÁ, N., "ein schöne iunckfraw ... pey czwelff iaren alte". Problematika zletilosti a římskoprávní vlivy. In: *Acta historico-iuridica Pilsnensia 2007*. First edition. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2008, p. 81–99.

the same way as the Romans. Similar discord was already between Sabinians and Proculians.[71]

It is sometime very difficult to find an evidence of Roman law influence. It is ideal that the lawgiver itself refers to Roman law in either positive or negative way.[72] Nevertheless since the first republic we can see that the awareness of Roman law has been disappearing.[73] Nowadays we often face a situation when Roman origin of certain terms was faded away and the purpose of having such a provision is rather explained that it is *"a common institute of continental legal orders."*[74] Roman law is usually referred to as for typical and famous Roman law institutes.[75]

Roman law influence does not necessarily mean that a certain institute is provision has either formally or materially taken over, but even a fact that by gradual development an exemption turns to be a principle may be considered as Roman law influence.[76]

An opposite problem may occur if certain Roman law provision is taken over to the letter. In spite of the fact that the influence of Roman law is crystal clear in such cases, we should ask whether it is right or not. As an example we could mention a provision from the Codex Theresianus, where it is stated that the minimum amount of 500 guilders is needed so that a deed of gift could be approved by a court. This amount had been exactly taken over from Roman law, where the amount of 500 solidi was required

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[71] Gai I,196, also in Inst. Just. I, 22.

[72] *Občanský zákoník*, Praha: Orbis 1950, p. 47, 54, 55 and so. This of course refers to "negative" delimitation.

[73] Its role played also language knowledge of the fact that classical languages were no longer taught at gymnasiums.

[74] This phrase was used by professor Eliáš on the issue of cluster of bees flown away. Interview with professor Eliáš during the conference on New Private Law held in Prague on May 23, 2011.

[75] For example contribution of F. Melzer presented at the same conference; he openly discussed Roman law roots of liability for a thing thrown away or poured out.

[76] VÁŽNÝ, J., Římské právní ideje v občanském zákoníku a osnově. In: *Časopis pro právní a státní vědu*. 16/1933, p. 171–186.

for that purpose.[77] However the value of these to currencies was diametrically different.[78] Another example could be liability of an heir for testator's total debt. Czech law and law of some former Soviet republic is a clear exemption in this respect. On the other hand it is important to mention that in Roman law this kind of liability was based on the fact that right to succession was not only understood as proprietary right, but it also had its religious dimension. As opposed to that, all modern codes stress only the proprietary aspect.[79]

Nowadays when novelization of the Civil Code is being often discussed, one should consider whether a certain institute shall be recognized just because it was known to Roman law or because codes of all neighboring countries consider it to be efficient and suitable. This fact has already been pointed out with respect to ABGB.[80]

3.2 INFLUENCE OF ROMAN LAW ON THE LAW OF OBLIGATIONS ACCORDING TO ABGB – THE COMPARISON OF SELECTED CONTRACT TYPES

The current legal regulations have adopted many fundamental rules, principles and institutes of Roman Law. These influences keep their conti-

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[77] HEYROVSKÝ, L.: *Dějiny a systém římského práva soukromého*. Fourth edition, Praha: J. Otto, 1910, p. 759, 766.

[78] KOSCHEMBAHR-LYSKOWSKI, Zur Stellung des römischen Rechtes im allgemeinen bürgerlichen Gesetzbuche für Keiserthum Österreich. In: *Festschrift zur Jahrhundertfeier des ABGB*, first part, Wien: Manzsche k. u. k. Hof-Verlags- und Universitäts-Buchhandlung, 1911. p. 231.

[79] This was mentioned already with respect to the codification that was being prepared between WWI and WWII. VÁŽNÝ, J., Pojem dědického práva a účelnost jeho dnešní struktury. In: *Právny obzor* VI/1923, p. 97–103.

[80] KOSCHEMBAHR-LYSKOWSKI, Zur Stellung des römischen Rechtes im allgemeinen bürgerlichen Gesetzbuche für Keiserthum Österreich. In: *Festschrift zur Jahrhundertfeier des ABGB*, first part, Wien: Manzsche k. u. k. Hof-Verlags- und Universitäts-Buchhandlung, 1911, p. 288 et con.

nuity up to this day in the identical rules, principles and institutes of modern codes of law. The legislators adopt the Roman Law institutes, classification, principles and terminology (the reception). The aforementioned creates a continuity of Roman Law in the modern codes. This continuity does not impact only on the identical rules, but also on the modified ones. In those branches of law, wherein the Roman rules are generalized and also still extend or restrict, there is generated an interaction of the social development and legal relationships being constituted in society, because the Law is being created within society and in its benefit.[81] The Law must react to the social and economic changes. The Roman legal history itself presents many evidences of those reactions to the social, or rather human needs: *ius honorarium* and primarily the Corpus iuris civilis. The most significant influence of Roman Law on modern civil law codifications is the Roman Law classification and in sophistication of particular legal institutes. The fundamental rules or principles, as bases of modern codifications (and also the current ones), are the consequences only of the scientific elaboration of Roman Law during the Middle Ages and Modern Times. Primarily there are included the scientific schools of glossators, commentators, the historical school of law and the law school called the Usus modernus pandectarum.

In the fundamental instruments of Roman Law (as stated previously) are included:

- inviolability of an individual's right to dispose of his own property
- respecting the real will of an acting person and deference to it
- resistance to a superfluous formalism

Roman Law established also certain fundamental freedoms

- contractual – in the meaning of autonomy of the will
- proprietary
- protection of the weaker party – the women and children (eg. *restitutio in integrum* or *legis actio Plaetoriae*)

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[81] BONFANTE, P., *Instituce římského práva*. (Translated by J. Vážný). Brno: ČS a S Právník v Brně, 1932., p. VII.

The classification of Roman Law has been violated by the scientific elaboration of Roman Law, or rather by diverse schools:

The Roman Law classification:

- Res
- Personae
- Actiones

Versus (being used also at present time) the Usus modernus pandectarum:

- The General Part
- The Property Law
- The Law of Obligations (general and special part)
- The Family Law
- The Law of Succession

The Roman Law principles as we perceive them today were not the aims of Roman Jurisprudence, they actually consist in sentences resolving concrete legal issues. Roman lawyers mastered the creation of abstract rules perfectly, though that was not their target. The principles, currently called as Roman Law principles, were in the significant part created only by the scientific elaboration of Roman Law, especially by commentators. We must perceive the influence of Roman Law as a natural development of the European legal culture. Since 19th century the interpretation of Roman Law has been meant as a dogmatic interpretation of the Justinian's Law and its institutes which have been situated in the historical development.

Within the scope of the Roman Law of Obligations and its influence on the Law of Obligations contained in modern civil law codifications, we should focus primarily on the classification of Law of Obligations itself, on the division of origins of obligations, on the types of obligations, on the object and subjects of obligations, the alternation and termination of obligations and others. In the process of concrete analysis of particular contractual and delictual types of obligations, it is necessary to analyse these institutes very thoroughly (eg. the real, consensual and others). We are not able to ascertain the Roman Law roots, or rather the extent of inspiration and applicability of the Roman Law way of contemplation in the legislative process, until we do not analyse particular institutes, systematic inclusion

(argumentation ad rubricam and others) in Roman Law and modern civil law codifications.

The most expedient method to discover the extent of inspiration by Roman Law in modern codifications is a comparison of selected contractual institutes. For illustration, there are chosen 3 areas of the Law of Obligations:

1. The term of obligation and origin of obligation
2. The purchase agreement
3. The loan

Selected institutes are located to a table wherein the Roman Law text is placed beside the legal text version of ABGB (by the year 1872) in order to point out the coincident traits of the legal regulations.

THE TERM OF OBLIGATION AND ORIGIN OF OBLIGATION	
Roman Law	**ABGB**
Inst. 3, 13 pr. *Obligatio est iuris vinculum, quo necessitate adstringimur alicuis solvendae rei secundum nostrae civitatis iura*. Now let us pass to the discussion of obligations. An obligation is a bond of law by which we are reduced to the necessity of paying something in compliance with the laws of our state.[82]	Section 859: The individual rights to a thing where of a person is obliged to carry out a performance to someone another.
Omnis enim obligatio aut *ex contractu aut ex delicto nascitur* Each obligation shall be established either by a contract or by an offence.	Section 859: …shall be established either directly by a statute or by a contract or a damage incurred.

[82] English text from: http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/just3_Scott.gr.htm #XIII [cited 1/8/2011]

THE PURCHASE AGREEMENT / EMPTIO-VENDITIO	
Roman Law	**ABGB**
Dig. 18.1.2.1 Ulpianus 1 ad sab. *Sine pretio nulla venditio est.* No sale can take place without a price.[83]	Section 1054: …The market price shall be assessed in cash.
Just. Inst. 3, 23, 1 *Pretium autem constitui oportet: nam nulla emptio sine pretio esse potest. sed et certum pretium esse debet.* Moreover, a price should be fixed, for there can be no sale without a price; and the price should be certain. [84]	Section 1053: The content of purchase agreement is to transfer an object of purchase for a purchase price.

In the terminology of Roman Law, the purchase agreement means a barter of a thing for money. The purchase agreement belonged to the informal consensual contracts which were created by consensus. The market agreement was and still is one of the most significant and applied contractual types of obligations. The object of purchase, the price and consensus are its essential elements. In Roman Law, the purchase agreement pertained to the consensual contracts: the moment of consensus on object and price causes perfection of a legal act and causes also passage of the ownership to a purchaser. The aforementioned principle was not adopted by ABGB so that the ownership transferred only by delivery of the thing and not before § 1053: Ultimately, the ownership would be acquired by delivery of a purchased thing. The vendor holds the title until its delivery.

[83] English text from:http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D18_Scott.htm#I [cited 1/8/2011].
[84] English text from: http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/just3_Scott.gr.htm #XIII [cited 1/8/2011].

THE LOAN / MUTUUM	
Roman Law	**ABGB**
Dig. 12. 1. 2pr. Paulus 28 ad ed. *Mutuum damus recepturi non eandem speciem quam dedimus (alioquin commodatum erit aut depositum), sed idem genus: nam si aliud genus, veluti ut pro tritico vinum recipiamus, non erit mutuum.* Dig. 12. 1. 2pr. Paulus 28 ad ed. We make the loan called mutuum when we are not to receive in return the same article which we gave (otherwise this would be a loan for use or a deposit) but something of the same kind; for if it was of some other kind, as for instance, if we were to receive wine for grain, it would not come under thishead.[85] *„Tantundem eiusdem genesis et qualitatis“*	Section 983: If the consumable thing is delivered to a person in order to dispose of it at his own will but also to be obliged to return thing of the same quantity, sort and quality, the contract of loan is created. Section 984: The object of loan shall be either money or some other consumable thing.
Actio de certa credita pecunia – an action, which is being applied in case the object of loan is money ***Actio de certa re*** – an action, which is being applied in case the object of loan is a thing.	Section 984: The object of loan shall be either money or some other consumable thing.

In Roman Law, the subject-matter of loan is lender's delivery of substitutable things in determinate quantity to ownership of the borrower in order

[85] English text from:http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D12_Scott.htm#I [cited 1/8/2011].

to use it with an obligation to return the same quantity of the same sort and quality in certain period of time *tantundem eiusdem genesis et qualitatis*. The purpose of loan is a consumption of things, therefore the sole object of loan may be a generic thing and the ownership is transferred. The borrower undertakes to return *in genere* (not *in specie*) the thing that has been lent to him. The borrower cannot be relieved even for incidental destruction or loss. The risk *periculum* is passed onto borrower at the moment of delivery and he can be excused assuming only that it would affect the lender also (e.g. case of earthquake, volcanic eruption, if both are sailing on one wrecking ship).

The conception of loan in ABGB remained essentially devoted to the Roman Law pattern. The generic things (things and money included) remained the only eligible object. Money (coins and also banknotes) as an object that is applicable for loan is mentioned in provision of Section 986 ABGB.

4. CIVIL LAW

4.1 WAY TO ELIMINATION OF LEGAL PARTICULARISM IN THE POST-WHITE MOUNTAIN BATTLE PERIOD

The period of absolutism has an irreplaceable significance for shaping the modern legal system. During this period the character of legal resources fundamentally changed, as well as the system of classification of the legal order, content of legal rules, and a number of legal regulations. However, these changes were not mostly implemented immediately with the transition to the absolutistic methods of reigning, but gradually, occurring most intensively in the period of the enlightened absolutism and its some kind of legal fading at the beginning of the 19th century. Thereafter they had influenced the way of legal provisions and also the form of the particular institutes until the year 1950, but they have not largely lost their significance up to the present day.

Absolutism with the codifications brought the governance of written law and thus reduced the space for employing arbitrariness of the applying authorities, abundantly developed in the medieval law. In the 18th century and at the beginning of the 19th century the branches of judicial law were already regulated by extensive and coherent codifications, at whose origination were the conceptions of natural law. In case of civil regulations (ius privatum) the inspirational Roman legal heritage was widely applied.

The law of the absolutistic period was definitely headed towards unification, namely in two directions – to unification of the estate fragmented legislation and to creation of a uniform system of law for the entire monarchy.

The subject of law was gradually ceasing to be a dependent subject and privileged member of the estates, but it turned to be a citizen who acted in all relations towards other members of the society as equal with an equal. The consideration based on natural law in the sphere of public law was opening the way to a constitutional system.

Namely the enlightened sovereigns endeavoured by legal means to regulate more and more spheres of life of the society and its individual inhabitants to the smallest details, which led to a large quantitative accrual of new normative and individual sovereign legal acts. The unclear arrangement of the legal order, including regulations with various territorial scope (nationwide, common for the Czech and Austrian lands, for the state of the Czech crown, for individual lands) and still remaining numerous pre-White Mountain Battle legal rules in force and effort for a uniform application of law intensified the generally felt need of the public officials and court staff to have the individual legal regulations easily available in an organised, well arranged form. Therefore, already since the beginning of the 18th century, private processors had been compiling the valid legal rules into collections and issued them in a printed form. During Josef's era there was a fundamental qualitative change when the official collection of laws started being issued for the entire monarchy. It was the Collection of Laws of Justice. Soon afterwards it was supplemented by the Collection of Political Laws. At the end of the second decade of the 19th century both the nationwide collections of laws were supplemented by provincial collections of laws for the individual lands. All these collections had been issued until the year 1848.

The first phase of elimination of legal particularism dealt with the removal of differences between provincial and municipal law, or seigniorial one. The beginnings belong to the post-White Mountain Battle period. Already in the Renewed Land Ordinance for the Czech monarchy from the year 1627 the Koldin Code was declared as a resource supplementing provincial law. In the year 1641 the Appellate Court rendered the emperor an expert's opinion claiming that it was impossible to unify provincial law with municipal one; however, it recommended a subsidiary application of the provisions of the Koldin Code.

A more decisive step in the unification of law in Bohemia and Moravia was not realised until the beginning of the 18th century. The court decree dated on 7th October 1709 established two committees, one in Prague and the other in Brno, which were assigned to endeavour for "universitas iuris statutarii durch Combination der Landesodnungen mit ihren Nachtragen", so to induce "uniformity of statutory law by a combination of provincial

ordinances with their amendments". Either committee was supposed to work independently; however, the Brno one had to send its report to the Prague committee, which should subsequently send both reports to Vienna. The Prague committee comprised of 15, the Brno committee of 12 members. Both committees consisted of court officials, attorneys and councillors of both capital cities. In the Prague committee the most important member was attorney Vaclav Neumann of Puchholc, a later professor of Roman and canon law at the Prague University, who was appointed the committee's recorder. The committees held sessions twice a week and as reward for their work they were promised an exclusive right to copy the provincial ordinance, which was supposed to result from this work, for the time period of ten years.

After its establishment the Prague committee drew up a plan according to which it wanted to proceed. The plan was approved by Emperor Josef I. and is known under the name "new system", which was divided into nine parts: the first part public law, the second authorities, courts and their competences, the third court proceedings, the fourth rights of persons, the fifth part property rights, the sixth inheritance law, the seventh law of obligations, the eighth private criminal offences, and, last but not least, public criminal offences.

Both committees continued their work also after the accession of Karel VI. Nevertheless, they did not work as fast as it had been expected. Later their work got totally deadlocked and due to this only the first part containing public law had been elaborated until the 1723.

It was recognised in Vienna that the delays in work had been caused by an excessive number of members in the committees. For this reason the rescript issued in November 1723 ordered to establish the post of a reporter. Professor Neumann was appointed the reporter for the third (court proceedings) and sixth part (inheritance law). However, neither this measure helped. In the year 1738 the work was dunned in vain in Vienna. Other work of the committee was dashed by the war which broke out after the death of Karel VI. Not until the year 1748 the government recalled both committees and decided to restore their activities. Owing to the fact that some members, including Professor Neumann, had died, the committees were supplemented with new members. It was namely Professor Josef

Azzoni who was in charge of the section of the ninth part (public criminal offences). In the year 1749 attorney Ganss, who was assigned to process the law of obligations, was appointed a member.

The propositions elaborated by the Prague committee are generally known as Elaboratum bohemicum and the Brno ones as Elaboratum moravicum. However, the result did not live to the expectations. The documents prepared by both committees were definitely insufficient for the codification.[86]

4.2 CODIFICATION OF CIVIL LAW DURING THE REIGN OF MARIA THERESA

New attempts for the unification of law emerged in relation with the centralisation efforts which culminated in dissolution of the Czech court office and Austrian court office on whose place there were established (in consequence of efforts for division of the judiciary from administration) Directorium in publico-politicis et cameralibus, as the supreme authority for the internal and financial administration, and the Supreme Court (Oberste Justizstelle). The seat of both authorities was in Vienna. The union of the Czech and Austrian lands was accomplished.

Already in February 1753, based on Maria Theresa's decision, supreme chancellor Count Haugvic announced to the Supreme Court an establishment of the committee for elaboration of a common legal code for the Czech and Austrian lands which should be called Codex Theresianus. The committee consisted of the chairman, who was the vice-president of the Supreme Court Count Oto Frankenberg, and of four members who were: Professor Josef Azzoni, chancellor of the Royal Tribunal in Brno, Jiri Hayek Duke Waldstetten, councillor Josef Ferdinand Holger, and council-

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[86] About this topic in more detail for example by VANECEK, V., *History of the state and law in Czechoslovakia to the year 1945.* Prague, 1975, p. 276 and following; MALY, K. et al., *History of the Czech and Czechoslovak law to the year 1945*. Prague, 1997, p. 153 and following.

lor Duke Thinnefeld. Afterwards this committee was supplemented with two other members, one from Silesia (Duke Burmeister) and the other from the Anterior Austria (Duke Hormayr).

The committee was summoned for May 1, 1753, but before it managed to meet, its chairman had died. The president of the royal representation and chamber in Brno, Baron Blümegen, was appointed the new chairman. Brno became the seat of the committee. The opening meeting was held on May 3, 1753. The first decision of the committee was to separate public law and thus to focus attention only on private law. Furthermore, the entire content was divided, according to the system of Roman law, into three parts of which the first should contain the rights of persons, the second property rights and the third law of obligations. This definitively resolved that only the codification of private law will be executed. Maria Theresa approved this plan and emphasised the necessity of existence of the same law in all the hereditary lands.

The original purpose to divide the matter into three parts was soon abandoned and division into four parts was approached provided that the fourth one should be court proceedings. However, even this decision was only temporary and the committee eventually returned to its original decision – division of the matter into three parts. It was followed by another systemisation of the matter. The first part was divided into 9, the second into 15, and the third into 14 passages. Every passage was further divided into sections, articles and clauses. The extant documents show that the codification was supposed to contain also peasant law.

After the executed systemisation the committee met in Brno in November 1753 (thence also the name Brno committee) and got down to work. The main official was Professor Azzoni (at that time already court councillor). In October 1754 four passages of the first part were sent to Vienna.

In order to review work done by the Brno committee a nine-member revision committee was established in Vienna under the chairmanship of court councillor Baron Buol, which further consisted of court councillors of the Directorium and the Supreme Court. It started operating in April 1755. The committee felt offended and its work slowed down. Even a reprimand from the empress did not revive its work. The result of these disputes was dissolution of the Brno committee, and the Vienna committee became the

legislative committee. Azzoni and Holger were called up from Brno to the new committee. In June 1758 the first part was finished and work on the second one began. However, once again the work did not go as fast as the sovereign expected. Therefore, at the beginning of the year 1760, there was a change in the chairmanship, i.e. Baron Buol was replaced by Count Altmann. Moreover, Azzoni died, and thus court councillor Zenker of the Supreme Court became the exclusive official.

Neither Zenker managed to accelerate work on the codification. Nevertheless, despite a lot of difficulties the work on the code draft reached its end in the year 1766. Codex Theresianus was sent to the sovereign and a draft of the introductory letters patent was drawn up. However, it was quite obvious that it was a very extensive, lengthy piece of work and in fact inacceptable for legal practice. The draft of the introductory letters patent stemmed from the prerequisite that the legislative power belonged only to the sovereign. The Roman law was to be admitted supporting validity and the provincial codes were supposed to remain effective until derogated by a new code law. It is interesting that, compared to the original presumption, the provision on subjects had been removed from the first part, so they were to be excluded from the operation of the civil code, and the unification of law was not supposed to consider villages. The particular parts were divided into chapters, articles and subsections.

Despite the fact that right after the completion of work the draft raised considerable discomfiture, there was no doubt that it would be sanctioned by the empress. This was especially indicated by the dealings about printing the German text of the code, and the draft started being translated from Czech to Italian. Simultaneously with the provision of translations it was considered whether it would be suitable to establish courts for Codex Theresianus at universities in Prague and Vienna. A committee supervising whether this code was being duly observed was also planned to be set up.

However, the years 1767 and 1768 had passed and no sanction had come. On the contrary, it was decided to review the whole draft again. For this purpose the entire draft was submitted to the state council to expertise. At first the opinion that an abridgement of the code would suffice prevailed in the state council. However, soon afterwards voices calling for a complete reworking started to resound. Objections of the state council were announ-

ced to the legislative committee, which replied within two years. At the same time the state council itself got down to reworking the draft. The articled clerk of the state council Bernard Horten was assigned the task to rework the first part and to give a report about the answer of the legislative committee on objections of the state council. At the end of July and beginning of August 1771 there was held a meeting on the topic of the draft of the code, whereas Horten was also called in based on the order by Maria Theresa. Everything suggested that the draft of the code as it had been elaborated by the legislative committee would not be sanctioned. When Maria Theresa then gave an order to stop working on the translations, it was quite clear. The draft became just a piece of literary work bearing witness of the high level of development of the Austrian jurisprudence; however, it gave evidence of the incapacity to generalise.

Nevertheless, the work was not completely stopped even at this moment. In November 1771 Horten translated the reworked first part of the draft. It was submitted to a special ministerial conference which approved it. However, the situation started progressing more and more unfavourably for the committee. On August 4, 1772 Maria Theresa approved the rework of the first part provided by Horten by means of a letter addressed to the president of the Supreme Court, but at the same time she ordered the legislative committee to rework the entire draft abiding to the following principles;

- it is necessary to express ideas shortly, briefly, and to leave out useless details;
- it is necessary to eschew ambiguity, unclarity, needless repetition and circumlocutions in the regulations about which no reasonable man has doubts;
- it is unnecessary to bind to the Roman law, but on the contrary it is necessary to lean on decency;
- it is unnecessary to verge on subtleties, but on the contrary it is necessary to strive for simplicity.

The legislative committee was also assigned to work with maximal engagement. Nevertheless, the committee resolved not to hold meetings every week, and it entrusted Zenker with reworking the draft. Shortly

afterwards Zenker was released from his task by the committee and Horten became its official, now already a councillor. Count Sinzendorf was appointed the chairman of the committee and the meetings were held until May 1773. The results of the particular meetings were submitted to Maria Theresa, who either approved or rejected them. However, her decisions were not of such nature to help the work of the committee, and that is why the work was still dragging on and there was no result in sight.

On March 31, 1773 the empress Maria Theresa wrote a letter urging to accelerate the work and expressing hope that this piece of work would be accomplished within two years. She also emphasised that the committee should meet in their total number and its individual members should prepare for the meetings, so as decisions could be made by voting. This is because the committee could make stylistic changes only by a decision of the majority of votes; however, the changes in content had to be submitted to the sovereign. The sovereign also ordered to provide a translation of the first part from Czech into Italian. The work on translations was initiated at once.

At this time Karel (later Baron) Martini, Professor of natural law and institutions and history of the Roman law at the university in Vienna and court councillor (later vice-president) of the Supreme Court was called in to the legislative committee. Moreover, the legislative committee was entrusted, besides the codification of the substantive civil law, also to process the rules of court.

In August 1776, when the committee had discussed the first part and major part of the second one, its work was suspended even though the committee itself did not cease to exist. What was the reason for this turn? At the Vienna court the forces, which can be called adversaries of the unified codification in the whole Habsburg state, had gained predominance. A representative of these forces was the president of the Supreme Court Count Seilern who, in his expert's report for Maria Theresa, pointed out the harmful effects of universalisation of civil law by claiming that *"it is a wise caution of the sovereign who governs a bigger amount of large lands not to implement new systems in all the countries at the same time, but to execute the intended reforms only in one country and to wait for the experience*

acquired in this country so as the reforms could be effected also in the other countries".

The mentioned report made Maria Theresa require an expert opinion about this issue from the Supreme Court. It was elaborated soon afterwards. Its author was court councillor of the Supreme Court Frantisek Knight Keesz. The opinion contained a statement that the issuance of codes is too costly. Moreover, the laws should suit the spirit of the nation, its overall attitudes and morality, as well as the nature of the country. Otherwise these are said to be forced and artificial operations which are rarely of a long duration, namely in Austria it is necessary to avoid universalism since the conditions in the particular lands are so different that even the property rights are based on different backgrounds. For this reason it was, among others, proposed to dissolve the union of the Czech and Austrian court office and to connect the judiciary with administration in the lands.

The opinion of the Supreme Court did not move Maria Theresa to cease work of the legislative committee, but it caused that its work got stuck at the deadlock for good.[87]

4.3 CODIFICATION OF CIVIL LAW DURING THE REIGN OF JOSEF II

In the year 1780 Maria Theresa's son Josef II acceded to the throne. He could not deny his education in law. He immediately moved on to reviving work of the legislative committee. Simultaneously, based on the suggestion of the committee's chairman Count Sinzendorf, he decided that they would not be biding time until the entire code was completed, but the individual parts would be gradually issued as they get accomplished. He also started executing reforms in other fields of law. He abolished serfdom and decla-

[87] A detailed exposition about the preparation of Maria Theresa's and Josef's code is presented, among others, by BAXA, B., *Commentary to the Czechoslovak general civil code and civil law valid in Slovakia and Carpathian Ruthenia*, Vol. I., Prague, 1935, p. 44 and following.

red religious toleration. Especially the first of the stated two reforms had an influence on bringing the individual layers of the population closer together. Besides, the abolishment of serfdom was significant also for the work itself of the legislative committee. Under the reign of Maria Theresa the committee, as it has been mentioned, left out the passage about subjects from the original programme since it was annoyed by the very institution of serfdom. That time another obstacle on the way to the unification of law has been removed. The court decree dated on June 7, 1784 ordered that the Koldin Code of municipal rights should, until the issuance of a new civil code, be in force in the matters of private law also for the subjects in Moravia and Silesia. This way the unification of municipal law with subject law was carried out.

Horten, the most important member of the legislative committee, remained to be its main official, who also elaborated the passage about marital law. The committee approved it and at the end of the year 1782 it was submitted to the sovereign to a sanction. However, objections against it occurred in the state council; there was an intense resistance namely from the side of high clergy. That is why the emperor returned this passage to the committee with reference to rewrite it on the basis of the rendered objections. The legislative committee did so almost immediately, and just a week later the emperor had the re-elaborated proposition back on his desk. This time Josef II did not make concessions to the clergy and declared it as the marital letters patent on January 16, 1783 (no. 117 of the Collection of laws of justice). This letters patent took away the marital matters from the ecclesiastic courts and they were ordered to be resolved at the secular courts. Its declaration caused a considerable stir especially from the side of high clergy. On this occasion the Lower-Austrian provincial government also proposed an implementation of the obligatory civil marriage. However, the united court Czech-Austrian office did not agree with this proposition pointing out that by implementing an obligatory civil marriage the seriousness of marriage would be totally buried. In the court committee for secular affairs three members declared for the obligatory civil marriage – chairman Baron Kresel, court councillor Duke Haan and court councillor Stepan Rautenstrauch, abbot in Broumov. In the state council namely Martini was against the civil obligatory marriage. Based on this the emperor sent the

legislative committee a proposition with a request for expert opinion. The committee declared against the obligatory civil marriage.

Besides marital law, Horten worked out also a passage about inheritance law. This was also approved by the legislative committee and submitted to the emperor to a sanction. It was approved in the state council in February 1786 and then declared as a letters patent of transmission by inheritance on May 3, 1786 (no. 548 of the Collection of laws of justice). This way the equality and uniform succession for all the estates and for all the hereditary lands, including Halic, was implemented. Any estate differences were eliminated.

In October 1785 Horten finished the entire first part of the forthcoming civil codification. The legislative committee approved it almost without any comments and submitted it to the emperor for sanctioning. Compared to the original draft, rather considerable changes had been made, and also its content had been reduced. By the emperor's decision from 21st February 1786 there were ordered further changes which the committee also immediately incorporated according to Horten's propositions. In March 1786 the draft was definitely handed in to the state committee, which suggested to the emperor its approval, which the sovereign also rendered on March 31, 1786. Then it was handed over to court councillor Duke Sonnenfels for minor stylistic adjustments. As late as in October 1786 the unified court Czech-Austrian office tried to make use of this in order to achieve a substantial change. However, based on the state council's suggestion the emperor decided that court councillor Duke Sonnenfels would be in charge only of this stylistic adjustment and not any execution of factual changes. The draft was declared as a valid legal code on November 1, 1786 (no. 591 of the Collection of laws of justice). This code was translated into Czech by the articled clerk of the register office and interpreter of Czech language and Professor of Czech language and literature at the university in Vienna Josef Zlobicky under the title "Wsseobecná Prawa Mestska. Dlj prwnj".

However, Horten died before the publication of this legal code, and court councillor Keesz was entrusted with the department for the civil code. In his further work he used the proposal of the second and third parts as they had been reworked by Horten. Since the year 1788, based on the emperor's order, members of the Hungarian-Transylvanian court office had

also been supposed to participate in the meetings of the legislative committee.

After the death of Josef II the committee did not make any progress in its work. It can be explained namely by its overload since, besides the private law, it was expected to codify also other legal branches.[88]

4.4 COMPLETION OF CODIFICATION OF CIVIL LAW

After the death of Josef II there was a considerable break in the work of the legislative committee. This was the cause of its dissolution in April 1790. The new emperor Leopold II formed the Court Committee in legislative matters whose chairman was appointed Baron Martini. None of the members of the cancelled legislative committee was appointed to the new committee.

Work of the new committee proceeded in quite a different atmosphere. Maria Theresa and Josef II considered themselves as absolute lawgivers, so in the issuance of laws only their will was detreminative. However, under the reign ofLeopold II, in consequence of the general effort for restitution of the estate constitutions, the estates of the individual countries endeavoured to achieve participation in the legislative work. These efforts were noticeable namely in the so-called desideria, with which the sovereign had to deal. And so in Bohemia, at least by the court decree dated on August 12, 1791, issued as a response to the second dossier of the Czech estates' desideria, the sovereign reassured the estates in article 2 that they would always be heard out in case of an issuance or change of the constitution or such laws that concern the entire country. And in the Czech lands really a number of laws issued during the reign of Leopold II were discussed at the provincial assembly and the advisory authority, or more precisely kind of preparatory commission, was the provincial committee.

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[88] More about this topic, among others, by CELAKOVSKY, J., *On participation of lawyers and estates from the Czech lands in codification of the Austrian civil law*. Prague, 1911.

This way the estates were ensured a participation in the legislative work even though the sovereign still officially remained to be the lawgiver.

At the beginning the task of the new committee was only to examine the laws issued so far from the field of private and penal law and court proceedings and also administration. However, the committee itself soon started to consider its task to be a continuation in the legislative work. At the same time in the presentation given to the sovereign in August 1790 it declared for the same law issued in all the provinces, unless required by special reasons. Nevertheless, so as the provincial particularities could be applied, the committee proposed the sovereign to submit, after a preliminary revision, the draft, elaborated by Horten and containing all the three parts of the civil code, for the opinion to the committees which would be established at all the appellate courts and which would take in representatives of the estates. Leopold II approved this proposition and also ruled that a unified law should be valid in all the Czech and German lands, and an exception to this principle could be accepted only providing that the conditions of one or the other land would require something else.

First of all, a reform of the first part of the civil code issued under the reign of Josef II was prepared. This reform was also sanctioned in February 1791 as an amendment to the civil code. After this amendment the Court Committee in legislative matters got down to reworking Josef's civil code. The official was appointed to be court councillor Duke Haan. The proposition which this committee submitted to the sovereign in July 1791 emphasised that "there is nothing more harmful to a good order, security of ownership and general internal welfare than frequent changes of laws, statutes and regulations", which allegedly "once again abolishes what has just barely had time to take its roots". This proposition was approved by the new sovereign Frantisek I in March 1792. At the same time the reworked draft of the first part was declared as approved and ordered to an immediate distribution to the appellate courts for filing their expert opinion. Concurrently it is reminded that a unified law should be implemented in the hereditary German and Czech lands and the task of the appellate courts is not to criticise the draft, but only to assess whether it is not contrary with substantial particularities of the provincial laws. Professors at the universities

in Vienna, Prague, Lvov, Innsbruck and Freiburg were invited to elaborate opinions of the draft as well.

The court decree from April 30, 1792 ruled to set up the so-called pre-agreement (intermediary) committees at the appellate courts in all the lands, to whom the forthcoming laws would be submitted for consideration. In Prague the established pre-agreement committee consisted of members of the gubernium, appellate court, provincial court, Prague municipal council, and provincial assembly. According to this decree the provincial assembly had to send one member and one substitute member to the pre-agreement committee. Nevertheless, the assembly did not send this member and substitute on its own, but, based on a proposition of the provincial assembly, at the assembly meeting held on December 10, 1792, there was elected a special committee, called the assembly committee for revision of laws (Landtagskommiss on in Gesetzrevisionssachen), comprising of 9 members and 2 substitute members. This committee was entrusted with a task *"in the name and on behalf of the entire estate authority gathered in the assembly to receive messages from the estate deputies who shall be send to the committee for revision of laws at the appellate court, about the result of the local dealings, and to consult this matter together and to resolve"*. And it was this committee that sent one member and one substitute from its centre to the pre-agreement committee. This estate deputy was not a representative of the assembly committee for revision of laws, or more precisely the provincial assembly, but a mandatary, i.e. he received the necessary instructions from the assembly committee, which he followed in the pre-agreement committee. This committee was not independent, but in important cases it had to submit the matter to the principal assembly for decision, which was stipulated in the instruction of the principal committee, according to which the assembly committee had to request a ruling from the assembly in case of important matters, namely about issues regarding the whole country or about rights or privileges of the estates as a whole and especially an individual estate. It was in fact the estates themselves, or more precisely the entire assembly, who spoke by the mouth of their representative in the pre-agreement committee. Also the records of the pre-agreement committee mention only propositions of the estates, not of the estate deputies. In this term there is an interesting record about a meeting of the pre-

agreement committee dated on 16th February 1793 on discussion about § 73 of the draft, where we can read: *"Die Stände beantragen einen anderen Text und zwar… Der ständische Deputierte tritt aber für seine Person diesen Antrage nicht bei..."*.The provincial assembly was concerned namely about... so that the civil code would not deviate too much from the Renewed Land Ordinance.

The Court Committee in legislative matters did not care much about expert opinions of the provincial committees and it rather took into account the university Professors' opinions. But meanwhile new delays occurred. The central office for internal administration and finance, Directorium in cameralibus germanicis et hungaricis et in publicopoliticis germanicis, started claiming its right to examine the draft. The dispute was not resolved until by the sovereign's act, who by a ruling dated on July 21, 1794 established at this Directorium a revision committee consisting of administrative clerks and entrusted it with the task to examine this draft and to announce the result, together with conclusions of the legislative committee, to the sovereign. However, its work was very slow and it just impeded the process of preparation of the civil code.

On November 20, 1796 Emperor Frantisek ordered that the finished draft should be send to the provincial pre-agreement committees for their opinion. They had two years for it. It was also decided that the whole draft of the civil code should be run on probation and put into force in western Halic, which had been acquired two years before that in the Third division of Poland. And thus by a letters patent dated on February 13, 1797, no. 337 of the Collection of laws of justice, the draft was issued as the Western-Halic Code.

The Court Committee in legislative matters could start further work as soon as the opinions from the provincial pre-agreement committees came in, which took almost four years. In place of Baron Martini, who had withdrawn from the committee due to his old age, the official was appointed to be Frantisek Zeiller, Professor of natural law and institutions of the Roman law at the university in Vienna, at that time an appellate councillor and later a court councillor at the Supreme Court. In the year 1802 the committee submitted to the emperor to sanction the first part of the civil code. The emperor did not give a sanction, but two years later he announced to the

committee that he had simply taken it into account. Meanwhile the committee had been working on other two parts of the code. In the year 1806 it finished the discussions about all three parts, provided their revision once more, and in January 1808 it submitted the accomplished draft of the whole legal code to the emperor for a sanction. Together with the draft there was submitted a comparative dossier with the Roman law, Prussian Landrecht and French Code civil. A proposition of the introductory letters patent was send in as well. The chairman of the committee, state minister Jindrich Count Rottenhann, submitted his own draft of the introductory letters patent to the emperor in February of the same year, according to which the validity of the civil code should be restricted only to cases which are not regulated in the individual countries.

On the basis of some comments of the state council, which was reactivated in the year 1808, Emperor Frantisek I ordered a super-revision of the draft, which was effected at high speed, and on January 22, 1810 the new chairman of the committee, supreme provincial judge Duke Haan, submitted the entire draft to the sovereign for a sanction. However, the sanction was held up since there had been taken up dealings with the court chamber about proof-reading of several articles regulating loans. The opinion of the court committee had not come for long, and so the emperor, with an exception of several articles about which the court committee was supposed to give its opinion, gave the sanction and commanded its issuance and initiation of lectures about it at the universities. The emperor gave the court chamber a time limit of one week to give its opinion. But the dealings about the disputed articles were protracted. In the meantime there had been issued a financial letters patent dated on February 20, 1811, and on March 15,1811 the emperor ruled that as its result the relevant changes should be carried out in the code. The court committee rebelled against this decision claiming that the changes in question should be incorporated in the introductory letters patent. The emperor accommodated this proposition and after the final stylisation of the disputed articles he granted the entire draft of the civil code a sanction by his ruling dated on April 26, 1811.

The legal code under the name of General Civil Code for all the hereditary German lands (*Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der österreichischen Monarchie*) was declared

a letters patent on June 1, 1811, no. 946 of the Collection of laws of justice, effective for all the lands which formed the Austrian monarchy at that time, except for the lands of the Hungarian crown. It came into force as of January 1, 1812.[89]

4.5 GENERAL CIVIL CODE (ABGB)

As it has already been stated, ABGB was declared for all the Austrian lands, except for Hungary. By the Austrian lands (or more precisely the German lands) were understood all lands of which the Austrian monarchy consisted in the year 1811. If the Habsburg monarchy expanded by the Paris agreements and the congress Vienna contract, the operation of the code would be extended as well: as it happened so in Krakow by the letters patent dated on March 23, 1852.

In the Hungarian lands, according to the cabinet deed from December 31, 1851, the civil code was declared as valid law by the so-called absolutistic letters patents, namely the patent from November 29, 1852, no. 246 of the Imperial Code in Hungary, Croatia-Slovenia, Vojvodina and Timisoara Banat, letters patent from May 5, 1853 in Transylvania. However, after issuing the October Diploma the previous status was restituted in Hungary, and thus the basis of the civil law here were the so-called resolutions of the Judexcurial conference. The resolutions made by the Judexcurial conference did not concern Croatia-Slovenia and Transylvania; that is why the General Civil Code remained in force there.

The code was proclaimed in German language; article 10 of the proclamatory letters patent said that this text was authentic, and that the translations to other languages of the "Habsburg provinces" shall be assessed in compliance with it. The code consisted of 1502 articles which were arranged into three parts, except for the introduction. The first part from article

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[89] A detailed list of sources and bibliography is, among others, stated in the *Commentary to the Czechoslovak general civil code and civil law valid in Slovakia and Carpathian Ruthenia*, Prague, 1935, p. 16 and following.

15 to 284, the second from article 285 to 1341, and the third from article 1342 to 1502.

The introduction, which is entitled "on civil rights in general", contains a treatise of the term of civil law, operation of the legal code, its interpretation, etc. The first part deals with private law and consisted of four chapters. The most voluminous is the second part, which is entitled "on rights to things" and consisted of an introduction and thirty chapters. These are divided into two sections. The first section includes division of things, provisions on possession, proprietary right and inheritance. The second part contains provisions on contracts. The third part of the code talks about common individual and potent rights.

The General Civil Code was indisputably the most significant legal code issued in our territory. In its time it belonged to the three most principal European civil codes, besides the French and German ones. Its perfection has been proved especially by the time duration of its operation. With slight changes it had been valid in our country until the year 1950, and it has been effective in an amended form in Austria to this day.

4.6 CHANGES IN CIVIL LAW IN THE 19TH CENTURY

The revolution in the year 1848 eliminated the bonds between subjects and nobility and signified the arrival of parlamentarism in the Habsburg monarchy. The perfection of the civil code proved to be true at this very time. It became apparent that it had outpaced its time, so no bigger changes were necessary. The core of slight modifications, which still had to be made, lied in elimination of the nobility's authority to the estate, release from the peasant land, thus abolishment of the so-called divided ownership which was included in the original text of ABGB.

Apart from that, the operation of part of the civil code dealing with family law was interrupted, temporarily though, as a result of concluding a concordat with the Catholic Church. Since the beginning of dealings about the concordat the Catholic circles had set their condition to implement the requirements of the Church in the field of marital law. And thus

by article 10 of the concordat, the legal force of provisions of the civil code regarding marital relations (chapter II) was invalidated. Catholic marriages still had to be subject to jurisdiction of the ecclesiastic consistory courts which resolved factually on the basis of rules of the canonical marital law. The regulations which these courts adhered to were summarised in the instruction no. 185/1856 of the Imperial Code. Provisions of the concordat came into effect in this regard as of January 1857. Neither the legal regime of adherents to other religions remained untouched since the provisions of the concordat indirectly influenced mixed marriages too.

At the beginning of the sixties the constitutional life was restored in the monarchy by issuance of the October Diploma and February Constitution. At that time the liberal political circles started a fight against the regulations on marital law stipulated by the concordat. In autumn 1861 the confession committee of the Chamber elaborated a proposition which counted on issuing a new marital law based on the state jurisdiction in conjugal matters when keeping the obligatory religious marriage. The government which did not want to surrender the concordat for internationally political reasons prevented any discussions about this proposition.

Changes in the field of family law, or more precisely marital law, did not happen until the second half of the sixties. See namely the legal acts no. 46/1868 of the Imperial Code., no. 3/1869 of the Imperial Code, no. 4/1869 of the Imperial Code, no. 51/1870 of the Imperial Code, and no. 128/1870 of the Imperial Code.

Despite the considerable stability of civil law there was implemented a significant change. New fields got separated from civil law, i.e. commercial law and law of bills and notes, which were independently legally regulated – see the exchange order no. 51/1850 of the Imperial Code and the commercial code no. 1/1863 of the Imperial Code.

4.7 CHANGES IN CIVIL LAW AT THE BEGINNING OF THE CENTURY

At the end of the last century the discussion about necessity of changes in the civil code became more intense. Unlike the previous time it was considered just to amend it. The leading personality of the programme of changes in the civil code was Unger, who also stood at the forefront of the committee which was nominated as "the committee for initiation of preparatory work on the General Civil Code" in the year 1904. Apart from Unger the members of the committee were Randa, Schey, Steinbeck, Madevski, and Klein. Nevertheless, their work did not bring any result. Therefore the Ministry of Justice took charge of this work and elaborated a draft "On change and supplements to several provisions of the General Civil Code". The draft was subjected to criticism, which was not very favourable though. Despite this it was submitted to the Chamber, where a five-member subcommittee had been set up, consisting of Schey, Madevski, Grunhut, Grabmayer and Czyhlarz who re-elaborated it in forty sessions, so it could be published in July 1907. It contained 253 articles.

The work was interrupted by termination of the session of the Imperial Council, so the government was forced to submit the draft again at the 20th session. The Upper House ordered it to the judicial committee and the latter again to the sub-committee. This one formally accepted the resolution of the 1st sub-committee, but it subjected the draft to the second reading, whereas the critical comments from the received expert opinions were taken into account. In the year 1911, after fifteen sessions, there was created a new draft containing 273 articles, which was submitted to the Chamber together with an extensive reasoning report. The main person managing this work was J. Schey.

Regrettably the Imperial Council did not manage to accept the draft at its 20th session either, and so the government submitted it again at the 21st session, i.e. already for the third time. The procedure was the same again. Firstly the work in the sub-committee, which submitted it, revised once more, to a committee member. Besides several slight changes and supplements, the committee espoused the proposition of the sub-committee and

its report, and submitted it to the plenary session of the Chamber in March 1912. In the meantime, based on Klein's initiative, the title of building law had been singled out, which became an independent act no. 86 of the Imperial Code on April 26, 1912. The rest of the draft consisting of 264 articles was accepted by the plenary session of the Upper House in December 1912. However, the draft did not get to the Chamber of Deputies before the war.

In the year 1914 the First World War burst out, which brought along new needs enforcing several changes in civil law, and therefore the civil code went through three amendments in the years 1914–1916.

The imperial ordinance no. 276 of the Imperial Code dates back to October 12, 1914, by which the partial amendment consisting of 73 articles was published, later called the 1st partial amendment, containing especially provisions on presumption of death, care for legally incapable persons and intestacy.

Less than a year later the circumstances called for further changes, so on July 22, 1915 there was issued an imperial ordinance no. 208 of the Imperial Code including provisions on renewal and modification of the borderline (added in brackets: the second partial amendment of the Imperial Code) consisting of five articles. The amendment seemed necessary particularly owing to the war events in Halic.

And finally the imperial ordinance no. 69 of the Imperial Code dates back to March 19, 1916, in which the rest of the amendment to the civil code was published, containing 202 articles, accepted still before the war by the Upper House.

4.8 CZECHOSLOVAKIA DURING THE INTER-WAR PERIOD

4.8.1 Establishment of Czechoslovakia and Reception Act

The Austro-Hungarian Empire came to an end in 1918, opening the way for the creation of new successor-states, i.a. Czechoslovakia. One of the first laws adopted by the independent Czechoslovak authorities was the so-

called "Reception Act"[90] that stated in its Article II that "all current land and imperial laws and regulations remain valid, for the time being". Such an apparently simple declaration, however, created a very complex legal situation for the newly established state. In this context, it should be noted that Czechoslovakia came into existence as a conglomerate of mainly two territories each having its own legal history, namely the "historic lands" on the one hand and Slovakia and Sub-Carpathian Ruthenia on the other hand.

The so-called "historic lands" (i.e. Bohemia, Moravia and Austrian Silesia) formed part of the pre-Great-War Austria and thus shared its legal regulations (except for local regulations, of course), including the Austrian General Civil Code (abbreviated as the "ABGB") of 1811.

By contrast, in Slovakia and Sub-Carpathian Ruthenia, territories acquired from the pre-Great-War Hungary, there was no comprehensive codification of any substantial part of private law. There, particular laws each addressed particular issues while a major part of the regulation was still at that time based on the use of customary law as described in the work *Opus Tripartitum* of Štěpán z Vrbovce, dating back to 1514.[91]

In addition, some minor territories were also acquired from Germany and for some time, until 1920, the German Bürgerliches Gesetzbuch (abbreviated as the "BGB") of 1896 applied there.[92] The Czechoslovak legal system as a whole and the civil-law regulations in particular, were thus again uncomfortably fragmented.

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[90] Act 11/1918, Collection of Laws, on the Establishment of Independent Czechoslovak State, of October 28, 1918.

[91] Štěpán z Vrbovce, known also in Hungarian as Verbőczy István, (1465?–1541) is the author of *Opus Tripartitum Iuris Consuetudinarii Inclyti Regni Hungariae Partiumque eidem Adnexarum*. For the latest publication of this work (and the first in Slovak), see z Vrbovce *Opus Tripartitum Iuris Consuetudinarii Inclyti Regni Hungariae Partiumque Adnexarum* (translated into Slovak by Erik Štenpien) (2008).

[92] Act 76/1920, Collection of Laws, on Incorporation of the Hlučín Region, as well as Government Regulation 152/1920, Collection of Laws, Regulating the Judiciary and Extending the Applicability of Laws and Regulations of Private-Law Nature and the Administration of the Judiciary in the Territories Ceded to the Czechoslovak Republic pursuant to Peace Treaties.

4.8.2 Commencement of Unification and Modernisation of Legal System

The relevant commentaries from the first half of the twentieth century confirm that general concepts of private law did not differ substantially, namely that civil law should regulate (i) the rights of persons, (ii) rights *in rem*, (iii) obligations, (iv) family rights, and (v) succession rights.[93] Nevertheless, the fragmentation of the legal system obviously posed a number of practical problems.

The most notable problems resulted, first, from the variety of languages used for the official versions of the laws,[94] and secondly from the number of official and unofficial collections in which the laws were published (if they were published at all, as in the case of Hungarian customary law). Czechoslovak legislators therefore attempted to unify the law for the entire country and to publish it in the "official state language" (which, under the circumstances, was represented by two in fact independent languages), namely in the Czech or Slovak languages. In this context, the Ministry for Unification of Legislation and Administration was established as early as in 1919. This Ministry, however, lacked the necessary competencies and the unification initiative was gradually taken over by the Ministry of Justice.

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[93] E.g. ROUČEK, F., SEDLÁČEK, J. (eds.), *Komentář k československému všeobecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi.* Part 1, 1935, p. 65–87 and 176–179; KRČMÁŘ, J., *Právo občanské. I – Výklady úvodní a část všeobecná*, 1932, p. 32f.

[94] The languages applicable were Czech, German, Slovak, Hungarian and Latin, as well as "the language to be identified by the diet of Sub-Carpathian Ruthenia". The latter formulation evidences the difficulties which the new Czechoslovak administration faced as there were so many different nationalities, and, importantly, because of the fact that the area of Sub-Carpathian Ruthenia was hugely under-developed. This quotation comes from the relevant piece of legislation, which is Act 139/1919, Collection of Laws, by which the Publishing of Laws and Regulations is Governed (dated 13 March 1919), as amended by Act 500/1921, Collection of Laws, Amending Partially Article 3 of Act 139/1919, Collection of Laws, by which the Publishing of Laws and Regulations is Governed, effective as of December 31, 1921, and for official translations into the Polish and Hungarian languages, effective as of January 1, 1922.

Since the original language of the ABGB of 1811 was still German,[95] the Ministry of Justice (already in 1919) first prepared a semi-official translation into Czech which, in addition to a mere translation, also incorporated some pieces of private-law legislation that have been adopted outside of the Civil Code proper. This translation thus served not only to simplify the language problems, but also as one of the steps towards the envisaged new Czechoslovak Civil Code. As such, this translation is also occasionally referred to as the "First Draft Czechoslovak Civil Code" or the "Hartmann Draft", using the name of the official at the Ministry of Justice sponsoring the relevant works. Given the practical problems the new state administration faced particularly in Slovakia and in Sub-Carpathian Ruthenia, many Czech public servants were substituting the employees which were critically lacking there. In the area of judiciary, Czech judges, trained to use the Austrian Civil Code, inclined naturally to use this translation despite the fact that the civil-law legal system in Slovakia and in Sub-Carpatian Ruthenia was different from that of the "historic lands".

Meanwhile, already in 1919, two leading scholars from the Faculty of Law of Charles University, Jan Krčmář and Emil Svoboda,were entrusted with producing a completely new draft of the Czechoslovak Civil Code.[96] In 1920, they invited a number of other scholars, not only from the Czech academia and legal practice, but also from Slovakia and the German community in Czechoslovakia, to discuss various aspects of the new Civil Code.[97]

The discussions carried out in a number of sub-committees centered i.a. on the question, which pattern to use for the contemplated new Civil Code. The Austrian Civil Code, quite understandably, gained a superior position over certain other considered possibilities, namely the German Civil Code

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[95] Article X of Imperial Patent No 946/1811.

[96] KRČMÁŘ, J., *Právo občanské. I – Výklady úvodní a část všeobecná*, 1932, p. 34; KRČMÁŘ, J., „Unifikační práce v prvním desítiletí republiky, I. Občanské právo". In: *Právník*, LXVII/1928, p. 564.

[97] KRČMÁŘ, J., *Právo občanské. I – Výklady úvodní a část všeobecná*, 1932, p. 34; KRČMÁŘ, J., „Unifikační práce v prvním desítiletí republiky, I. Občanské právo". In: *Právník*, LXVII/1928, p. 564.

of 1896, the French Civil Code of 1804, the Swiss Civil Code of 1907 or the draft Hungarian Civil Code (never adopted) of 1913.[98]

The sub-committees distributed the works on the basis of the prevailing topic. The leading personality in the ensuing works remained Jan Krčmář (who focused on general terms of civil law, on the rights *in rem*, on the international private law and to some extent also on the law of obligations). Other Czech personalities involved were Emil Svoboda mentioned above (who focused on the law of succession), Miroslav Stieber (who focused on the rights *in rem*); from the Prague German academia, Bruno Alexander Kafka (focusing on family law) and Egon Weiss (focusing on the law of obligations and certain other topisc) were also involved.[99]

4.8.3 Draft of the Czechoslovakian Civil Code

The first draft of the Czechoslovakian Civil Code, comprising 1395 Articles, was completed by the sub-committees and published in 1923. In the same year, the draft was subjected to various expert discussions, both in the Czech legal context and in the context of the interaction between the Czech and Slovak legal systems: a special revision committee under the presidency of Vladimír Fajnor was established in Bratislava, Slovakia, in 1923[100] and the Ministry for Unification entrusted František Rouček with the final redaction of the works. Moreover, starting in 1925, the German text of the draft began to be discussed amongst German scholars in Czechoslovakia.[101]

From 1926 onwards, the draft was submitted to a "super-revision committee" which discussed the draft until 1931.[102] The result was published,

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[98] See e.g. ZELINKA, J., Překlad občanského zákona rakouského či občanský zákon československý? In: *Právník*, LXIII/1924, p. 183–189 and 217–230.

[99] See an anonymous report Revise občanského zákoníka pro Československou republiku. In: *Právník*, LXIII/1924, p. 173 and 174.

[100] SKŘEJPKOVÁ, P. (ed.), *Antologie československé právní vědy v letech 1918–1939*, 2009, p. 230-–37.

[101] KRČMÁŘ, J., *Právo občanské. I – Výklady úvodní a část všeobecná*, 1932, p. 34.

[102] KRČMÁŘ, J., *Právo občanské. I – Výklady úvodní a část všeobecná*, 1932, p. 34–35.

together with the corresponding explanatory report, under the title of "Draft Act Promulgating the General Civil Code" and contained 1353 Articles, distributed in 4 parts and 45 chapters. It generally followed the pattern laid down by the ABGB of 1811, although certain matters were newly incorporated, such as collective bargaining agreements and the international private law. This draft was then submitted to various ministries for further comments. The "super-revision committee" resumed work in 1933 and the revised draft was submitted to the Government in 1936, which, in turn, forwarded it to Parliament in 1937.[103]

4.8.4 Collapse

Having outlined this progress of the codification process, it should be observed that given the complex political situation within Czechoslovakia itself, which in a certain way reflected similar problems in the pre-Second-World-War Europe, the preparatory efforts faced numerous challenges. At first, some of the invited experts advocated the German BGB of 1896 as the model for the new Czechoslovak Civil Code. Czech legislators, however, considered this as a step supporting German political aspirations to dominate Central Europe. As a consequence, they preferred that the draft Czechoslovak Civil Code should follow more closely the legislative pattern of the Austrian ABGB of 1811.[104] In addition, towards the end of the 1920s, certain nationalist frictions between the Czechs and Slovaks started to emerge and this too hampered the preparatory work.[105]

Although the draft reached a relatively advanced stage in the process of becoming law,[106] it was never actually discussed in Parliament itself and

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[103] KRČMÁŘ, J., *Právo občanské. I – Výklady úvodní a část všeobecná*, 1932, p. 35.

[104] KRČMÁŘ, J., *Právo občanské. I – Výklady úvodní a část všeobecná*, 1932, p. 564–565; ZELINKA, J., Překlad občanského zákona rakouského či občanský zákon československý? In: *Právník*, LXIII/1924, p. 183–189 and 217–230.

[105] See, e.g., MALÝ, K. (ed.), *Dějiny českého a československého práva do roku 1945*. Praha: Linde, 1999, p. 357; PRAŽÁK, A., „Sjednocení soukromého práva na Celostátním unifikačním kongresu právníků v Bratislavě" In: *Právník* LXXVI/1937, p. 583.

[106] MALÝ, K. (ed.), *Dějiny českého a československého práva do roku 1945*. Praha: Linde, 1999, p. 357.

never adopted as law. The main reason for this was the gradually deteriorating political situation during the 1930s, both internally within Czechoslovakia itself and internationally in Europe.

Under the circumstances, legislative unification in Czechoslovakia was therefore carried out by adopting particular laws valid in the entire country. One of the most important of such laws was the Act on Matrimony,[107] which, among others, introduced an optional civil form of matrimony in the Czech lands whilst introducing an optional religious form of matrimony in Slovakia and in Sub-Carpathian Ruthenia.

At the outset of the Second World War, Czechoslovakia disintegrated. Her relationship with her neighbours, except for Romania, had never been easy. The crucial neighbour was, understandably, Germany. Following January 1933, when Adolf Hitler became Germany's *Reichskanzler*, and Germany's adoption of a one-party model controlled by the Nazi party, relations with the parliamentary multi-party and democratic Czechoslovakia worsened. In addition, there were approximately 3,5 million ethnic Germans in Czechoslovakia whose attitude towards the Versailles system in general and Czechoslovakia in particular was by and large uneasy. This large ethnic minority followed the developments in Germany very closely and a substantial part of them was obviously disposed to accept the German political model.

Following the radicalisation of a major part of the German community in Czechoslovakia in the 1930s and the ensuing conflicts, Hitler invited four European powers to Munich to discuss the situation in Czechoslovakia on 29 September 1938. As a result of this meeting, the Munich Accord was signed on the next day[108] and Czechoslovakia was forced to cede vast boundary regions to Germany. Later that year, in November, there were similar

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[107] Act 320/1919, Collection of Laws, Amending Certain Provisions of Civil Law on Ceremonies of the Matrimonial Contract, on Divorce, and on Matrimonial Impediments.

[108] The Munich Accord was signed by Germany (Adolf Hitler), Italy (Benito Mussolini), the United Kingdom (Neville Chamberlain) and France (Edouard Daladier). It is worth mentioning that the Munich Accord was not signed by Czechoslovakia itself, and that Czechoslovakia had also not participated in the preceding discussions.

cessions in favour of Poland and Hungary.[109]Czechoslovak territory thus became indefensible and the country gradually turned into a satellite of Nazi Germany. As a direct consequence of this development, Slovakia declared its independence on 14 March 1939 and the rest of the Czech part was formally occupied by Germany and declared the Protectorate of Bohemia and Moravia[110] within the German Reich, as of 15 March 1939. Sub-Carpathian Ruthenia was annexed by Hungary in the same month. The Second World War formally erupted soon after, on September 1, 1939, when Germany invaded Poland.

Political developments naturally left the codification attempts in abeyance. The last sessions of the Parliamentary codification committees were held in the summer of 1938.[111] As a result of the political crisis, Parliament ceded its legislative powers to the Government.[112] It was consequently envisaged that the new Civil Code would be adopted in the form of a Governmental Ordinance rather than in the more common form of an Act of Parliament. The dissolution of Czechoslovakia, however, intervened.

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[109] In this way, Poland acquired certain minor territories in the north of Moravia / Silesia and in northern Slovakia as a result of a forced consent of the Czechoslovak Government expressed on 1 October 1938, reacting to an earlier Polish ultimatum in this respect, dated September 29, 1938. Hungary gained vast territories in the south of Slovakia as a result of the first Vienna Arbitration Award of Joachim von Ribbentrop and Galeazzo Ciano, foreign ministers of Germany and Italy, respectively, dated 2 November 1938.

[110] In German *Protektorat Böhmen und Mähren*. It was established on the basis of the Decree of the *Führer* and *Reichskanzler* Adolf Hitler of March 16, 1939, published under No 75/1939, Collection of Laws.

[111] See Stenographic Minutes of the National Assembly (Parliament) of the Czechoslovak Republic 1935–1938, Chamber of Deputies (in Czech, Poslanecká sněmovna), 92nd Session at *http://www.psp.cz/eknih/1935ns/ps/stenprot/092schuz/* (the official internet site of the Czech Parliament) (March 8, 2009).

[112] Act 330/1938, Collection of Laws, on Authorisations for Amendments to the Constitution and Constitutional Laws of the Czecho-Slovak Republic and on Extraordinary Ordering Powers, dated 15 December 1938 (note the changed official name of Czechoslovakia). Although Parliament still retained some legislative powers, such was exercised mainly by the Government. The Parliament was officially dissolved by the President of the Protectorate on March 21, 1939.

4.9 CIVIL LAW IN THE PROTECTORATE OF BOHEMIA AND MORAVIA

On March 15, 1939, the occupation of the Czech lands by the German army started and a new state entity called "Protectorate of Bohemia and Moravia", which existed until the end of the World War II, was established. Slovakia separated off from the Czech lands and declared an independent state (Slovak Republic, also called Slovak State).

Material civil law is a branch of law that, in comparison with the other branches of law, was not significantly changed during the era of occupation by Germans.

There were *de facto* three groups of residents in the Protectorate, each of them having a different legal status. In the first group were German Reich citizens, who were the former Czechoslovakian citizens having German nationality. Germans who lived in the Protectorate were subject only to the Reich's authorities and exclusive jurisdiction of German courts. Czechs were in the second group of Protectorate residents and in the third group, to which the racial laws applied and whose members were completely deprived of legal protection, were Jews and Romany.[113] Thus there were two sorts of law in the Protectorate of Bohemia and Moravia – the Protectorate (autonomous) law, and German (Reich) law. The application of these particular systems of law was usually based on nationality (citizenship) of the persons involved. Protectorate citizens were subject of the adopted laws of the Czechoslovak Republic together with the new laws passed in the Protectorate after March 15, 1939 (governmental decrees, Reich Protector's orders, and executory ordinances of particular Ministries).[114]

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[113] VOJÁČEK, L., SCHELLE, K., KNOLL, V., *České právní dějiny*. Plzeň: Aleš Čeněk, 2008, p. 423.

[114] Generally on the law of the Protectorate, for instance: SCHELLE, K., TAUCHEN, J., *Grundriss der Tschechischen Rechtsgeschichte*. München: Dr. Hut Verlag, 2010, p. 63; SCHELLE, K., TAUCHEN, J., *Recht und Verwaltung im Protektorat Böhmen und Mähren*. München: Dr. Hut Verlag, 2009, p. 101.

After the Protectorate of Bohemia and Moravia had been established, certain regulations interfering on property rights, contractual freedom, family rights and status rights of some groups of citizens entered into force; these laws were passed in connection with the racial persecution taking place at that time. The citizens of the Protectorate were still subject to the General Civil Code of 1811 as amended and other civil law regulation of the previous period.[115]

The citizens of German Reich living in Protectorate had to follow the German Civil Code (BGB), which was significantly affected by the Nazi ideology. Now we will briefly outline the approach of the Nazi legal theory to private law, for the principles of it were partly included in the Protectorate law and were it not for the defeat of Nazism in 1945, these principles would be undoubtedly implemented in the legal order of the Protectorate.[116] The Nazi legal theory rejected the existing liberal approach to law and the famous Ulpian's "interest definition" of distinguishing between public and private law. It also refused the distinction between private and public law itself, since under this theory there was only one sort of law – public law. Under the Nazi's approach, private law is thus only law of collectivity (communities). An individual, as a member of a community has "subjective rights" only if he or she was granted such rights by the community and therefore the rights of individuals were limited to bringing benefits for a community. In their treatises, the Nazi theorists emphasized especially the duties (obligations) that individuals had before they outlined individuals'

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[115] Generally on the private law in the Protectorate: TAUCHEN, J., Die Grundcharakteristik des Privatrechts im Protektorat Böhmen und Mähren. In: *Journal on European History of Law*, London: STS Science Centre, Vol. 2/2011, No. 1, p. 56–60.

[116] On the Nazi private law see for instance NÝDL, V., Základy nacionálně-socialistické nauky právní. In: *Právník*, Vol.78/1939, No. 1, p. 7.; SALJE, P., Bürgerliches Recht und Wirtschaftsordnung im Dritten Reich. In: SALJE, P. [Ed.], *Recht und Unrecht im Nationalsozialismus*. Münster: Wissenschaftliche Verlagsgesellschaft Regensberg & Biermann, 1985, p. 53; TAUCHEN, J., *Základní ideologická východiska nacistického „soukromého" práva jako vzoru pro právo protektorátní.*In: *Dny práva – 2010 – Days of Law. Sborník příspěvků – the konference proceedings.*Brno: Masarykova univerzita, 2010, p. 1720.

rights.[117] Thus the essence of law was not "subjective right" but rather duty or obligation. An individual was supposed to act especially in favor of collectivity, i.e. an interest of collectivity shall be put before his or her individual interest. If an individual did not act in favor of collectivity (community), he or she would breach the law, because according to the belief of the Nazi theory, the law and interest (benefits) of collectivity were integral. In a Nazi state there was no state standing against an individual (there was no public law opposing private law), but rather an individual was a part of collectivity, which meant that the tasks of a state (collectivity, community) were also tasks of every individual.[118] Based on these theoretical approaches, the Nazi lawyers opposed the German Civil Code BGB *(Bürgerliches Gesetzbuch)* of 1896, which entered into force on January 1, 1900, as a product of the liberal approach to law; they rejected especially its provisions of the general part.

Nazis interfered significantly with the Reich's Civil law, which was done especially by means of legal interpretations – the so-called general clauses, such as *bonos mores*, good faith, general wellbeing or public interest.[119] Notwithstanding that one of the goals of the Nazi party was to eliminate Roman law from the German legal order, massive elimination of the legal institutes based on Roman law had never taken place.[120] It was planned to be done by passing the new People's Code *(Volksgesetzbuch)*, which was supposed to replace both the German Civil Code (BGB) and the General Civil Code (ABGB). Nevertheless, German law had never significantly influenced Civil law in the Protectorate.

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[117] See for instance LEHMAN, H.,Der Primat der Rechtspflicht. In: FREISLER, R., HEDEMANN, J.W. [Eds.], *Kampf für ein deutsches Volksrecht. Richard Deinharhart zum 75. Geburtstage.* Berlin: R. v. Decker's Verlag, 1940, p. 108.

[118] KNAPP, V. *Problém nacistické právní filosofie*. Dobrá Voda: Aleš Čeněk, 2002, p. 179–182; NÝDL, B. Základy nacionálně-socialistické nauky právní. In: *Právník*, Vol. 78/1939, No. 1, p. 18–19.

[119] See for instance STOLLEIS, M., *Gemeinwohlformeln im nationalsozialistischen Recht*. Berlin: J. Schweitzer Verlag, 1974, p. 89.

[120] VÉGH, Z., Römisches Recht und Nationalsozialismus Gedanken zur Universalität des Römischen Rechtes. In: *Journal on European History of Law*, London: STS Science Centre, Vol. 2/2011, No. 1, p. 2–9.

In the era of the Protectorate, the General Civil Code was amended by the Protectorate source of law only once and it was in 1944 (Decree No. 64/1944 Coll.), when the provisions on finder's reward were changed. This amendment laid down a duty to report to a respective authority any found property of the amount exceeding 100 crowns within three days. If the value of such a found property was over 1000 crowns, the respective authority was supposed to announce the discovery in the Official Journal. The period, after which the founded gained rights to use the property that he or she had found, was reduced from one year to only three months.

In 1940, law of succession was interfered with by a decree implementing the Act on Limitation of Succession due to Behaving against Community (RGBl. I., S. 35), by which the residents of the Protectorate whose Protectorate citizenship was divested were deprived of right of succession. These persons were not allowed to acquire any property from any citizen of the Protectorate or any German citizen and this rule applied even to both these persons' spouse and children. Moreover the citizens of the Protectorate could not give any presents to these persons. If this provision was breached and a gift was given or promised, a criminal punishment of imprisonment for a period of until two years or a monetary penalty could be imposed. This law applied especially to the families of persons that escaped to foreign countries and engaged in foreign resistance.[121]

The state of war influenced and put extraordinary requirements on agriculture, which was connected with efforts to increase agricultural production. This goal was to be achieved by laying down statutory lien on outstanding debts concerning deliveries of fertilizer, seed, and plantation (decree No. 91/1940 Coll.). Therefore, the State was interfering with private law relationships and stated that right of lien be originated *ex lege*, which was a guarantee both favorable for suppliers and making trade easier. The purpose was to increase harvest production. Creditors had a lien on the harvested products from the land belonging to the undertaking even before the fruits were detached from the land to secure their claims based on delivery

[121] RONKE, M., Die Anwendung erbrechtlicher Vorschriften im Protektorat Böhmen und Mähren. In: *Deutsches Recht*, Vol. 12/1942, No. 10/11, p. 375–377.

of fertilizer, seed, and plantation against owners, holders, users, or tenants of agricultural land. This provision brought a new concept into the legal order of the Protectorate; under this concept, the lien applied even to undetached fruits, i.e. real part of real estate. Similarly in 1942, there was established a right of lien for creditors who gave a loan to processers of flix (ordinance No. 342/1942 Coll.).

In 1940, the effectiveness of the laws from the so-called "Second Republic" targeting limitation of alienation, leasing, and acquiring real properties (decree No. 80/1940 Coll.) was prolonged. Thanks to these laws, during compulsory service, the State was able to limit "autonomy of will" of owners of agricultural real estate, parcels on which resident housing was built, and building parcels. Further, it was prohibited to alienate property without having an approval of municipal authority and this applied also to leasing and agricultural and forest enterprises. Such an approval was rejected if it was presumed that the real estate in question was to be subject of mischievous speculation or that the real estate would no longer be used for its present purpose. However no approval was needed if the transaction was to take place between spouses, between parents and their children, or if one of the parties was the State.

There were significant changes to family law. There was adapted an amending decree regarding family law in February 1943 (RGBl. I., S. 80). It laid down a new decisive period for presuming legitimacy of children; this period started to run at the time of marriage. Even the end of this period was changed; it was prolonged from the original 300 days to 302 days. Further this decree empowered state attorneys to negate legitimacy of a child in public interest.

Analogous to the situation in the Reich, Jews were subjected to racial persecution in the Protectorate.[122] Since June 1939, they were allowed to dispose of real estate, easements, or securities of all kinds only if they had a special prior written approval by so-called "Oberlandrat". Moreover,

[122] MEDEAZZA, J. Judenfrage und Judengesetzgebung in Europa. In: *Deutsches Recht*, Vol. 11/1941, No. 13, p. 674–682.

under a Reich Protector's decree,[123] they were not allowed to gain property rights to real estate, undertakings, securities, and precious things. This decree also adapted the Nurnberg racial laws, since it defined which persons shall be considered to be Jews.[124] Over the coming years, there were issued a couple of Reich Protector's decrees on property of Jews, by which Jews were forced to report and register their property.

After that, they had to hand over some of their property, e.g. stocks and other securities had to be deposited with banks. Property of Jews was gradually being confiscated and transferred to Germans. In the following years, there were issued numerous orders to report property and register undertakings of Jews. Moreover, Jews were limited even on the field of monetary policies; they had to have so-called tied bank accounts, from which they were allowed to withdraw only a limited amount of money. Furthermore they were limited and injured in many other areas.[125] In July 1941, the Act on Protection of German Blood and German Honor, which prohibited marriages between Jews and "nationals" having German or generically related blood.[126]

It is typical for Civil law of the Protectorate that equality of subjects (parties) of Civil law relationships was eliminated and "autonomy of will" was substantially limited. Persons with Jewish roots were being persecuted in all areas; they were for instance not allowed to issue certain kinds of goods or acquire property rights over certain things. Jewish lessees of apartments were also excluded from the protection against termination of lease (the decree No. 248/1941 Coll.).

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[123] Reich Protector's Decree on Jewish Property of Jun 21, 1939 (VBlRProt.S. 45).

[124] SCHMIDT, Das Gesetz zum Schutz des Deutschen Blutes und der Deutschen Ehre im Reichsgau Sudetenland und im Protektorat Böhmen und Mähren. In: *Deutsches Recht*, Vol. 10/1940, No. 38, p. 1655–1657.

[125] MALÝ, K. (Ed.), *Dějiny českého a slovenského práva do roku 1945*. Third edition, Praha: Linde, 2005, p. 463.

[126] Third decree executing the Act on Protection of German Blood and German Honor of July 5, 1941 (RGBl. I. S. 384).

4.10 CZECHOSLOVAKIAN SOCIALIST CIVIL LAW IN THE YEARS 1948–1989

After the social changes, as a result of so-called Victorious February in 1948, it was obvious that also elementary codification regulating everyday life of the Czechoslovak citizens and organizations must come through necessary changes. In accordance with these social changes there were opened works on new Civil Code and other legal acts. This process is also known as a legal two-year plan.[127]

The legal two-year plan was finished in year 1950 when the Civil Code[128] and other legal acts were adopted. It was especially Family Code, Criminal Code, Civil Procedure Code and some other. From 1st January 1951 the civil legal relations were under the regulation of new Civil Code that was in force for all the Czechoslovak State. From this day these civil relations were regulated by old Austrian (in the Czech part of the state) and Hungarian (in the Slovak part of the state) legal regulations no more. It is necessary to add that the Austrian Civil Code from 1811 was abrogated in 1966, because it still regulated the labour-law relations.

The adoption of new Civil Code also meant very important change, because the Czechoslovak legal system abandoned ideals of past First Republic and began the building up of new socialist society. The questions of family law were hived off to separate legal act, as well.

The elementary principles of newly establishing Czechoslovak socialist civil law were founded in the Constitution of 9th May from 1948.[129]

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[127] See BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.), *Komunistické právo v Československu*. Brno: Masarykova univerzita a Mezinárodní politologický ústav, 2009, p. 426.
[128] Act no. 141/1950 Coll., Civil Code.
[129] Constitutional Act no. 150/1948 Coll., Constitution of the Czechoslovak Republic.

4.10.1 Constitution of May 9, 1948 and its Influence on the Socialist Civil Law

The preamble of the most important legal act that was adopted after the revolution in 1948, the Czechoslovak Constitution, stated, that the state would exist on the principles of public democracy that should lead the society to the establishment of socialism, as an early stage of communism. The further text of the preamble is dealing with the former history of the Czech and Slovak nations, the exploitation of the working class. This exploitation should be cleared; the constitution especially stated that the national economy should serve for all member of the society, not only for capitalists. It was obvious that the changes of the Czechoslovak legal regulations would be connected with the ownership of factors of production. The labour is connected with the human and it is impossible to transfer this factor to someone else. But, if we are thinking of other factors, land and capital, we have to add that the land and the capital were not divided to all member of the society. The land and capital were concentrated in the hands of narrow group of the richest people. These factors should be transferred to the hands of the whole society.

Other elementary principles of the future evolution of the civil law were stated in the art. XII. This article was based on the Marxist model of economy established on the central (controlled by the state) plan. The Czechoslovak economy in years 1948-1989 was not established on the basic economics factors known as an offer, an acceptance and a price. The elementary signs of the new socialist central planned economy were:

- the nationalizing of the mining and other industry, big businesses and banking,
- the ownership of land established on the principle that the land belongs to the working class,
- the protection of retail and middle-sized business and the protection of personal property.

The protection of property was guaranteed by the art. 8 and 9.

The civil law relations were also connected with other articles of the constitution that protected for example personal and domestic freedom, freedom of movement, freedom of expression etc.

4.10.2 The Criticism of the "Bourgeois" Civil Law

Almost every publication from the era of establishing a socialist society had the part dealing with the criticism of the bourgeois law.[130] This criticism arises from the elementary conception differences between the capitalist and socialist model of a society. After 1948 the Czechoslovak national economy was under the control of state. It was necessary to divide the factors of production again, mainly under the control of the working class. The "bourgeois" law was based not on the socialist ownership but on the private ownership.

The first point of the criticism was connected with the private ownership of the exploiting class. The second was dealing with the conception of the autonomy of will and the third with the differentiation of the public and the private law. The criticism was not against the conception but against the usage of autonomy of will and the differentiation of the public and private law. The socialist lawyers argued that the bourgeois law was only legitimizing the private ownership of factors of production and the exploitation of the working class by the capitalists.

4.10.3 Civil Code from 1950

After the socialist revolution in 1948 there were stated four elementary aims of future development of the socialist civil law:

- to develop socialist property – state and cooperative,
- to regulate legal relations between the socialist organizations fulfilling the central plan,

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[130] See KNAPP, V., PLANK, K. (eds.), *Učebnice československého občanského práva*. Praha: Orbis, 1965.

- to guarantee the satisfaction of material and cultural needs of the citizens,
- to bring up new socialist society.

In 1950 the new Civil Code was adopted, it came into force on 1st January 1950. It was the first civil code that's aim was to lead the society to the establishment of a socialism.

4.10.3.1 The Changes in the Sphere of the Ownership

Art. 100 and the other of the new Civil Code brought very new construction of ownership. The Civil Code established three kinds of the ownership – socialist, individual and private.[131]

The socialist ownership was understood as a common ownership that belonged to everybody. At this point the civil law met the elementary condition of legal relations, the subjectivity of an individuals and entity of an organization. Every property must have its individual concrete owner. It is impossible to construct the ownership as a property of everybody. The term "society" or "everybody" is not concrete enough and nobody knows who is entitled to dispose with this property. Due to this fact the socialist ownership belonged to the state and cooperative society. The state was the one and only subject that may represent the interests of the society. The property under control of cooperative society was also influenced by the policy of the state.

Art. 103 of the Civil Code allowed transferring a part of a national property to national or communal enterprises and to socialist organizations. We have to add that this was not a transfer of right of ownership, but it was only a transfer of the right to use the thing. The national property belonged only to the state.

The Civil Code also established the individual and private ownership. These terms are quite similar, but the socialist legal theory didn't allow

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[131] KNAPP, V., LUBY, Š. (eds.) *Československé občianske právo. II. zväzok*. 2nd edition. Bratislava: Obzor, 1974, p. 21 et seq.

mistaking them. The individual ownership was not in the conflict with the interests of the society. Every working human was allowed to own his house or flat, his own personal belongings as well as savings from his salary. But the private ownership was in conflict with the interests of the society. The private ownership was dangerous because it represented the interests of the exploiting class and the main aim of the civil law was to clear it. The private ownership was only transitory.

4.10.3.2 Other Changes

The Civil Code from 1950 was also connected with other changes but they were not as important as the structuralism of the ownership. Some institutes typical for bourgeois law was also regulated by this code, because it was adopted in time when a large mass of property was not nationalized yet.

4.10.4 Constitution of 1960

In 1960 a new socialist Czechoslovak constitution was adopted.[132] This constitution stated the victory of socialism in Czechoslovakia and changed the official name of the country – Czechoslovak Socialist Republic. The national economy changed the aim of its activity from socialism based on principle "everybody has to work for society, everybody will get according to his merits" to communism based on the principle "everybody has to work for society, everybody will get according his needs". This change also influenced the development of Czechoslovak civil law. It was obvious that the former Civil Code form 1950 was not corresponding the needs of a new developed socialist society. It was necessary to prepare a new civil code.[133]

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[132] Constitutional act no. 100/1960 Coll., Constitution of the Czechoslovak Socialist Republic.

[133] KNAPP, V., PLANK, K. (eds.), *Učebnice československého občanského práva.* Praha: Orbis, 1965, p. 106.

The constitution from 1960 defined the socialist, individual and private ownership. The private ownership was also tolerated but only in accordance with the principle that nobody is allowed to exploit someone other.

4.10.5 Civil Code from 1964

On 8th December 1960 the session of Central Committee of Czechoslovak Communist Party was held. This committee decided to begin works on preparation of new civil code that should better serve the modern socialist society. This works were finished in 1964 when the act no. 40/1964 Coll., Civil Code, was adopted. It came into force on 1st April 1964.

4.10.5.1 Preamble of Civil Code and the Elementary Principles

The preamble was an inseparable part of the new Civil Code. It continued older rules stated in the constitution from 1960. The preamble stated:

"In the Constitution of the Czechoslovak Socialist Republic are introduced the main directions of development of our society and personality of human. It is a ground of total and new regulation of relations in the sphere of socialist production and labour and in the sphere of personal demand of citizens.

The development of central planned socialist production, consistent attitude to the elementary principles of democratic centralism in the spheres of production and effective enforcement of whole society interests in the production of socialist organization need new regulation that is included in the Economic Code respecting the development of lawmaking.

The economy of socialist society is based on the common socialist property production means. The quantity of satisfaction of material and cultural needs of citizens are generally depended on the development of socialist economy and on the labour contribution of each citizen.

The Civil Code arises from the unity of socialist economy and from the correspondence of interests both of society and citizens. It qualifies the personal property as deferred from the common property and protects it as the one of the most important means of citizens' needs satisfaction.

The main aim of the Civil Code is to set and define the rights and duties of citizens and organizations rising in the spheres of satisfaction of material and cultural needs, to protect these rights if they are exercised in accordance with the interests of whole society, and to administer to consistent abidance of socialist rule of law in the civil relations.

The provisions of the Civil Code aspire to strengthening of socialist economic and other social relations and to get over the anachronisms in people's minds. These provisions help to make conditions for changing socialist relations to communist."

This preamble fully influenced the elementary principles[134] of new socialist civil law that were listed in the art. I–VII:

"I. The socialist social structure is a ground of civil-law relations.

II. The constantly growing social production based on socialist common property is the mail source of the citizen's basic needs satisfaction. Everyone is obliged to diversify, to strengthen and to protect this kind of property.

III. Satisfaction of material and cultural needs of citizens is mainly provided by remuneration for work in accordance with its quantity, qualify and social importance. Redistribution is provided at no cost in accordance with the capacity of society and with the social importance of the needs.

IV. The main aim of socialist organizations is to satisfy the material and cultural needs of citizens. The citizens participate in direction of the activities and in control of performance of tasks.

V. Not only reciprocal subject's rights and duties but also the rights and duties to society arise from civil-law relations.

VI. The performance of subjective rights and duties must be in accordance with the rules of socialist society.

VII. Nobody is allowed to abuse his rights against the interests of society or fellow citizens and also nobody are allowed to enrich himself at the expense of society or fellow citizens."

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[134] LAZAR, J., ŠVESTKA, J. (eds.), *Občanské právo hmotné I.* Praha: Panorama, 1987, p. 21 et seq.

This list is different from the lists of private law principles that are know from the era of first Czechoslovak Republic. It is impossible to find principles of equality, autonomy of will etc. These elementary socialist principles were used in the process of application and interpretation of concrete provisions of Civil Code.

The main problem is connected with the principle under art. V. As it is known from the general legal theory, the rights and duties from the legal relations arise only to participants of this relation. It is impossible to affect other subject negatively. So, the problematic question is how the relation between two citizens, between citizen and socialist organization or between two socialist organizations may affect the society, respectively who is to society.

4.10.5.2 Participants of Civil-Law Relations

The elementary civil-law terminology had changed. The Civil Code from 1964 didn't recognize the individuals as natural persons and legal entities any more.[135] The individuals were called as citizens and the legal entities were called as socialist organizations. The term legal entity was used only by art. 488.

4.10.5.3 Structuralism of Ownership

Also the Civil Code from 1964 recognized the socialist, individual and private ownership but the definitions (due to rules stated in the constitution) were not as precise as they were in the Civil Code from 1950.

The individual ownership was defined in art. 123 et seq. Things that were in the ownership of the state might be transferred from the state to individuals or they might be entrusted to the individuals. Also people's work might be a source of their property, but it must be only the work for

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[135] LAZAR, J., ŠVESTKA, J. (eds.), *Občanské právo hmotné I.* Praha: Panorama, 1987, p. 25.

the whole society. The property acquired from the other sources (except of presents, inheritance etc.) was not protected by the law.

The individual ownership consisted of thing of domestic and personal use, one-family house, holiday homes etc.

The other things were in the property of state.

Private ownership was also possible but it was recognized as provisional.

The right of possession was not regulated by the Civil Code. This institute as well as positive prescription was adopted in year 1983.

4.10.5.4 Personal Use of Flats, other Rooms and Estates

The material and cultural needs were not satisfied only by the personal owned property, but also by the property owned by the state.[136] The Civil Code (in accordance with the art. 152 et seq.) entitled the state to entrust the property to the individuals. The typical things subjected to personal use were for example flats, other rooms and estates. It means that these persons were not owners of the thing but they were entitled to use it.

The typical notes of this trust were non-limited period and payment. The body that was entitled to decide whether the part of socialist ownership (flats, living rooms, garages or ateliers) would be entrusted to the individuals was local people's committee. When the contract between this body and the individual was signed the individual was entitled to use the thing and obliged to pay for it. The trust of estates was in competence of district people's committee.

The institute of personal use was revoked at the beginning of 90's and it was changed to ownership or tenancy.

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[136] KNAPP, V., LUBY, Š. (eds.), *Československé občianske právo. II. zväzok.* 2nd edition. Bratislava: Obzor, 1974, p. 75 et seq.

4.10.5.5 Services

The Civil Code from 1964 didn't recognize the typical obligations as they are known from today's legal regulations. These obligations were known as services that were provided by socialist organization. The main aim of socialist organization was to satisfy material and cultural needs, so citizens were entitled to use these services.[137]

But the activity of socialist organizations was not the only way of satisfaction of material and cultural needs. The Civil Code from 1964 adopted the regulation of civil help. In accordance with the Article 384 et seq. citizens were entitled to use the help of other citizens, for example it was possible to do something for someone else, to borrow money from someone else or to help other with something.

4.10.6. Changes after 1989

After important changes in Czechoslovak society after 1989 it was obvious that the Civil Code also needed changes. The national economy was based on central planning under the control of state no more and it was necessary to adopt an absolutely new legal regulation that will allow a national economy based on market.

The participation in collective companies (also under the control of state) was newly recognized as free and independent. It means that nobody was enforced to take part in collective companies no more.

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[137] LAZAR, J., ŠVESTKA, J. (eds.), *Občanské právo hmotné II*. Praha: Panorama, 1987, p. 60 et seq.

5. BUSINESS LAW, LAW OF BILLS OF EXCHANGE, AND ECONOMIC LAW

5.1 PREHISTORY OF BUSINESS LAW AND LAW OF BILLS OF EXCHANGE

a) The beginning of business law which, to say it simply, regulated the relationships of those being permanently engaged in productive or commercial activities trying to achieve gain, should be looked for in municipal law and guild's articles; guild's regulations governed business until the mid –1800s.

At the beginning of the second half of the nineteenth century, regulation of business issues in the Habsburg monarchy was laid down in numerous laws. The provisions of the General Civil Code were the basics. Nevertheless after the revolution of 1849-1849 had been defeated, and in the era of Bach's absolutism, new provisions were adapted - especially those of Bills of Exchange Act of 1850, the Act on Associations of 1852, the Act on Firms and Companies of 1857 and the Act on Protection of Hallmarks and the Act on Protection of Templates, Models, and Industrial Products of 1858. In 1860, another important law was passed – the Act on Stock Exchanges and Brokers.

b) Until the end of the seventeenth century, the regulation of bills of exchange in the Kingdom of Bohemia was based practically only on legal customs. In 1651, the municipal council of Slezská Vratislav had issued the Bills of Exchange Act, which the two following acts on bills of exchange used as a model. The last one of them, enacted in 1712, had become the core for regulation of bills of exchange in Bohemian cities (the Emperor's rescript of 1717). Nevertheless this line of development was stopped in the early 1740s due to the loss of a large part of Silesia.

In 1763, in order to unify the Czech and Austrian laws, the uniform Bills of Exchange Act was passed. Based on this Act, a system of bills of

exchange courts and mercantile courts was set up. Its fundamental elements were Land Bills of Exchange Courts and Mercantile Courts whereas in Prague and Brno, there were established courts of appeal. The entire system was headed by the Supreme Court seated in Vienna.[138]

5.2 CODIFICATION OF BUSINESS LAW AFTER 1862

In the late 1850s, on the basis of the German Confederation and with help of Prussian experts, codification preparatory works started. In 1862, they were implemented in the legal order of the western part of the monarchy, which was done by means of the General Business Code (No. 1/1863), which dealt with rules of commercial relations and capital companies.[139]

As for business law, the concept of business activities (business) had a little different meaning from the common meaning given to this term by spoken Czech, which considers business to be any exchange of goods for money or switching goods. On the one hand, the meaning was narrower, and on the other hand, it was wider. In light of the Business Code (the Sections 271–273), practically only transactions of businessmen (or merchants, in terms of the Code) were considered to be of business nature and thus "business". There was an exception for speculative purchases (purchases made with a view to reselling the goods), acquiring goods by means of speculative purchases (speculative sales), taking over insurance for a fixed premium, maritime loans and operation on stock exchanges, which were always understood as business. Further, in the general understanding, also non-commercial activities stated in the Section 272, e.g. bank and currency

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[138] This topic is discussed in more detail in textbooks on the Czech history of law or eventually in older Czechoslovakian textbooks on Czechoslovakian or Austrian history, introductory passages of text books on business law, or see: URFUS, V., *Zdomácnění směnečného práva a počátky práva obchodního.* Praha, 1959 or MALÝ, K., *České právo v minulosti.* Praha: Orac, 1995.

[139] From the Czech commentaries, see: DOMINIK, R., KIZLINK, K., *Obecný zákon obchodní platný v historických zemích Československé republiky.*Praha: Vladimír Orel, 1927.

exchange operations, commission agents, shipping and transportation services, publishing services, operating storages, were considered to be of business nature. However it applied only if these activities were done "in traders' way", i.e. repeatedly and with the intent to gain profit. Moreover, all contracts concluded by businessmen if regarding their line of business and did not involve real estate, were also so-called businesses.

The term of "businessman" (merchant) was crucial for defining the term of "business". Businessmen were those who concluded "business" in the abovementioned meaning, i.e. for instance companies, industrials, traders dealing with their goods, owners of commercial facilities (sales centers, colonials, stores in which industrial goods were sold, etc), i.e. businessman *sensu stricto* and restaurateurs, bakers, stock brokers, bankers, owners of currency exchanges, forwarding agents and publishers. These activities had to be carried out in their own name, repeatedly and with an eye to making a profit.

Businessmen that were registered at business registers were called fully-fledged (enrolled). Only the fully-fledged businessmen were entitled to have own business name; they also had to keep records in business books and their disputes were dealt with before special courts, whose lay judges were being chosen from the fully-fledged businessmen. All limited liability companies were registered in the business register and also the businessmen that exceeded a stated amount of a general or special income tax had to be registered there.

The lawgiver created a concept of capital companies so that undertaking in industry, agriculture, commerce and other areas was easier, as more persons could assemble and either run businesses together or at least provide funds for it. In the Business Code, there were provisions on public companies (the Articles 85–149), special limited partnerships (the Articles 150–172), special limited partnerships with shares (the Articles 173–206), joint

stock companies (the Articles 207–249) and silent partnerships (the Articles 250–265).[140]

5.3 DEVELOPMENT OF BUSINESS LAW AFTER THE PASSAGE OF THE BUSINESS CODE

After the Business Code had been passed, as for the older laws, only the relevant provisions of the confederate act of 1852 remained in force, but as time went there were more and more new laws enacted.

The coalition act of 1870 included provisions on cartels and in 1875 a new Act on Stock Exchanges was passed, followed by a stock regulative of 1899 and the Act on Insurance Contracts of 1918. The Act on Cooperatives No. 70/1873 was also of significant importance. Cooperative movement was progressing from 1840s. After the confederative patent No. 253/1852 had been adapted, cooperatives *("for-profit and economic associations")* were being established under and regulated by this Act. The Act of 1873 characterized them as self-help associations with open membership, whose purpose was to support trades or business of their members. We can agree with the old handbook that "*they are associations, whose members try to achieve together such results that they could not achieve as individuals.*"[141] First there were disputes over whether they were legal entities or not. The idea that they were legal entities prevailed and it was claimed that they can get rights and bind themselves, acquire property and other *rights in rem* and act a party before court under their names. The Act stated that the confederate patent of 1852 did not apply to cooperatives whereas application of the confederate patent of 1867 was excluded by its own express provision.

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[140] The most famous Czech discussion about business law: RANDA, A., *Soukromé obchodní právo rakouské.* Praha: Vysoká škola aplikovaného práva, 2008 (according to the original print from 1908).

[141] *Praktický advokát.* I., Kniha II., Praha: F. Strnadel a spol., p. 104.

At the beginning of the twentieth century, the Act on Limited Liability Companies No. 58/1906 was adapted. It took over from the German law the modern form of collective undertaking. Limited liability companies consisted of individual legal entities and were registered in business registers.

After the new republic was established, business law valid in the Czech lands and Slovakia had to be not only unified, but also modernized. Preparatory works on a Business Code were slowed down, as a consensus on the complex concept of regulation of private to be found. Thus the Ministry of Justice decided that a commission on unification of business law be established. Nevertheless this effort had not materialized until 1929. Despite the fact that it helped prepare a draft of a new Business Code, which was published in 1937, the draft had been neither deliberated nor adapted.

As for the first laws of Czechoslovakia, we will outline new rules on publishing entries from the business register (No. 397/1919 Coll.), which started to be published in the *Central Announcer,* which was being published in Prague. One of the most significant measures in the area of business law was that application of the adapted Austrian Act on Limited Liability Companies (No. 58/1906 Coll.) was extended to Slovakia and the Carpathian Ruthenia. This eliminated the significant handicap of the businessmen from Slovakia and the Carpathian Ruthenia, as the Hungarian law did not recognize this form of companies. The new law on publishing contract of 1923 (the Act No. 106 Coll.) was very important as well, since publishing contracts were not regulated properly by the old adapted Austrian laws. The same reason – inadequate regulation by the adapted Austrian laws – stands behind the passage of the new Act on Insurance Contract of 1934 (the Act No. 145 Coll. on Ensuring Claims of the Insured in Private Insurance and on State Supervision over Private Insurance Companies). Private insurance, especially life insurance, insurance against fire, and against damages caused by burglary, accident insurance, car insurance of liability for damage, car insurance and agricultural insurance, had been regulated especially by the Act No. 501/1917, before the new Act was passed. Nevertheless the old act had entered into force just partially and thus its provisions were not complex. The purpose of the Act No. 111/1927 Coll. on Unfair Competition was to ensure *bonos mores* in economic competition. The Act stated that any behavior of a competitor that is *contra*

bonos mores and capable of causing damage to other competitors (the Sec. 1) shall be looked on as unfair competition. Moreover, the Act laid down the following: deceptive advertising, incorrect specification of origin of goods, palliating, misusing company brands, etc.

Further interference with business law is connected especially with the efforts to overcome the consequences of the deep economic crisis of the early 1930s. It resulted in passing the Act No. 141/1933 *on Cartels and Private Monopolies* (the Act on Cartels). As opposed to the previous regulation, it allowed that cartels be established. Under the Act on Cartels, the cartels were agreements of independent entrepreneurs, by means of which the parties made a pact to limit or eliminate free competition, especially as for production, sales, terms of trade or prices, or even rates if the purpose of such a contract is to gain power of a particular market. There could be just one-shot cartels, established only for a single deal. Nevertheless there were cartels of permanent nature, based on an entire system of agreements. The new act stated that cartels shall be registered, which would allow authorities to check and eventually regulate their activities. The checking was done by the State Statistical Office. As for the tools for regulation, there were cartel commissions and cartels court. Nonetheless state could intervene only if the cartel endangered public interest.

5.4 CODIFICATION OF LAW OF BILLS OF EXCHANGE IN 1850, 1928 AND 1940

The Bills of Exchange Act of 1850 (No. 51/1850) was prepared with a great deal of help by the Prussian experts and the original text was elaborated by these experts. Austria accepted it, as it tried to join the single German customs and commercial area. It remained in force until the end of the Habsburg monarchy, as the pattern, which had been prepared in 1913 as a result of the international conferences held in Hague in 1910 and 1912, was neither deliberated nor adapted.

Bills of exchange provided creditors with great advantage, because the courts were very fast with regard to bills of exchange issues. There issued

orders to pay, which stated that a debtor shall pay his or her debt within three days together with costs of the proceedings). The bills of exchange were even tradable and thus the creditors were allowed to transfer them to third parties by means of endorsements.

After the Czechoslovakian Republic had been established, the need for unification of the distinct regulation from the Czech lands and Slovakia and the Carpathian Ruthenia was rising. Moreover, it was needed to implement the outcomes of the negotiations that had taken place in Hague shortly before the World War I. The first proposal, which had been prepared by the deputy Alois Rašín in 1920, was set aside after deliberated by the constitutional committee. Prior to that, the National Assembly abolished the privilege of military officials, who were not allowed to become bills of exchange debtors.

The Czechoslovakian regulation of bills of exchange was originated in the late 1920s and in so doing it was kept in mind that "global" legislation on bills of exchanged had been planned on the international level. The original idea that both of the acts on bills of exchange would be unified was rejected and the new model was based on the existing legislation and the exiting loops were to be eliminated by setting up a suitable combination of both existing laws. The National Assembly approved it at the end of 1927 and it was published under the No. 1/1928 Coll.[142] Professionals accepted the new law very positively and it was even discussed abroad. It was even proposed that the new law would be taken as a model to the international conferences preparing a uniform bills of exchange act.

The international negotiations on the new uniform bills of exchange act, which was initiated by the League of Nations, culminated at an international conference that took place in Geneva in 1930. The Geneva conventions, including a proposal of the Uniform Bills of Exchange Act, were approved there. Nevertheless the needed amendments to law of bills of exchange had not been deliberated by the Czechoslovakian parliament and a new Bills of

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[142] The author of a template to the Act, František Rouček, published also a commentary (ROUČEK, F., *Československý zákon směnečný.* Praha: Čs. Kompas 1928, 1932; and, *Nové československé právo směnečné. Podrobný systém.* Praha: Státní tiskárna 1927, 1931).

Exchange Act was passed in 1940 as a governmental decree No. 111/1941 Coll., after the Protectorate of Bohemia and Moravia had been established.[143]

5.5 BUSINESS LAW IN THE PROTECTORATE OF BOHEMIA AND MORAVIA

Especially the adapted Austrian "General Business Code" (AHGB – No. 1/1863 RGBl.), which remained in force, was of significant importance for the citizens of the Protectorate but the citizens of the German Reich who stayed in the Protectorate had to follow the German Business Act of 1897 (RGBl. I., S. 219).

The economy during the occupation was characterized *inter alia* as transition from peace economy to warfare economy, i.e. almost all industrial production started being aimed at military material for the German army.[144]

During the war, the State interfered with the laws of business law significantly. Based on the requirement of public order and with respect to state of war, Minister of Justice was entitled to set limits to and reliefs of duties laid down in business laws. This applied especially to a duty to publish final accounts or some entries into business register (governmental decree No. 312/1942 Coll. on Relief of Compliance with Business Laws). Moreover, trading of stock was also heavily regulated by the State and securities that were not sold at the official stock exchange could not be sold for more than what their price was at the Prague stock exchange. It was not possible in the Protectorate to buy stocks or any other securities from anyone else than financial institution (governmental decree No. 137/1941 Coll. on Trading Securities). In 1941, the Uniform Bills of Exchange Procedural Code,

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[143] K němu ROUČEK, F.: *Nové českomoravské právo směnečné.* Praha: Českomoravský Kompas 1941; and, *Praktické směnečnictví a šekovnictví.* Praha: A. Hubálek 1941.

[144] VOJÁČEK, L., SCHELLE, K., KNOLL, V., *České právní dějiny.* Plzeň: Aleš Čeněk, 2008, p. 352.

which brought the legal order of the Protectorate closer to international law of bills of exchange, entered into force. The Uniform Bills of Exchange Act, approved at the Geneva conference of 1930, became a part of the Protectorate legislation (governmental decree No. 111/1941 Coll.).

There were also laws on establishing mandatory cartels in the Protectorate, which served as a ground for merges of the undertakings seated in the Protectorate and cartels from the German Reich. The principle of autonomy was suppressed by placing a duty to report their economic situation on entrepreneurs. Thus the Reich authorities were entitled to control prices, stock, and performance of Czech undertakings and from 1939 the undertakings were not allowed to set prices for their products themselves. A new authority called the Supreme Price Office was established to set up prices of goods and services and to check compliance with the official prices.[145]

Economic alliances started to be abolished in 1939 and even mandatory organization of the Czech economy, according to German interests, was ordered. Ministry of Industry, Business, and Trade was empowered to establish, liquidate and have merged the existing economic alliances and meddle with their bylaws. There were established so-called central alliances (total number of seven), which were divided into four subgroups (governmental decree No. 168/1939 Coll.). As from 1941, all banks and financial institutions were mandatorily organized in three economic groups organized in so-called Central Alliance of Finance (governmental decree No. 114/1941 Coll.). Even agricultural production was subjected to regulation and Ministry of Agriculture, playing the major role, managed the production so that food-supply would be ensured. All producers and traders in agricultural commodities had to participate in so-called mart alliances according to their field of activities.[146]

In cases where it was demanded by the public interest, Ministry was able to appoint fiduciary or sequestrator and these persons were in charge of managing the respective undertaking. Sequestrator was even entitled to

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[145] Governmental Decree of May 10, 1939 on Establishing Superior Price Office No. 121/1939 Coll.

[146] MALÝ, K. (Ed.), *Dějiny českého a slovenského práva do roku 1945*. Third eddition, Praha: Linde, 2005, p. 485.

act on behalf of such an undertaking and was responsible to the Ministry. However all extraordinary acts concerning the undertaking, e.g. leasing, had to be preapproved by the Ministry. The owner of the undertaking was entitled to receive part of the profit.[147]

With respect to forced labor under German rule, there were established certain reliefs for some fields of private law in 1944. It was for example suspension of period of limitation or bans on transformations from joint stock companies into limited liability companies (Minister of Justice's decree No. 228/1944 Coll.).

Analogous to the Reich, Jews were subjected to racial persecution in the Protectorate. They were not allowed to lead and later not even own enterprises and securities. This property and property of the Protectorate's citizens was often transferred to the hands of occupants who were trying to take over the economy of the Protectorate. As for undertakings of Jews, Reich's Protector was entitled to appoint a manager (controller) who was controlled and supervised by him.[148]

5.6 INDUSTRY, COMMERCE, AND TRADES AT THE END OF FORTIES AND IN THE FIFTIES

In a situation where the socialistic political parties of the National Front aimed at a transition to centrally planned economy, numerous transfers were carried out shortly after the war, i.e. confiscation of property of enemies, nationalization, and revision of the first land reform). After February 1948, these changes were followed by the second stage of nationalization and new land reform. The nationalized undertakings kept on operating as so-called national enterprises.

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[147] Governmental decree of March 21, 1939 on Administration of Economic Undertakings and Supervision over them No. 87/1939 Coll.

[148] Reich's Protector decree on Property of Jews of June 21, 1939 (VBlRProt. S. 45).

The nationalization that took place after February affected especially owners of such undertakings that, as of January 1946, had been giving jobs to more than fifty persons.[149] Nonetheless as for the industrial sector, which was a sector on which special emphasis was placed, the rule of fifty employees did not apply and all undertakings belonging to this sector were nationalized. Hence the State gained ownership to these undertakings. In December 1948 another stage of nationalization took place and non-state railroads, all public transportation including fluvial and aerial was nationalized as well. The existing credit unions and savings banks were transformed into a network of branches of the State Savings Bank.

The process of nationalization in the Fifties exceeded the framework of the nationalization acts and therefore at the end of 1948 there were almost none private undertakings employing more than twenty employees. At the end of 1940s and in the 1950s, most of trades had to join the socialistic sector and a large number of craftsmen started working for industrial or construction companies. Other craftsmen were being persuaded and forced to join craftsmen cooperatives or communal enterprises. Retails and hotels and restaurants became a part of state commerce or consumer cooperatives (Jednota). These measures created serious problems, because demand for craftsmen exceeded supply and thus citizens were forced to use illegal ways to satisfy their needs.

Shortly after February 1948, both the existing and intended interventions in economic relationships were reflected in the Constitution of 1948, new planning acts, and laws passed during the era of so-called legal two-year period, and especially in the Civil Code, the Act on Economic Contracts and State Arbitration, the laws on organization and operation of state enterprises and the Act on Uniform Agricultural Cooperatives (JZD).

[149] Especially the Acts No. 114 and 115/1948 Coll.

5.7 THE ABOLISHMENT OF BUSINESS LAW, LAW OF BILLS OF EXCHANGE AND THE BIRTH OF ECONOMIC LAW

Business law did not exist as an independent branch of law anymore after the so-called "middle" Civil Code No. 141/1950 was passed. While it was being prepared, a special commission that was to deal especially with commerce and undertaking issues was established. Its subcommittees prepared new provisions on patent law, trademarks, unfair competition, companies register, intellectual property, joint stock companies, law of bills of exchange and checks, insurance contracts, public storages, securities, forwarding and transportation agreements, civil associations, and powers of attorney for undertakings.

It was further crystal clear that the business law issues be connected with civil law issues. The internal organization of the commission showed that some institutes and institutions of business law were no longer taken into account and that they should be simply abolished. On the grounds of the new legislation, most companies established according to provisions of business law were abolished as well. There was only one exception that applied to joint stock companies.

The role of the joint stock companies was now regulated by the Act No. 243/1949 Coll. *on Joint Stock Companies*. It was based on well-established principles and their organization and operation was under strict supervision by the State. The existing companies, except those that were engaged in international trade and international forwarding, had to apply for state permit and approval of their bylaws. If it was required by so-called public interest, the supervisory body, i.e. the relevant Ministry, was empowered to abolish any joint stock company. The Act also stated that it be possible to transform the existing limited liability companies into joint stock companies. However an approval by the State was required. If such a transformation did not take place in the stated period of time, these companies were dissolved and entered into liquidation. In the situation of the socialistic economy, the joint stock companies were used in the area of in-

ternational trade. For instance, the joint stock companies were Centrotex, Chemapol or Strojimport.

The text of the Civil Code included only several institutes that had been deliberated in the special commission. Others were regulated by special laws. Thus, in the following years, the regulation of relationships concerning production and trade was fractionalized into numerous particular laws. These laws may be classified into three groups. First it regulation of economic planning, second regulated role of national enterprises and organizations of economic management and the third regulated the economic relationships, which had been originally included especially in the Act on Economic Contracts and State Arbitrage of 1950. These three independent but also intertwined flows of legal regulation poured together in the preparatory works on the economic code and origination of an independent branch of economic law in the middle Sixties.

At the end of the year of 1950, law of bills of exchange was newly shaped. However the lawgiver connected it with regulation of check law, which was carried out by means of the Act No. 119/1950 Coll. This Act is still a part of the existing legal order although it has been amended several times.

5.8 REGULATION OF ECONOMIC PLANNING

In connection with the two-year economic plan, which was announced for the years of 1947–1948, the National Assembly enacted the first five-year economic plan (No. 541 Coll.) in 1948. Successful fulfillment of generally realistic goals of the five-year plan was disturbed by crucial refit of the plan in 1951. The party leadership decided to take this step due to worsening international situation. The Czechoslovakian economy started to be more heavy industry oriented and aimed at military production. Such a fundamental structural change was possible only at to cost of stagnation in other sectors. Consequently there were troubles with supplies of all kinds of goods. One of the results of the worsening economic situation was increasing inflation. The monetary reform of 1953 affected many citizens and

caused major protests, which led the new party leadership, led by Antonín Zápotocký, to partial changes in the economic sphere, i.e. less administrative pressure and passage of annual plans on development of economy for 1954 and 1955. These plans were focused on stabilization and increasing development of standard of living.

In 1955, the economic situation was partially stabilized and the party leadership returned to five-year planning. The second economic five-year plan was again aimed at the development of heavy industry, but only in relatively acceptable extent. In 1957, the extensive growth was exhausted and the centralistic way of leadership got into crisis again. The party bodies tried to solve the problem by partial decentralization of the operative management of economy. They accepted more often and more effective approach to economic tools, based on the law of value (own costs, price, profit, etc.) The "khozraschet" (it is a term for economic budget used in Soviet Union) was supposed to mitigate the former voluntaristic management, which ignored the fundamental economic principles. Nevertheless the reform remained at its beginning, because it was only reflected in the new regulation of so-called supplier-customer relationships, which was done by the Act No. 69/1958 Coll. *on Economic Relationships between Socialistic Organizations* and in regulation of industrial subject and their management by the amendment (No. 67/1958 Coll.) to the Act on National Enterprises and Some Economic Organizations of 1955.

The third five-year economic plan for the period of 1961–1965 was constructed badly from its very foundation and this was done despite the fact that many economists had warned against unrealistic objectives of this plan. Thus it had to be repealed in 1962 and, as it was done nine years before, they started making only annual plans. The party leadership first tried to find solution in new centralization, but in the middle Sixties, the leaders agreed with preparation of new economic reform. The outcomes of the preparatory works were reflected in *"Principles of Advanced Management of National Economy"* in 1965. Liberal economists were able to include some positive approaches in it, even thought the concept of planned economy had to be complied with. It applied especially to the status of particular economic subjects.

In the period of so-called rebirth process (Prague Spring), the party economists embodied their ideas about the future heading the economy into the action program of the Communist Party of Czechoslovakia and proposals prepared for congress of unions. They wanted to continue with freeing the directive planning, increasing economic responsibility of undertakings and more active use of instruments of market economy. Evaluation of undertakings was to be based on real economic effect: capability of evaluating deposits and investments. Even employees were supposed to gain influence over managing bodies in their undertaking. An emphasis was also placed on using the findings of science and engineering, freeing international trade and liberating cooperative agriculture from central orders. Nonetheless it was not supposed to mean that the plans and state economic management be suppressed; it was to harmonize the particular interests of certain sectors and undertakings. The advantages of "socialistic market economy" and central planning were supposed to be merged in this new concept.[150]

The concept of "Prague Spring" was however lost after the August invasion of allied forces. The advent of normalization had led to crucial rejection, abandonment and even criminalization of the reform program of the late 1960s. In 1970, the party bodies prepared another five-year plan, which was supposed to overcome the frustration connected with the occupation. Economy was again subject to hard central management even though it took into account some needs of citizens. Thus the plan was focused especially on increasing their standard of living and as for this objective it was almost satisfyingly achieved. However the efforts to increase effectiveness of production failed and backwardness of application of scientific results in practice, which was characteristic for the whole coming period, was more and more apparent. Economy got into deep structural crisis in the following period.

The new reform program of 1987 was supposed to set up a way to prosperity. It was called the *Principles of Reshaping the Economic Mechanism in the CSSR*. It was based on the concept of 1968. One could say that this

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[150] See: MENCL, V., HÁJEK, M., OTÁHAL, M., KADLECOVÁ, E., *Křižovatky 20. století. Světlo na bílá místa v našich dějinách*. Praha: Naše vojsko, 1990, p. 296 et con.

new attempt to overcome stagnation by means of a reform, in socialism comparatively radical, preceded the collapse of the whole pre-November regime.

5.9 NATIONAL ENTERPRISES AND ORGANIZATION OF ECONOMIC CONTROL

National enterprises, as new subjects of management of industry started to be formed already in the period of 1945–1948. They had already been mentioned in the Decree No. 100/1945 Coll. and their statute was announced by a governmental decree in 1946.

After 1948, their legal status was changed on the grounds of passage a whole series of laws and decrees in 1950 (No. 103–106 and 108 Coll.) The first and most important of them was the Act on National Industrial Enterprises, which was followed by a newly issued statute of national enterprise (the attachment to a governmental decree No. 105/1950 Coll.). The new regulation was based on the Civil Code, under which there were no doubts that national enterprises were – to certain extent- independent subject, which were in charge of managing state property.

National enterprises were established by relevant ministers after such an intention was discussed with the minister of finance. They were being entered into register of enterprises. Only directors, named by CEO (the Act did not take into account the former board of directors) were entitled to act on behalf of such enterprises. General directories, in which similar national enterprises were associated, were being established by a relevant minister.

The role of the national enterprises was, as it was laid down in a way typical for that time in the Section 2, to *"contribute with their production according to plan to increase of national wealth and to level up material and cultural standards of workers and strengthen the power of working people."* They were supposed to operate on the grounds of the following principles: planning, efficiency, participation of workers in management, efficient combination of centralization and decentralization, personal liability, elasticity of management, motivation of workers and periodical

checks. In bylaws, there was stated the principle of permanent growth, under which an enterprise was to improve its management permanently and improve its management and organization in all possible ways and set higher and higher goals. National enterprises followed a company plan, which also included a budget. They were allowed to dispose of the state property that administered, but were not allowed to alienate it. Their financial needs were covered by the State (the Act No. 104/1950 Coll. *on Financing National and Communal Enterprises*). This applied also under the new Act No. 106/1951 *on Lay Out of Financing the National and Communal Enterprises*, which connected the national and communal enterprises directly to the state budget. Thus the budget had become a fundamental state financial plan.

Regulation of the status of national enterprises of 1950 had however not acquitted well and thus it started to be modified by amendments and new special laws. In 1955, the National Assembly adapted a new law on national enterprises and some other economic organization No. 51 Coll. This Act outlined particular principles of establishment, organization and operation of national enterprises. It also empowered relevant ministers to issue statutes within its framework which would lay down detailed rules for particular sectors.

The basis of the regulation was however still similar to the existing state. The Act emphasized that national enterprises may only acquire rights and get obliged if it is connected with fulfillment of their tasks. Otherwise such acts would not be valid. It also underlined the principle of planning and even workers were supposed to participate in preparation of such plans. Management of an enterprise and its organizational departments was always assigned to a single leader, who, while making his decisions, was independent, but was still supposed to take into account "broad participation of workers" associated in particular unions. If approved by the government, ministers were entitled to establish a trust that associated several enterprises with relating line of business or a combine which associated such enterprises whose activities were supplement or concurred. Moreover they were empowered to establish some sales and supply organizations if needed. The Act also placed an emphasis on technological development.

However not even this regulation of the status and funding of national enterprises lasted for long. It was significantly amended by the Act No. 67/1958 Coll. during a partial reform of managing economy in 1958. The problems of the existing operation of national enterprises were shown in the objectives of the novelization and in the intended ways to its achievement. The goal was to enhance the economic level of management of national economy by certain measures, such as higher participation of workers in management, increased liability of undertakings for their products, etc. The most visible organizational change that had been brought by this Act was that productive economic units (PEU) were established. As opposed to the former units, there were given more authority as for the operative management of enterprises. They were led by particular Ministries or district National Committees with regard to certain significant issues. The financing of national enterprises was regulated by the Act No. 83/1958 Coll.

At the end of this part, we should not forget to mention the bodies of the state (economic) arbitrage, which were established by the Act No. 99/1950 Coll. on Economic Contracts and State Arbitrage, as "*bodies of brand new type*".[151] The system of arbitrage bodies was later set out by the Act No. 47/1953 Coll. and after that by the Act No. 121/1962 Coll. Further organizational change took place after the Czechoslovakian federation had been established (the Act No. 139/1970 Coll.).

The task of the arbitrage bodies was to bring decisions in disputes between socialist organizations (pre-contractual, proprietary, etc). As opposed to courts, they were obliged to follow not only laws, but also the core principles of economic policy. Thus they were supposed to make sure that national economic plans predominate over the particular ones and that the tasks stated by a state plan of the development of national economy by achieved.

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[151] OEHM, J., *Hospodářská arbitráž a arbitrážní řízení*. Praha: SPN, 1973, p. 5. For more on this issue see: KLIMEŠ, F., *Hospodářská arbitráž a její funkce*. Praha: UK, 1983 or LUKÁČ, M., Hospodárska arbitráž v systéme orgánov štátnej správy. In: *Arbitrážní praxe*, Vol. 1973, No. 4, p. 114 et con.

5.10 ORGANIZATION OF INTERNAL AND INTERNATIONAL TRADE

The regulation of the status of national enterprises and other companies was connected to laws on organization of internal trade, which was included in the governmental decree No. 3/1953 Coll. on Enterprises of State Business. The status of enterprises of state business was very similar to that of national enterprises.

The organization of international trade was regulated by the Act No. 119/1948 Coll. *on State Organization of International Trade and International Forwarding*. Under this Act, Ministry of International Trade was empowered to issue an ordinance stating which of the enterprises that had been engaged in international trade or international forwarding shall be nationalized. Moreover, it was entitled to establish new enterprises of international trade and these enterprises were registered at district courts and were allowed to act as independent legal entities disposing of state property.

5.11 ECONOMIC RELATIONSHIPS

Regulation of the obligations emerged in economic area were substantially different from those of civil law. Their parties did not have full contractual freedom, as their tasks depended upon economic plans. Superior bodies were thus entitled to order that they enter into certain contract or that contractual terms of a concluded contract be changed. Further, they were allowed to terminate contracts that had already been concluded. Economic relationships and the obligations arising out of them were therefore based not only on contractual basis, but also certain official measures, arbitrary decisions and other facts. The interference of administrative bodies with contractual relationships of course limited legal certainty of the parties. Regulation of economic issues, including obligations did not respect the principle of equality, as it preferred socialist organizations.

The foundation of regulation of obligations of socialist organizations was included in the Civil Code, especially the Section 31 para 2, Sections 211, 212 and 251. They breached the principle of contractual freedom in favor of enforcing public interest. The first provisions contained the core interpretation rule for an expression of will important for fulfilling economic plan: it stated that interpretation shall comply with the tasks arising out of economic plans. It was laid down in the Section 211 that a single economic plan was one the causes of origination of obligations and the Section 212 contained framework provisions on economic obligations. Under this Section, a single economic plan was supported by contracts adjusted to the needs of economic planning and, moreover, the economic bodies had the power to assign a particular obligation to a party. The Code therefore changed administratively the content of economic contacts if it was needed for compliance with a single economic plan. The second paragraph of this Section stated that as for economic obligations, the provisions of the Civil Code shall apply secondarily. Nevertheless the application could be avoided by different regulation, i.e. for example even a mere ordinance or a decree, which "was carried out very often." This practice got so far that *"there were even ideas that the contracts are no longer needed."*[152]

The Civil Code also included regulation of some institutes of the former business law. Nevertheless their practical use was not that often because they lost their purpose in the socialist economy.

The obligations between the enterprises of socialist sector (and the state arbitrary) were first precisely regulated by the Act No. 99/1950 Coll., which despite having been passed prior to the Civil Code, was based on the same concept. This issue was newly regulated by a governmental decree *on Economic Contracts* No. 33/1955 Coll. It differentiated between framework economic contracts, which stated who and with whom and to what amount shall conclude particular contracts, and the particular contracts themselves that defined the details. Aside from these contracts, the enterprises were allowed to conclude direct, seasonal, short-term and other contracts. Spe-

[152] Both quotes are from: ČAPEK, K., *Předmět a systém československého hospodářského práva*. Praha: Academia, 1984, p. 133.

cific contracts for the construction industry was laid down by the legislative measure No. 6/1957 Coll.

The partial efforts to reform the economic sphere in the period of 1957–1958 resulted into more complex regulation of economic relationship, which had been already included in the Act No. 69/1958 Coll. *on Economic Relationships between Socialist Organizations*. This Act repealed both preceding laws, but continued to rely on secondary application of the Civil Code, whose application however was much narrower due to the complexness of the Act. It regulated not only the relationships originated by means of a contract but also those emerging from measures issued by authorities, findings of arbitrations, caused damage, etc. The socialist organizations had to cooperate with one another and help each other while working on the planned tasks. With respect to the system of planned economy, contractual freedom was limited because it was sometimes requested that a party conclude a contract. It also established numerous particular contractual types for specific situations, which included detailed conditions of delivery from which neither of the parties could deviate. As for the supplies of goods, it also regulated so-called capacity contracts, which were supposed to be a foundation of a long-term relationship between suppliers and their clients and to stabilize their contractual relationships.

5.12 PASSAGE OF THE ECONOMIC CODE

The Economic Code No 109/1964 Coll. emerged as a result of the existing state, in which economic relationships were regulated just by means of partial laws with subsidiary application of the Civil Code.[153]

The idea that economic relationships shall be codified and thus a basis for an independent branch of law and a scientific and pedagogical discipline be laid down was brought by the Central Committee of the Communist Party of Czechoslovakia at the end of the Sixties. Some proposed that

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[153] *Komentář k hospodářskému zákoníku a k zákonu o hospodářské arbitráži.* I. A.,B., II., III. Praha: Institut ČSK VŘ, 1971.

economic law of obligations would be included in the Civil Code, which was being prepared at that time, and supporters of this approach (for instance Viktor Knapp)[154] emphasized that economic law of obligations was of a special sort and included only certain deviations from the general law of obligations. In the end, however, the concept of having an independent regulation in an economic code prevailed. It based on the belief that the relationships between socialist organizations, which were regulated by the Economic Code,[155] were of different nature from *"satisfying material and cultural needs of workers"*, which were regulated by the Civil Code. The Economic Code was something extraordinary even between the countries of the Soviet bloc, as there had been no similar law passed in any of them.

The Economic Code summed up, classified and newly regulated the relationships emerging both there where the system of planned economy was in place and at the activities of socialist organizations except such relationships that were regulated by other laws such as Civil Code, Labor Code and the Code of International Trade. It consisted of Preamble, Principles of Economic Relationships (the Articles I-X), which were important for interpretation and application of the following provision of the Code and twelve other parts. The lawgiver laid set out the principles of planning and financing economic activities, economic system and also some relationships between the leading bodies. It also included provisions on organization of economic activities, status of the socialist organizations, their operations and obligations and their liability for breaching the stated duties. Moreover, there were provisions on payment and credit relationships.

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[154] Compare: KNAPP, V., K otázce systému československého socialistického práva. In*: Stát a právo IV*. Praha: Nakladatelství ČSAV, p. 207–218.

[155] A textbook from that time read: *"especially the area of planned sales relationships between the socialist organizations"*; (STUNA, S., *Hospodářské právo.* Praha: Orbis, 1966, p. 8). For more on that see: OEHM, J., Několik poznámek o předmětu a systému československého hospodářského práva. In: *AUC – Iuridica*, 1965, No. 2, p. 163–176.

5.13 PRINCIPLES OF THE REGULATION UNDER THE ECONOMIC CODE

The initial principle of the national economy was included in the first Article of the Economic Code. Under that Article, the national economy was a uniform unit run by the Communist Party on behalf of the State according to the principles of democratic centralism. Oneness was assured by the existence of a single economic system based on a single economic state policy and a system of planned management of national economy. The main tool for running the economy was the state plan of development of national economy (the Article II). Further, all bodies and socialist organizations were obliged to make their best to achieve its goal (the Article VI). The state plan of development of national economy was connected with the planned acts of the particular parties of legal economic relationships.

The legal economic law relationships were such social relationships that were regulated by norms of economic law and that were emerging in planned economies and at socialist organizations and the relationships that were closely connected with or derived from them. Their subjects were: the State, the bodies of economic management, socialist organizations and their lower organization departments or bodies, some international organizations and state (later economic) arbitrage. The enterprises registry was very important for ensuring legal certainty, because important facts regarding socialist organizations were being entered in it. Organizations engaged in international trade were registered in a special chapter.

The Socialist organizations, which we the fundamental part of national economy, were independent economic and legal entities. They were also capable of being engaged in legal economic (but also civil and labor) relationships. Their economic activities were based on a common socialist ownership (the Articles III, IV and V). The Act also differentiated between state, cooperative and society socialist organizations. It was typical for the State organizations that they were established by the State, which let them administer some of its property (national assets). The cooperative organizations administered the property of their members and their own property (in socialist cooperative property). The society organizations administered

their own property (property owned by socialist society organizations) and similarly to cooperatives.

The economic obligations could, as it had been before, originate on the grounds of all kinds of facts, especially economic contracts, planning acts, unilateral legal acts of socialist organizations (supply orders), and measures by managing bodies or economic (state) arbitrage and breach of duties of socialist organizations. In the introductory provisions, the lawgiver highlighted as the most important tool of mutual cooperation between socialist organizations when fulfilling the planned tasks the economic contracts. Together with that, it emphasized that the proprietary liability of socialist organizations for breach of law (the Article VIII).

The economic contracts were bilateral or multilateral legal acts of socialist organizations concluded for fulfillment of a plan or in connection with other forms of economic cooperation of socialist organizations. There were contracts on preparation of supplies, supply (realization) economic contracts and other contracts or agreements between organizations. The contracts on preparation of supplies included a promise that future supply contract be entered into. Thus, these contracts created a duty to enter into contract later. The supply contracts were being entered into by organizations for a supply of goods, work or other form or cooperation. Their feature was that they were originated at the moment of agreeing on essential terms. On the contrary, other contracts or agreements could only supplement the economic contracts and there had to be an agreement about the entire content. While entering into economic contracts, the socialist organizations were bound by the tasks of the national economic plan. The obligations arising out of these contracts could be change or even abolished by a decision made by a superior body or economic arbitrage.

The lawgiver included the principle traditional proclamation about participation of workers in managing national economy and the principle of subordination of the resort, enterprises' and local interest to the interests of the whole society between the other fundamental principles (the Article IX and X).

5.14 PRE-NOVEMBER NOVELIZATIONS AND AMENDMENTS TO THE ECONOMIC CODE

The Economic Code had been amended several times. The changes that had been made before 1989 concerned just particular issues and did not affect the concept of the Code. The content of the Code was touched especially by the reform efforts of the late 1960s and later 1980s. The reform principles of 1968 and 1969 were soon eliminated by the amendment No. 138/1970 Coll. and the Act No. 145/1970 Coll. on Economic Planning. The reforms of the late 1980s were not unfolded.

The legal economic relations were not regulated only by the Economic Code. There were influenced by numerous other laws, especially ordinances by the executive branch.

The sphere of the national economic planning and management of the national economy was interfered with the abovementioned Act *on National Economic Planning* No. 145/1970 Coll. and the Act No. 134/1970 Coll. *on the Rules of State Budget of the Czechoslovakian Federation and the Principles of Administering the Budget Means*. The provisions on socialist ownership and socialist organizations, which were included in the Economic Code, were followed by the Act No. 42/1980 Coll. *on Economic Relations with Foreign Countries* and the Act No. 114 *on Certain Measures Regarding the Enterprise Register*. Provisions on industrial rights were included in the Act No. 84/1972 Coll. *on Discoveries, Inventions, Improving and Industrial Patents*; the Act No. 8/1952 Coll. *on Trademarks and Protected Models*; and the Act No. 159/1973 Coll. *on Protection of Labeling the Origin of Products*. There were also a lot of international treaties in this area. We should also mention regulation of economic arbitrage and arbitrage proceedings, which was laid down in the Act No. 121/1962 Coll.

With regard to ordinances by the executive branch, we should pay attention to the significant conditions of supply. They were usually issued in a form of an ordinance published in the Collection of Laws of a Ministry, or eventually a superior body of state arbitrage. In connection with the Economic Code's provisions, they regulated supply conditions for particular groups of products and works. They were specific, because if needed

they could have been distinguished from the provisions of the Economic Code and they applied to all supplies of products or works of the relevant type even if the supply organization had not been established by the particular Ministry that set the conditions. Originally, they had were obligatory (cogent), but as from the beginning of the Seventies, they were of dispositive nature.[156]

5.15 THE CODE OF INTERNATIONAL COMMERCE

The Code of International Commerce (hereinafter referred to also as *"the Code"*) regulated international commercial law. It came into force on April 1, 1964, and it was repealed effective on January 1, 1992 when the new Commercial Code came into force. According to the doctrine, the Code of International Commerce reflected modern tendencies; it was based on comparison that took "capitalistic legal philosophy" into account, considering Haag Uniform Law on the International Sale of Goods, Swiss Code of Obligations as well as Italian and Greek codes. Similarly, the Law on International Commercial Contracts of People´s Republic of China was influenced by western legal philosophy.[157]

5.15.1 The Process of Codification

First of all, it should be noted that the first half of the 1960's brought an overall disintegration of legal regulations due to re-codification of civil and family law and due to the creation of new Code of Business, Code of International Commerce and a new Code of Labour. All of them followed an

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[156] For more on that see: VANĚK, S. (ed.), *Československé hospodářské právo.* Praha: Panorama, 1979, p. 154–155.

[157] RAŠOVSKÝ, P., Rozhodné právo v závazkových vztazích z mezinárodního obchodu – Lex mercatoria – part III, EPRAVO.CZ – Sbírka zákonů, judikatura, právo. [online] [cit. 29. 11. 2010] http://www.epravo.cz/top/clanky/rozhodne-pravo-v-zavazkovych-vztazich-z-mezinarodniho-obchodu-lex-mercatoria-cast-iii-22526.html.

approach according to which the codes were all independent, none of them had a general character (meaning it would apply in all areas), and on the other hand each of the new codes was a specific set of rules self-sufficiently regulating a particular sector of social relationships. Such a concept caused a fragmentation of legal relations. This fragmentation could be best demonstrated by the fact that particular legal institutes were – without any specific, objective reason – regulated multiple times within autonomous codes (for example legal capacity, conclusion of contracts, statute of limitation, damages, etc.)[158].

It is clear from the stenographic records of the 22nd session of the National Assembly (December 4, 1963)[159] that the Code of International Commerce stems from the legal equality of parties to the international trade, with no regards to whether the party comes from a socialistic or capitalistic country. When introducing the proposal of the Code of International Commerce, the representative of the Constitutional committee and of the Committee for planning and budget stressed that the equality of the parties was its key characteristic and the one that could assure there would be no pretext available for foreign countries to criticize the concept of the new *Code* with regards to possible discrimination. Moreover, it was assumed that many more international partners would agree on choice of Czechoslovak law because the new *Code* dealt solely with legal relations with international element, whereas the Civil Code contained the regulation of domestic legal relations. Another quite interesting conclusion from the stenographic record is that the importance of Code of International Commerce was to surpass Czechoslovak borders; the *Code* was supposed to be a clear evidence of the fact that *"Czechoslovak Socialistic Republic strictly applies the politics of peaceful coexistence and fair economic competition of both world economic systems."*

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[158] For more see Explanatory report on amendments to Civil Code, available online at http://obcanskyzakonik.justice.cz/tinymce-storage/files/Duvodova_zprava_OZ_LRV_090430_final.pdf, cit. 1. 12. 2010.

[159] Available online at http://www.psp.cz/eknih/1960ns/stenprot/022schuz/s022013.html, cit. 29. 11. 2010.

In the course of discourse on the proposal of the Code of International Commerce, the member of parliament Novák had expressed his opinions on purpose of this *Code*.[160] According to him, the Code of International Commerce aimed to become an important tool of the development of Czechoslovak international trade and thus indirectly of the entire Czechoslovak economy. The achievement of this goal relied on increased security in the course of international business relations due to precisely defined rights and obligations of the actors of such relations guaranteed by *the Code*. *The Code's* function to support the volume of Czechoslovak international trade could, according to PM Novák, properly operate only if the domestic enterprises fulfilled their obligations which they took upon themselves with regards to their international partners.

5.15.2 The Process of Repeal of *the Code*

For now, it is worth to move a few decades forward in time and to mention the historical context of the repeal of the Code of International Commerce at the beginning of 1990's. In the process of adopting new codes during the 18th meeting of the Federal Assembly, on October 31, 1991, deputy Prime Minister, Pavel Rychetský, also mentioned the legislative history of the previous era. He stated, among other things, that in the altogether deformed economy, the laws incapable of regulating the market relations had been often adopted. This had created the need to issue, along with them, the law on international trade – however, one applicable only to the commercial relations with foreign countries.[161]

It follows from the above mentioned as well as from a short analysis of the process of repeal of the Code of International Commerce, that *the Code* became an inspiration even for the current Commercial Code. Often, it is also stressed that only thanks to this Code of International Commerce one can follow an uninterrupted development of commercial law on Czech ter-

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[160] As above.

[161] Available online at http://www.psp.cz/eknih/1990fs/slsn/stenprot/018schuz/s018026.htm, cit. 30. 11. 2010.

ritory during the second half of the twentieth century, in spite of complete deformation of commercial legal obligations. *The Code* actually preserved in itself certain purely private law principles that the Code of Business did not contain. The Code of International Commerce strongly influenced the legislative development after the year 1989, for example by becoming an inspiration for the parts of the big set of amendments of Civil Code.[162] On the other hand, the above mentioned set of amendments is often criticized for preserving certain schemes typical for totalitarian legal constructions, even though it removed the most blatant displays of socialistic legal terminology created in the sixties. For example, this set of amendments did not touch the principle of absolute nullity of legal acts, even though the Code of International Commerce – quite liberal in socialistic atmosphere – lessened the impact of this principle. However, the solution included in this legal act was not taken into account, and the old concept was preserved in the Civil Code instead.[163]

5.15.3 Structure and Content of *the Code*

With everything already mentioned in mind, it is clear that the adoption of the Code of International Commerce was motivated by the effort of lawmakers to create legal conditions favourable for the development of international economic and scientific and technical cooperation. It is frequently praised that *the Code* was based on equality of the actors of international trade, with no regards to the social system of the state from which the actors came from.[164] This much is obvious from the entire text of *the Code*.

As for the structure itself, the Code of International Commerce was divided into five heads:

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[162] For more see explanatory report available online at <http://obcanskyzakonik.justice.cz/tinymce-storage/files/Duvodova_zprava_OZ_LRV_090430_final.pdf >?cit. 1. 12. 2010?.
[163] As above.
[164] KOPÁČ, L., *Komentář k zákoníku mezinárodního obchodu*. Prague: Panorama, 1984, p. 7.

1. Head I: Opening provisions
2. Head II: Common provisions
3. Head III: General provisions on obligations
4. Head IV: Special provisions on some obligations
5. Head V: Special, transitory and final provisions

Each head was then divided into chapters, sub-chapters and sections. The Code of International Commerce contained 826 sections in total.

The opening provisions (that is the first five sections) dealt with the purpose of the act and more importantly with the subject matter of this legal regulation as well as with its relation to other legal acts. Both available commentaries[165] confirm that a subsidiary use of Act no. 40/1964 Coll., Civil Code, was excluded. The provisions of the Civil Code could thus be applied only if the Code of International Commerce expressly referenced them. The Code of International Commerce was mainly used when the Czechoslovak law should have been applied in accordance with the provisions on choice of law or in accordance with the agreement of the parties. If slightly simplified, one could say that *the Code* was applicable to those relationships *"arising in the international business relations and containing a foreign element"* that were minutely described in provisions of section 2 of *the Code*. The subject matter of these relationships was defined objectively; this meant that if the conditions of the section 2 par. 1 were met, the Code of International Commerce applied also to the relationships between Czechoslovak actors. Antonín Kanda, in his commentary[166], divides the relationships, which the Code of International Commerce regulated, into four groups:

1. Relationships between persons who do not have their seat or their place of residence on the territory of the same state,
2. Relationships where the performance is realized on an international scale,

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[165] KANDA, A.: *Zákoník mezinárodního obchodu*. Prague: Orbis, 1976 and KOPÁČ, L., *Komentář k zákoníku mezinárodního obchodu*. Prague: Panorama, 1984.
[166] KANDA, A., *Zákoník mezinárodního obchodu*. Prague: Orbis, 1976, p. 19–20.

3. Relationships arising from procurement or performance of marine transport of consignment, or from renting of ships, or from contracts on operation of ships,
4. Relationships connected to some of the above mentioned relationships.

Provisions of section 5 of the Code of International Commerce state that the regulation is in principle of non-mandatory character. The list of mandatory provisions is contained in section 722.

In *common provisions* (that is Head II, sections 6 to 99), *the Code* regulates legal status of persons and things; it defines rules for legal acts, representation and power of attorney (including proxy and power of attorney for cases of operation of business). Moreover, this part deals with the counting of time, contains the statute of limitation and acquisitive-prescription (usucaption). As seen from this list, this part of *the Code* is quite extensive. Therefore, a few interesting features will be pointed out.

Compared to the Code of Business, the Code of International Commerce uses a different terminology in relation to actors of legal relations. Instead of "citizen" used in the Code of Business, *the Code* defines a "natural person". In the same way, instead of "organization" of the Code of Business, *the Code* uses "legal person". Moreover, according to the commentary, it was not necessary for the "legal person" to be classified as "organization" according to section 114 of the Code of Business because the Code of International Commerce was (as already mentioned above) intended also for the regulation of property relationships between parties from states with different social systems. The terminology of the actors of legal relations was thus trying to reflect the terms used in international trade.

In the area of the legal capacity, the Code of International Commerce references to the Civil Code.

It is astonishing, even, that definitions of for example immovable assets, (section 14), of generic things (section 15) or of accessory of things (section 16) could be found in the Head II of *the Code*. The analysed part of *the Code* also devotes numerous provisions to the topic of legal acts (sections 22 to 48).

The general time limit under the statute of limitations was 3 years, in some cases it was 10 years (the compensation of damage from the debt secured by surety, the return of insurance payment). On the other hand, *the Code* also anticipated the situations in which the time limit was only 1 year (e.g. claims towards the carrier). It is also very interesting that it was possible to agree upon a time limit, but *„together the time limit agreed upon and the statutory time limit could not exceed 15 years,"* (section 88).

Head III (sections 100 to 275) contained *general provisions on obligation*. It encompassed many provisions that are known today. Again, with regards to the extent of the regulation, only some parts are pointed out. Thus Head III contained provisions on: creation of obligation, creation of contract, references to general business terms and conditions, contract forms, custom rules, agreement on a future contract, and so on.

Head IV (sections 267 to 720) regulated *particular types of contracts*. As stated in the section 101 of the Code of International Commerce, *"obligations arise from contracts, caused damage, unjustified enrichment or from other circumstances listed in this code."* The Code of International Commerce envisioned the so called "typical" (author's note: named) contracts – which were regulated in this Head – on one side and other "atypical" (author's note: unnamed) contract – which had to fulfil certain substantial conditions[167] – on the other hand. The commentary classifies contracts such as a contract on production specialization and a contract on production cooperation into the second category. Particular contract types defined in the Code once again resembled those in the current Commercial Code. There were for example: a contract on sale, a barter contract, a contract on loan, a lease contract, a contract on deposit, a storage contract, custody of a thing by third person, a contract on performance of work, a contract on supervision activities, a transport contract, an insurance contract, a procurement contract, a contract on association, some contracts on bank transactions and so on.

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[167] KOPÁČ, L., *Komentář k zákoníku mezinárodního obchodu*. Prague: Panorama, 1984, p. 77.

5.16 CHANGES IN LEGISLATION AFTER NOVEMBER 1989

The existing economic law was not suitable for the development of entrepreneurs' relationships after November 1989. Despite all that the ternary approach of regulation of proprietary relationships, which had been established in the middle 1960s, remained in our legislation until January 1, 1992. Neither the substantial changes to the Economic Code, nor numerous new economic law of significant importance changed that. The turning point occurred when the Business Code and an amendment to the Civil Code entered into force, as the Economic Code and the International Trade Code were abolished at that time.

The Economic Code had been amended for instance by the Acts No. 103 and 403/1990 Coll. and No. 63/1991 Coll. Aside from the, the lawgiver abolished all basic articles and restored many traditional institutes of business code, which allowed private enterprise to redevelop. The valid economic law had become applicable or at least transient time until the new Business Code, which was to become the core for the restored business law, was passed. Simultaneously, the lawgiver took several other steps to transform the planned socialist economy into open market economy.

The novelization of the Economic Code focused on relationships emerging from entrepreneurs' activities of legal entities and physical persons, business relations of legal entities and proprietary liability in such relationships. The Code also regulated some traditional institutes of the private law, such as for instance powers-of-attorney or liens. The lawgiver also laid there down general provisions on companies, to be more precise, they were public business company, special limited partnership, special limited partnership with shares, and limited liability company. Joint stock companies, which had not disappeared from our legislation even in the pre-November era, were regulated by a special act. It was the Act No. 104/1990 Coll., which abolished the Act on Joint Stock Companies of 1949.

The Business Code, which had been published as a No. 513/1991 Coll. was very different from the Economic Code, as for the approach to and the concept of business relationship.[168] It was prepared in hurry and was not a perfect document from the legislative point of view. In its introductory provisions, such terms as an enterprise (undertaking), business assets or business name, business register, competition and unfair competition were laid down. Then, inspired by the Business Code of 1862 (1863), the law-giver focused especially on companies and business obligations. The provisions on cooperatives, which used to be regulated separately, were also included in the Code. There were also provisions on obligations in international trade.

After the Business Code had entered into force, there was a difficult situation, as there were relationships regulated by the Business Code and those regulated by the abolished Economic Code. The Business Code applied only to such legal relationships that were originated after it entered into force, but the relationship that had been established prior to that, and the rights arising out of them, and from liability for their breach, were governed by the then existing laws. This applied also to all statutory periods which had started to run before the Business Code entered into force and also to periods for claiming someone's rights regulated.

[168] *Obchodní zákoník se zapracovanou důvodovou zprávou.* Brno: Petrov – Lidová demokracie, 1991.

6. LABOR LAW

6.1 FORMATION OF LABOR LAW

Labor law had not been formed into an independent branch of law until the second half of the Twentieth century. This is really remarkable, as exercising certain profession was more defining for a status of an individual than his or her other characteristics such as age, marital status, residence, etc. By looking at it closer we can find that our astonishment has no real justification, for law reflected this important part of life of individuals even in the past, but its particular form was different due to its connection to economic and complex social circumstances. The roots of Czechoslovakian and Czech labor law may be found in regulating status of dependants living in countryside as echoed in patents on *corvée*, servants' regulations, journeymen and apprentices contracts based on guilds regulations and customs, or in mining legislation.[169]

The ideological source of the new approach to law and to position of individual human being in society (generally, but also when providing for themselves) were reformation, renaissance and the following age of enlightenment, as they resulted in revolutions of the sixteenth through eighteenth century, which culminated in French revolution and its postulates of liberty and equality of all people before the law. The former unfree labor was supposed to be replaced by labor that would be completely free, because it would be based on a contract of free and equal parties. This approach was reflected in provisions on labor (hiring, serving) contacts in

[169] The link between the older and newer regulation is obvious especially as for mining law. At the pre-war Czechoslovakia, we can find special mining socialization legislation and later, in the times of power monopoly of the Communist Party, there were numerous privileges for miner in labor law and social security. Both of these facts reflected how difficult this profession was, but it was also connected with the historical tradition of having special regulation of that.

civil codes of the beginning of the nineteenth century. However in the real life, the illusions about real, not only formal, equality of contractual parties vanished away. Employees have to invest more in the employment relationship: all their work (energy), which forms substantial part of their personalities. Together with the illusion about equality of the parties, illusion about real contractual freedom of employees disappeared as well and the State, partly forced by workers corporations and partially with the awareness of certain social responsibility, started interfering with employment relationships. Thanks to that the regulation of employment contracts and employment itself started gradually losing its purely private law nature.

The term "labor law" cannot be found in the *General Dictionary of Law,*[170] which was published at the end of the nineteenth century and in the third part of the *Dictionary of Public Czechoslovakian Law*, published in 1934, the prominent civilist Jan Krčmář wrote that unification of labor law does not correspond with the legislative and educational tradition nor the categorization of competencies of authorities. Moreover the refusal of unification was backed by the fact that labor law is partly private and partially public law (law of administration) and that employment relationships by their nature so different that a *"single labor law is not suitable for them."*[171] Nevertheless the prominent representative of the science of administrative law Emil Hácha had a different approach to it; we wrote that labor law *"is rather just a collective title for subject of a new legal discipline than a stable legal term"*.[172] Another influential Czechoslovakian lawyer, prominent civilist Jaromír Sedláček from Brno wrote that *"labor law or in other words law of laborers"* is a special part of the legal order and he further stated that *"notwithstanding that there are a lot of advantages of having this systematic elaboration of law of laborers"*, there is a danger that a connection with other civil law provisions will be lost. It can be concluded that

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[170] *Všeobecný slovník právní. I. – V.* Edited and published by F. X. Veselý. Praha: self-publishing, 1896–1899.

[171] *Slovník veřejného práva československého.* III. The entry: *Pracovní smlouva* (J. Krčmář). Brno: Polygrafia – Rudolf M. Rohrer, 1934, p. 442.

[172] *Slovník veřejného práva československého.* III. The entry: *Pracovní právo* (E. Hácha). Brno: Polygrafia – Rudolf M. Rohrer, 1934, p. 423.

he considered only public law norms supplementing the civil law base to be the specific labor law norms. Young Otakar Peterka (*1906), who stated that labor law norms, despite being fragmented all over the legal order, are *"connected with a single development tendency and common content which is formed on the grounds of efforts and an objective of the State to ensure individualists (capitalistic) economy and its advantages, but also to mitigate the unfavorable effects which this order imposes on underprivileged classes as a result of their current employment relationship."*[173] Nevertheless he emphasized that in spite of the fact that labor law had made a great progress after the World War I, it had not been duly elaborated yet.

Despite the fact that legal theorists of the first half of the Twentieth century did not concentrate on this issue, it is crystal clear that the labor law issue started to be so important and specific that it was no longer possible to ignore the connection between private law norms and administrative law norms concerning labor process and its outcomes.

6.1.1 Labor Law and Economic and Social Development

At the end of this introductory passage, there is one more moment that should be mentioned. A prominent representative of legal science from the era of the first republic Zdeněk Neubauer, who was a professor at Masaryk University, aptly wrote at the beginning of the Forties of the last century that *"employment relationship, its challenges and development of history mean a great deal of human's and mankind's faith."*[174] By mentioning not only a single human, but also *mankind*, he addressed an important feature of employment relationships that is worth mentioning: employment relationships are not mere issues of a particular individual, or two individuals, i.e. employee and employer, but they are a part of society's distribution of labor and thus the entire organization of particular societies. If we wanted to go into a detail, we should mention at least the contours of economic and social development in these introductory passages or in introduction to par-

[173] Ibid. p. 8.
[174] NEUBAUER, Z., Právní řád práce. In: *Brázda*, 1941, Vol. 4 (22), p. 279.

ticular stages of development, as the development predetermined the shape of individual *"labor"* (employment) relationships.

Due to vast comprehensiveness of this issue, we will only concentrate on outlining narrow connection of labor law issues with economic and social development and relevant literature[175] as well as we will mention the industrial revolution in the Czech lands of the nineteenth century, as because of that the labor law issues started to be looked on as a significant and specific field of our legal order.

6.1.2 German Pattern

The very first attempts to shape labor law in the Czech lands as an independent discipline, even though only within the field of civil law, were inspired by the German model. In context with labor law issues, Emil Hácha, whom we have already cited above, wrote that "*propinquity of content of legal norms … is often culminated to ideal dependence of our law on German law."*[176] Nevertheless as for the development of Austrian justice, inspiration by German law was neither unusual nor surprising.

Historical traditions, political and legal connection between the development of the Habsburg monarchy and German states in the form of the Roman-German Empire and later German confederation, significant economic linkage, and no language barriers had led to a fact that after the after the German confederation collapsed and the German Empire was established, the Austrian and German justice influenced and incited one another.

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[175] In efforts to show also the wider relations we remind GIDE, Ch., RIST, Ch., *Dějiny nauk národohospodářských od doby fisiokratů až po naše dny.* I., II. Praha: Jan Leichter, 1915, 1917 or the work aimed at our economic history PRŮCHA, V. (ed.), *Hospodářské dějiny Československa v 19. a 20. století.* Praha: 1974 or as for the newer works for instance *Dějiny hospodářství českých zemí od počátku industrializace do současnosti.* I.–III. Praha: UK, 1995, the work PŮLPÁN, K., *Nástin českých a československých hospodářských dějin do roku 1990. I., II.* Praha: UK, 1993 with a vast list of literature or ROMPORTLOVÁ, M., SLÁDEK, Z., *Hospodářský a sociální vývoj ve střední a jihovýchodní Evropě 1918–1938.* Brno: FF MU, 1994.

[176] *Slovník veřejného práva československého.* III. The entry: *Pracovní právo* (E. Hácha). Brno: Polygrafia – Rudolf M. Rohrer, 1934, p. 424.

Given the successful development of German economy, and relating issues, the German influence was predominating, which, as for drafting new laws, resulted in adjusting numerous Austrian laws to the German ones. In this context, we would like to mention that some Austrian statues concerning enterprising, i.e. also regarding labor law issues, especially Business Code, were based on the common grounds, which had been prepared in the German confederation.[177] Also the attempts to recodify Civil law and the following first formal novelizations of the Austrian Civil Code, which were done between 1914 and 1916, out of which especially the last one is most important for us, were strongly influenced by the German Civil law Code of 1896 (*Bürgerliches Gesetzbuch*; BGB).

Despite the fact that the situation changed after the establishment of independent Czechoslovakia, the reception of Austrian law, using vast Austrian court decisions by the Czechoslovakian courts and only small transformation of the legal order "forced" the Czechoslovakian science to keep an eye on the new trends in the Austrian and German science, compared the outcomes of this science with the fruits of their efforts and let themselves to be influenced by that.

For the purpose of this study, it is not needed to pay close attention to the fact that in Germany, the efforts to constitute labor law as an independent discipline were based on the rapid development of industry, commerce, and transportation, welfare oriented interference by the State, whose grounds had been laid down during the second half of the nineteenth century by the Bismarck's administration. After the war, this trend, supported by difficult economic challenges, was reflected even in the Weimar constitution. Its Article 157 openly required that there be originated single labor law. The German legal science paid close attention to the issues of labor law and the Austrian and Czech lawyers cooperated on that. Nonetheless

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[177] The members of the German confederation thought that would be good for the member states if the regulation of especially business were unified. The confederation authorities were however not entitled to adapt such laws. Thus the prepared texts were issued only as a recommendation for legislative bodies of the member states, which usually approved them with a few revisions. For example, at the beginning of the Sixties of the nineteenth century, the Cisleithanian business code was adapted in that way.

there was no single approach to what should be subject of the arising branch of law. The ideas of some German legal theorists (W. Kaskel, H. Potthoff, E. Jakobi, or W. Silberschmidt) were brought to the Czech and Slovakian readers by Emil Hácha's *Dictionary of Public Czechoslovakian Law.*[178]

6.1.3 Efforts to Define Labor Law in the Interwar Period

The fragmented regulation of labor law was organized into a handbook *Labor Law of the Republic of Czechoslovakia* in 1930 by Jaroslav Říha and František Freudenfeld.[179] An updated and extended edition of this book was published by František Freudenfeld and Jan Kasanda in 1938.[180] The term "labor law" was used there, but not defined. Only in the introduction (p. 5) was stated that *"labor law was meant in its general meaning and thus they only deliberated the regulation of service employment relationship with exclusion of the independent labor contract (contract for work, publishers)."* Thus it seems to be clear out of this text that their presented a broad approach to labor contracts according to two-part Lotmar's work of 1902.[181] Hence, according to them, labor contract was every contract by means of which the parties to it agree that one shall carry out some work for the other and the other shall pay a reward for it.[182] However the "service employment relationship", which is mentioned in the quotation and which according to them was a key concept of labor law, was thought to be only such an employment relationship that was based on service agreement, i.e. employment contract under which the amount of labor was limited in time. There-

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[178] For more see: E. Hácha ve *Slovníku veřejného práva československého.* III. Heslo: *Pracovní právo*. Brno: Polygrafia – Rudolf M. Rohrer, 1934, p. 423–431.
[179] ŘÍHA, J., FREUDENFELD F., *Pracovní právo republiky Československé*. Praha: V. Linhart, 1930.
[180] FREUDENFELD F., KASANDA, J., *Pracovní právo republiky Československé.* Praha: V. Linhart, 1938.
[181] LOTMAR, Ph., *Der Arbeitsvertrag nach dem Privatrecht des Deutschen Reiches.* Leipzig: 1902.
[182] It included also contract for work and publishing agreement, or broker agreement.

fore the service employment contract was regarded as an employment contract *sensu stricto* and labor law was connected only with it.

In a perfectly elaborated dictionary entry *Labor law*, Emil Hácha rejected Kaskel's characteristic of labor law[183] as a law of a certain society groups and as well as the authors of the abovementioned handbook, he looked on labor law as a collection of norms concerning employment relationship. This approach was also close to Heinz Potthoff.[184] He understood employment relationship as a relationship based on employment contract concerning labor limited in time and he defined it as a permanent obligational relationship. In respect to that he used to emphasize especially the aspects of labor dependency and from it he deduced a higher degree of personal dependency of employees upon employers. Nevertheless, aside from that, being an experienced practicing lawyer, he knew and stressed that it is sometime very difficult to distinguish whether, in a particular case, we deal with a labor contract, i.e. employment contract *sensu stricto*, or a contract for work.[185]

Emil Hácha believed that it would not be possible to include service law of public employees into the labor law that was being conceived, since the former is a relationship of public nature whereas the latter is a private law relationship. He also claimed that it would not always be advantageous for public employees, by which he meant that the laws, which were openly adapted as of labor law nature, i.e. concerning labor law, which means especially so-called protecting laws, would not apply to their relationships.

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[183] KASKEL, W., *Arbeitsrecht.* Berlin: Verlag von Julius Springer, 1925, p. 3–4.

[184] *Alphabetisches Wörterbuch des Arbeitsrechtes. Practisches Handbuch für das gesamte Dienstrecht der Arbiter, Angestellten und Beamten.* Hrsg. H. Potthoff, Stuttgart: Verlag von J. Heß, 1921, p 26 et al.

[185] Srovnej *Slovník veřejného práva československého.* III. Heslo: Pracovní právo (E. Hácha). Brno: Polygrafia – Rudolf M. Rohrer, 1934, p. 424–425. Jaromír Sedláček was aware of that when he wrote *„there is no such an activity that would not have a result without activity"* and that *„we often see such contracts that have characteristics of both service contracts and contracts for work"*; see SEDLÁČEK, J., *Obligační právo II. Speciální ustanovení o jednotlivých typech smluvních.* Brno: ČsAS „Právník", 1926, p. 112–113, 113. It may be found also in Sedláček's and Rouček's commentary on Civil Code (ROUČEK, F., SEDLÁČEK, J., *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a Podkarpatské Rusi.* Díl V. Praha: V. Linhart, 1937, p. 190).

According to Otakar Peterka, labor law was *"a system of law of those underprivileged due to their employment relationship, i.e. especially the working class."*[186] As opposed to Hácha, he did not openly accepted Kaskel's definition of labor law as a law of a certain social class.

Another work on labor law issues called *Laborers' Czechoslovakian Law*[187], was written by František Polák and it may be deduced from the title that his views were similar to those of Otakar Peterka. He regarded laborers' law as a law that shall protect working class and that *"has its origin in both laborers' fighting against employers and concessions given by employers voluntarily to laborers so that class reverses would be mitigated and potential losses in work force avoided."* However he only regarded laborers as a subject thereof, i.e. *"persons carrying out exclusively or predominantly physical work."* His reasons for this definition were that what other call labor law and what according to them applies to both laborers and servants is the result of class struggle of laborers against bourgeoisie and that *"servants or even officials are mainly far from collectivity with laborers and the employment relationship of those categories of employees and created completely different from those of laborers."* Further, his unclearly formed definition of laborer's law states that *"its subject was a legal relationship between laborer and employer, regulation of labor relationship, representative activities of laborers, i.e. undertaking committees, laborers' chambers, protection of laborer's work against employers)."*[188] The whole substance was further divided into collective, individual, and protective laborer's law.

Zdeněk Neubauer, who was a legal theorist and constitutionalist from Brno, had an approach to labor law that differed from the others even more than the approaches of Otakar Peterka or František Polák. Neubauer looked on labor law as the most important component part of the broad branch of social law which, according to him, was composed of all norms of social security for underprivileged classes. Aside from labor law issues, he inclu-

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[186] PETERKA, O., *Pracovní právo.Výklad přítomného stavu pracovního zákonodárství.* Brno: Moravské nakladatelství B. Pištělák, 1936, p. 7.
[187] POLÁK, F., *Dělnické právo československé.* Praha: self-publishing, 1931.
[188] Citation also in this paragraph ibid, p. 14, 20 and 16.

ded in it for instance accommodation security and care for mothers and infants or laws protecting small traders and agriculturalists. The labor law itself, according to him, was divided into labor law *sensu stricto* and law of social security (insurance). In this context, the labor law *sensu stricto* was composed of *"laws protecting employees and the weaker party of employment contract."*[189] Therefore it limited contractual freedom and as *ius cogens* stated that employment contract shall have certain content.[190]

6.1.4 Synthesis or Symbiosis of Private and Public Law?

Thus it can be claimed that labor law was arising out of the sphere of private law (in Czech, there were especially the provisions of Civil Code on "hiring contract" and after it was amended in 1916, the provisions on employment contract), but it was getting its special character due to protective legislation and acceptance of collective labor agreements as a specific source of law. Therefore we should complete the treatise of formation of labor law by remembering the theoretic discussions about labor law which were led from the basic, but not completely clear, view of distinguishing between private and public law. This theoretical problem, whose roots reach all the way to the ancient Rome, has always been very practical: we should keep in mind that this separation serves as a ground for the branch of procedural law, or to be more precise, the way in which disputes are deliberated is based on it.

There were two basic concepts that arose out of the discussion on the nature of labor law at the beginning of the twentieth century. The first con-

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[189] NEUBAUER, Z., Právní řád práce. In: *Brázda*, 1941, Vol. 4 (22), p. 290.

[190] A task of an author who specializes in certain legal issues is to outline the existing literature. As for the extent off the scientific and popular works regarding the first republic approach to employment contract and employment relationship, we concentrate on that only while comparing certain approaches to labor law and than in connection with certain approaches to employment contract. We will of course turn to the literature of that time while characterizing the partial provisions of particular laws. Otherwise we only refer to the long list of literature in ROUČEK, F., SEDLÁČEK, J., *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a Podkarpatské Rusi.* Díl V. Praha: V. Linhart, 1937, p. 184–187.

cept tried to synthesize both integral parts – private law and public law – into a special (third) branch whereas the second concept claimed that there were both private law and public law components and that the latter kept on extending gradually. Under the first approach, which however did not have too many supporters, labor law was a synthesis of public and private law, in which both these integral parts were inextricably intertwined and created very special and independent connection between private and public law. Therefore the division into two branches was extended to division into three parts. The supporters of this approach called this special law as economic[191] law or social law and as it may be cleared from the abovementioned statements, Zdeněk Neubauer was one of the supporters of this approach in the Forties.

The second concept was prevailing. Under that approach, there are both private and public law areas in labor law. Nevertheless its supporters did not completely agree on where the line between the two areas is. The regulations whose purpose was to protect employees, i.e. so-called protective laws which were already mentioned and on which we will concentrate bellow, were clearly connected with the area of public law. Social security laws, for their closeness to private law insurance contract, were originally believed to be of private law nature. However the idea that they were subject to public law prevailed. The disputes over where to put provision on employees' organizations were not completely resolved.

6.1.5 Classification of Labor Law

As there was no single regulation over labor law in the first half of the last century and even legal theory was not united in their approach to labor law, there was no uniform approach to its system. Probably the most famous one was one by Walter Kaskel, whose basics were already outlined. Kaskel divided labor law regulations into four divisions, to which he also

[191] Even though that it is probably not needed, we remind that this economic (agricultural) law should not be confused with the economic (agricultural) law developed during the second half of the last century in our republic.

connected international labor law. Therefore, under his approach, labor was sectioned into law of employment contracts, protective law, organizational labor law, law of labor disputes, i.e. procedural law, and international labor law.

1. There were not only private law norms on execution, subjects, object, content and termination of employment contracts, but also provisions on labor brokers (W. Kaskel mentioned *"preparation of labor law"*) included within the scope of labor law.
2. Protective law was internally divided into the direct objects of protection. In its first part there was protection of employment contract, which meant that employers were obligated to let their employees know about all the conditions of the employment relationship. It was done by means of labor, trade or service rules. Another part consisted of protection of life, health and decency, working hours, continuous general and professional education for young employees and training for apprentices. The protective law also included a system of sanctions, on which the lawgivers the protective norms places and further there were provisions on state supervision applying to certain areas, e.g. trade inspection or mining offices. *Sensu largo* we can even add laws on insurance of employees, which however we will not focus on herein.
3. Organizational labor law was composed of laws regulating law of employees' alliances, i.e. right to associate in trade unions, provision on the most important function of the trade unions, i.e. collective bargaining, and further provisions on undertakings committees (undertakings councils).
4. Law of labor disputes was developed into a special category of judiciary, which was caused by a unique character of labor law disputes. Aside from the classic trade courts and later labor courts, there had been developed certain mediating bodies serving the purpose of settling disputes among individuals and also *"collective"* disputes between trade unions and employers, and between undertaking committees and employers.

5. International labor law started to be developed especially in connection with the establishment of the *International Labour Organization* and its bodies after the World War I.

6.2 ISSUES OF LABOR LAW IN THE AUSTRIAN AND CZECHOSLOVAKIAN LAW UNTIL 1950

6.2.1 Specifics of Employment Contracts and Employment Relationships

Labor law was conceived within the Civil law and its roots reach all the way to the concept of free employment agreement professed by the Physiocrats and economic liberals as a hiring agreement included in the Austrian Civil Code. This agreement was entered into by an employer and an employee as two equal parties, which under the orthodox liberal approach was the only admissible and sound foundation of an employment relationship. Its nature was very similar to that of contract of exchange, since labor (work) was exchanged for a pay (salary).

As we have already hinted, the legal construction of equality of parties to employment contracts veiled the factual inequality of employees, especially laborers,[192] while concluding and exercising the contract. Especially the working conditions of laborers were of a low standard, which led to a situation that laborers started creating collective bodies (trade unions) and organizing strikes. The old laws did not allow coalitions of employees and even threatened with criminal punishments, since it understood them as an unacceptable pressure on the other contractual party, i.e. the employer. This ban and sanction for its breach may be found in the Section 479 and 481 of the Criminal Code of 1852.

[192] The term laborer (worker) was used in regularly and it was accepted by the lawgiver. We will return to that while describing trade employment relationships.

The tension between laborers on the one side and employers and government on the other not only endangered the prosperity of particular employers, but also disturbed the stability and proper functioning of the whole society. Therefore a significant change in the approach of the State to the conditions in the industrial sphere, i.e. the issue of the relationship between factory workers and their employers had to take place. Governmental bodies reassessed their approach and started to tolerate laborers' coalitions and they further repealed or at least limited the persecution measures and even started interfering with employment relationship in order to eliminate the most dangerous consequences of the strictly liberal approach to employment agreement.

6.2.2 Austrian Labor Law Legislation

A special regulation of some employment relationships was brought in the Fifties of the nineteenth century by the Mining Proceedings Code of 1854 and especially the Trade Law of 1859. In the latter, the emperor *"having in mind to organize and simplify the industrial issues of the empire"*[193] laid down the regulation of trade helpers. Clear patriarchal features could be found in the new regulation of menials of 1857, 1866, 1867 and 1886, which fell under the competence of land authorities.

After the initial efforts to limit the laborers' movement by persecution policy, the State bodies accepted the existence of laborers' organizations and occasional associations. Strikes were no longer punished and the government tried to persuade the laborers that the government itself is the best entity for protection of their interests (coalition Act No. 43/1870 Coll. and in the Transleithania the Article V: 1878).

The development nevertheless did not stop with the acceptance of employees coalitions. This process was *inter alia* supported by the gradual stabilization of the constitutional regime and the expansion of the right to

[193] This quotation of the original Trade Proceedings Code of 1859 was taken from *Věstník vlády zemské pro království České*. Ročník 1859. Part I, in which there are chapters I. to XLII. Nr. 1 to 237. Prag: Statthalterei Druckerei, 1860, p. 519 et al.

vote, thanks to which the laborers started to become a political power of significant importance, whose interests could not be completely ignored. The important amendment to the Trade Proceedings Code of 1885 (the Act No. 22/1885 Coll., which was later further amended, especially the amendments of 1907 and 1913) laid down complex regulation of trade helpers, i.e. factory workers and apprentices. It laid down the principles of healthcare and work safety, work day regime, especially the working hours and it fashioned the regulation of termination of employment relationship and remuneration and outlined some specifics for factory and construction workers. Further there was a special chapter on all kinds of aspects of the status of apprentices including their right to education.

The Empire's Council also adapted a special regulation for particular categories of employees (private officials and other employees having similar status, employees of financial institutions, employees of forest industry, journalists, miners, road construction workers, etc. Protective legislation was thus developed within and outside the Trade Proceedings Code. More tolerable working conditions were ensured and work of women and juveniles (children) was regulated; employees were also given certain protection in emergency situations. The Act No. 117/1883 Coll. established Trade Inspection, whose task was supervise that especially trade laws regarding healthcare of workers, working hours, wages, etc. were complied with. In Bohemia, a network of public employment agencies which were supposed to help resolve the more and more acute problem of unemployment was established (the Bohemian Land Act No. 57/1903 Coll.; the situation was worse in Moravia and Silesia). There were also laws on obligatory breaks and holidays (Sundays and religious holidays). The lawgiver laid down special working hours and even interfered with salary issues of certain categories of professions (miners, business). At the turn of the century, as a result of accepting the employees' coalitions, new institute characteristic for labor law arose, i.e. collective (framework, tariff, bargaining) agreement.

Moreover, aside from these changes, an amendment of significant importance to the Civil Code's provisions on employment contracts was passed, i.e. so-called third amendment passed in 1916. The lawgiver laid down special provisions on service contract (*locatio, conductio operarum*)

and contract for work (*locatio, conductio operis*); as for the former there were numerous cogent provisions which were not allowed to be changed to disadvantage of employees.

Thus we think that we may agree with Emil Hácha, whom we already quoted above, who in this context wrote: *"the development of labor law seems to be a chain of corrections to the detrimental consequences of free employment contracts. By so-called socio-political or protective laborers' legislation, the State is empowered to eliminate or at least limit the detriments threatening employees, which is done by certain methods and on the grounds of various motives."*[194]

6.2.3 Labor Law Issues in the Law of Czechoslovakia until 1939

Shortly after Czechoslovakia was established, in the revolutionary atmosphere, the lawgivers paid close attention to the labor law issues. However it was not something unusual for the young republic, as after the years of war suffering there was similar situation in other countries as well.

There were two most significant qualitative changes – labor law legislation gained international extent and the freedom to form coalitions which had only been tolerated gained constitutional protection. The most famous change was the Act on Eight-Hour Days (No. 91/1918 Coll.). The title of this Act reflected its most important provisions, but there were regulated other important issues as well.

a) The new approach to employment relationships, to which a long process of overcoming the strict private law approach to employment relationship, and the basic law of the international labor law were provisions of the Treaty of Versailles and other peace treaties. The Article 427 of the former read: *"labor cannot be regarded merely as a commodity or article of commerce"* and that it is fair that a State recognize either directly or indirectly, by means of its legislation, *"that the well-being, physical, moral and intellectual, of in-*

[194] *Slovník veřejného práva československého*. III. The entry: *Pracovní právo* (E. Hácha). Brno: Polygrafia – Rudolf M. Rohrer, 1934, p. 426.

dustrial wage-earners is of supreme international importance." Similar provisions may be found in other peace treaties.

In connection with the post-war peace negotiations, under the wings of the League of Nations, the International Labour Organization, whose member the Czechoslovakian Republic was. Under the introductory provisions, its objective was to push through that the principle of social justice was a necessary condition for keeping peace in the world. This was to be achieved by eliminating such working conditions that were for many unjust and misery. This ambitious organization with vast apparatus adapted at the international conferences on labor, the first of which took place in 1919 in Washington, the proposals of laws regarding labor law issues (eight-hour days and forty eight-hour weeks, night work of women, ban on child labor, i.e. children under the age of 14, public employment agencies, employment of pregnant women and women who just gave birth and night work of juvenile laborers). The Czechoslovakian lawgiver dealt with these issues in the same year. It stated that the Czechoslovakian legislation met most of these requirements. However complete compliance with them had not been achieved.

b) As for the second document, freedom to form coalitions, the Austrian lawgiver only tolerated the coalitions after the ban on them was repealed whereas the Czechoslovakian lawmakers provided it with constitutional protection from limitations imposed by regular laws. The Section 114 of the Czechoslovakian constitution stated the "*the law to associate for protection and support of work (employment) and economic conditions is ensured."* This step also fits in the framework of the immediate post-war development in democratic regimes of the Central Europe; similar provisions were also included in the Weimar constitution.

c) One of the first Czechoslovakian labor laws that should be emphasized is especially the abovementioned Act No. 91/1918 Coll. on

Eight-Hour Days. Even though there had been dissonant voices[195] and the speakers expressed their fear of some of its consequences, all political parties supported it. Still under the influence of establishing the new State, which was thought to be of much higher quality than the old monarchy, the particular speakers were ensuring themselves that certain mutual helpfulness was necessary. It disappeared shortly after these laws entered into force.

The main principle on which the law was based was that eight-hour days and forty eight-hour weeks be implemented and shall apply to all employed persons. The extent of the scope of application and various conditions in certain areas, i.e. trade, agriculture, railroads, household services, etc, had required certain exemptions or eventually empowerments to grant such exemptions. The Act further regulated breaks at work, over time, night work, employment of juveniles, services provided by employees living in households of employers, keeping the existing salaries despite cutting down hours on the grounds of this Act, etc. Breach of this law could be, in the first instance, even dealt with political offices as offences.

As opposed to the preceding protective legislation, the Act did not apply just to trade undertakings, but also to mining, agricultural and transportation undertakings and to both for-profit and non-profit undertakings run by the government, or public or private unions, funds, associations and companies.

d) There were more of the important laws, such as the Act No. 420/1919 Coll. on Child Labor. It prevented employers from employing children, i.e. those younger than fourteen. The purpose was to protect their physical and psychical development, i.e. not being exposed to hard work and long working hours, working in unsatisfactory conditions and ensuring that they go to school. Given the regular interpellations at Parliament, we can deduct that the law was never really applied in practice. Paid vacation of miners was enacted

[195] www.psp.cz, digital depository, NS RČS 1918–1920, stenographic protocols of December 19, 1918.

in 1921 and in 1925, the six-day paid vacation for all other employees entered into force. These statutory provisions corresponded with the existing situation, as most employees had paid vacation on the grounds of collective labor agreements.

e) The Act on Employment Relationship between Employees and Employers in Slovakia and the Carpathian Ruthenia of 1922, which was amended in 1922, was of significant importance for the employees from Slovakia and the Carpathian Ruthenia. It ensured by its mandatory provision the salaries of employees and it stated that employers had certain duties towards their sick employees. Moreover it laid down provisions on health protection and safety of employees and conditions to be met while giving a notice and terminating employment relationship.

6.2.4 Labor Law in the Protectorate of Bohemia and Moravia

There were two systems of law in the Protectorate – the Protectorate law and German (Reich) law. Application of the particular system of law was based on what citizenship particular subjects of legal relationships (persons) had. The citizens of the Protectorate had to follow the legal order of the Czechoslovakian Republic and the new laws of the Protectorate passed after March 15, 1939.[196]

Labor law was interfered with shortly after the Protectorate of Bohemia and Moravia was established, as labor law was a branch of law that was heavily influenced in the era of German occupation; the most significant changes applied to so-called collective bargaining. In the previous period, it was built on three pillars: freedom of association, right to strike, and autonomy of trade unions during collective bargaining. Thus autonomy during collective bargaining was actually eliminated.

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[196] Generally on law of the Protectorate see: SCHELLE, K., TAUCHEN, J., *Grundriss der Tschechoslowakischen Rechtsgeschichte*. München: Dr. Hut Verlag, 2010, p. 63; SCHELLE, K., TAUCHEN, J., *Recht und Verwaltung im Protektorat Böhmen und Mähren*. München: Dr. Hut Verlag, 2009, p. 101.

The existing approach to labor law did not correspond with the political dogmas and objectives of the occupants, as Nazi labor law was based on the following three principles: the idea of collectivity (community), Fuehrer principle, and looking on every work as "service for nation and State".[197] The goal of emphasizing the idea of collectivity was to camouflage the natural conflict of interest between employees and employers. Labor was not to serve just to pursue the targets of an enterprise but also to achieve general benefits nation and the State. The supreme goal of labor law in the Third Reich was to ensure peace in the workplace. One can also see that during this era Nazis tried to bring militarization into lives of workers and they also tried to bring these principles into the legal order of the Protectorate, which they partially achieved.[198]

The Protectorate law was based on creating a system of controlled work, in which the State limits autonomy of will of parties to labor relationships significantly. For instance, persons that were engaged mostly in agriculture could be hired for a different job only if they had a prior approval of district authority. Moreover it was possible to order that unemployed people shall ensure that certain agricultural work be done on time.[199] Since 1941 (decree No. 46/1941 Coll.), the Protectorate citizens of the age 18-50 that were able to work could be ordered to carry out certain urgent services of significant political or economic importance; this applied especially to services of protecting land, ensuring support, dealing with state of emergency or natural disasters. Furthermore for this purpose, the public and private enterprises could be ordered to provide some of their workers. The decree No. 154/1942 Coll. allowed that so-called "total employment", i.e. forced labor under German rule, may be carried out anywhere throughout the Reich as for the citizens of the Protectorate that were able to work. Hence there were hundreds of thousands of Czech brought to Reich (decree

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[197] For more about Nazi labor law see: TAUCHEN, J., Vývoj pracovního práva ve Třetí říši. In: *Právní a ekonomické problémy V.* Ostrava: KEY Publishing, 2008, p. 129–137.

[198] For more about principles and essence of Nazi law, see: TEGTMEYER, W., *Grundlagen und Wesen der nationalsozialistischen Arbeitsordnung.* Fourth edition, Leipzig: W. Kohlhammer, 1944, p. 29 at seq.

[199] HOFFMANN, J. (ed.), *Nové zákony a nařízení Protektorátu Čechy a Morava. Ročník II. (1940).* Praha: V. Linhart, 1940, p. 970.

No. 177/1944 Coll.). Management of work and entitled to issuing approvals regarding employment relationships were granted to Labor Authorities that were established in July of 1939. These authorities took over some of the agenda that had been carried out by public employment agencies.

The decrees No. 190/1939 Coll. and No. 195/1939 Coll. on Universal Duty to Work introduced a system of forced labor; the force labor, i.e. a duty to carry out some important tasks applied to all men being able to work, who were between the age of 16 and 25, and had citizenship of the Protectorate. Despite the fact that the service was generally for a period of one year, it could be prolonged for two years if it was required by special importance of the tasks.

Employers' autonomy of will was limited by stating that employment relationship could be terminated only if approved by labor authorities called labor offices. If an employment relationship was terminated, employee had to report to respective labor office without delay (especially decree No. 154/1942 Coll.). In July 1941, so-called "labor books", which were supposed to serve for managing and planning distribution of work force, were introduced. It was not allowed for employers to be engaged in trying to obtain employees of other employers by any offering them higher salary, better benefits or working conditions (decree No. 13/1942 Coll.). The Decree on Ensuring Stability of Salaries, Wages, and Labor Decency No. 404/1942 Coll. stated that employer shall not increase salaries of his employees without having a prior written approval by Ministry of Economics. Failure to comply with these duties led to monetary punishments or even imprisonments.[200]

The state of war caused work assignment to go up, which resulted in increased exploitation of citizens of the Protectorate by German occupants. This fact could be seen for instance on extended working hours; it was possible to extend regular working hours to ten hours a day or sixty hours a week without having to get any approval from authorities. Nevertheless

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[200] TAUCHEN, J., Einige Bemerkungen zur Entwicklung des Arbeitsrechts im Protektorat Böhmen und Mähren. In: *Journal on European History od Law*, London: STS Science Centre, Vol. 1/2010, No. 2, p. 50–54.

these limits could have been exceeded if special approval was obtained (decree No. 287/1942 Coll.). Land office was entitled to order a duty to work even on holidays or Sundays during the period of extraordinary economic conditions caused by warfare.

As for collective bargaining, since April 1939 collective labor contracts had to be approved by Ministry of Social and Health Administration so they could enter into force (decree No. 118/1939 Coll.). The destruction of autonomy of trade unions and their actual subordination under authorities of the occupants was completed by passing the decree No. 347/1941 Coll. on Regulation of Trade Unions, under which it was possible to have merged or dissolved trade unions or transfer member of one trade union to another.

In the Protectorate, analogous to the German Reich, there was also so-called racial legislation, which did not allow certain persons, to which racial laws applied, to carry out certain jobs. It was especially the decree No. 136/1942 Coll. on Legal Status of Jews in Public Life, which excluded Jews from all employments in public administration, schools, bar association, health care and journalism.[201] Derogation of protective function of labor law, which is understood as one of its main pillars, was embodied in decree No. 260/1942 Coll. onEmploying Jews. This decree stated that an employment relationship in which there is involved a person with Jewish roots was employment relationship *sui generis*. They were not entitled to for example special overtime payment or extra payment for working nights or Sundays and paid vacation days. Working hours of Jewish juvenile workers was regulated by the same laws that applied to adults and the abovementioned provisions on working hours did not apply to adult Jewish employees at all.[202]

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[201] For more on legal status of Jews, see: UTERMÖHLE, W., SCHMERLING, H., *Die Rechtsstellung der Juden im Protektorat Böhmen und Mähren*. Prag: Böhmisch - Mährische Verlags- und Druckereigesellschaft, 1940.

[202] TAUCHEN, J., Diskriminace Židů v pracovním právu v Protektorátu Čechy a Morava. In: *COFOLA 2010: the Conference Proceedings*. Brno: Masarykova univerzita, 2010, p. 742–752.

6.2.5 The Development Immediately after the War

The first post-war government undertook in their program to make sure that they *"will not allow that predatory interests of parasitic individuals and groups would predominate in the liberated republic"* and that the government would develop the munificent social policy. It also eliminated some consequences of discriminatory measures from the war period and in the interest of "national purge" it interfered in some existing employment relationships.

Aiming to achieve fast renewal of the national economy, the President and the government laid down a duty to work in 1945 and the Act No. 29/1946 Coll. replaced the employment books with employment ID cards. There was also constituted a single union organization (Revolutionary Union Movement). The lawgiver also partially intervened in labor conditions; especially the recovery vacation.

6.3 LABOR LAW IN 1950–1992

6.3.1 Development until the Sixties

After the Communist Party gained power in Czechoslovakia, no provisions regarding employment were included in the new Civil Code of 1950. The lawgiver explained that in an ideological way by saying that it cannot adapt bourgeois concept in which labor is looked on as a commodity. In that time, the labor code that was to be passed was not ready yet. Therefore the regulation of labor law was scattered over numerous laws even after February 1948. The new law nevertheless started the process of unification of the employment relationships. They started eliminating both the differences between the regulation of each republic and the differences in regulation that had applied to particular professions.

The previous private law nature of labor law was getting behind and the public law aspects prevailed. The personality cult, or to be more precise, the efforts to get the core of the regulation from statutes to legislative acts of "lower power" reflected in underestimating statutory regulation of em-

ployees' rights. Especially in the first half of the Fifties, non-democratic aspects appeared in the branch of labor law; especially labor camps and administrative assignments of employees.

The partial regulations passed after 1948 touched especially on work conditions. Some of them applied to the duty to work, which had been established already in 1945 and which remained until 1965. Other were connected with employees' organization's (the Revolutionary Union Movement) empowerment to carry out tasks of state administration (authorities).

a) Wage issues of employees of both private and public sector were generally regulated by the Act on Wages Policy of 1948 (No. 244 Coll.). Under this Act, the Ministry of Social Security was entitled to set and change wages of employees being in employment relationship and other bonuses and salaries of house workers and workers having similar status or set piecework. The wage policy of the Ministry was supposed to be based on the needs of an economic plan and the Ministry participated in regulation of the labor market. Despite partial changes, the regulation of paid vacation had, principally until 1959, drawn upon the act of 1947. The *Act on Workplace Safety*, which was passed in 1951 (No. 64 Coll.) stated that both management and particular employees shall pay attention to work safety and prevention of occupational diseases. Safety at the workplaces was to be inspected and superintended by bodies of the RUM (Revolutionary Union Movement) by means of its inspection bodies and the health protection was to be superintended by bodies of the Ministry of Healthcare. Ten years after that, the *Act on Workplace Safety and Health Protection at Workplace* (No. 65/1961 Coll.) drew upon the previous Act and also replaced the prior independent regulation of agricultural cooperatives and private farmers (1954) and production cooperatives (1959).

b) One of the most problematic areas of labor law in the Fifties was regulation of allocation of employees *("workforce")*. The tasks of this area were carried out by county and district national committees, at which respective departments were established. The original regulation, under which only these bodies had been empowered to make decision about allocation of workforce, was changed in 1951

and the respective bodies of the national committees had the authority to make decisions about hiring workers only for the most important sectors and undertakings whereas other undertakings could make such a decision on their own.

The lack of workforce in some regions was being solved by certain administrative methods. The administrative authority to assign workforce to some workplaces important for public interest was partially limited by the amendment of 1948, under which it was possible to assign somebody to a workplace only for a period of one year with an option to prolong the period twice. However each prolongation could not exceed one year. The education of qualified laborers and especially and their assignment to factories was rather problematic. Under the *Act on State Advance Payments* of 1951 (No. 110 Coll.), juveniles engaged in laborers' professions were educated within a system of professional schools and schools of undertaking practice, which were run by a single central authority and after having graduated the graduates were being assigned to particular undertakings. A special decree of 1952 regulated allocation of high school and college graduates; they were assigned for a period of three years to particular workplaces according to the state economic plan.

The directive approach to a practice of handling workforce which was typical for the Fifties started to be changed at the end of the Fifties. Allocation of employees was further regulated by the Act of 1958 (No. 70 Coll.). This Act abolished the power to assign citizens to certain workplaces and gave more power to make such decision to particular undertakings and employees. The most problematic provisions of the previous regulation of education of laborers juveniles were abolished by the Act on Education of Juvenile Apprentices *(The Act on Apprentices)* No. 89/1958 Coll. Under this Act, the apprentice relationships were originated on the grounds of apprentice agreements which were concluded between apprentices or eventually their statutory representatives and particular undertakings which educated them. In the following year, the practice of assigning graduates to particular workplaces was also liberalized.

The responsibility for giving jobs to college and professional schools was transferred to particular undertakings.

Administrative handling of employees in the Fifties was one of the causes of fluctuation, which, in the planned economy, was a very serious problem. Solution was usually sought in administrative measures and so fluctuation was to be confronted by limiting employees' right to terminate employment relationship. In 1953, traditional notice given by an employee was replaced with employment relationship termination agreement. Therefore a mere unilateral act by an employee was no longer sufficient, as an approval given by a respective manager was required. Managers were also entitled to punish unjustified absence from work, which was done by means of a temporary transferring the employee to a job for which they were paid less. The culprits could also face criminal charges.

c) Workers' participation in running companies was to be carried out by means of uniform unions (Revolutionary Union Movement, RUM) and undertakings' councils. The intertwinement of undertakings' councils and unions was later even tightened. In 1959 (the Act No. 37 Coll.), they were transformed into undertakings' committees of union organization and thus they become a direct components of union organization. They took part in drawing economic plans and concluded collective agreements with management of undertakings. They also reviewed whether labor law regulations were followed and paid attention to improving qualification of employees. They also significantly participated in social security issues and were in charge of solving individual labor disputes between employees and undertakings.

   Transferring some tasks from state authorities to uniform union strengthened the status of unions only putatively, for they were pushed away from their original role as an organization whose purpose was to defend interests of employees. Instead of that they became "a gearing stick" of the Party's policy in undertakings and emphasized the oneness of planned economic policy of the State and undertakings on the one side and employees on the other.

6.3.2 Labor Code of 1965

Passage of the "socialistic" constitution in 1960 logically resulted in calls for reconstruction of the whole legal order including the inconsistent and disorganized complex of labor law norms.

At the end of the year of 1960, the Central Committee of the Communist Party assigned the task of preparing a labor code to the Central Council of Unions and the preparatory works started in 1962. By January 1963, the Central Council of Unions outlined the principles of regulation of particular parts of the code and in fall of 1963 it completed the whole text of the code. With respect to the economic problems, which the republic faced, and the discussions about how they should be solved, deliberation of the final version was postponed. Thus the National Assembly had not approved the Labor Code, which carefully reacted to the reform proposals arisen out of the discussion about how to solve the economic challenges, until June 1965. It was announced under the 65 Coll. and entered into force as of January 1, 1966.

The Code was supposed to express a new relationship between a worker and an organization, for which he or she works. The relationship between laborer and his or her employer was not to be of antagonistic nature, as it had been before, for the laborers could actively participate in running the entire national economy and their undertaking, which was not owned by a private owner, but was *"a common property of all the people"*. The abovementioned construction nevertheless remained to be just an empty proclamation having no reflection in the real decision-making processes.

On the positive note, the new Code was a universal law, i.e. first labor proceedings code, which applied to all citizens being able to work. There were two concepts of regulation that met in this Code. Under one of them, which however did not prevail, the Code was to ensure just minimum rights of employees and allow the parties (management and union organizations) lay down more advantageous conditions in collective labor agreement. The one who proposed this approach believed that it would better motivate employees within the work process and that the Code would not be rigorous while launching market mechanisms in the reforming socialistic economy. The lawgiver nonetheless sided with the supporters of cogent (mandatory)

regulation of rights and duties, whose approach was closer to the existing party-bureaucratic system of central planning.

The approach of the Code to the most important legal institutes was similar to regulations typical for the Fifties. The employment relationships were originated on the grounds of employment agreement or sometime as a result of being appointed or elected. The Code allowed that employees be transferred to another work, but only if certain conditions were met and only for a limited period of time. An approval by district national committee was no longer needed for ending employment relationships. An employee was allowed to end the employment relationship both if certain statutory stated and approved conditions were met and even without having to present any reason. However, as for the latter, the length of notice was six months longer. An organization was allowed to end a relationship with a worker only on the grounds of expressly stated causes. The principles of remuneration for work did not change at all. The Code anticipated that working hours be shortened in the future, which showed to be true. There were even laid down certain provision of international treaties adapted by the International Labour Organization regarding work conditions of juveniles, pregnant women, and mothers.

Immediately after the Code had been passed, it seemed that its approach would have to go through extensive revision. Nevertheless, having been many times amended, it survived not only the post-November changes, but also the separation of Czechoslovakia. The need for change was connected with the reform of the system of running national economy which was being prepared. The contemplated diversion from administrative proceedings and more emphasis placed on the economic methods of management open more space for applying collective agreements while negotiating about work conditions and for new ideas of the role of the Revolutionary Union Movement. It also anticipated that wage policy be reassessed in favor of the motivational components. These and other changes were supposed to be reflected in the Act on Undertakings, which was being prepared in 1968 and 1969, which however lost its chance to be passed due to the beginning of normalization and the return to bureaucratic approach to management.

The purpose of the later amendments passed in the pre-November era was to adjust the legal order to the imminent political needs and practice of central planning of economy. We should mention especially the discriminating provisions of a 1969 amendment No. 153 to the Labor Code. Principally, the lawgiver took them over from the legislative measure of the Federal Assembly No. 99/1969 Coll., which stated that employment relationship may be terminated, or an office holder may be recalled if he or she *"interferes with socialistic order of society and loses the faith given to him to carry out his labor duties."* Similarly it was possible to terminate employment relationship of teachers and exclude students from their school.

The issue of distribution of workforce was not laid down in the Labor Code. According to the governmental order No. 38/1967 Coll., which executed the Code and which had remained in force until the beginning of the Nineties, ensured that the college, conservatoire, and high school graduates be given a job *"according to their education and knowledge and in accordance with the needs of national economy"*. The duty to ensure relevant jobs was imposed upon central authorities and county national committees. The graduates usually started working at basic workplace so that they could be useful in the basic profession which they had been schooled in and the organization had to provide special care to their professional and political development.

6.3.3 Development after 1989

After 1989, numerous amendments to the Labor Code and other partial laws aimed specially to harmonizing the regulation with the market economy and ensuring that the national laws comply with international treaties in force in Czechoslovakia. Labor law was changed by a number of laws; among them there was a series of three laws published at the beginning of 1991; the Act No. 1 Coll. on Employment; the Act No. 2 Coll. on Collective Bargaining; and the Act No. 3 Coll. changing and amending the Labor Code. Labor relationships regarding private enterprise of citizens had been regulated by a decree by the federal government (No. 121/1990 Coll.).

The Act on Employment laid down the instruments for supporting employment including creating new jobs and requalification programs, the

mechanism of work agencies, special status of persons with limited ability to work, etc.

The amendment to the Labor Code No. 3/1991 Coll. included typical features of transformation to market economy: it strengthened the principle of autonomy of will of the parties to employment relationship; it allowed greater mobility of workforce; and gave a new quality to collective agreements, which were not only a legal act, but also a specific source of law. Further there were new provisions on certain offices, which, prior to that, had been regulated by the legislative measure by the presidium of the Federal Assembly of 1990 No. 362 Coll. It also set down alteration and termination of employment relationship; especially these relationships could be no longer altered or terminated as a result of disciplinary measure. In connection with the termination of employment relationship, it also regulated payoffs. Moreover there were provisions on work discipline, working hours, recreation, wages issues, work obstacles, etc.

The Act on Collective Bargaining concurred on the amendment to the Labor Code, or to be more precise, on its provisions on collective agreements, because it was focused especially on the negotiations leading to the formation of a collective agreement. This Act may be regarded as the first regulation of the collective labor law which, in respect with the individual labor law, has a function of a special protective mechanism. Within the scope of dealing with collective labor disputes, it stated that even going on strike or exclusion may be allowed in extreme cases.

7. FAMILY LAW

7.1 ATTEMPTS TO ALTER THE APPROACH TO MARRIAGE AND FAMILY LAW

Passage of the Tolerance Patent of 1781 may be looked on as the very first significant change. This patent *inter alia* allowed that evangelist churches be engaged in certain activities and, moreover, Catholics and Evangelists may get married, which had been condemned before. A year later, even the bindingness of betrothal, recognized by the Catholic law, was abolished and even the Pope himself protested personally against further reforms.

Despite all that, on January 16, 1783, the Patent of Joseph II, No. 117 of the Collection of Laws, was adapted. By means of this law, the Emperor carried out further significant changes to this field of law. Clerical jurisdiction over marriage disputes, which had lasted from the tenth century, was no longer used and the authority to make decisions regarding matrimonial disputes was given to state courts of law. Besides, the Emperor declared to have a sole and exclusive right to regulate spousal relationships.

The Marriage Patent of 1783 did not however deviate from the clerical approach to marriage and thus is laid down different rules for members of different religions, which was actually in compliance with the beliefs of particular churches.

As for the regulation of Catholic marriages, which predominated in that era, the Patent originated from a lenient reform of the canonic rules. Nevertheless they brought numerous practical challenges in the future. For instance, as for the hindrances, the system of canonic hindrances – only with slight changes – was taken over; they included even those that drew upon the Christian approach to marriage (hindrances to clerical sanctification, professions, and ban on marriages with non-Christians). On the other hand, some of them were defined more narrowly, especially relatives and brothers-in-law) and it even laid down new hindrances, which had not been

known until then. This resulted in a situation in which the system of state and canonic hindrances did not correspond with one another. Concurrently, the obligatory clerical form of marriage was kept in force. This situation put clerics on the horns of a dilemma whether to bless such marriages that met all the requirements set by the Patent, but did not comply with the requirements of canonic law and vice versa. The Patent also fully adapted the canonic thesis that marriage was inseparable; Catholics could only be divorced from bed and board, as it was approved by the canon law. On the other hand, Evangelists were granted the right to separation of marriage (nevertheless as for marriages between Catholics and Evangelists, the ban on separations applied even to the Evangelist). The Patent did not apply to marriages of Jews, as the rules for Jewish marriages had not been issued until 1791. Jews were allowed to define the rules of relatives and in-laws differently and separation could be based on mutual agreement of parties, which was actually the relatively most convenient law of marriage in Austria.

One of the disadvantages of the Marriage Patent by Joseph II was that, in a many provisions, there was no clear line between the competence of churches and the State. On the other hand, the negative approach of churches to some rules raised reaction of certain radical quarters; even an idea of having obligatory civil marriages emerged in the State council in 1784. None of the adverse approaches – clerical and civil – had prevailed so the State did not leave its principles concerning spousal relationships during the reign of Joseph II. On the contrary, the legislation of this era progressed in the last two years of the Emperor's reign and laid down a new regulation of the status of children born out of wedlock. The Emperor's Patent of 1787 accorded equal rights to legitimate and illegitimate children, especially as for succession and it also newly regulated the institute of wardship.

7.2 FAMILY LAW IN THE AUSTRIAN GENERAL CIVIL CODE

The compilation works on codification of private law, which had started already during the reign of Maria Theresa, continued during Joseph's life. On November 1, 1786, these works resulted in issuance of the first part of the General Civil Code, whose author was Horten. The Code consisted of five parts, the first two of which contained general provisions and the following ones regulated relationships between parents and children, the status of orphans and prodigals. The Code included even the laws, or their consequences, which had been issued till 1781. As for the area of spousal and family law, it contained the Marriage Patent, the Patent on Hereditary Succession and Equality of Legitimate and Illegitimate children.

Nevertheless the codification works did not stop after that. With the great help of Professors Martini and Zeiller, a final version of the General Civil Code was completed. This Code entered into force as of January 1, 1812 and was published under the title "Allgemeines Bürgeliches Gesetsbuch". Its first part, which included provisions on marriage law, relationships between parents and children, and wardship and custodianship brought enduring stability to the field of marriage law and family; at least as for the material law.

Also the spousal and family law issues included in the General Civil Code of 1811 drew upon the tradition of Canon law. However the rules laid down in the Code were authorized by the State and compliance with these rules which was superintended by the State. The Civil Code considered marriage to be a contract between spouses which was based on nuptial freedom, i.e. marriage could be entered into by everyone who was not prevented from doing so by a legal hindrance. These legal hindrances were defined in the Code in a very detail. Moreover, a political consensus, which was an approval by a public authority, had had to be obtained prior to wedding ceremony until 1867. Such an approval was given on the grounds of sufficient evidence proving that the applicants were able to provide for themselves and their family and, further, that they were both physically and morally competent. Certain occupations were looked on as hindrances in

some cases. With regard to state officials, an approval by their superiors was needed and marriages of active soldiers were not allowed until the compulsory service of such applicants was completed, or to be more precise, if the applicant was qualified as "unable" at three military drafts. Commissioned officers needed not only an approval by their superiors but they also had to put down a relatively high deposit (up to 120 000 K).

The General Civil Code laid down the institute of marriage as a bond of two unequal persons; women were in subordinate position. Husband was declared to be head of his family and his wife was to be subjugated to his power and had to help him with their estate, household and carry out his orders.

With regard to termination of marriage, the Code of 1811 stated the following options, which however differed according to religion of the spouses: a marriage could be either declared to be nullified or terminated by separation or ended due to the fact that one of the spouses died or was declared to be death. Nevertheless the separations were not available to Catholics until 1919. They were only allowed to get divorced from bed and board, which meant that the spouses did not have to live together, but from the legal perspective, the marriage still existed. Hence the separation applied only to non-Catholics. As for Jews, the separation could be based either on husband's will, adultery or mutual agreement and Evangelists could be separated due to having committed adultery, having been sentenced to five or more years in prison, having left the husband mischievously, having tried to endanger his life, maltreatment or irresistible antipathy.

It emerges from the above discussions that the concept of law of marriage under the ABGB was not – especially for Catholics - that far from the tradition of the Canon law as it was as for the previous provisions of the Joseph's Marriage Patent. The complications that arose from the Marriage Patent were not eliminated, but, moreover, there were numerous collisions of competences of clerical bodies, which had the authority to make decision about origination of marriage, and state bodies, which were entitled to deal with spousal disputes including divorces and separation. Further changes in this respect had not appeared until 1855 when a concordat was concluded (see below).

The other group of relationships, i.e. law of parenting, was laid down in the third chapter of the Code, i.e. the Sections 137–186. The principle that men (husbands) had privileged role within their family was not abandoned; men were in charge of choosing a name for their kids, giving an approval with possible covenants of their children, making decision about education of their children and also administering the property of their children. In the cases of divorce or separation, the children stayed with their father. Nevertheless there was an exception that boys until the age of four and girls younger than seven were given to their mothers. The Code also reenacted that legitimate and illegitimate children have a different status.

7.3 THE DEVELOPMENT OF FAMILY LAW IN THE NINETEENTH CENTURY

The above discussed antagonisms, which were taken over by the restored regulation of spousal issues from the Joseph's foundation, remained to be, as it was already mentioned, the cause of repeating collisions between the Canon and state law. While in the course of the reign of Joseph II any potential discrepancy had been resolved to the benefit of the State, this time the situation was different, as Pope's personal intervention in Rome helped change the Emperor Francis's idea in favor of clergies; especially as for the issue of origination of marriage and the relationship between the different set of canonic and secular hindrances. The priests were now entitled to reject to bless a wedding ceremony owing to canonic hindrances, even though such hindrances were not approved by the State. On the contrary, Emperor stopped all the ongoing cases dealing with an issue that someone got married according to the Canon law despite secular hindrances.

The further compromises in favor of the Catholic Church which did not comply with the original wording of the Civil Code regarded mixed marriages. The Austrian government issued an official interpretation of some of its ambiguous provisions. This was carried out by means of decrees by the Court Office (Hofkanzlei) issued between 1814 and 1835. They defined a new matrimonial hindrance, so-called "hindrance of Catholicism", which

meant that after a mixed married couple got separated (as opposed to the Joseph's Marriage Patent, the separation was allowed by the Civil Code), the Evangelist party was allowed to get married again, but the Catholic party was not. Separated Catholics were bound by their marriage as long as their former Evangelist spouse was alive.

The State was nevertheless not willing to compromise anymore and issued an Emperor's Patent of 1819 on Proceedings in Matrimonial Issues, which served as exact guidelines for courts.

Only the new situation in which the Metternich's cabinet got was supposed to eliminate at least some the controversial provisions of canonic and state law of marriage. One of the most important issues was the issue of mixed marriages of Catholics and Evangelists. It was resolved in 1841 by the Austrian government's accepting the Pope's instruction which ordered that priests try to persuade fiancé and fiancée not to enter into such marriages. If however they did not change their mind, the churchmen were supposed to proceed with the wedding ceremony only if the Evangelist party promised in writing that he or she would not insist that his or her Catholic spouse leaves the Catholic Church and that he or she agrees that any children born in such a wedlock would be raised in a Catholic way. Otherwise marriages with no religious ceremonies were to be just entered into the Registry Office. Nonetheless this was not the end to the competition between the State and church with regards to matrimonial law. After a negotiation that had taken several years and which was led on behalf of the Austrian government Professor Raucher, on August 18, 1855, a Concordat with Vatican was signed in Vienna (Raucher's proposal made in 1836 that all matrimonial issues be put under the authority of the church did not get through). The Concordat stated that jurisdiction over matrimonial issues be passed to clerical forum. The State was only entitled to regulate civil results of marriages and the Emperor's Patent No. 185 of October 8, 1857, which entered into force on January 1, 1858, even abolished the application of matrimonial law provisions laid down in the Civil Code to Catholics. Simultaneously there was issued an instruction for clerical courts, in which the rules of the Canon matrimonial law, both material and procedural, were laid down.

The Emperor's Patent No. 185 stated that there be established diocesan consistory courts appointed by relevant bishops and only they had the authority to deliver judgments regarding validity of marriages under the Canon law. One could appeal against their decisions to archbishops and then to Pope. Thus the State was not to interfere any more in matrimonial issues. All hindrances to marriage, which as from the era of Maria Theresa the State had tried to carry through the Canon rules, became to be only prohibited and for which the State could impose criminal sanctions, but their non-compliance had no effect as for the validity of marriage. The relationship between the State and religion was getting more and more complicated. Discrepancies between the secular and clerical hindrances were to be resolved by recommendations given by churchmen that fiancé and fiancée desist from getting married. However if they insisted on the marriage, an approval given by a bishops sufficed. On the other hand, if a marriage was declared invalid by one of the clerical courts, bishop had to make an announcement to land's political office which consequently drew conclusion for civil issues. Similarly the view of clerical courts was crucial when giving an approval for divorces from bed and board and the State waived any influence on releasing from matrimonial hindrances.

The provisions of the Concordat applied to marriages of non-Catholics as well and mixed marriages fell under the jurisdiction of the Catholic clerical court and marriages became inseparable for both parties if at least one of the parties had been Catholic at the time of entering into marriage. This also applied if both parties joined the Catholic Church at the wedding ceremony even if they had already left the church before filing petition for separation.

For the Catholics, the Concordat was actually a return to the matrimonial Canon law in its medieval form: the principles of officialdom and of formal procedural truth in proceeding were restored; proceedings were led in Latin and in writing; there were used rigid laws on assessing evidence and the parties were granted no right to be heard. As for the material law, and with regard to the relationship between the Austrian matrimonial law and the Canon law, there were no significant changes. Basically only the act of espousal became to be binding and the list of matrimonial hindrances was extended.

It seemed that the new situation was similar to that before the Marriage Patent of Joseph II was passed. In fact, it was not so. The Concordat of 1855 did not affect for instance the "political consensus for marriages" and administrative approvals or proscription to get married; on the contrary the Section 111 empowered the State to create all kinds of administrative limits to nuptial freedom.

In the complex process of changes that were taking place in Austria after the fall of the Bach's absolutism, one cannot miss the efforts to change the matrimonial law. The first period of the disputes over the character of matrimonial law aimed at changing the regime that had been set by the Concordat of 1855. Nevertheless numerous legislative proposals, including the Mühlfelder's Clerical Edict of 1861, had not been listened to. Also the efforts to eliminate the needed political consensus for marriages were not successful.

The second period of the changes to matrimonial law took place after the so-called Austro-Hungarian Compromise. Liberals had not been able to influence law of marriage more significantly until 1867. In December 1896, the Vienna's Assembly enacted the Articles on the Fundamental Rights of Citizens, which *inter alia* ensured equality of religions. In the spring of 1868, the political consensus for marriages was abolished. It was done either in assemblies where liberals held majority or by means of governmental decrees.

Other important steps in the field of family law were the "laws of May", enacted on May 25, 1868. The first of them, No. 47, restored the application of matrimonial civil law to Catholics and the second, No. 49, was called an inter-confessional act and it executed significant changes in status of children born in mixed marriages. Under this law, boys were supposed to follow the religion of their fathers, as opposed to girls who were to keep their mother's religion. Moreover this law stated that all adverse preceding law be abolished. Consequently, the church was ordered not to carry out marriages that did not comply with the rules of the Canon law. However the law took this into account and it recognized extemporary civil marriages, which could be entered into at district offices if church rejected a marriage due to hindrances that were not recognized by the civil law. Further steps of the reform of matrimonial law had been delayed on the

procedural ground because of impatience of the church for so long that the new concept of a statute on matrimonial law in Austria did not get through.

The efforts to change the rules regarding matrimonial law stopped and reversed in 1870 when the Pope himself terminated the Concordat, because it had been repeatedly breached by the Austrian state. Nevertheless, in that time, the situation was so controversial that even partial novelization of some provisions of the Civil Code did not get through the Senate. Hence, as for most citizens, the matrimonial law remained on the level set up by the Patent by Joseph II.

As well as in 1870s, the efforts to reform matrimonial law in the monarchy at the beginning of the twentieth century crashed. The final end to reform efforts was brought by the World War I. Notwithstanding that partial revision of the Civil Code was carried out during the WWI, only one of the tree amendments touched on the family law. The first amendment, which was enacted by means of the Patent No. 276/1914 and the third amendment No. 69/1916 supplemented by the decree on general custodianship influenced the relationship between parents and their children. The objective of these amendments was to support the children's right to alimony, simplify adoptions by people more well off than the original parents and completely change the concept of custodianship.

7.4 CHANGES IN FAMILY LAW IN THE FIRST CZECHOSLOVAKIAN REPUBLIC

7.4.1 Passage of the Act on Separation

The end of the World War I brought with it the fall of the monarchy and establishment of Czechoslovakia. As for the field of family law, the famous reception norm (the Act No. 11/1918 Coll.) adapted both the Austrian and Hungarian norms and therefore this legal dualism gave rise to troubles; this situation lasted for the entire existence of the first republic.

With regard to the field of family law, it is undoubtedly interesting that the very first proposal, which was introduced in the Revolutionary National

Assembly on its very first session on November 14, 1918, was a proposal given by Dr. Bouček concerning matrimonial law. On the other hand, it is a historical fact that especially the discussions on novelization of matrimonial law while trying to revise the Civil Code of 1811, were one of the most crucial reasons why the codification efforts were not successful in the end.

First it seemed that the proposal to reform the matrimonial law, as it had been elaborated and introduced at the end of the year of 1918, would not bring special polemics. Its complex approach helped make the concept of marriage more understandable to laymen and the confessional character of matrimonial law was narrowed. However there were already a lot of reproaches in the explanatory report and the clerical quarters opposed especially the proposal of civil marriage and the possibility to get separated. After a half year of debates, a governmental proposal including a lot of compromises was approved. It was passed in the Assembly on May 22, 1919 and was published as No. 320 in the Collection of Laws.

The Act on Separation, as the matrimonial amendment had been called, established facultative clerical marriage, which meant that fiancés and fiancées had the option to choose whether they have their wedding ceremony at a church or at a district office. Moreover, the amendment repealed some matrimonial hindrances and uniformly formulated the causes on which separation could have been based. The provisions on hindrances and separation however could not be applied in Slovakia, which even deepened the impractical dualism in this field of law. The amendment limited the confessional elements of matrimonial law to certain extant, as numerous hindrances having canonic origin were abolished and the option of separation was given. Generally we can regard the Act No. 320/1919 Coll. as the most important interference with family law during the whole era of the pre-Munich republic.

Nevertheless the practice showed that this law also had some weaknesses. They were to be eliminated by the complex reform of matrimonial law, which was supposed to be carried out together with the revision of the General Civil Code. Nonetheless nearly twenty years of revision works, which started in 1920, did not bring the expected results.

Matrimonial and family law was thus changed only by means of numerous partial laws during the era of the first republic. These laws were espe-

cially the Act No. 256/1921 Coll. on Protection of Children in Custody and Illegitimate Children, the Act No. 56/1928 Coll. on Adoptions, the Act No. 4/1931 Coll. on Protection of Persons Entitled to Request Support or Board and Lodging (the Alimony Act) and some governmental decrees executing the particular laws. Further changes in the field of family law were stopped by the Munich events and by the war. The post-war history of the development of family law is a completely different chapter.

7.4.2 Preparation of Codification of Family Law

Legal historians usually pay attention to legal acts that had been a part of the legal order and thus provably penetrated into the legal culture of a particular state. However even the legal concepts that had never entered into force and thus only remained in the phase of *lege ferenda* influenced the evolution of law. One of them was the attempt to codify family law while preparing Civil Code during the era of the pre-Munich republic, which is discussed below.

The establishment of Czechoslovakia brought a significant change not only for state, but also for law. Despite that fact that the reception norm, which had been announced on October 28, 1918, temporarily fixated the existing legal situation, in fact, the norm was known to have created the abovementioned legal dualism. It was a challenging situation for civil law, which according to the then classification contained family law. In the former Austrian territory, civil law had been codified by the General Civil Code (ABGB) since 1811 and the area of family was regulated by the amendments adapted during 1914 and 1916, whereas in the area of the former Hungarian territory, only some areas of civil law were regulated by written law, as otherwise there was consuetudinary law, whose sources were often difficult to define. Family law was regulated by the Act No. XXXI/1894.

In this challenging situation, it seemed to be important to have passed a new civil code, which would be in force all over the state territory and there were several reasons for that. The unitary state needed a uniform legal order especially in the so important branch of law that civil law is. The second reason was the practical aspect and fears of possible collisions

between both legal orders that were in force. Last but not least the agedness of the old Austrian Civil Code was to be taken into account as well. Nevertheless the reigning quarters did not tackle any more complex legislative work and, on the contrary, the easiest solution was approached: the Ministry of Justice prepared Czech translation of the Civil Code of 1811, which as for the field of family law had already been amended in 1919 by the Act on Separation No. 320 Coll. and this translation was planned to be established as a new civil code. However the civil law specialists, Professors Krčmář and Svoboda, who had been asked to review this proposal, did not support this idea. Thus the Ministry of Justice asked a commission of experts to elaborate a report on which direction should be taken while preparing the new civil code. The consultations that took place on March 6 and June 16, 1920 resulted in issuing a guideline for "careful revision" of the existing Civil Code. Together with that it was recommended that the legal order valid in Slovakia and the Carpathian Ruthenia be taken into account. The task to work on revision of the Civil Code was assigned to four, or more precisely, five subcommittees, in which both the representative of Ministry of Justice, Ministry of Unification and other judicial specialists were to participate.

The family law subcommittee dealt with provisions of the chapters two, three and four of the first part and provisions on building contracts – the chapter 28 of the second part. Professor Katka acted as a referent of this committee, whose members were the administer to the High Land Court Dr. Cerman, the notary Dr. Černý, and attorneys-at-law Dr. Löwy and Dr. Sobička, the advisor to the High Land Court Wünsch and the notary Dr. Zemek. In spite of the fact that the subcommittees for the general part of the Civil Code and subcommittees dealing with law of obligation had completed their work in December 1920, the subcommittee for family law kept on working until 1923 and its proposal was published in 1924. In 1923 and 1924, the Ministry of Unification also issued a report assessing how the proposed legislation corresponds with the laws in force in Slovakia and Carpathian Ruthenia.

The first stage of the revision work was closed by presenting the subcommittees' proposal for public discussion. According to the guidelines of 1920, the next step was that the single parts of the proposal would be

welded together and in so doing even the comments that had arisen out of the public discussion were to be taken into consideration. This was to be done by so-called super-revision commission, which had to follow the principles that had been agreed in 1920. This commission started working after holding a meeting with representatives of the Ministry of Unification on May 20, 1925. Nevertheless the activities of this commission, joined by members of the Slovakian commission for civil law, started on February 15, 1926. The super-revision commission held 321 meetings and the last meeting took place on November 4, 1931. The draft that arose out of these meetings was printed at the beginning of 1932 and sent to numerous offices and organizations so that it would be made accessible to public and this proposal was also discussed by ministers. First, the inter-ministers proceeding had been carried out in writing but it was more and more clear that this approach to shaping the complete version of the proposal would be very time-consuming. The Ministry of Justice suggested that all parts of the new Civil Code be discussed at 32 inter-ministers meetings and these meeting were taking place as from June 18, 1934 through July 24, 1935. In the fall of 1935, the Ministry of Justice called on the super-revision commission to shape final version of the draft of the Code. Senate of the National Assembly published it in 1937 as a print No. 425 under the title Governmental Proposal of New Law.

Even in this case, it was based on the Austrian ABGB, or to be more precise the draft to the Civil Code of 1931. Nevertheless there were major changes in the institutes of family law. Only the provisions on persons, which had been included in the chapter three, were taken over from the first part of the draft of 1931, which covered rights of persons and family law. The governmental proposal did not adapt the chapters two through five of the draft of 1931, which regulated family law, or more precisely matrimonial law, legal relationship between parents and children, adoption, custodianship and wardship and support. On the contrary, some provisions on family law from the Austrian Civil Code and the draft of 1931 were included in the proposal of 1937. It concerned especially the provisions on obligations of children being in their fathers' power and custodians, further it concerned laws on proprietary rights of spouses, including provision on prenuptial agreements. The abovementioned parts of family law were

supposed to be included in law of obligations; laws on patrimonial agreement remained also in the proposal of 1937 in provisions on law of succession.

Thus only a torso of the codification of family law remained and there was no unified approach to enactment of these provisions. There were numerous causes that had led to the situation that most of family law issues were not included in the final version of the Civil Code and that did not become a part of valid law. Some of them are mentioned below.

The issue of independence of family law as a peculiar branch of law was not sufficiently justified by the legal theorists. Nevertheless the approach of some legal theorists was and still is different; family law has been looked on as a component of civil law. And it seems that especially the different quality of relationships which were to be regulated by the Civil Code "uniformly" had become a significant obstacle that despite leading to regulation of proprietary issues of matrimonial and family relationships in the draft of the Civil Code, they prevented their personal aspects to be included. This approach emerged from underlining the economic relationships in families.

Even if we leave the more or less positivist approach, we could find a lot of other reasons that caused the failure of codification attempts within the field of family law in the era of the first republic. The main causes may be the ones that follow: legal dualism established by the reception norm; impetus of ideas about marriages and family which had been influenced by religious ideologies and clerical law for centuries; and of course the standpattism with which the unification was approached, and the lenient adjustments of ABGB to new circumstances.

The differences that were arising from the different regulation in both parts of the republic were often disputed and they regarded especially the essence of marriage, its origination and termination and even equality of spouses, which included the proprietary equality as well.

The question about the essence of the marriage has been dealt with many times throughout the history. The traditional religious concept of marriage as a "sacrament" was, after Joseph II, breached also by ABGB, because it recognized it as an agreement. Despite all the changes that matrimonial law had gone through during the era of the monarchy, the Czech lands inherited a state in which family law – except proprietary issues –

was mostly captured by "the clerical provisions of civil law". As for Slovakia, the reception norm adapted the Weckler's Act No. XXXI/1894, which was undoubtedly more progressive in many aspects and tended to the civil concept of marriages. Moreover the situation was complicated by the fact that only the Sections 1 through 12, 25 and 29 of the matrimonial amendment of 1919 were applied in Slovakia.

These different recourses resulted in numerous disputes during the preparatory works on new family laws. The issue of origination of marriage was dealt with in the Act No. 320/1919 Coll. The Section 12 stated that it be up to fiancé and fiancée to decide whether they choose civil or clerical marriage. With regard to Slovakia, it was undoubtedly a step back, for the obligatory civil marriage had been already introduced in 1894. And thus, as this provision raised many contradictory ideas while formulating the matrimonial amendment, there were many disputes while deliberating the draft of the new Civil Code. Although the concept of civil marriage gained victory in the proposal of 1924 and origination of marriage was regulated similarly in the draft of 1931, the authors were aware of all kinds of negative reactions, especially from clerics. The final solution of this problem had been repeatedly postponed and finally it was one of the parts of family law that were not included in the draft of 1937.

There were also controversies regarding the kinds of termination of marriages. Notwithstanding that there a certain progress in the regulation had been achieved by adapting the Act on Separations, it was not applied in its full extent in Slovakia and so a complete termination of marriage – separation – was allowed differently in both parts of the republic. Though the draft recognized two causes for separation: brake down of marriage and overwhelming antipathy, the interpretation of these terms gave rise a number of all kinds of polemics.

Over the entire period of preparing the Civil Code, the issue of the status and role of wife and husband and relating proprietary issues between spouses were discussed numerous times. Even on this field, there were adverse proposals. Aside from the fact that the draft took over from ABGB the complicated system of statutory proprietary rights of spouses and contractual proprietary rights, the situation was more difficult due to pertinacity of the Czech and Slovakian lawmakers who supported the principle of

keeping the property gained during the marriage separate and the well-established Hungarian principle of common property. In the last revision of the proposal, the lawmakers turned to a compromise. In spite of the fact that they moved towards the institute of common property of spouses as for the property gained during marriage, they did not excluded such a situation that judges may make adverse decision. Moreover, if a wife did not protest, her husband was to be in charge of her assets. Especially women did not consider this provision as an expression of equality in family.

Nevertheless, as I have outlined in the introduction, there were much more disagreements and discords over many issues while preparing the codification of family law. When at least some of its parts had seemed to acceptable for being enacted, the Supreme Court expressed its doubts whether it is suitable that some parts of family law be codified when there would not be a complex solution for the branch of family law. Similar approach appeared at the First nation-wide unification conference o lawyers in Bratislava that took place in 1937. Its resolution requested that complex regulation of family law be included in the Code. Many participants justifiably pointed that the lack of complexity of the proposed solution would cause further unexpected and hardly avoidable problems.

Despite all these difficulties, the proposal of the Civil Code including the abovementioned sections on family law was deliberated in committees and commissions of the National Assembly and it was prepared for plenary sessions of houses, the Munich agreement of 1938 stopped the work. Not even the desperate attempts to carry the draft into effect at least in the form of a governmental decree on the grounds of empowering act went through, because March 15, 1939 completely thwarted the outcome of the twenty years of codification efforts on the field of civil and family law.

7.5 FAMILY LAW AFTER THE YEAR 1945

7.5.1 Introduction

It is well known that *Family Law in the former Czechoslovakia was designed according to the Soviet pattern* as in other satellites of the Soviet Union due to Czechoslovak-Polish commission after the communist take-over. There were a lot of reasons for it. Beside the political one, let us mention the problem called *legal dualism* (bipartism) in the Czech lands and Slovakia. Let us add that the former *Compilation Commission on Recodification of Civil Code* failed to create new Civil Code that would cover Family Law matters as well.[203]

However, the results of the Compilation Commission on Re-codification of Civil Code serve as an inspiration for the experts working on re-codification of Civil Code in these days. Of course, other aspects are taken into consideration.

7.5.2 The Communist Take-Over and Czechoslovak-Polish Commission

After the communist take-over in 1948, the traditional distinguishing between Public Law and Private Law was abandoned. According to the Soviet model, the Czech legal order was divided into relatively separated legal branches. Not only the new Constitution of May 9, 1948, but many new acts were passed in the so-called juridical two-year-plan *(právnická dvouletka)* to found communist law. The destructive character of traditional values of law was pointed out in the series of the International Encyclopedia of Family Law.[204]

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[203] See the Draft No. 425 from 1937.

[204] For the general view on the communist Family Law, compare MLADENOVIĆ, M., JANJIĆ-KOMAR, M., JESSEL-HOLST, C.,*The family in Post-Socialist Countries. International Encyclopaedia of Comparative Law. Vol. IV, Chap. 10.* Tübingen, 1998, p. 3–151.

Provisions of Family Law were enacted in the new *Family Law Act* (Act No. 265/1949 Coll.),[205] which was passed beside the new Civil Code (Act No. 141/1950 Coll.). The separation of the Codes was the result of the conception of artificial atomisation of legal order according to the Soviet model.[206] The new Family Law Act was concentrated only on "personal relationships among family members". Property aspects of marriage were regulated insufficiently in the Civil Code. Protection of property rights of the child was missing at all.

The aim of the new Family Law Act was to purify Family Law from characteristics known in the bourgeois society and its law.[207] That is why the Family Law Act followed the ideals embedded in *the Constitution* of May 9, 1948. The communist family based on marriage was pronounced as a basis of communist state. Because the communist society and the communist law intended to eliminate the influence of the Catholic Church on social life, the form of obligatory civil marriage was stipulated as an exclusive one. The concept of marriage as a contractual relationship was disregarded and marriage was made upon the affirmation of spouses on marrying before a national committee. The hate against the clergy escalated into criminalisation of priests.[208]

The new Family Law Act simplified the terms for concluding a valid marriage. Both, the Constitution and the Family Law Act stipulated equality of man and woman in marriage and family. As for personal rights and

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For the Czech reality in details, see HADERKA, J., *The Czech Republic – New Problems and Old Worries. International Survey of Family Law 1994*. The Hague – Boston – London: Martinus Nijhoff Publ., 1996, p. 181–197, and HADERKA, J., *A Half-Hearted Family Law Reform of 1998. International Survey of Family Law*. Bristol: Jordan Publ., 2000, p. 119–130.

[205] See ANDRLÍK, J., BLAŽKE, J., KAFKA, A. *(eds.)*, Zákon o rodině. Komentář. Praha: Orbis, 1954, p. 13 ff.

[206] See BĚLOVSKÝ, P.: Rodinné právo. In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. *(eds.)*, *Komunistické právo v Československu*. Brno: Masarykova univerzita, 2009, p. 463 ff.

[207] See KHAZOVA, O., Family Law within the former Soviet Union: More differences or more in common? In ANTOKOLSKAIA, M. *(ed.), Convergence and Divergence of Family Law in Europe*. Antwerp – Oxford – New York: Intersentia, 2007, p. 97 ff.

[208] In details see TUREČEK, J.,Civilní sňatek *In: Právník*, No. 2/3, 1950, p. 71–82.

duties, the spouses had equal rights and duties, they were supposed to live together, to be faithful to each other and help each other. As for matrimonial property law, the regulation was based on the principle of community property with an option of contractual modifications. No ante-nuptial agreements were allowed. After-divorce maintenance was constructed as an exceptional measure.

Marriage dissolution, too, was considerably simplified. The old institution of separation was repealed. Marriage was terminated by divorce based on an objective principle which was the irretrievable breakdown of relations between the spouses. This objective principle was modified by the principle of a breakdown due to one of the spouses' fault, namely in the case of granting divorce and its legal consequences. Married spouses could not be divorced without a consent granted by the so-called exclusively faultless spouse. If so petitioned by both spouses, the court could omit the fault to be rendered in the verdict. Family Law Act was amended twice.

Beside the Family Law Act, a discriminating law stipulating marriages with aliens was passed (Act No. 59/1952 Coll., On Marrying Aliens). Under this law marrying a person with other than the Czechoslovak citizenship was only possible on approval of the Ministry of HomeAffairs or an authority empowered by it. Without such an approval marriage could not be concluded. The Act was in force until 1964.

Let us mention some *positives* regarding children. Family Law Act was considered to be the Code of the Rights of the Child. The law maker established equality between t children born in the wedlock and children born out of wedlock. The "pater familias" was changed into power of parents. Unfortunately, Family Law Act did not regulate due to political reasons any individual personal substitute care of children such as traditional foster care.

Let us add that the Family Law Act was later on amended: in relation to divorce (Act No. 61/1955 Coll.) and adoption (Act No. 15/1958 Coll.).

7.5.3 Sixties

Due to the passing of the *New Constitution in 1960* (No. 100/1960 Coll.) proclaiming the victory of socialism in Czechoslovakia, all codes from previous period were substituted by new acts: *the Act on the Family* (Act No. 94/1963 Coll.) and *the Civil Code* (Act No. 40/1964 Coll.). The new Act on Family and the Civil Code are said to be even more simplified than the older ones. Some experts speak about further vulgarisation of legal culture.

As the main change, the divorce law and regulation of matrimonial property law is to be mentioned. Divorce regulated in the Act on the Family was based only on irretrievable breakdown of relations between the spouses. The rules of undivided co-ownership of spouses as a basic institution of matrimonial property law were introduced into Civil Code. Only things in "personal ownership" could be the object of undivided co-ownership of spouses. The law was rigid, without any possibility of making a contract. The Codes were amended several times but those changes were of minor importance.

The Act on the Family was amended, mainly in the year of 1982 (Act No. 132/1982 Coll.)and 1992 (Act No. 234/1992 Coll.), when the church wedding was again established. However, *purge* from ideological principles and terminology was done quite late after the fall of the Berlin Wall, in 1998 (Act No. 91/1998 Coll.).

7.5.4 The Fall of the Berlin Wall

The favourable atmosphere of the post-revolution period of the early 1990s provided the lawmakers with a great space for a re-codification of the basic codes, mainly the Act on the Family and the Civil Code. Unfortunately, that advantage was missed. On the contrary, the most important codes were amended many times, partially and lacking any proper concept, which made the life of users of the law in practice very complicated disturbing the legal consciousness of the public and obstructing the full formation of „the state of law" in the country.

That is why both the Act on the Family and the Civil Code do not meet the requirements of the contemporary society sufficiently. Since the early 1990s there have been some projects of a Family Law reform. Unfortunately, the systematic ones were rejected. In general, we have to admit that the results of legislative work are far from the desire of most Czech legal theorists to have a really effective Family Law as part of the civil law system in compliance with the democratic tradition of Continental Europe. The first signs show that the reform has been greeted with no cheers – with a few exceptions - and that courts, solicitors, social care centre workers and other professional who have to bear the main burden of applying the Family Law in practice are rather embarrassed and hesitant about it.

Nevertheless, thanks to the *role of the Constitutional Court*,[209] the "old law from the 1960s" started to be newly interpreted in harmony with the Constitution. As changes of majorimportance must be mentioned the following ones:

- *the Charter of Fundamental Rights and Freedoms*, being part of the Constitution (Constitutional Act No. 23/1991 Coll., bringing into operation the Charter of Fundamental Rights and Freedoms as a constitutional law adopted by the Federal Assembly of the Czech and Slovak Federal Republic, implemented in Constitutional Law of the Czech Republic by a ruling of the Board of the Czech National Council No. 2/1993 Coll.), promulgated (human rights) treaties to the ratification of which Parliament has given its consent and by which the Czech Republic is bound and which make due to Article 10 of Constitution part of the legal order and are directly applicable prevailing over domestic ordinary law (see Appendix),
- the small amendment of the Act on Family (Act No. 234/1992 Coll.) which re-introduced religious marriage into the legal order,
- the so-called great amendment of the Act on Family and Civil Code (Act No. 91/1998 Coll.) which brought out "reform" of divorce and maintenance duty between ex-spouses and matrimonial property law, changed adoption etc.,

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[209] See mainly Rulings of the Constitutional Court No. Pl. ÚS 15/09 and No. ÚS 72/1995.

- the law concerning "hidden" child delivery (422/2004 Coll.),
- the law regulating partnership between the same sex partners – *Act on Registered Partnership* (Act No. 115/2006 Coll.),
- *the Act against Domestic Violence* (Act No. 135/2006 Coll.).

7.5.5 The Need for Re-Codification of Family Law

It is possible to say that the above mentioned partial changes of Czech Family Law prepared the ground for the decisive step – the re-incorporation of Family Law institutes into the Civil Code as the basic source of private law. The time for enabling the realisation of the second detached phase could come – the phase of the private law family regulation reform recommended in studies for a general discussion on the Czech Family Law according to designed law so that it should get closer to the current legal regulations of European countries.

In the spirit of the European tendencies, the work on the re-codification of the civil code as the basis of the private law has currently been proceeding in the Czech Republic. The work should result in a unified, coherent, systematic, clear, complete, and at the same time necessarily open code. This direction of development of the Czech Family Law, defined by the subject-matter of the Ministry of Justice (ref. No. 2623/00-L of January 29th 2001), can be characterised as an effort to create a European continental civil concept of the Family Law. Family Law rules were incorporated in *the Second Part* of the working version (draft) of the re-codified private law code, which, apart from the matters now codified by the Act on the Family, also includes marital property law, based on the principle of full private autonomy between the spouses, further the rights of marital and family dwelling and other connected property issues, including the private-law rules against domestic violence. The new Civil Code will also regulate, among others, the registered partnership of people of the same sex. After new elections, the draft should be submitted to the Parliament again for a further legislative process in 2011.

7.5.6 Conclusion

The explanatory note to *the first version of the Draft of the Civil Code* (2005) mentions several times that Czech Family Law was a result of Sovietization and that one of the major aims of the Draft is to achieve *discontinuity with the communist Civil Codes of 1950 and 1964and with the communist Family Acts of 1949 and 1963.* We can fully agree with the Draft´s statement that Czech Private Law must come closer to European standards.[210] Let us hope that new Czech Civil Code will meet them.[211]

[210] See the explanatory note, I. general part, pp. 1 and following, and the partial explanatory notes to the individual clauses of the Second Part – Family Law, pp. 92 and following of the Draft for the Civil Code. Part One to Four. Draft of the working committee. Praha: Ministry of Justice, without reference, without year (spring 2005) [in Czech]. [Main compilers: *K. Eliáš* and *M. Zuklínová*]. Then, see the 2011´version of the Draft – www.justice.cz.

[211] See ANTOKOLSKAIA, M. *(ed.), Convergence and Divergence of Family Law in Europe*. Antwerp – Oxford – New York: Intersentia, 2007.

BIBLIOGRAPHY

Textbooks on Legal History

ADAMOVÁ, K. *Dějiny soukromého práva ve střední Evropě*. Praha: C. H. Beck, 2001.

BÍLÝ, J. L. *Právní dějiny na území ČR*. Praha: Linde, 2003.

JÁNOŠÍKOVÁ, P.; KNOLL, V.; RUNDOVÁ, A. *Mezníky českých právních dějin*. Plzeň: Aleš Čeněk, 2005.

KADLECOVÁ, M.; SCHELLE, K.; VESELÁ, R.; VLČEK, E. *Dějiny českého soukromého práva.* Plzeň: Aleš Čeněk, 2007.

MALÝ, K. a kol. *Dějiny českého a československého práva do roku 1945*. Praha: Linde, 2003.

MALÝ, K.; SIVÁK, F. *Dějiny státu a práva v Československu do roku 1918.* Praha: Panorama, 1988.

SCHELLE, K. a kol. *Československé dějiny státu a práva (1918–1945).* Brno: MU, 1991.

STIEBER, M. *Dějiny soukromého práva ve střední Evropě.* Praha: vlastním nákladem, 1930.

URFUS, V. *Historické základy novodobého práva soukromého.* Praha: C. H. Beck, 1994.

VANĚČEK, V. *Dějiny státu a práva v Československu do roku 1945*. Praha: Orbis, 1975.

VANĚČEK, V. *Krátké dějiny státu a práva v Československu*. Praha: SPN, 1955.

VANĚČEK, V. *Malé dějiny státu a práva v Československu*. Praha: Práce, 1947.

VLČEK, E. *Právní dějiny ČSR (1939–1947).*Olomouc: UP, 2005.

VOJÁČEK, L.; SCHELLE, K. *České právní dějiny do roku 1945*. Ostrava: Key Publishing, 2007.

VOJÁČEK, L.; SCHELLE, K. *Právní dějiny na území Slovenska*. Ostrava: Key Publishing, 2007.

Published Historical Relics, Documents and Collections of Documents

ADAMOVÁ, K.; SOUKUP, L. (eds). *Prameny k dějinám práva v českých zemích*. Plzeň: Aleš Čeněk, 2004.

BEŇKO, J. *Dokumenty slovenskej identitya štátnosti II.*, č. 221. Bratislava: Národné literárne centrum – Dom slovenskej literatury, 1998.

BRANDL, V. (ed.). *Kniha Drnovská. Kritickými i věcnými poznámkami opatřená*. Brno: nákladem vlastním, 1868.

BRANDL, V. (ed.). *Kniha Rožmberská*. Praha: Jednota právnická, 1872.

ČÁDA, F. *Vybrané prameny k právním dějinám středoevropským*. Brno: Čs. A. S. Právník, 1931.

ČÁDA, F. Kniha Tovačovská – základy jejího textu. In *Studie o rukopisech*, 1970.

HRDINA, I. A. (ed.). Texty ke studiu kanonického práva. *Plzeň: Aleš Čeněk, 2007.*

HRDINA, I. A. (ed.). Texty ke studiu konfesního práva. II. Český stát. *Praha: Karolinum, 2007.*

ROUČEK, F. *Československý zákoník občanský a občanské právo platné na Slovensku a Podkarpatské Rusi*.Praha: Čs. Kompas, 1926, 1932.

ROUČEK, F. *Československý zákon směnečný*. Praha: Čs. Kompas, 1928, 1932.

ROUČEK, F. *Nové českomoravské právo směnečné*. Praha: Kompas, 1941.

Řád živnostenský. I. Praha: Československý kompas, 1926.

SCHELLE, K. *Vývoj státní správy v dokumentech I., II* Brno: MU, 1992.

SCHELLE, K. *Československé dějiny státu a práva v dokumentech I. Období boje za státní samostatnost (1914–1918).* Brno: MU, 1993.

SCHELLE, K. *Československé dějiny státu a práva v dokumentech II. Ústavní systém (1918–1938).* Brno: MU, 1993.

SCHELLE, K. *Československé dějiny státu a práva v dokumentech III. Státní správa (1918–1938).* Brno: MU, 1993.

SCHELLE, K. *Československé dějiny státu a práva v dokumentech IV. Zahraniční politika, organizace soudnictví, právní úprava ekonomiky (1918–1938).* Brno: MU, 1993.

SCHELLE, K. *Československé dějiny státu a práva v dokumentech V. Druhá republika (1938–1939).* Brno: MU, 1993.

SCHELLE, K. *Československé dějiny státu a práva v dokumentech VI. Období nesvobody (1939–1945).* Brno: MU, 1993.

SCHELLE, K.; VLČEK, E. *Dokumenty z československých dějin státu a práva 1937–1949.* Brno: MU, 1994.

SCHELLE, K.; SCHELLEOVÁ, I. *Civilní kodexy 1811–1950–1964.* Brno: MU, 1993.

SCHELLE, K.; SCHELLEOVÁ, I. *Právní úprava civilního řízení (Historie a současnost). I., II. část.* Brno: MU, 1995.

SIVÁK, F.; KLIMKO, J. *Dokumenty k dejinám štátu a práva na území ČSSR. I., II.* Bratislava: UK, 1974.

VANĚČEK, V.; MALÝ, K. a kol. *Prameny k dějinám státu a práva v Československu.* Praha: SPN, 1967.

VAŠICA, J. *Literární památky epochy velkomoravské 863–885.* Praha: Vyšehrad, 1996.

VESELÝ, Z. *Dějiny českého státu v dokumentech*. Praha: Epocha, 1994.

Other Bibliography

ADAMOVÁ, K.*Pojem Koruna česká. Myšlení o státu v historii českého království do počátku 19. století.* Plzeň: ZČU, 1995.

ADAMOVÁ, K. a kol. *Dějiny českého soudnictví do roku 1938*. Praha: Lexis Nexis CZ, 2005.

ADAMOVÁ, K.; MATES, P. *Právní pověry*. Praha: Linde, 1996.

BALÍK, S.; BALÍK, S. ml. *Právní dějiny evropských zemí a USA. Stručný nástin*. Plzeň: Aleš Čeněk, 2002.

BALÍK, S.; HLOUŠEK, V.; HOLZER, J.; ŠEĎO, J. *Politický systém českých zemí 1848–1989*. Brno: MU, 2007.

BARTL, H. *Österreichische Rechtsgeschichte*. Graz: Leykam-Verlag, 1986.

BAXA, B. *Sněm Království českého*. Praha: Josef R. Vilímek.

BOHUSLAV, J. V. *Rukověť života spolkového*. Praha: Dr. Frant. Bačkovský, 1901.

BUDNÍK, J. *Prozatímní státní zřízení ČSR*. Praha. Československý kompas, 1947.

ENGLIŠ, K. *Soustava národního hospodářství. I., II*. Praha: Melantrich, 1938.

FEJTÖ, F. *Rekviem za mrtvou říši. O zkáze Rakouska-Uherska*. Praha, 1998.

FLODR, M.*Brněnské městské právo. Zakladatelské období (–1359)*. Brno: Matice moravská, 2001.

GALANDAUER, J. *Vznik Československé republiky 1918. (Programy, projekty, předpoklady)*. Praha: Svoboda, 1988.

HARNA, E.; FIŠER, R. *Dějiny českých zemí. I., II*. Praha: Fortuna, 1995, 1998.

HAVLÍK, L. E. *Slovanské státní útvary raného středověku*. Praha: Academia, 1987.

HAVLÍK, L. E. *Kronika o Velké Moravě*. Brno: Jota, 1992.

KAPLAN, K. *Pravda o Československu 1945–1948*. Praha: Panorama, 1990.

KAPLAN, K. *Pět kapitol o Únoru*.Brno: Doplněk, 1997.

KAPLAN, K. *Kořeny československé reformy 1968*. Brno: Doplněk, 2000.

KNOLL, V. Predikát. In Tomáš Durdík, *Ilustrovaná encyklopedie hradů – Dodatky 2*. Praha: Libri 2005.

KNOLL, V. (ed.). *Acta historico-iuridica Pilsnensia 2006. Sborník příspěvků ze setkání pracovníků kateder právních dějin z České republiky a Slovenské republiky ve dnech 21.–23. 9. 2006*. Plzeň: Aleš Čeněk, 2007.

KNOLL, V. (ed.). *Pocta profesoru Stanislavu Balíkovi k 80. narozeninám. Acta historico-iuridica Pilsnensia 2008*. Plzeň: Aleš Čeněk, 2008.

KUKLÍK, J. *Londýnský exil a obnova československého státu 1938–1945*. Praha, 1998.

KUKLÍK, J. *Mýty a realita tzv. Benešových dekretů*. Praha: Linde, 2002.

MALÝ, K. (ed.). *Pocta akademiku Václavu Vaněčkovi k 70. narozeninám*. Praha: UK, 1975.

MALÝ, K. *České právo v minulosti*. Praha: Orac, 1995.

MALÝ, K; SOUKUP, L. (eds). *Vývoj práva v Československu v letech 1945–1989*. Praha: Karolinum, 2004.

MALÝ, K; SOUKUP, L. (eds). *Vývoj české ústavnosti v letech 1618–1918*. Praha: Karolinum, 2006.

MARŠÁLEK, P. *Protektorát Čechy a Morava*. Praha: Karolinum, 2002.

RANDA, A. *Právo vlastnické dle rakouského práva v pořádku systematickém*. Praha, 1922.

RAUSCHER, R. *Zemské míry na Moravě*.Praha: nákladem vlastním, 1919.

RAUSCHER, R. *Dědické právo podle českého práva zemského*. Bratislava: Právnická fakulta Univerzity Komenského, 1922.

RAUSCHER, R. *K rukojemství v českém zemském právu*. Praha: nákladem vlastním, 1923.

RAUSCHER, R. *O nálezech zemského soudu českého v XVI. století*. Praha, 1923.

RAUSCHER, R. *Volební kapitulace a korunovační reversy panovníků ve státech střední Evropy*.Bratislava: Právnická fakulta University Komenského, 1925.

RAUSCHER, R. *O vzniku popravců a opravců*. Lwów, 1930.

ROUBÍK, F. *Český rok 1848*. Praha: L. Kuncíř, 1931.

ROUČEK, F.; SEDLÁČEK, J. a kol. *Komentář k Československému obecnému zákoníku občanskému a občanské právo na Slovensku a v Podkarpatské Rusi*. Praha: V. Linhart, 1935–1937.

SCHELLE, K. *Bibliografie právních dějin Moravy 1945–1990*. Brno, 1992.

SCHELLE, K. (ed.). *Vývoj právních kodifikací*. Brno: MU, 2004.

SCHELLE, K.; SCHELLEOVÁ, I. a kol. *Soudnictví (historie, současnost a perspektivy*). Praha: Eurolex Bohemia, 2004.

SCHELLE, K.; SCHELLEOVÁ, I.; VOJÁČEK, L. *Proměny státu a práva ve druhé polovině 19. století. Vybrané problémy*. Praha: Eurolex Bohemia, 2006.

SCHELLE, K.; TAUCHEN, J. *Grundriss der Tschechischen Rechtsgeschichte*. München: Dr. Hut Verlag, 2010.

SCHELLE, K.; TAUCHEN, J.; HORAKOVÁ, M.; SALÁK, P. *Protektorát Čechy a Morava – jedna z nejtragičtějších kapitol českých novodobých dějin (vybranné problémy).* Brno: The European Society for History of Law, 2010.

SCHELLE, K.; TAUCHEN, J. *Recht und Verwaltung im Protektorat Böhmen und Mähren*. München: Dr. Hut Verlag, 2009.

SCHELLE, K.; VOJÁČEK, L. *Stát a právo v letech 1848–1918 ve středoevropském kontextu*. Bratislava: BVŠP, 2007.

SCHELLE, K.; VOJÁČEK, L. (eds). *Stát a právo v období absolutismu*. Spisy PF MU v Brně. Řada teoretická, č. 295, 2005, Brno: MU.

SCHELLE, K.; VOJÁČEK, L. (eds). *Rakousko-uherské vyrovnání 1867 a jeho státoprávní důsledky v českých zemích a na Slovensku.*Ostrava: Key Publishing, 2007.

SCHELLE, K.; VOJÁČEK, L. (eds). *Stát a právo v letech 1848–1918 ve středoevropském kontextu. Sborník příspěvků z mezinárodní konference, konané v Bratislavě 1.– 2. června 2006.* Bratislava: BVŠP, 2007.

SCHELLEOVÁ, I.; SCHELLE, K. *Vývoj kodifikace občanského práva.* Brno, 1993.

URFUS, V. *Zdomácnění šekového práva a počátky práva obchodního.* Praha, 1959.

URFUS, V. *Právo, úvěr a lichva v minulosti. Uvolnění úvěrových vztahů na přechodu od feudalismu ke kapitalismu a právní věda recipovaného římského práva.*Brno: Univerzita J. E. Purkyně, 1975.

URFUS, V. *Historické základy novodobého práva soukromého.* Praha: C. H. Beck/SEVT, 1994.

VANĚČEK, V. K *soudní imunitě duchovních statků na Moravě.* Praha: nákladem vlastním, 1931.

VANĚČEK, V. *Základ právního postavení kláštera a klášterního velkostatku ve starém českém státě (12.–15. stol.). Zakladatelská práva – Pozemková vrchnost – Imunita. Část 1.–3.* Praha: nákladem vlastním, 1933, 1937, 1939.

VANĚČEK, V. *Dvě studie k otázce právního postavení kláštera a klášterního velkostatku ve starém českém státě.* Praha: nákladem vlastním, 1938.

VANĚČEK, V. *České právnictví za kapitalismu*. Praha: Nakladatelství ČSAV, 1953.

VANĚČEK, V. *České „kobylí pole" jako právní instituce*. Praha: ČSAV, 1959.

VANĚČEK, V. (ed.). *Miscellanea historico-iuridica. Sborník prací o dějinách práva napsaných k oslavě šedesátin JUDra Jana Kaprasa, řádného profesora Karlovy univerzity, jeho přáteli a žáky.* Praha: nákladem vlastním, 1940.

VANĚČEK, V. (ed.).*Česká národní rada, sněm českého lidu. K 25. výročí osvobození.Praha: ČNR, 1970.*

VEBER, V. *Osudové únorové dny.*Praha: NLN, 2008.

VESELÁ, R. a kol. *Rodina a rodinné právo. Historie, současnost a perspektivy*.Praha: Eurolex Bohemia, 2003.

VESELÁ, R. a kol. *Rodina a rodinné právo. Historie, současnost a perspektivy*. Praha: Eurolex Bohemia, 2003.

VESELÁ, R. *Vývoj rodinného práva do roku 1938.* Brno: MU 1993.

VESELÝ, F. X. *Všeobecný slovník právní. I.–V.* Praha: nákladem vlastním, 1896–1899.

VOJÁČEK, L. *Urážky, pomluvy, nactiutrhání. Ochrana cti v československém trestním právu.* Praha: Eurolex Bohemia, 2006.

VOJÁČEK, L.; SCHELLE, K. *Rakousko-uherské vyrovnání 1867 a jeho státoprávní důsledky v českých zemích a na Slovensku. Sborník příspěvků ke 140. výročí rakousko-uherského vyrovnání.*Ostrava: KEY Publishing 2007.

VYKOUPIL, L. *Slovník českých dějin*. Brno: Julius Zirkus, 2002.

Význam Února pro rozvoj věd o státu a právu. Praha: Universita Karlova, 1974.

WANDYCZ, P. S. *Cena svobody. Střední Evropa v dějinách od středověku do současnosti*. Praha: Academia, 1998.

WEYR, F. *Teorie práva*. Brno – Praha: Orbis, 1936.

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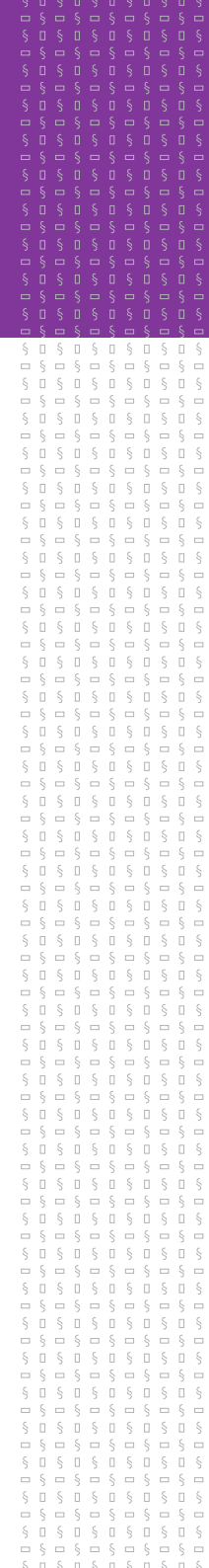

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