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Processes of Modernisation of Private Law Compared, and the CFR's Influence

1. Introduction

The purpose of this article is to explain what constitutes the approach of the Czech legislator in recodifying Czech private law, and to justify my position that this is the optimal way forward. I will reach this aim through having completed a relatively extensive and broad-ranging analysis.

Having established a starting point, in the second part of the paper I point out the various possibilities of the method and address, in particular, its place in view of the background of private law in the 'new' member states of the EU, which have a recent history similar to that of the Czech Republic behind them — i.e., the influence of the Soviet model. In this part of the paper, I will attempt to show how differences, and frequently also rational influences, played their part in the further development of the private law system.

Following this, in the third section, I evaluate the significance of the Draft Common Frame of Reference (DCFR) and other national or supranational codification or similar projects. Furthermore, I continue the discussion concentrating on the Czech Republic and provide an analysis of the decisive factors related primarily to the content and method of legislation in the country's new civil code. Finally, I offer justification for the adoption of the DCFR as a model in many areas of private law for the re-codification thereof.

2. Civil law modernisation — comparison of approaches

Not only on the European level but also in the national rules of law, an enormous quantity of activity has been carried out in recent years. It is unsurprising perhaps that the most important changes in Europe over the last 10 years have been made, above all, in some new EU member countries — namely, Poland¹, Hungary²,

¹ See J. Poczybut. Zur Reform des polnischen Zivilrechts. – Zeitschrift für Europäisches Privatrecht (ZEuP) 1995, pp. 75–90.

² See L. Vékás. Über die Neugestaltung des ungarischen Zivilrechts. – J. Basedow et al. (eds.). Festschrift Drobnig. Tübingen 1998, pp. 713–723; L. Vékás. Privatrechtsreform in einem Transformationsland. – J. Basedow et al. (eds.). Aufbruch nach Europa. Tübingen 2001, pp. 1049–1064.

Slovenia³, Estonia⁴, Latvia⁵, Lithuania⁶, Slovakia⁷, and the Czech Republic.⁸ However, the individual countries chose different approaches. The only common feature in this process is represented by the effort for modernisation. Its extent and the method of its realisation, in particular, in the individual countries differ significantly. On the basis of knowledge of the individual approaches applied, we can carry out a specific classification procedure that should prove interesting for the audience. We will classify these approaches or efforts according to several criteria:

- 1) the state of the current national private law system,
- 2) the timing, and
- 3) the model for the changes and the method of their realisation.

2.1. The state of the national system of private law

2.1.1. Assessment criteria

The first aspect we assess and analyse here is a phenomenon that can be assessed or, as the case may be, evaluated from a number of standpoints. Our evaluation criteria consist in the extent of adequacy of the private law in the countries being compared with respect to the satisfaction of market — or, as the case may be, market economy — needs. In other words, we assess the private law's capability to function under new political but first of all economic circumstances in the climate following the fundamental changes of the late 1980s and/or at the beginning of the 1990s. The criterion applied here is to a substantial extent similar to another criterion — one involving the difference of the relevant private law, particularly in its codified form, from what follows the traditional understanding in this area (i.e., its difference from the concept under Roman law).⁹ Thus we will first evaluate the state of the legislation itself, subsequently turning to the area of private law theory and of the judicature.

2.1.2. Legislation

From the above point of view, we can develop the following classification:

- a) **The private law as a part of another rule of law.** This category includes the Baltic countries (Estonia, Lithuania and Latvia)¹⁰, which, after their separation from the Soviet Union at the beginning of the 1990s, found themselves to have been placed in a situation of 'total' inheritance of a foreign rule of law — that is, even in the area of civil or, as the case may be, private law, to have been left with the Soviet regulation. This 'inheritance' alone, regardless of the non-functionality or perhaps even inadequacy of the Soviet civil law legislation (in the strict sense, the legislation of the Russian Federation)¹¹, was the reason for making a swift change of the system of law. However, each of these systems followed a significantly different path. While Estonia¹² tried to adopt certain principles of the Western European legislation as its own (the Principles of European Contract Law, or PECL, in particular) and adjusted the codification, in the sense of the system, to that of pre-war times (in the law of obligations, the property law codex, etc.), Latvia¹³ took over earlier legislation — i.e., the civil code of 1937. Lithuania¹⁴ (civil code of 2000) chose a relatively distinctive way in its combination of some Western European elements with its own legal categories.

³ See V. Trstenjak. Das neue slowenische Obligationenrecht. – WGO 2002, pp. 90–110.

⁴ See L. Mikk. Zur Reform des Zivilrechts in Estland. – Jahrbuch für Ostrecht 2001, pp. 31–52.

⁵ K. Balodis. On Latvian Civil Law. – Latvian Law Review 2001, p. 58 ff.

⁶ See J. Mikelenas. Unification and Harmonisation of Law and the Turn of Millennium. – Uniform Law Review 2000, pp. 2243–2261.

⁷ See V. Lazar. K niektorým koncepčným otázkam rekodifikácie súkromného práva (On Some Conceptual Aspects of the Civil Law Recodification). – Právní praxe 2001, p. 87 ff. (in Slovak).

⁸ See, *inter alia*, K. Eliáš. Charakteristika návrhu nového občanského zákoníku (Characteristics of the Czech Draft of the Civil Code). – J. Švestka, J. Dvořák, L. Tichý (eds.). Sborník statí z diskusních fór o rekodifikaci občanského práva (Essays on the Recodification of the Civil Law). Prague 2006, p. 28 ff.; K. Eliáš, M. Zuklínová. Principy a východiska nového kodexu soukromého práva (Principles and Basis of the New Code of the Civil Law). Prague 2001.

⁹ See L. Vékás. Models in Central-Eastern European Code. – S. Grundmann, M. Schauer (eds.). The Architecture of European Code and Contract Law. Kluwer 2006, pp. 117–128.

¹⁰ See Notes 4–6.

¹¹ Principles of the civil law legislation from 1922.

¹² See Note 4 and Law of Obligations Act (võlaõigusseadus) of 26.09.2001. – RT I 2001, 81, 487 (in Estonian).

¹³ See Note 5.

¹⁴ See Note 6.

- b) **Relatively capable legislation.** At least three 'Eastern Bloc' countries have retained a relative autonomy, though each of them has done so for a different reason, as well as the quality of capability of their civil law systems. In contrast to the Czech Republic^{*15}, Poland^{*16} used in its codification work, as preparation for its civil code of 1964, both strictly scientific methods and the main European sources (German, French, and Austrian) and was affected relatively little by the Soviet example.^{*17}

Through its still valid civil code of 1959, Hungary^{*18} substantially assumed the Hungarian equity from the times of the Austro-Hungarian Empire. The Hungarian civil code was, however, significantly updated — to a level completely unprecedented at the time. Undoubtedly, it was affected by the Swiss model as well. The Hungarian civil code is brief, systematically modern, and in its abstractness capable of substantial flexibility. Slovenia^{*19} followed the Yugoslavian way, which, by contrast, was a very modern one.^{*20} As all the other Yugoslavian countries, it did not know a civil code in the current understanding of the concept; however, similarly to the Baltic countries, Yugoslavia^{*21} codified the law of obligation, family law, and substantive law, as well as the law of persons, each in a special legal regulation. Despite its lack of modern legal discourse in this area, Yugoslavia displayed a very modern understanding of the law of obligations, in particular — both in a purely technical sense, assuming the international business contract as a starting point, and with respect to the protection of the weaker party.^{*22}

In all of these countries, the existing private law legislation was very capable of functioning under the changed economic circumstances.

- c) **A peculiarly created system.** As the reader will be aware, in addition to the GDR's civil code of 1975^{*23}, it was the Czechoslovak civil code of 1964^{*24} that, from the legal concept point of view, was the most distinct attempt to deviate from the concept of civil law found in Roman law. Similarly, it is relatively well known that, from the system point of view, in particular, its concepts manifested themselves in a number of ways. It distinguished rather faithfully — i.e., in accordance with the economic situation — among the various economic law relations and adjusted the handling of civil law issues in response to the economic-political situation in the most faithful way of any Eastern European country.^{*25} The obligations were replaced with services, in other than an economic sense; the legal personality was changed and adjusted; and the obligation-related issues were adjusted to the quota economy. From this standpoint, a certain part of the civil code showed an absolute focus on protection of the weaker party. The superficial *solo cedit* principle was abandoned as a key traditional institution of property law.
- d) **Other systems of law.** Other systems include the civil law of Romania and that of Bulgaria.^{*26} Neither of these systems is original, with Romania still retaining some aspects of the French Code Civil.

2.1.3. Jurisprudence and the judiciary

The condition of legislation is, to a great extent, reflected in the level of civil-law-related jurisprudence.

- a) **Jurisprudence** includes Poland, Hungary, and Slovenia.^{*27} In all of these states, civil-law jurisprudence (legal theory) enjoys a relatively autonomous position — it does not immediately fall victim to the Communist ideology and, in fact, aids in developing (as paradoxical as this may seem) private law jurisprudence. All of these states maintained more or less intensive contacts with, and thus reflected, the free jurisprudence of the West. However, there were some authors who succumbed to the ideology or certain related illusions, and one therefore can observe a substantial difference

¹⁵ See Note 1.

¹⁶ See Note 14.

¹⁷ A. Brzozowski. – K. Pietrzykowski. Kodeks cywilny. Komentarz. Vol. I. 2nd ed. Warsaw 1999, p. 7 ff.

¹⁸ See Note 15 and G. Eörsi. Das ungarische Zivilgesetzbuch in fünf Studien. Budapest 1963.

¹⁹ See the Obligations Code enacted on 1.01.2002, No.83-4287/01.

²⁰ See the Law on Obligational Relations from 1978.

²¹ See Article 547 of ZGB.

²² See ZGB der DDR.

²³ See the Civil Code, Law No. 40/1964 Coll.

²⁴ See Notes 11, 16, 17.

²⁵ See S. Stalev. Transformation der Rechts- und Wirtschaftsordnung in Bulgarien – Probleme und Perspektiven. – ZEuP 1996, pp. 444–451.

²⁶ See Notes 14, 16, 18.

²⁷ T. Sarkózy. A kereselmi törvény esetleges koncepciója (On the Conception of Private Law). Gasdaság es Jog 1999, p. 36 (in Hungarian); E. Weiss. Konsumentenschutz und Produkthaftung. – Zeitschrift fuer rechtsvergleichung (ZfRV) 1983, p. 25 ff.

from our understanding of civil law. These illusory concepts are seen in, among other actions, the Hungarian Sarkozy's^{*28} attempt to create a socialist joint-stock company and Letowska's^{*29} approach to competition or consumer protection.

The condition of the jurisprudence of other Eastern Bloc member states witnessed a steep fall, succumbing to both ideological concepts (Knapp)^{*30} and illusory notions of a new civil law (as did Z. Kratochvíl and Karel Knap).^{*31}

- b) **The judiciary.** One can hardly observe any major differences in the judiciary between the countries considered in this article. Even the supreme courts fail to express themselves as anything more than the legislator's mouth, not daring to adopt a suprapositivist and antiformalist approach to the interpretation of law. Some provisions that are directly designed for this method of interpretation find no application at all.^{*32}

2.2. Timing of the changes

In addition to purely political or political and economic aspects, the speed of changes in private law legislation is mostly a function of the degree of adequacy of these systems for addressing the changes in the economy. The foreign legislation has clearly gained political implications in the newly independent Baltic States. Therefore, fundamentally new provisions have come into existence in the Baltic States.

Partial changes are characteristic of the remaining states examined here. Ideologically and functionally inapt provisions are deleted immediately after the landmark political changes, with the necessary categories or legal institutions added in the civil law legislation later. These changes were more dramatic where these institutions had not existed before than they were in states such as Poland, Hungary, and Slovakia^{*33}, where the socialist legislation had provided for these institutions — e.g., the pledge right.

2.3. Models for changes and their implementation

This section addresses two important aspects of the development of civil law legislation. We want to find out the extent and, above all, the sources of the changes adopted in the individual states. Therefore, we look for examples or models for the new civil law systems or their reform, while also paying attention to another important angle — the methods used to create the changes to the civil law legislation.

2.3.1. Models (templates)

According to these models, the legislation examined can be divided into three groups:

- a) **Conservative.** The states with legislation that accommodated their needs proceeded with caution. These states did not carry out (and still have not carried out) any substantial changes, and, even if some partial changes have been adopted, the approach was reserved at best — save for a few exceptions, these states have not followed any models or modified the same to accommodate for their own concepts. Many times, one can hardly consider any models wherein the changes implemented solely reflect the pragmatic approach of supplementing the existing provisions. This applies mainly to Hungary^{*34} and Poland.^{*35} The approach of Latvia in taking up again the basis of its 1937 legislation can be evaluated in similar terms. Even Lithuania^{*36} falls in this category — its approach is radical in scope but very cautious in its content.

²⁸ E. Letowska. *Prawo umów konsumenckich (Law of Consumer Contracts)*. Warsaw 1999 (in Polish).

²⁹ See V. Knapp. *Vlastnictví v socialistické demokracii (Property Rights in the Socialist Democracy)*. Prague 1953 (in Czech).

³⁰ See Z. Kratochvíl. *Nové občanské právo (New Civil Law)*. Prague 1965 (in Czech).

³¹ See Z. Kühn. *Aplikace práva (Application of Legal Rules)*. Prague 2002, *passim* (in Czech).

³² See the papers of J. Poczybut, A. Maczyński and J. Lazar from the conference held in Vienna on 10–11 October 2007. Published in: R. Welsch (Hrsg.). *Privatrechtsentwicklung in Zentral- und Osteuropa*. Vienna 2008 (J. Poczybut. *Geschichtlicher Hintergrund, heutiger Stand und Perspektiven des polnischen Privatrechts*, pp. 125–140; A. Maczyński. *Die Entwicklung und die Reformpläne des polnischen Privatrechts*, pp. 115–124; J. Lazar. *Über die Reform des slowakischen Privatrechts*, pp. 31–40) and J. Rajski. *On the Need for a Progressive Harmonisation of Private Law in the European Union*. – *Juridica International* 2006, p. 20 *ff.*

³³ See Note 16.

³⁴ See Note 14.

³⁵ See Note 5.

³⁶ See Note 6.

- b) **Very progressive, second change.** The approach adopted by Estonia^{*37} involved accomplishing a second phase of modernisation through adoption of the law of obligations in 2001. Slovenia followed a similar progressive path, with a new wave of change.^{*38} Estonia^{*39} has been following a modern model, similarly to Slovenia or Yugoslavia, which took the content of the provisions of the Vienna Convention on International Sale of Goods (CISG) for its own provisions on purchase agreements
- c) **Combined approaches.** The present reformation framework of the Czech Republic can be considered very conservative or pragmatic; but, in addition to that, it is characteristic, in its draft civil code, of a system manifesting a special hybrid of several concepts. Notwithstanding the novelty of this approach, what is important is that the Czech legislator has failed to incorporate the most modern approaches, which probably have been the only ones to have found a great number of relevant applications. The Czech legislator has reflected neither the Vienna Convention on the International Sale of Goods (CISG) nor the PECL or DCFR.^{*40}

2.3.2. Implementation of the changes

All of the states considered, save for the Czech Republic and Slovakia, proceeded to reform their legislation in a manner comparable to the Western European models. The approach adopted by the majority has two distinctive features — a ‘collective’ approach to drafting and a ‘scientific’ method. This means that the reform is carried out on the basis of a certain analysis of the status quo and of a certain method for transformation, with each change having its thorough theoretical rationale. The collective approach means that a team of experts participates in the changes in a relatively similar manner (with the same rights and duties). The teams usually comprise several groups, each addressing specific parts of the civil law; the results then are discussed in a committee that, similarly to the workgroups, adopts specific decisions by consensus or by voting.

The Czech Republic, where the preparatory work started in 2001 and since 2005 the Draft of Civil Code as being amended has been published^{*41}, has chosen a very different and unique method in respect of both elements mentioned above. This is seen in various ways:

- Even with a certain basic analysis of the legitimacy of the changes and their implementation presented, the proposed provisions (i.e., the materials drafted) contain virtually no rationale.^{*42} The basic analysis is very brief and sketchy and basically addresses only the need for new legislation. The reasons for the fundamental change, although more or less ideological, will suffice at a basic level. The principles of the private law provisions published on paper do not constitute an analytic work that would display the fundamental direction for the whole future code and portions thereof — in particular, in speaking of the nature and importance of the specific legal institutions concerned. Still, the most fundamental shortcoming is the non-existence of any rationale for the language, or even the existence, of the draft. The very principles of the draft — i.e., the fundamental wording of the later draft — cannot be deemed the ideological source or the rationale for the draft, as mentioned above.^{*43}
- Drafts are compiled by individuals, which is reminiscent of certain isolated working methods (as seen in Switzerland).^{*44} Drafts are presented by an individual who has the main say in the discussion. The latest changes (with ‘mini-teams’, a co-ordination group, or the re-codification committee) hardly indicate any movements toward the standard methods of drafting legislation.^{*45}
- The fact that the text of the draft is being made available to the public for several months (on the Web pages of the Ministry of Justice)^{*46} is clearly a positive development. Everyone can look at the changes implemented. However, the procedure for implementation of these change and the reasons for these and for other changes are classified information. It is clear that the discussions or the evaluation of comments and objections are not kept on record; therefore, the work and developments associated with the draft and its changes are not transparent. This undoubtedly is in correspondence

³⁷ See Law of Obligations Act of 26.09.2001.

³⁸ Prior to the Law of Obligations Act, Estonia had adopted in 1993 the Law of Property Act (*asjaõigusseadus*). – RT I 1993, 39, 590 (in Estonian).

³⁹ Full title of CISG is United Nations Convention on Contracts for the International Sale of Goods. See Note 18.

⁴⁰ K. Eliáš, M. Zuklínová (Note 8), pp. 10–37.

⁴¹ <http://portaljustice.cz>.

⁴² Věcný záměr občanského zákoníku (Basis of the Codification of the Civil Law). – Právní praxe (Legal Practice) 2001, pp. 3–87.

⁴³ See E. Huber. System und Geschichte des schweizerischen Privatrechts. Basel 19-32-1937.

⁴⁴ Letter of the Deputy Minister of Justice of 7 December 2007.

⁴⁵ There are no (!) minutes of the sessions made.

⁴⁶ See Note 41.

with the lack of rationale in the original text of the draft. In the end, this only increases the doubts surrounding the draft itself.⁴⁷

- The funding of the work is another issue.⁴⁸ It is remarkable that, at present, dozens of people are working on formulating the draft and its changes (even though the level of their active participation and the scope of their actual co-operation may be a matter of some doubt) and undertaking this work free of charge. In itself, this is nothing extraordinary by European standards. What is remarkable is that the project as a whole also lacks funding from the parties involved, even for out-of-pocket expenses. Nor has it been taken into account that translations will have to be made (most of the members of the current mini-teams do not even have access to relevant comparative materials or knowledge of legal language in foreign languages that is sufficient for them to make any meaningful comparisons).

2.4. Comparison

If we summarise the findings presented so far, we can reach the following conclusions:

- a) The state of private law in the individual states compared at the time of the political transformations predetermined to a significant degree the timing and degree of transformation of private law legislation. The less the state of the written civil law fit the altered socio-political conditions, the more fundamental were the changes made and the swifter the effecting thereof.
- b) Substantial changes that did not directly relate to the state of the legislative exist, however, with regard to the specimens or models of the existing or future legislative.
- c) Most of the new Member States are hesitant to undertake fundamental transformations and modernisation in the style of the supranational projects for private law. Estonia is an exception.

3. Significance of the CFR

The understanding of the significance of the Common Frame of Reference (CFR) may differ, even in the conceptions of the individual members of the Study Group. This is particularly true where this significance is evaluated in relation to the legal codes of their own legal backgrounds and the need for their modernisation. The significance of the CFR is appraised in the Czech Republic primarily from the perspective of the possibility of inspiration, influence, or assumption into the draft Czech Civil Code material.

For all of these reasons, it is necessary to ask ourselves the following basic questions:

- Why should the CFR be reflected in the field of the law of obligations?
- In the affirmative case, in what manner should it be reflected?
- To what extent do the draft and the resolution in the CFR differ?
- What are the advantages and disadvantages of reflecting the CFR, particularly with regard to further development?

3.1. Methods and illusions

For almost 100 years now, there has been an illusion of understanding the Czech Civil Code Draft as the work of an individual. Similarly, one holds an illusion of believing that there will be created an original civil code presently that fully corresponds to a specific national legislator's vision. Primarily in view of extralegal factors, law and the creation thereof is also becoming an international enterprise in the sense of its adopting models and tested methods.

One specific method applied is the method of creation of supranational projects. Here there will undoubtedly arise competition or conflict. It has been shown, however, that, although there exist a range of variation, differences in understanding and application, etc., still some fundamental, accordant understandings of the conception prevail. This is attested to by the products or the method of work of international collectives, both on the official international or inter-state basis and through 'spontaneous' platforms (academic teams).⁴⁹

⁴⁷ See the letter of the Deputy Minister of Justice of 15 December 2007 addressed the author of this paper.

⁴⁸ See the famous activities as the basis of many fruitful projects in Europe: from the so-called Lando commission over ECTIL, Secola, up to Study Group on the European Civil Code.

⁴⁹ See, e.g., the law of unjustified enrichment in the Czech Draft Civil Code — 4 provisions, DCFR 15 provisions, etc. See Note 41.

3.2. Possibility of use

What O. Lando states in the foreword to the second edition of the PECL applies not only to the CFR but also to the PECL, the Principles of European Tort Law, and certain models from UNIDROIT. The possibilities for use of these projects — in particular, the CFR — are manifold. The CFR may function as model law. Even though many people contest it, its purpose and major principles 1) may lead to the adoption of several parts or institutions in national legal codes of Member States, 2) may undoubtedly serve as soft law, and 3) may have the significance of a future unified arrangement of civil law for a certain territory — maybe in Europe. The CFR may in addition, however, be a significant source for identifying law for judges and arbitrators and, finally, for study and education.

It is remarkable that many of its passages have, as regards individual provisions, the character of perfect legal norms. Therefore, the material does not involve only principles, as it would be possible for one to believe (i.e., setting forth optimising clauses); it also displays provisions having a normative character. The degree of abstraction comes remarkably close, in the aggregate of its individual parts, to a perfect normative expression of certain legal institutions. In many senses, this is a more detailed arrangement than the draft Czech Civil Code.⁵⁰

3.3. Level and quality

It is possible to view a project such as the draft Czech Civil Code, but also the CFR, primarily from the system perspective. The features of both include a certain degree of homogeneity in the individual parts. The ideal, therefore, is a kind of form that is forged, as it were, from one piece. The Swiss Civil Code, the work of the sole author Eugene Huber⁵¹, is usually cited as a model. In the case of the CFR, it would be possible at first glance to conclude that the 'nature of the matter' — that is, the method of its creation (an international 'non-homogenous' community) — precludes us from following this model. In fact, however, a creative group thus heterogeneously constituted is precisely able to create a work that in its own way is internally consistent, well-arranged, and holistic. Its potential first phase is re-forged by varied opinions to offer a new quality, which affords a higher degree of harmony and unity than the work of an individual could at the present time. This is indeed the case to a greater extent with the CFR than with the draft Czech Civil Code, which to too great an extent appropriates individual provisions from various legal codes without retaining the necessary context and transformation 'at the interfaces'.

In contrast to the Czech draft, the CFR is equipped not only with a detailed rationale, which also sets forth specific cases of resolution, but also with commentary material, which maps the resolution in particular legal codes, including its advantages or disadvantages. This thus documents the quality of the outcome as a certain compromise among the best national resolutions.

The inspiration that can be provided by the CFR undoubtedly has the following merits:

- a) transparency of creation and particularly the clarity of the significance of particular provisions,
- b) the guarantee of high quality and the least possible conflict in the resolution, and
- c) guarantee of acceptance in the private law community.

3.4. The CFR and the Czech draft

3.4.1. Starting point

Private law in the Czech Republic has undergone considerable changes in the last roughly 60 years. We have the general civil code, our first phase of socialist law (the Civil Code of 1950), a second phase of socialist law (with the Civil Code of 1964 and other codices), and the transition period running from 1991 to the present.

In the briefest possible terms, I can provide a summary evaluation of the operation of these individual codification projects, thus: Practitioners (in particular, judges) were unable, possibly also as a result of the frequent changes, to make the transition from (formalistic) interpretation to teleological considerations. On the other hand, one must note the presence of a considerable degree of adaptability, not only in the field of civil law itself. This adaptability was especially evident in those areas that were beyond the scope of the civil code *per se*, particularly in legislation relating to the most rapidly developing areas, such as banking, securities, and the like. In addressing these matters, the specialist public showed great creative capability.

⁵⁰ See P. Widmer, *Helvétické úvahy nad návrhem nového českého občanského zákoníku* (Helvetic Observations on the Draft of the New Czech Civil Code). – J. Švestka, J. Dvořák, L. Tichý, *Sborník statí z diskusních fór o rekodifikaci občanského práva* (Collection of Papers on the Recodification of the Civil Law). Prague 2008, p. 123 *ff.* (in Czech).

⁵¹ L. Tichý, *Systémy soukromého práva a modely jeho kodifikace* (Systems of the Private Law and Models of its Codification). – J. Švestka, J. Dvořák, L. Tichý (eds.) (Note 50), pp. 42–62 (in Czech).

The result of these rapid changes, and especially the atmosphere that prevailed from the 1950s onwards, was that not even a basic theoretical foundation was created for the application of private law and the teleological interpretation thereof. The Czech Republic does not fare well if we compare the theoretical foundation present in the Czech Republic with the 'reservoir of ideas' in the traditionally revered national bodies of law. Czech theory was not even capable of bringing certain phenomena into awareness, let alone reflecting them, or accepting and developing them. There is even a substantial disparity between this state of affairs in the Czech Republic and that in other former socialist states, such as the similar legal cultures seen in Hungary and Poland, which, in comparison to our own history of development, were substantially less ruined. The latter were capable of the vital creative development of their existing positive provisions of law, such that their applicable law now offers, to a considerable degree, an adequate private law apparatus for their economic and social systems. This factor is an argument in favour of adopting the most modern solution, since the absence of a sufficiently secure 'bedrock' for the conceptual foundations of current law means that the risk of a substantial shock is relatively small.

Essentially, the present draft proceeds from these premises and is very critical of current law. The need for many amendments and the calls for further corrections testify to the unsatisfactory state of our applicable positive provisions of law and, at the end of the day, also our legal theory. However, in implementing its resolutions (see the reasoned statement accompanying the draft), it is not entirely thorough. Some areas of the draft adopt parts of the current law (e.g., language on representation; unjustified enrichment; and, with some modifications, compensation for damage). Other areas reflect the Czechoslovak model from 1937⁵², which, on account of the time of its creation and the fact that it never became applicable law, as well as the designs from which it was drawn up (in particular, the *Allgemeines Gesetzbuch der Republik Österreich*, or ABGB), cannot be considered an immediate or full-valued component of our private law tradition, being instead one of several relatively old attempts at national codification, albeit work that was of remarkable significance at the time of its creation.

3.4.2. Evaluation criterion — model

If I summarise the foregoing considerations, I reach the conclusion that it is necessary to prefer a modern approach to an approach clinging to a particular practice that, because of its superficiality and short duration, is not actually something one could invoke as a truly functioning tradition. I therefore make my evaluation of the Czech draft primarily through the prism of modern supranational legislation or drafts thereof (particularly the CFR), whereas I measure up the field of rights *in rem* — which is not part of the supranational codification efforts — primarily against the benchmark of a system of law that has a remarkable tradition and relationship with Czech law; that is the law of Austria. Several factors speak in favour of using supranational projects as a benchmark and model solution (although not as a pattern for verbatim transposition):

- a) although there is compromise involved, the supranational projects are the result and reflex of national solutions developed by absolute experts on the basis of long-term experience;
- b) in several cases, the fundamental basis used is the applicable law (CISG), or projects that, although not applicable law, are nonetheless applicable as law (as in the case of the UNIDROIT principles); and
- c) in many fields, the development is aimed at a gradual harmonisation or even unification of private law.

3.4.3. Method of reflection

Two final considerations should be applied in moving forward from the discussion here:

- a) The principles are often actually very general clauses; in most cases, however, these are functional legal norms.
- b) Reflection does not mean a slavish assumption. Even particular clauses are suitable for flexible adaptation.

⁵² See the Draft Civil Code in: F. Rouček, J. Sedláček (eds.). *Komentář k československému obecnému zákoníku občanskému* (Commentary on the Czechoslovak General Civil Code). 5 volumes. Prague 1937 which includes the draft of the "new" Czechoslovak Civil Code.