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Re-Codifying Civil Law in Hungary

Codification of civil law in Hungary was a long and diverse process. Codification ideas got central attention only in the beginning of the 20th century. In 1902 a version of the general part of a future civil code was drafted but never became a binding legal document. The Private Law Draft from 1928 is considered the first complex attempt to regulate all classic areas of civil law in Hungary in one code. Eventually, this draft did not enter into force either, however its draft provisions made a remarkable impact on judicial practice and the continuing codification ideas.[1] The first Hungarian Civil Code was adopted in 1959, in an era that had no significant interest in establishing a modern core of civil law. Still, Act IV of 1959 (hereinafter: Civil Code of 1959 or the old Civil Code) was a relatively modern achievement that could serve the needs of civil society for more than half a century through many amendments. The Civil Code of 1959 regulated classic areas of civil law with a surprisingly modern attitude. Law of persons, property, contracts, obligations and succession all got flexible and clear legal background through the text of the old Code. The reason why the dominance of Soviet ideas did not influence the Code significantly is that civil law was considered a truly professional area and politics did not pay much attention to this. Despite of the modernity of the Civil Code of 1959 some understandable restrictions were obvious in the regulative concept. Most importantly the freedom to establish business associations was completely missing from the adopted Code as the state practiced exclusive dominance over all business activities. Still, protection of personality rights and private property along with a modern approach to freedom of contract were all present in the original text of the old Code and could serve the needs of the Hungarian society for decades, even after the constitutional change of the political regime in 1989. In 1977 a complex

[1] See: K. Szladits, *A magyar magánjog vázlata 1–2*, Budapest 1933.

novel[2] amended the Code in order to open to the Western ideas of business law and implemented new provisions that guaranteed more freedom to citizens to conduct business activities. After the shift, the old Code was also modified to suit the changed needs of society, mainly to open towards new possibilities in the establishment of business and civil associations. Probably the main reason while the core of the Code could still survive two and a half decades after the shift is that company law was never a part of it. The legislator decided to enact a separate code for company law in 1988[3] and the Civil Code incorporated only definitive provisions for companies, while detailed rules were placed in the company code. At very early stages of reorganizing the constitutional regime in Hungary, the requirement for a new and revised Civil Code was communicated from the government and a committee was established in 1989 to work on the theoretical foundation of the future code.[4] This first initiative was more of a scientific project than a real re-codifying process, so it never led to serious drafting actions. Governmental decree 1050/1998 (April 24th) started the active re-codifying process with an exact assignment given to a Codification Committee and its Editorial Chapter and supplied them with financial support. The re-codifying process got to an end in 2013 when the Parliament adopted Act V of 2013 on the Civil Code (hereinafter: the new Civil Code or the new Code or Civil Code of 2013) that entered into force on March 15th in 2014.

This paper aims to describe basic questions and theories behind the new Code and to demonstrate what circumstances and needs led to the adoption of the new Civil Code. Naturally, the length of the essay does not allow us to give a detailed description of all new legal institutions and conceptual, theoretical changes in the long process of codification, so we focus on real shifts in paradigms and professional and political considerations and influences during the process.

The way toward the new Civil Code

In case of such enormous legal columns as the civil code no codification is short and easy. All governments reigned during the re-codifying process in Hungary were committed to involve academics and practitioners in the work and provide publicity to the debates and drafts along the birth process. After the above-mentioned governmental decree in 1998 effectively marked the

[2] Act IV of 1977 on the amendment and unified text of the Civil Code of 1959 (entered into force on March 1st 1978).

[3] Act VI of 1988 on business associations (1st Company Code of Hungary).

[4] Members of the committee were Professors Tamás Sárközy, Attila Harmathy and Lajos Vékás.

launch of the project, the Codification Committee established an academic journal dedicated exclusively to articles and papers about the new Civil Code and its theoretical background.[5] The Committee published the Conception of the New Civil Code in 2002, revealing the structure along with theoretical and conceptual questions of the forthcoming code. The Conception did not contain actual draft texts for future provisions. The Conception dealt with theoretical issues to be resolved in the new Civil Code. It also marked what provisions of the Civil Code of 1959 should be left untouched as the Conception only described those in need for a change. The document, therefore, stipulated primarily the theoretical bases of the reform, its regulatory guidelines, the content limits of the new Civil Code and its structure. A remarkable approach of the Conception was the way it handled the use of foreign models. As the Codification Committee followed this idea along the long way of codification, the Conception did not intend to adopt one foreign model or civil code as a guiding pattern, it rather drew examples of foreign models and ideas liberally. However, the Committee did not deny the obvious connection between the Civil Code of 1959 and its theoretical foundations with the German[6] and Austrian[7] Civil Codes. This is why the models of these two countries were specifically examined in the process of working on the Conception. The Dutch Civil Code[8] seemed the most modern work and the Conception did not deny how important the result of an almost 50 year long Dutch codification process could be for the Hungarian legislator. Still, it acknowledged that *'from several points of view (first and foremost in terms of the living conditions to be regulated and the structure of the civil code), this civil code (the Dutch Civil Code) can also serve as a model for Hungarian reform, but it cannot be taken as a regulatory model for the entire codification'.*[9] In addition to the national civil codes, the Hungarian reform also derived from international documents, namely the Vienna Sales Convention, the UNIDROIT Principles of International Commercial Contracts[10] and the Principles of European Contract Law[11]. The Conception also recognized that legislative elements

[5] Title of the journal was 'Polgári Jogi Kodifikáció' (published 48 issues between 1999 and 2008) for a complete list of contents visit: www.jogiforum.hu/folyoiratok/20/514 [20.06.2014].

[6] Bürgerliches Gesetzbuch (BGB) (1896).

[7] Österreich Allgemeines Bürgerliches Gesetzbuch (1812).

[8] Burgerlijk Wetboek (BW) (1992).

[9] L. Vékás, *Conception and the Regulatory Syllabus of the New Civil Code,* Magyar Közlöny 2003, No. 8. P. 6.

[10] UNIDROIT Principles of International Commercial Contracts 2010, www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf [10.06.2014ś.

[11] *Principles of European Contract Law*, ed. O. Lando, Kluwer Law International 1999, Vol. 1–2, No. 3.

of the European Union had a direct influence on the reform of civil rights in several areas. Finally, the Conception marked the integration, over the broadest possible range, of private law regulations stipulated in specific laws and the results of four decades of judicial practice. Not long after the release date of the Conception, the Conception and the Regulatory Syllabus of the New Civil Code[12] was published. The Regulatory Syllabus showed some changes in paradigms as those were stated in the Conception[13], and also added textual drafts to the conceptions. The Regulatory Syllabus stated the first complete draft of the new Civil Code must have been ready by September 30th in 2005. The Committee kept this deadline and handed over the first draft to the Ministry of Justice that made it available on its website early 2006. The first half of 2007 was spent with a complex professional debate over the draft involving universities, courts, public bodies, chamber of commerce and various civil and professional organizations and associations. On August 30th 2007 the Ministry of Justice suddenly decided to implement the recommendations in the draft by itself and dismissed the Codification Committee. The reason for this shift was that the Ministry found the process an endless debate over these recommendations and wanted to keep a short deadline in order to deliver the draft to the Parliament as soon as possible. Legal professionals and academics especially debated over this decision of the Ministry[14] and feared the professional work of the Committee would be of waste in the hands of politicians. The dismissed Committee published its version of the reconsidered draft with detailed reasoning in order to make the public know what recommendations they consider relevant and important to be implemented in the text.[15] The first draft bill of the new Civil Code was ready by May 28th 2008 and the Hungarian Parliament adopted it in September 2009. The Hungarian President at that time, Dr. László Sólyom, a well-respected private

[12] L. Vékás, *Conception and the Regulatory Syllabus of the New Civil Code*, Magyar Közlöny 2003, No. 8, also adopted by the Hungarian Government in the 1003/2003 (January 25th) Governmental Decree.

[13] The most notable shift in ideas was how the institution of restitution (pain award) and damages for non-pecuniary loss were treated in the two documents. While the Conception aimed to sustain damages for non-pecuniary loss and keep it as a compensatory instrument to provide damages for obvious personal injuries, pain award would have been a pure instrument for protecting all rights relating to personality, independently from the fact whether the plaintiff could verify any loss he suffered as a direct consequence of the infringement. The Regulatory Syllabus gave up the dualist idea and created only pain award, excluding damages for non-pecuniary loss from the system. The latter concept was kept in the final version of the Code.

[14] Idem, *Bírálat és jobbító észrevételek az uj Ptk. kormányjavaslatához,* Magyar Jog 2008, No. 55, p. 65–76.

[15] Idem, *Szakértői javaslat az uj Polgári Törvénykönyv tervezetéhez*, Budapest 2008.

law professor sent the bill back to the Parliament for reconsideration, exercising his limited veto rights over legislation. The President's main concerns were around the new regulations of legal competency and its limitations and many other legal institutions that did not take into account the decisions of the Codification Committee. The Parliament readopted the bill with almost no modifications and Act CXX of 2009 on the new Civil Code was adopted on November 9th 2009. The Parliament wanted to celebrate the 50th anniversary of the validity of the old Civil Code[16], so according to its intents, the first two books of the new Code (General provisions, Law of Persons) should have entered into force on May 1st 2010. The Constitutional Court annulled the executive bill[17] containing this proposed date.[18] The Constitutional Court found that such a short period of time between the adoption and the effectiveness of these important regulations concerning the law of persons is not enough to provide time for the society and professionals for preparation. The short time lapse was against the predictability and legal order clauses of the Constitution.[19] The year 2010 also marked Parliament elections in Hungary and the new government revoked Act CXX of 2009 and rehabilitated/reestablished the Codification Committee on June 10th.[20] New and continuing assignment was give to Professor Lajos Vékás, former and new leader of the Committee to finish their work. The Committee finished the draft of the new Civil Code and handed it over to the government on December 16th 2011. During the Parliamentary debate several amendments were made on the draft that, however, did not affect the structure and conception of the Committee's draft significantly. Legal aspects of civil partnership under family law were the main target area of such modifications. While the Committee wanted to provide civil partnerships under family law an almost equal protection and legal background as marriage enjoys, the Parliament implemented significant restrictions on it in order to support marriage over civil partnerships.[21] Act V of 2013 on the Civil Code was adopted on February 11th 2013.

[16] Act IV of 1959 was entered into force on May 1st 1960.

[17] Act XV of 2010 on the entry into force and execution of Act CXX of 2009 on the Civil Code.

[18] 51/2010. Constitutional Court Decision (April 28th).

[19] Act XX of 1949 on the Constitution of the Republic of Hungary (Constitution became ineffective on January 1st 2012 as the Fundamental Law – the new Constitution of the country – replaced it.

[20] 1129/2010. (June 10th) Governmental Decree.

[21] If civil partners cannot meet certain conditions (most importantly they do not have a common child) their relationships is only considered an obligation and bears no significance from a family law angle.

Reasons and motivations behind the re-codifying process

Civil Code of 1959 was a remarkably modern legal work that preceded its age and most importantly surpassed the defects of the political regime in which it was originally drafted. After many modifications and the adoption of separate bills to regulate private law matters – most importantly in the area of company law, family law and selected business contracts – the old code looked a bit weary and even judicial practice delivered *contra legem* interpretations of it in order to provide frameworks to modern business needs.

Market economy environment needed a much more flexible and complex code that relies on the complete recognition and protection of private property, free enterprise and the extensive acknowledgement of contractual freedom. These free basic freedoms or fundamental pillars of private law could have been traced in the old code as well, however especially the areas of company law and the law of associations seemed more of a matter of public law in the old Code as mandatory rules governed the types and forms of such associations leaving less freedom to founders and members when drafting the instrument of constitution.

Regarding the pillar of contractual freedom, the new Code had to take into account that any restrictions on this freedom can only be justified when it is indispensably necessary, mainly when a weaker party (e.g. a consumer) is present in the contractual relationship or limitations are justified by ethical considerations. On the other hand the old Code was originally created to serve civil contracts rather than business contracts, as private business law was almost non-existent during the Soviet regime. After the political shift amendments on the old Code tried to satisfy the two otherwise very different interests and needs creating mostly unified rules for the same type of contract. The new Civil Code has a certain business character and it aims to provide flexible background provisions for business contracts. It also has a strong consumer protection sense integrated among the general rules of contracts in order to handle situations differently in cases when one contractual party is acting outside his or her professional needs and procedure and therefore he/she is considered a consumer.

As the three freedoms or pillars of modern private law (protection of private property, free enterprise, contractual freedom) were the guiding lines for the Codification Committee members, the vast majority of norms in the new Code are dispositive and only very few cogent rules can be traced among its text. It mainly contains model rules to fill the gaps in the relationship of the parties on one hand, while on the other hand parties can easily overwrite

these rules in most cases to form the legal relationship between them to their personalized needs. The dispositive regulatory method was already obvious regarding the law of obligations and contracts but seemed more of an exception in the area of company law and the law of private associations. Even if the former company code[22] had many dispositive rules for general partnerships, limited partnerships and the limited liability company, derogation was only available if the company code gave specific license to the parties. The closed circle of associations did not only mean the types of such associations are determined by the law but it also prescribed their internal structure and operation with cogent norms. The new Civil Code however gave up on this strict and cogent regulatory idea and implemented a very liberal, mainly dispositive approach. Some rules are still cogent but only if ethics or the protection of weaker parties require so. We will discuss what difficulties this completely dispositive regulatory method may result especially in the field of company law later. On the other hand it must be emphasized that providing such freedom to citizens and legal entities also mark very clear boundaries for the sovereign as well. While reducing any exceptional restraints as much as possible on the autonomous actions of private individuals, the cases of state or judicial intervention are also clearly determined in the new Civil Code.

Structure of the new Code

The Civil Code of 1959 had six chapters: general provisions, persons, property, contracts (obligations), law of succession, closing provisions. The old Code consisted of 689 Sections. Company law and family law[23] were traditionally separately regulated in two different bills in Hungary before the validity of the new Code. Even if these areas of private law were regulated in separate legislative sources, both referred to the old Civil Code as many legal institutions could have been interpreted only under the Code's provisions (e.g. preemptive rights, statutes of limitation, etc.). This is why in the re-codifying process the codex-like nature of the new Civil Code was a desired goal.

In the environment of modern market economy only adequately abstracted and systemized norms can fulfill the needs of society. Therefore the new Code must coherently systemize norms and create uniform terminology for most private law institutions. Even if some private law rules remained outside the new Civil Code[24], the new Code, to the greatest degree possible, provided

[22] Act VI of 2006 on Business Associations (3rd Company Code of Hungary).

[23] Act IV of 1952 on Family Law.

[24] See for example Act CLXXVI of 2013 on transformation, merger and separation of legal persons.

unified terminology and institutional background to all areas of civil law. It was a decision to make on what areas should be integrated in the new Code and which columns of private law will remain in separate legal sources. Family law and company law got full recognition as vital elements of private law issues and therefore these fields are integrated in the new Code. On the other hand, the law of intellectual property seemed too diverse containing many procedural and public law rules and this is why copyright law, patent law, industrial property law and trademarks could not be integrated in the new Code. As providing full autonomy to persons through mainly dispositive rules determined and governed the codification process, such absolute rights as it is the case with IP law would have stretched the coherent regulatory framework of the Civil Code. Various IP law instruments are still regulated in different and separate legal sources.[25]

The new Civil Code was built on the monist principle as it embraces private law relations of both private persons and professional actors on the business market. Trade rules and civil rules are both integrated in the Code and can be used to fulfill the needs of two very different worlds. As a consequence of the monist principle, general rules of contracts were framed so that they are able to organize the relations of every legal entity and there was no need for special norms. As for special rules for each type of contract the assertion of the monist principle had to be ensured. In the first place, the types of contracts in the business world (mainly consignment, carriage, forwarding, agency) were modeled to this level of expectations. In case of contract types playing an important role in both worlds (business and private relations), the level of requirements of professional business life seem to get more significance (sales, leasing, professional services). Those types of contracts that function almost exclusively in the relations of private persons (maintenance agreements, donations and gifts, lending agreements) are relatively few in number, so the business oriented regulatory approach and the monist concept seemed easier in order to avoid repetitions of many general rules that are applicable in both worlds.

As a result of this monist concept, the long debated detached nature of company law could not have been maintained. The Codification Committee acknowledged that the integration of company law, a relatively dynamic and fast changing area of private law might cause some anomalies requiring more frequent future amendments of the Code than desired, these disadvantages are still surpassed by the advantages of having a uniform Code on all impor-

[25] Act XXXIII of 1995 on Patents, Act XXXVIII of 1991 on Industrial Patterns, Act XI of 1997 on Trademarks.

tant private law relations.[26] Integration of family law did not generate such debates as its pure and less complex institutions between private persons were always considered to be a part of classic civil law.

The new Civil Code followed a book-like structure, like its Dutch equivalent. It contains eight books and 1596 Sections, around 4000 norms. Book one contains introductory provisions defining the scope of the Code and its general principles (good faith and fair dealing, reasonable conduct, prohibition of abuse of rights). Book two bears the title 'Man as a subject at law'. This book is considered to be the first part of the law of persons as book three deals with legal persons. Book two contains rules of legal capacity, legal competency and rights relating to personality protection. It also serves as a link between the Code and various IP law acts with declaring that the Civil Code shall apply to matters falling within its scope, which are not governed by the legislation on copyright and industrial property rights.[27] Book three on legal persons is a giant part of the codex with its 406 paragraphs. Beyond the general rules relating to legal persons book three provide detailed regulations on civil associations, business associations (general partnerships, limited partnerships, limited liability companies and shareholders companies), cooperative societies, economic interest groupings and foundations. This book only rescued purely private law norms from the formerly separate acts on business associations and cooperative societies leaving the more procedural, technical and accounting norms for separate legislation. Some state that this regulatory method actually made it more difficult to identify the rules of business associations and cooperative societies as instead of having a unified act on these matters, new rules shall be looked for in various legal sources beyond the Civil Code.[28] Book four contains the rules of family law, declaring principles, regulating the institution of marriage, legal aspects of civil partnerships under family law, kinship and guardianship. Book five contains the rights in rem. This is a book in which norms were adopted mostly from the old Code without conceptual modifications and changes. The Codification Committee did not feel the need to change the governing conception on property law and did not extend ownership to rights.[29] Rights in rem are only applicable to 'things' instead of rights and debts. Norms on possession, ownership rights,

[26] L. Vékás, *Conception and the Regulatory Syllabus of the New Civil Code*, Magyar Közlöny 2003, No. 8, p. 8.

[27] Civil Code of 2013 Section 2:55.

[28] T. Sárközy, *Szervezetek státusjoga az uj Ptk.-ban – Társasági, egyesülési és alapítványi jog a Ptk. Harmadik Könyve alapján*, Budapest 2013, p. 12.

[29] A. Menyhárd, *Észrevételek és javaslatok az uj Polgári Törvénykönyv dologi jogi koncepciójának kiegészítéséhez,* Polgári Jogi Kodifikáció 2002, No. 5–6, p. 7–30.

limited rights in rem (liens, mortgages, rights of use, servitude) and basic provisions about the operation and function of the real estate register can be found in this book. Book six is by far the longest part of the Code. Law of obligations embraces various areas of private law obligations: common provisions relating to obligations, general provisions on contracts, contract types, delictual (non-contractual) liability for damages, securities and other facts establishing obligations (u just enrichment, negotiorum gestio, implicit conduct, offering rewards, public commitments). Book seven contains the rules of law of succession. Succession by will became the first and most important core of law of succession and reflects the undeniable intention of the Codification Committee to provide full autonomy to persons to freely dispose of their property. Intestate succession is just a core of rules to be applied only if the testator died without leaving a valid testamentary disposition or the testamentary disposition did not cover all his or her property. Compulsory share of inheritance is still maintained in the Hungarian system, granting one third of what the closest relatives would be entitled in case of intestate succession.[30] Book eight has some closing provisions, mainly interpretative rules, transitional provisions and references on compliance with the legislation of the European Union.

Shifts of paradigms – selected novelties of the new Code

The new Civil Code introduced new or modified rules and legal institutions in approximately 30% of its provisions, while another 30% of the rules are considered as implementation of the achievements of judicial practice (directions, court opinions, individual decisions). Around 40% of the provisions are either identical in words or at least in content with the provisions of the old Code and its separate acts. Significant changes however may be identified in several areas of private law. Here, we would like to draw attention to four major novelties of the new Code that are not only new legal institutions but real shifts in paradigms comparing to the old concept of private law as of the Civil Code of 1959. This selection seems to be a very subjective one and other authors might emphasize different novelties of the Code. Apart from the generally business driven character and regulatory method, we still believe these four novelties mark real conceptual changes in Hungarian civil law and would most likely require a changed attitude in judicial practice as well.

[30] The exact amount of this share was established in the Parliamentary debate phase of codification against the original suggestion of the Codification Committee (the Committee recommended to maintain the old theory of half share).

Legal competency

Legal competency of a private person is a crucial issue of civil law as it marks how actively one may decide in his or her everyday activities and how contractual capacity gets unlimited freedom. For decades Hungarian civil law distinguishes three categories of legal competency: full legal competency, limited capacity and legal incompetency. Legal incompetency and limited capacity might have been a result of two possible factors: age of the person (minors under 14 years of age were legally incompetent, while minors between 14-18 years of age were considered persons with limited capacity) and the court could have placed him or her under conservatorship or guardianship. This latter right of the courts allowed them to either limit or exclude legal competency of a person even if he had the proper age in order to gain full legal competency. Reasons for such intervention would have been mental problems, emotional instability or even addictions. Courts had to decide whether these above mentioned disorders are partially limits the ability of the person for conducting his affairs (limited capacity) or completely, fully and permanently limits this ability (incompetency). This solution in the old Code got many criticisms. Putting someone under guardianship and totally limiting his legal competency, declaring him incompetent was a very powerful instrument in the hand of judges, even if they barely lived with it. The new Civil Code seized this power from courts and can only allow them to put a person under guardianship or conservatorship while either partially or fully limiting but not excluding his/her legal competency completely. Incompetency is no longer an option for courts if the person is over 18 years. It might not seem a dramatic change but a change in terminology, however both types of competency limitations are *ultima ratio* instruments and courts must evaluate whether other instruments would serve the interests of the person better without limiting his competency. These other instruments may be partial limitations on full legal competency only in selected cases and activities as the new Code allows judges to put somebody under guardianship only in selected cases rather than in all cases with general scope. Another instrument to completely avoid any limitations on one's legal competency is advocated decision-making without prejudice to legal competency. Where a person of legal age is in need of assistance due to the partial loss of his or her discretional ability in certain matters, the guardian authority shall appoint an advocate upon his or her request with a view to avoiding conservatorship invoking limited legal capacity. If in an action for the placement of a person under conservatorship or guardianship the court considers that there is no justification to limit that person's legal competency even partially, yet he/she

is in need of assistance due to the partial loss of his/her discretionary ability in certain matters, the court shall dismiss the action for placement under conservatorship or guardianship, and shall deliver its decision to the guardian authority. The advocate is appointed by the guardian authority based on the court ruling, in agreement with the person affected.[31] This advocated decision-making is a giant step toward widening the scope of freedom even in the area of law of persons, comparing to the old Code. Not only courts cannot seize somebody from his/her legal competency for all cases in general, there is also a codified legal institution (advocated decision-making) in order to avoid such intervention in somebody's freedom in acting. Moreover, everybody of legal age with legal competency are entitled to make a prior legal statement executed in an authentic instrument or in a private document countersigned by an attorney, or before the guardian authority in persons, with a view to partially or fully limiting his/her legal competency for future considerations. In such prior statement the person may designate one or more persons of his/her liking as a conservator, may exclude persons from the list of potential conservators or may instruct the conservator as regards the way to proceed in his/her specific personal and financial affairs.[32] These provisions and new rules project a very different and changed attitude of the legislator in the whole legal competency problem. We feel the new Code went to the wall, granting maximum freedom to those who wish to make prior statements for future disorders, while providing more flexibility for judges and the potential to individualize every single competency case. One last remarkable novelty on this question is that the new Code orders mandatory review of placement under guardianship or conservatorship, so there is no permanent mental disorder that could justify any permanent limitation on one's legal competency by the court.[33] While these changes are independent from the cobweb-like concept of market economy that was a huge motivator of codification, they still fit to the general purpose of the Code to open all windows possible for completing individual freedom both in private and business relations.

Sanctions for violation of personality rights

Personality rights were always problematic subjects to protect with private law instruments. Most civil codes have a constant attempt to restore origi-

[31] Civil Code of 2013 Section 2:38.

[32] Civil Code of 2013 Sections 2:39-2:41.

[33] Frequency of the mandatory review depends on whether court originally partially (every 5 years) or fully limited (every 10 years) someone's legal competency. *see* Civil Code of 2013 Section 2:29.

nal conditions in case of an infringement and make the injured party whole again. Rights related to personality significantly differ from monetary interests. In the latter case, the damaged goods all have monetary value and it can be calculated in a relatively easy and objective way. On the other hand, rights related to personality do not even have a commonly accepted definition or an exhaustive list. These interests are highly regarded by civil law without acknowledging that these rights may bear any monetary value. In case of infringement of personality rights, civil law can only use its classic restorative institutions that mainly cause monetary loss to the wrongdoer, the tortfeasor. Liability for damages exists in this field as well. The old Code defined two types of losses: monetary losses and non-pecuniary losses. The latter was equivalent to inner harms as results of any infringement against rights relating to personality. Damages for non-pecuniary loss was a very chaotic legal institution in Hungarian law for more than a century. While the beginning of the 20th century applied damages for such infringements against rights relating to personality, the Soviet ideology of civil law prohibited the 'sellout of one's personality'.[34] Only the novel in 1977 that amended the old Civil Code re-established the possibility to award damages[35] for non-pecuniary loss with very strict limitations on potential cases (only serious and permanent harms were eligible for damages, limiting judicial practice to virtually only physical harms, personal injuries, while other rights relating to personality got no protection through the institution of damages for non-pecuniary loss).[36] After the political shift, the Hungarian Constitutional Court annulled the provisions on damages for non-pecuniary loss of the old Civil Code[37] marking the path of a European style, modern personality protection under private law. Judges however could not let the old habits die easily, so the ghost-like survive of the old and harm-oriented damages concept was sustained for almost a decade. In the wake of the 21st century, society needed a much more open attitude in personality protection as technological development made infringements against rights relating to personality more frequent and easy. These infringements mostly constituted non-personal injuries, such as harms in human dignity, reputation, image, data protection, etc. In case of such personality rights it is almost impossible to verify that the injured party suffered tangible, manifested harms obvious to others. As the legal institution of damages for non-pecuniary loss was still part of delictual liability law and therefore it required some verification of the loss or harm suffered, many cla-

[34] T. Fézer, *A nem vagyoni (erkölcsi) sérelmek megítélése a polgári jogban*, Budapest 2011, p. 58.

[35] Civil Code of 1959 Section 354.

[36] T. Ács, *A nem vagyoni kártérítés*, Budapest 2003, p. 273.

[37] 34/1992 Constitutional Court Decision (June 26th).

ims were dismissed on the grounds of no evidence for obvious harms. Courts slowly moved towards a somewhat *contra legem* practice when they implemented an otherwise procedural institution in their judgments, notoriety facts. They found that in many cases of infringements against rights relating to personality, there is no need to show evidence of some harms, since suffering inner harms as a consequence of such incidents is evident and notoriety.[38] Still, courts maintained the right to use the old concept of damages and make the plaintiffs provide evidence to their loss or harm if they felt that the use of the notoriety concept would be too liberal or the claim was insignificant based on possibly petty harms. The new Civil Code came up with a brand new idea on compensating non-pecuniary losses. Restitution or the more talkative name for the new institution 'pain award' was introduced to the Hungarian legal system, dismissing the old institution of damages for non-pecuniary loss. Any person whose rights relating to personality had been violated shall be entitled to restitution for any non-material violation suffered. As regards the conditions for the obligation of payment of pain award (restitution) – such as the definition of the person liable for the restitution payable and the cases of exemptions – the rules on liability for damages shall apply, with the proviso that apart from the fact of the infringement no other harm has to be verified for entitlement of pain award. The court shall determine the amount of restitution in one sum, taking into account the gravity of the infringement, whether it was committed in one or more occasions, the degree of responsibility, the impact of the infringement upon the aggrieved party and his environment.[39] Pain award is a real change in paradigm. It does not request the verification of any harms suffered by the injured party, and solely relies on the fact of the infringement hurting rights relating to personality. Theoretically and with using grammatical interpretation methods, if conditions of liability are proved (unlawful act, accountability, causation) there is no way the wrongdoer could exempt him or herself with referring to the insignificant or petty nature of the possible harm the aggrieved party might have suffered. Although this solution seems very similar to the notoriety concept developed by judicial practice under the validity of the old Civil Code, it goes a lot further than that. Pain award does not leave the option for selecting among claims on the grounds of how evident or significant the inner harm might be. As the new Code only entered into force on March 15th 2014 there is no judicial practice exist relating to the new institution of pain award. It is difficult to project how judges will use the new norms in cases of

[38] BH 2002/186., BDT 2005/1088.

[39] Civil Code of 2013 Sec. 2:52.

personality rights protection, however we still try to provide some possible ways of interpretation, even if it sounds a bit of spellbinding.

One possible solution is to take the grammatical interpretation and award restitution in all cases when the unlawful nature of the infringement is proved and other conditions of liability – except, of course, the verification of any loss suffered – are met. However, judges may grant insignificant amounts as restitution if they feel the presumed inner harm is insignificant and the claim is not properly based. These amounts will most likely remain far under the costs of litigation, teaching society that ill-founded litigation is not rewarding.

Another possible interpretation would be similar to the Dutch 'seriousness requirement' clause.[40] Judges may interpret the provisions the way the aggrieved party cannot be ordered to prove his/her harm, however judges have a right to search for it. As the purpose of restitution (pain award) is not clear (is it purely compensation for some presumed or real harm suffered, or does it have some punitive character), judges may try to retain as much as possible from the practice of damages for non-pecuniary loss, and dismiss all claims they consider insignificant or malicious litigation. Functional questions are plentiful in case of the new pain award institution. While the norm does not say anything about it, moreover emphasize the compensational character of restitution (restitution for any non-material violation suffered), the ministerial comments and reasoning attached to the new Civil Code clearly speaks about 'civil law punishment'. We do not favor this interpretation, even if the 'apart from the fact of the infringement no other harm has to be verified for entitlement to restitution' text may seem a bit more focused on the perpetrator, as civil law, especially in Hungary never had an intention to introduce punitive elements and conquest territories from penal law.

Dispositive rules as the main principle in the book of legal persons

We already mentioned that granting the greatest freedom possible to private persons and legal individuals in their legal affairs was a flagship principle in the long process of drafting the new Civil Code. While the old Civil Code and other acts on various legal persons always followed the regulatory method of cogent rules in order to ensure the predictability and safety of commercial relations, the new Civil Code clearly gave up on this solution. In book three on legal persons, the new Code states: 'as regards relations between members

[40] T. Fézer, *op. cit.*, p. 130.

and founders, and between them and the legal person, and as regards the organizational structure and operational arrangements of the legal person, in the instrument of constitution the members and founders may derogate from the provisions of this Act relating to legal persons'.[41] This is a very open clause in the Code as the listed relations may cover all potential subjects of civil law regulations, so theoretically and with the sole interpretation and application of this Subsection of the Code, no rules in book three are cogent, mandatory, every single one of them is just a model rule available for derogation. Luckily, the next Subsection establishes some limitations on this freedom: 'members and founders [...] may not derogate from the provisions of this Act, if it is precluded by this Act; or were any derogation clearly violates the rights and interests of the legal person's creditors, employees and minority members, or it is likely to prevent the exercise of effective supervision over legal persons'.[42] The first limitation on derogation is clear and easily predicted. If the Code states that any clause of the instrument of constitution to the contrary of a rule shall be null and void, derogation is not available for members and founders of the legal person. The second limitation however is more uncertain and makes us ask a question: who should decide on this. In the registration process at the establishment stage the company registration court seems to be the competent authority. We still think it is very unlikely that the registration court that works under very strict and short time limits can individually review the instrument of constitution whether any derogation from the model rules in the Code are not clearly hurting the interest of creditors, minority members and employees. Most legal persons do not even have employees and creditors at that time, so the monitoring would be highly hypothetical. Another question is whether the imperative or dispositive nature of a rule in the Code is permanent and applicable to all legal persons or a matter of individual consideration for the particular legal person under monitor. It seems that courts may make a list about the rules in book three and categorize them in two boxes: rules that would clearly hurt the interest of creditors, employees and minority members, and rules that have no significance in that respect, so these are dispositive. There are already several articles debating on the dispositive or imperative nature of rules in the new Code.[43] A common point in these articles is that these rules project some long years of unpredictability in the judicial practice of law of legal persons. We clearly must wait for a more detailed judicial practice to truly understand where the boundaries of this freedom can be marked.

[41] Civil Code of 2013 Section 3:4, Subsection (2).

[42] Civil Code of 2013 Section 3:4, Subsection (3).

[43] G. Gadó, *Kógens-e a diszpozitív*, Céghírnök 2013, No. 9, p. 3–5.

Liability for loss caused by non-performance

The Civil Code of 1959 did not constitute separate liability regime for contractual liability in case of non-performance. Delictual and contractual liability both shared the same principles, with very few specialties relating to contractual liability.[44] Liability was regulated in details in the delictual liability chapter of the old Code, and the linking provisions in contract law connected the two liability systems together. Liability in its principle form requires fault, so accountability of the wrongdoer is a crucial element for establishing it. The torfeasor was relieved of liability if able to prove that his conduct was not actionable, so he acted the way as it was expected of or by a person, or in a particular situation.

The new Civil Code separated the two liability regimes and created strict liability in case of liability for any loss caused by non-performance of a contract. The new Code imposes more stringent rules under which a non-performing party can be excused from liability comparing to what delictual liability norms presume. The only way for a party's non-performance to be excused if it proves that the damage occurred in consequence of unforeseen circumstances beyond his control, and there had been no reasonable cause to take action for preventing or mitigating the damage.[45] The new Civil Code also introduced, in principle to limit full compensation of lost profits and other losses, the concept of reasonable foreseeability: liability shall not exceed the measure of loss that the non-performing party foresaw or could reasonably have foreseen at the time of the conclusion of the contract as a likely result of its non-performance based on the facts and circumstances attending the conclusion of the contract *(foreseeability clause)*.[46]

The new Civil Code does not attach liability for non-performance to the culpability of the non-performing party. Accordingly, the non-performing party will not be excused under the pretext of having taken all measures that could be reasonably expected to prevent non-performance. The only way for a party's non-performance to be excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract. The same concept applies when performance is entrusted to another person. The non-performing party is not be liable for loss suffered by the aggrieved party to the extent that the aggrieved party contributed to the non-performance or its effects.

[44] Civil Code of 1959 Section 318.

[45] Civil Code of 2013 Section 6:142.

[46] Civil Code of 2013 Section 6:143.

The new Code – in line with international commercial standards – established strict liability in case of non-performance of a contract with the implementation of the foreseeability rule that is a brand new terminology in Hungarian civil law. The main reason for this change of concept is that in commercial dealings, and particularly in trading, the sanctions on non-performance of voluntary contractual obligations are usually be detached from the efforts made be the non-performing party. The aggrieved party should be able to recover its losses even if the non-performing party has taken all measures that could reasonably be expected to prevent non-performance, simply because its legitimate expectations were bankrupted on account of such non-performance. Moreover, the sanctions included in consequence of non-performance of commercial (business) contracts are aimed, first and foremost, at distributing risks and not at repressing the faulty conduct of an individual. While the rules of conventional liability are designed to address the errors made men as private individuals (culpability), this kind of approach in commercial (business) contracts is meaningless. It is difficult, and frequently impossible to determine whether there is any negligence involved (especially from the standpoint of outsiders, like a contracting party or the court) mostly because the actions that take place and which ultimately contribute to the non-performance of commercial contracts are impersonal. The Vienna Convention on the International Sale of Goods contains objective requirements regarding the excuse of a non-performing party in its Article 79. In essence, the Principles of European Contract Law also contain similar rules for excuse.[47]

It should be pointed out that since the 1970s this same trend of stringency has also been followed in the Hungarian judicial system, recognizing the "lack of accountability" in the contractual relations of economic organizations only if the non-performing party is able to prove that it is due to an impediment beyond its control.[48] The new liability rule is therefore intends to preserve the current judicial practice.

At the same time, let us not overlook the fact that these rules of liability pertain not only to breaches of commercial contracts, but also to other forms (e.g., medical treatment) of agreements. In these subjects, the principle of accountability, as the gauge of excuse, should be retained, so the legislator had to implement new statues in various acts in order to maintain the delictual liability rules will be applicable in such contractual relations.

[47] United Nations Convention on the International Sale of Goods (1980 Vienna) Art. 8.108.
[48] Gf. II. 30 137/1980: BH 1981/330; Gf. V. 30 605/1981: BH 1982/524.

This proposal is a fine example of integrating common international commercial standards in the new Civil Code. While the new provisions somewhat truly follow the achievements of judicial practice in the past 20 years, some brand new attitudes shall be introduced at the same time. The more stringent liability regime for breach of a contract required the separate handling of gratuitous contracts, where the new Code maintained the accountability principle instead of the new, more commercially driven liability rules.[49] Also, the interpretation of foreseeability first as part of the exemption regime, second as a limitation on full compensation will require a new line of judicial decisions as foreseeability almost only got application in Hungarian court cases under the scope of the Vienna Convention that is clearly designed to serve the needs of the big business.

Closing remarks

The new Hungarian Civil Code is only valid for a few months and therefore it is difficult to evaluate its reception in society and business. There is no doubt the country needed a revised core of private law as apart from the merits of the old Civil Code and its attached acts, social, technological and business development stepped over on some of its old paradigms and concepts. The re-codifying process was mainly in the hand of well-respected academics and therefore the Code uses very sophisticated legal language leaving almost no chance for misinterpretation. On the other hand, the new Civil Code is so flexible in terms of the tons of dispositive norms even in surprisingly conservative areas (e.g. law of legal persons) that rely on judicial interpretation more than even before. Reception of the new Civil Code is very favorable in academic circles and both its birth process and the actual act shook civil jurisprudence provoking scientific debates on many of its new or newly drafted legal institutions. The original goal to create a modern and flexible code that is able to serve business and private life at the same time is fulfilled in our opinion. Slight modifications and the adoption of other executive acts and ordinances will most likely happen in the upcoming few months as codification is not over yet. A Civil Code governs so many important areas of law that it undeniably makes a significant impact on almost all areas of law requiring conformity and coherency. We believe that Professor Lajos Vékás, leader of the Codification Committee and his fellow drafters created a true codex that understands the needs of modern life situations. Our closing remark is that we see the melt of the dividing line between common law and

[49] Civil Code of 2013 Section 6:147.

civil law systems these days, granting more power and freedom of creative interpretation to judges than ever before, while getting to the very same or at least similar conclusions in typical legal debates. The new Hungarian Civil Code is a fine example of this, with its flexible, relatively open norms and the careful implementation of international standards and solutions.

Streszczenie

Rekodyfikacja prawa cywilnego na Węgrzech

Pierwszy węgierski Kodeks cywilny został przyjęty w 1959 roku, w czasach, w których niespecjalnie interesowano się ustanowieniem współczesnego trzonu prawa cywilnego. Tak czy inaczej, Ustawa IV z roku 1959 była względnie nowoczesnym osiągnięciem, które za sprawą wielokrotnych poprawek służyło potrzebom społeczeństwa obywatelskiego przez ponad pół wieku. Na wczesnym etapie reorganizacji reżimu konstytucyjnego na Węgrzech po transformacji w 1989 roku rząd zakomunikował potrzebę ustanowienia nowego, zrewidowanego Kodeksu cywilnego. W 1989 roku powołano także specjalną komisję, która miała opracować podstawy teoretyczne przyszłego kodeksu. Niniejsza praca ma na celu opisanie podstawowych kwestii i teorii leżących u podłoża nowego kodeksu, a także przedstawienie okoliczności i potrzeb, które doprowadziły do przyjęcia nowego Kodeksu cywilnego na Węgrzech, czyli Ustawy V z 2013 roku. W poniższym tekście przedstawiono pewne ważne zmiany w zakresie koncepcji regulacyjnej Kodeksu cywilnego, podkreślając kilka teoretycznych i doktrynalnych nowości w dziedzinie prawa prywatnego, a szczególnie w zakresie prawa osób oraz odpowiedzialności za szkodę wynikłą z naruszenia zobowiązań wynikających z zawartej umowy.

Słowa kluczowe: węgierski Kodeks cywilny, kodyfikacja, prawo osób, prawo handlowe, odpowiedzialność cywilna