Lajos Vékás

Some Features of the Civil Code of Hungary

This essay is dedicated to Professor Péter Halmai, my colleague and friend, an outstanding expert on European economic integration, for his 70th birthday

Late codification of private law

Almost uniquely on the European continent, until the second half of the twentieth century, private law in Hungary was partly statutory partly judge-made customary law. Between 1900 and 1928, several high-quality draft codes were produced but none of them was enacted, mainly for political reasons. The first private law code, Act IV of 1959 (hereinafter: the Civil Code of 1959), which entered into force in 1960, was conceived and adopted in an era – between 1953 and 1959 – in which the ruling dictatorial political power and nationalisation almost fully liquidated the natural social conditions (first of all private ownership) for property transactions and for unfolding personality rights. Among those economic, social and political circumstances, we have to appreciate the enactment of a high-quality code which was elaborated by professors who graduated before the Second World War and benefited from a high level of legal education. We have to mention their names with respect: Endre *Nizsalovszky*, Miklós *Világhy* and Gyula *Eörsi*. Thanks to its outstanding professional quality, the Civil Code of 1959 could survive the radical economic and political developments leading to the changes after 1990 by more than two decades. Among the codes of that era, only the Polish Civil Code of 1964 can boast such a success as the Civil Code of 1959. Nevertheless, it is understandable that the changes, as a result of which a market economy based on private property could evolve again in Hungary, had to be followed by frequent amendments. This progress resulted finally in such fundamental developments in the field of private law relationships that their legal settlement rendered a comprehensive reform and the adoption of a new civil code necessary. Recognising this need, in 1998 the Government ordered the preparation of a new code. According to the Government

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Decree, "the goal of the reform is the creation of a modern civil code compatible with international practice and expectations, which shall become the fundamental statute of private law as the constitution of the economy". After preparatory works and thorough discussions between experts, taking more than a decade, a draft was prepared: The proposal of the Expert Committee was submitted by the government to the Parliament, which adopted Act V of 2013 on the Civil Code (hereinafter: *Civil Code* or *Code*) on 11 February 2013. It entered into force on 15 March 2014.[1]

The social model of the Code

After four decades of non-democratic governments and misguided policies that resulted in economic and social deadlock, Hungary set out on the path of a social order based on private property and free enterprise in 1990. The social policy goals followed since then and the constitutional guarantees adopted to implement these consider the view of society, i.e. the pattern of the social market economy, prevailing in today's developed Europe, and primarily in the Member States of the European Union (EU), as a model. This political and social direction is intended to be served by the Civil Code. The legislation departed from the premise that the new code has to establish the conditions for a constitutionally protected market economy interwoven with social elements in private law. The Civil Code primarily lays down the legal frameworks for property transactions. At the same time, it intends to provide protection for persons, including the personality rights of individuals and legal persons and personal relationships within the family.

The new social model required the far-reaching acceptance of the private autonomy of owners, in particular the full recognition and protection of private ownership. This principle (as the first pillar of private autonomy) pervades the entire Civil Code as well as its detailed provisions (e.g. the norms on expropriation). This is, of course, supplemented by public law and social constraints imposed on private property, for example, in the rules on the protection of public health, historic buildings, environment, etc., as well as in private law rules on protecting the interests of neighbours. The other fundamental consequence of private autonomy (the second pillar) is the acceptance of the principle of freedom of contract. Any limitation to this pillar of private law is justified only to the extent that this is rendered indispensably necessary by the demand for social justice and it is still possible under the conditions of free market competition. Consumer contracts

[1] See Menyhárd–Veress 2017; Vékás 2010: 51–63; Vékás 2016: 37–52.

law is the most important field of this balance, which is hard to achieve. The third pillar of private autonomy is the freedom of association, the demands of which are intended to be served by the Civil Code through the institutions of associations, companies and cooperatives following the tested models of traditional private law regulations.

Tradition and innovation

The drafters of the Civil Code departed from the existing living law and they intended to change it only if this was rendered necessary by the demands of the changed economic and social conditions. In accordance with this methodological point of departure of fundamental importance, the Civil Code maintained the rules of the Civil Code of 1959 wherever it was possible, and they were complemented by integrating the provisions of certain specific acts. In addition, the Civil Code built in the results of the decades of Supreme Court practice on the Civil Code of 1959, which had a lasting message, was ripe for codification and demanded positive law regulation. In case of doubt, the Civil Code thus opted for the existing law and did not adopt new alternative solutions if they could have caused uncertainty in the legal system. On the other hand, the Civil Code wanted to reform Hungarian private law: it intended to serve the needs of the changed economy and society by introducing new legal institutions, for example, in the field of collateral and contracts. The reduction of private law transactions under the conditions of socialism necessarily resulted in the impoverishment of private law, the disappearance of the shades of solutions based on legal dogmatics and the fading of contours. The edge of private law concepts known and applied for centuries was blunted and became a victim of the sometimes undemanding court practice. The Civil Code also wanted to compensate for these losses, e.g. with the separation of liability for breach of contract and extra-contractual (delictual) liability or with new regulation of the assignment of claims. At the same time, the legislation by no means wanted to complicate regulation with superfluous innovations in legal dogmatics; it brought changes only in those questions to which more correct answers could be given based on a more nuanced approach of legal dogmatics. To mention only one example, the Civil Code amended the rules on transfer of property in accordance with this objective. Taking this into account, the rules on establishing a pledge and on the transfer of contract, for example, were also changed.

The Civil Code took into consideration that EU legislation directly influences the reform of Member State private law in several fields and it intended to integrate the lasting core of EU private law directives organically, for example, in consumer contract

law and company law. However, the legislature did not endeavour to build the entire corpus of EU private law into the Code. The reason for this was that the rules in the EU private law directives are too fragmented, casuistic and often subject to changes, and thus are not suitable in all their details for codification planned with a long-term perspective. The Civil Code therefore opted for the lesser evil by leaving some rules based on directives in separate acts.

Foreign examples

The Civil Code did not choose a foreign model, but it drew abundantly on foreign codification works. The drafts prepared during the first half of the twentieth century had already primarily taken the solutions of the Austrian (ABGB) and the German (BGB) codes and occasionally the French *Code civil* into consideration; the Swiss ZGB provided some examples for the draft of 1928. As such, the lessons of these big classical codifications had already been used by Hungarian private law codification earlier. From the more recent national codes, the Dutch Civil Code (Burgerlijk Wetboek of 1992) and the Code of the Canadian province of Québec (1991) may be considered the most modern ones. These codes served as a pattern in several respects for the Hungarian reforms (primarily in determining the scope of the situations to be regulated and the structure of the Code), but not even these were considered a regulatory model as far as the entire codification was concerned.

In addition to national codes, the Civil Code also drew on the results of international legislation which has achieved world-wide recognition among legal experts and has a broad impact on legislation and judicial practice. From these, the United Nations Convention on Contracts for the International Sale of Goods, adopted in Vienna in 1980 (CISG) must be mentioned first. Model acts elaborated by academic groups served also as patterns which could be considered and occasionally followed regarding the regulation of contract law, namely the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law (PECL), as well as the Draft Common Frame of Reference (DCFR).

The code character of Act V of 2013

Although the endeavours of the EU for legal unification also reached the area of private law in the last decades and they have considerable influence on national

legislations today, it seems that private law may still be codified comprehensively, even within the EU, at the level of the Member States only. This statement is justified by the fact that, in addition to the Netherlands (1992), a new civil code entered into force in several countries in Europe, including Lithuania (2001), Romania (2011) and the Czech Republic (2014), and even the classical codes (the BGB, the ABGB and the Code civil) have been recently subject to substantial reform. This codification by the Member States is understandable, because the EU Directives and regulations result in legal unification in narrow specific fields only and constitute small islands in the sea of the private law rules.

The Civil Code is a legal work which possesses the character of a code and the advantages of this are intended to be profited broadly. Of course, this method may not be an end in itself. The Civil Code took into account that, even beside the most successful codification, some private law rules remain outside the Code. The Code must therefore provide for a subsidiary default legal framework regarding such norms. The substantive accord and the terminological unity of these separate private law acts with the Civil Code must be ensured to the fullest extent; the concepts contained in the Code must be used with the same content in the separate acts as well.

The Civil Code took as a point of departure that it is appropriate to broaden the substantive borderlines of the Code as long as the positive effects of the codification, in particular terminological unity, the methodological homogeneity of the norms integrated and the possibility of compression and abridgment facilitate legal practice. The integration of rules into the same code is therefore desirable and expedient as long as the methodological unity of the norms to be integrated exists and as long as the systematisation denotes the advantages of codification, including systemic rationality, coherent and consistent legal drafting, the certainty of terminology and clear and perspicuous solutions.

Taking all these into account, the legislature incorporated the material of family law into the Civil Code. Partly for ideological reasons, this part of private law was regulated in a separate family law statute and not in the Civil Code of 1959 during the decades of socialism. In the course of integrating it, the due expression of the peculiarities of family law relationships could not be ignored. This is demonstrated by the fact that the legislator in Book 4 of the Civil Code laid down certain principles, primarily for the protection of the interests of the child, applicable to such legal relationships only.

The legislator also decided in favour of integrating rules on commercial companies into the Civil Code and the relevant rules have been located among the provisions on legal persons in Book 3. This solution follows logically from the fact that the internal and

external relations of legal persons take place in the framework of private law relationships and thus the object and the method of regulation is in accordance with the character of the Code. The integration of the rules on companies into the Code involves several advantages. The scope of the general rules on legal persons may be broadened and the repetition of the norms may be avoided. Moreover, the mainly default character of the norms of the Civil Code on contracts becomes self-evident. For this and some similar advantages in terms of codification, in the Swiss OR (1881), then the second Italian code (Codice civile of 1940), and most recently the Dutch code (Burgerlijk Wetboek of 1992), other legislatures decided on accommodating company law in the private law code. The counterarguments commonly advanced, in particular on mixing of private and public law norms regarding the regulation of companies, the tradition of separating the regulations, etc., weigh less in comparison to the advantages of integration. The Civil Code equally provides framework rules on cooperatives in Book 3 on legal persons, laying the foundations for a more specific regulation of the main types of cooperatives (carrying out production, service and credit providing, etc. activities).

Similarly to the Civil Code of 1959, the new Code did not integrate the material of the separate acts on copyright and industrial property, although the subjective rights emerging in the legal relationships of intellectual property and the majority of the sanctions for their violation have an unequivocally private law character. The separate acts embrace mixed norms from the point of view of legal branches, but it would not be expedient to decompose them, notwithstanding the difference in their character. The Civil Code stresses at the same time the private law nature of the protection of intellectual property and other intellectual goods, and therefore the Code lays down its own background role regarding the separate acts.

Although the Civil Code, and in particular the general rules on contracts, constitute the legal background for the special regulation of employment relationships too, the Code left the settlement of individual employment contracts in the Labour Code. The main reason for this solution is that the legal regulation of employment contracts today already has so many peculiarities, and therefore, it would be difficult to integrate this system of norms into a civil code. The employee is conceptually a 'weaker party' and this characteristic is a distinguishing peculiarity in regulation. Moreover, the shaping force of EU law is more intensive here in comparison to other fields of private law. Regarding those contracts for carrying out work that do not fall under the scope of application of the Labour Code, the rules of the Civil Code on mandate or works contracts may be duly applied, depending on the characteristics of the service.

The Civil Code encompasses the private law relationships of both businesses (i.e. the professional actors in property transactions) and individuals. This is visible

in how it regulates contract law. By adopting the so-called monistic approach, the Civil Code created such general rules on contracts that can be applied to relations on any legal subject. In regulating special types of contracts, the Code imposes the standards of professional business on contract types playing a role in both business transactions and relationships between individuals. The Civil Code lays down exceptional rules only if the contract is entered into between an undertaking and a consumer (business to consumer: B2C), i.e. it qualifies as a consumer contract. The Code contains provisions providing for special rights for consumers both among the general rules of contracts, notably in relation to the obligation to inform and concerning the norms on general contract terms and conditions, on warranty and the right to rescind, and among the rules on certain types of contracts (pledge agreement, guarantee, suretyship, etc.).

The so-called monistic approach and the mainly commercial law character of the Civil Code are indicated also by the new contract types regulated by it. The Civil Code intends to offer non-mandatory rules for those contracts which have been crystallised to the necessary extent in practice and which are not simply a combination of contract types, mixing the already existing contract types, but have content that is clearly distinguishable from other contracts. Following this approach, the Civil Code regulates factoring and financial leasing among financing types of contracts, and those contracts, which mediate goods and services from producers and service providers to end users: agency contracts, distribution contracts and franchises. An important novelty is the regulation of fiduciary asset management contracts (a kind of trust). The comprehensive review of the rules on credit and account contracts and the extension of the number of types of contracts regulated here are in accordance with the selected codification approach.

The Civil Code is not one among many statutes. The importance and complexity of the situations directly regulated by it demonstrates its paramount significance. The impact of the Code goes well beyond the relationships regulated directly by it and radiates through any relationship which is or may be settled by a private law norm, irrespective of whether the given norm refers explicitly to the Code or not.

Traditional structure

Following the traditions of Hungarian codifications, the Civil Code does not contain a general part, unlike some foreign private law codes such as the German BGB. Structuring norms in such a way may be justified by the fact that the rules on institutions,

which play a role in several fields, are located in an independent structural unit highlighting them. This is the case with the 'legal transaction' in the BGB, when its norms, which can have a role in addition to the law of obligations, in terms of rights *in rem,* in family law and succession law, are summarised in the general part. Proponents of this solution to codification used the legal literature to oppose Gusztáv *Szászy-Schwarz,* the outstanding Hungarian private lawyer of his era, in the course of the elaboration of the very first Hungarian draft code, published in 1900. He rightly pointed out that the concept of 'legal transaction' is an exaggerated and unhelpful abstraction in a code, because the most important legal transaction is the contract, the rules of which should be determined in their own place in the contract law and not to have them highlighted in an abstract manner. Furthermore the last will, the most significant unilateral legal transaction, is anyway regulated by separate provisions in Book 7. Having accepted this approach, all Hungarian draft codes and the Civil Code of 1959 refrained from creating a general part putting the 'legal transaction' at the centre, and so did the drafters of the Civil Code as well.

The Civil Code builds up the system of its norms in principle following the Code of 1959, but in a partly different structure. The most crucial change is that it gives place to the provisions on legal persons in an independent book (Book 3), separating them from the rules on natural persons (individuals) to accommodate the increased amount of rules due to the integration of company law. In comparison to the previous law, the other important change in the structure of the Code is that the Civil Code takes out from contract law the rules applicable to all legal obligations, including representation, the limitation period, multiparty obligations and the norms determining the performance of the obligations. These rules are placed in an independent part at the beginning of the Book on the law of obligations (Part 1 in Book 6). Moreover, the rules on legal declarations placed in this Part may gain application not only to legal declarations in the law of obligations but also to those made in terms of rights *in rem,* family law and succession law, unless otherwise provided. This structural solution is not unproblematic, but indicates unequivocally that these highlighted norms are to be applied to any obligation. The case is similar with regard to the common rules on legal persons in the Book 3. These were created mostly by generalisation from the norms of company law and primarily play a role in the legal disputes of companies, but they may be duly applied to any other legal person. In comparison to the Civil Code of 1959, the last structural change worthy of mention concerns Book 5. This Book bears the title 'Rights *in rem*' instead of 'Ownership Law', because in addition to private law norms on ownership it regulates possession and limited rights *in rem* in a more detailed way than the Civil Code of 1959. Among them are the rules on pledge, which, unlike in the

Civil Code of 1959, are not in the law of obligations. This latter change was justified primarily by the fact that the fundamentally new regulation of pledge retains its double nature (pertaining to rights *in rem* and the law of obligations) of the most important types of collateral, but today the rights *in rem* character must be emphasised much more than in 1959, when a debtor under the law of obligations and the debtor of rights *in rem* almost never differed. The Civil Code also accommodates the principles of the Land Registry in the Book on Rights *in rem*.

About the style of the Code and the nature of its norms

The Civil Code avoids casuistry; it does not want to make legal practice more difficult with speculatively created detailed norms. Instead, it creates more general rules which are capable of following social and economic changes and are thus more flexible. For example, the Civil Code accordingly specifies a deadline expressed in days only where it is indispensable. Otherwise, it provides for acting 'without delay', which enables the circumstances of the case to be taken into account instead of a necessarily rigid deadline, and for the standard of conduct that may be generally expected to be applied in the given case. However, the Code does not intend to risk imposing legal uncertainty by an extensive application of open norms (general clauses). The intention of regulating in a general way where possible is demonstrated also by the fact that the Code provides for the obligations applicable to all contracts (e.g. obligation to cooperate with or to inform the other party) consistently among the general rules of contracts, and only the possible deviations appear concerning the particular types of contracts.

The Civil Code applies referring norms only where this method makes it possible to avoiding word-by-word repetitions and involves abridgment, and this advantage is not compromised by the fuzziness or ambiguity of the provision. The Civil Code avoids referring simply to the number of the appropriate section. This is because such a solution renders the use of the code more difficult, as demonstrated in the example of the German BGB.

The main guarantee of the freedom of contract is the non-mandatory character of the overwhelming majority of contract law norms, allowing the parties to agree freely on the terms of individual transactions. They are free to determine the content of their contract and can derogate from most of the rules of the Code. The Code created the non-mandatory norms in view of typical life situations and taking the interests of the parties into account in a mutual and balanced way.

As with the realm of the contracts in the law of obligations, the Civil Code recognises the autonomy of the parties for the association of persons (of course, subject to the necessary deviations). Accordingly, the rules on legal persons in the Civil Code also broadly have a non-mandatory character. The non-mandatory nature for a significant part of the law of companies and associations, similar to contract law, is traced back to the consideration that the legislature apparently cannot foresee the goals to be achieved by the parties for an enormous mass of clauses. As such, the Code cannot give room to the intention of the parties individually or according to company type. If there were a completely mandatory regulation, a lot of contract clauses would inevitably be prohibited even if it was not justified for any reason. It is therefore, more appropriate to follow an inverse regulatory method, instead of the method allowing exceptions to the general principle of mandatory regulation, and to open the door to the parties' freedom to determine the substance and limit this by mandatory provisions only where it is justified for overriding reasons. This method was adopted by the Civil Code in regulating associations and commercial companies, too.

The function and significance of non-mandatory rules lies in the fact that the rules offered by the Code do not need to be 'invented' by the parties and they did not have to include them in their agreement as they apply by virtue of the law. They extend to the relationship concerned unless the parties agree otherwise. By this solution, transaction costs related to the formation of a contract or foundation of a company or association may be significantly decreased. As mentioned, the rules laid down in the Code for contracts and legal persons are in general of a non-mandatory character, i.e. the parties may in each individual case either simply exclude their application in whole or in part or modify their content so as to adapt them to the specific needs of the kind of transaction involved. We stress, however, that the Civil Code makes it clear that the parties are entitled to deviate from non-mandatory norms only regarding the provisions establishing their rights and obligations. The parties cannot deviate from the norms determining the concept of legal institutions, not even by agreement.

In the field of the regulation of contracts, companies and associations, there are, of course, also mandatory norms which do not allow deviation by the parties. A contractual clause derogating from such rules is null and void. Mandatory rules are necessary primarily where the interests of third parties (e.g. the creditors), the minority members in the case of associations and companies or the protection of the moral value system of the society require mandatory norms in order to intervene in the autonomy of the parties. Furthermore, the Civil Code also contains mandatory

norms where a significant lack of balance in economic power or expertise may be established behind the presumed equality and interdependence of the parties to a contract and this asymmetry may result in the unilateral determination of the content of the contract. Such situations include primarily contracts concluded with consumers (B2C contracts). In regulating them, the Civil Code provides for protective rules using mandatory norms to safeguard the interests of the weaker party, effectively. The Code locates the rules protecting consumers thematically, i.e. it lays down special norms for the protection of consumers in answer to concrete questions. The Civil Code makes the mandatory nature of these norms and the nullity of any deviation from them unambiguous.

In exceptional cases, where one of the parties profits from the possibility offered by non-mandatory regulation in an inadmissible way and the flagrant failure of the desired position of balance between the parties may not be remedied in the absence of a concrete mandatory rule, the principles formulated in the form of a general clause by the Civil Code give courts the possibility of intervention. Such an open norm may also be found among the general provisions on contracts, such as the rule declaring a contract obviously breaching good morals as null and void. Moreover, the common principles of the Civil Code among the introductory provisions serve the protection of the legal order also in the realm of contracts, companies and associations. The abuse of mandatory regulation may be impeded by relying on the standard of the principle of good faith and fair dealing or the prohibition of abuse of law, provided that this may not be achieved by a closer legal instrument in the case concerned, such as the safeguards of the rules on general contract terms and conditions (e.g. by declaring an unfair contract term null and void) or by establishing a violation of good morals.

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