Guiding Principles of the Comprehensive Reform of Hungarian Civil Law

Lajos Vékás*

A. Introduction

Decision No. 1050/1998 of the Hungarian Government fixed the deadline for the elaboration of the concept of the new Civil Code in the third quarter of 2001. This article will summarize some of the fundamental questions of the reform and some structural problems of the new Code. On the one hand the reasoning of this article offers an explanation, and on the other hand, it will raise further questions and provide – mostly as an alternative – possible answers to be decided in the course of the reform.

B. Framing of a New Civil Code is Necessary

The Hungarian Civil Code of 1959 (the Code)[1] was framed between 1953 and 1959, in an era when the basis of civil law relations, i.e. private ownership (in the form of private property and the so-called personal property), was accepted only within very narrow boundaries.[2] This circumstance – in spite of the outstanding legal education and professional practice of the codifiers of the Civil Code – left its definitive mark on the Code: on its principles, its framework of contents and its specific provisions, as well.

The radical social changes of the last decade in Hungary have revealed the obvious deficiencies of the Civil Code. From the point of view of the Code, the following main factors shall be mentioned:

(1) effective privatization (about 90 per cent) of the former state sector;
(2) establishment of a corporate governance system and capital markets;

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* Professor of Law, Chairman of the Codification Committee, Budapest.

1 See G. Eörsi, (ed.), *Das ungarische Zivilgesetzbuch in fünf Studien* (Budapest 1963).

2 N. Reich, *Sozializmus und Zivilrecht* (Frankfurt 1972).

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(3) thereby the complete change of the role of public property and the state as such in civil law relations;
(4) consequently private property has become the constitutionally protected fundamental of the society, and the social market economy has been approved as the form of the social system.

The legislator has drawn inferences from all these changes in the field of civil law[3] by passing more than three dozen modifications. Some of these amendments (e.g. Act No. XIV of 1991, Act No. XCII of 1993 and Act No. CXLIX of 1997) have affected the entire Code or some of its main institutions. Also the role of the decisions of the Constitutional Court has been of vital importance.[4] More than ten decisions of the Court have dealt with civil law issues. Some of them were aimed at annulling the unconstitutional provisions, while others sought to enforce new legislation. However, all these modifications have often merely led to the annulment of obsolete provisions, which resulted in the many empty paragraphs of the Code. New regulations that meet today's social requirements have been enacted only in few cases and even then mostly outside the Code.

A further reason for the obsolescence of the Code[5] is that its provisions (since, initially, they were designed to meet only the oversimplified requirements of transactions either within state property or those based on personal property limited to the minimum) reveal several fundamental deficiencies in the light of the needs of today's business transactions. This statement may be illustrated by the following (far from exhaustive) list of examples: possession; acquisition of property; security *in rem* and *in personam* (e.g. collateral, mortgage); assignment; breach of contract (extent, limitation and exclusion of liability, means of exculpation, remedies); bank transactions; substantive law of securities (bill of exchange, cheque etc); and commercial contracts, etc.

Furthermore, important new developments after the coming into force of the Code have to be taken into consideration. These include the emergence of new types and mixed forms of contracts, mostly in the field of business transactions, and the use of new means of formation of contracts (fax, e-mail, Internet), etc.

Most transpositions of the European Union (EU) directives, accomplished by Hungary up to now, have not been inserted into the Code, but into separate laws (Act on Product Liability, Act of Consumer Protection and Government Orders).[6]

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[3] See G.B. Ginsburgs, D.S Donald, and B. William, (eds.), *The Revival of Private Law in Central and Eastern Europe* (The Hague/London/Boston 1996).
[4] See L. Sólyom, and G. Brunner, Verfassungsgerichtsbarkeit in Ungarn (Baden-Baden 1995).
[5] See A. Harmathy, (ed.), *Introduction to Hungarian Law* (The Hague 1998); L. Vékás, 'Über die Neugestaltung des ungarischen Zivilrechts' in J. Basedow, K.J. Hopt, and H. Kötz (eds.) *Festschrift für Ulrich Drobnig* (Tübingen 1998) at pp. 713 *et seq.*
[6] See L. Vékás, *Autonome Angleichung an das Gemeinschaftsprivatrecht und das EU-IPR* in Ungarn. (IPRax 20, 2000).

The only implementation made within the Code (that of the Directive on Unfair Terms in Consumer Contracts Regulations), unfortunately, violates the coherence of the Code.

Last but not least, the achievements of judicial practice and domestic and international legal literature have to be mentioned because many of them are ripe for incorporation into the Code.

C. It is Possible and Necessary to Make a Civil Code for the 21st Century within the Framework of a National Legal System

(a) Has the codification, i.e. the code making, as a rationally planned, coherent systematization of legal norms kept its timeliness at all? Can the existence of a civil code be justified?

The scientific basis of the great classical civil codes of the 19th century was elaborated in the late 17th and 18th centuries. These codes had something in common. Despite the significant differences between them and the social circumstances behind them, they were made under the urge of the liberal bourgeoisie and with the purpose of strengthening the endeavour for national unity.[7] The idealized social model of the classical codes has put sooner or later a great burden on judicial practice: it was the judiciary, supported by legal sciences, which had to adjust the civil law to the rapidly changing reality of the late 19th and the 20th centuries.

The question is whether the radical changes of the original idea concerning the model of society since the creation of the classical civil code have dissolved the grounds for any codification? In the opinion of many, the time of the great comprehensive codes is over, codification, as a way of legislation, is out of date. This statement is usually based on the fact that the social stability allowing the necessary foresight required for codification is missing because of the radical changes in society and the unpredictability of the direction of development. Also relations within modern welfare societies are so complex that their legal rules cannot be fixed decades ahead. That is why the legislator – reflecting the complexity of civil relations, their fast changes and partly with the intent of escaping political liability – is hyperactive: more and more rules and more and more special rules are enacted. In many cases social relations seem to be atomized; therefore, they can be regulated only in their segments, separately. The general principles of the civil law seem to be hardly

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[7] See F. Wieacker, *Privatrechtsgeschichte der Neuzeit* (Göttingen 1967, 2nd ed.) at pp. 458 *et seq.*

enforceable and without such organizing principles the codification is more than questionable.[8]

However, these arguments may be reversed. The specific social conditions (and hypotheses) of codification in the 19th century have certainly passed for a long time. The ideology of the ambitious bourgeoisie is irretrievable; furthermore, it had its social support only for a short period. The historically overdue nation-state ambitions (e.g. in Eastern and Southern Europe) may and do give some political impetus to codification. However, they are insufficient in themselves if the above factors from the opposite direction prove to be well-founded. However, it has to be examined whether the duly abstracted and systematized, i.e. codified legal norms, are not more appropriate to the fast changes of life than a confusingly detailed and immense mess of casual rules? 'Accelerating times' and globalization are actually inherent phenomena of our society, though the last century, the century of great codification pieces, can hardly be said to have been stable. The democratic political system requires legal security. This requirement can be fulfilled more effectively by a code of high quality than by the immense flow of new legal norms.[9]

Looking at codification in the last decades, the examples are encouraging. The most frequently mentioned example of modern codification is the Dutch Civil Code. Similarly comprehensive civil law codification pieces were successful in other countries, namely in Portugal (1967), Québec (1994) etc.

Therefore, comprehensive codification is not at all obsolete, history has only passed the ideological and political views that gave the impulse for the creation of the classical codes. What has remained is the demand for a legislative solution in which the legal norms of homogeneous, or similar legal methods, are collected into a coherent system which is based on uniform terminology thus enabling the legislator to use rational shortenings, and satisfying the demand of practitioners and private users for a clear structure of legal norms. In the present author's view codification is more than justified by these reasons.

(b) So far comprehensive civil law codification has come into being in the framework of the nation-state, moreover, the disintegration of the common civil law in continental Europe based more or less on Roman law (*Gemeines Recht*) was crowned and finished by the codes of the 19th century.

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[8] See F. Wieacker, Aufstieg, Blüte und Krisis der Kodifikationsidee (Bonn 1954) at pp. 34 *et seq.* (pp. 47 *et seq.*); W. Fikentscher, Methoden des Rechts Bd. IV (München 1977) at pp. 135 *et seq.*; F. Kübler, 'Kodifikation und Demokratie' in (1969) 24 *JZ*, at pp. 645 *et seq.*; U. Diederichsen, *Die Flucht des Gesetzgebers aus der politischen Verantwortung im Zivilrecht* (Karlsruhe 1974); J. Esser, 'Gesetzesrationalität im Kodifikationszeitalter und heute' J. Vogel and J. Esser (Hrsg.), in *100 Jahre oberste deutsche Justizbehörde* (Tübingen 1977) pp. 13 *et seq.* (pp. 31, 37 *et seq.*); A. Heldrich, *Normüberflutung, Festschrift Zweigert* (Tübingen 1981) pp. 811 *et seq.*; Boerlin, Keller and Zummstein, 'Die Normenflut als Rechtsproblem' in *Trappe (Hrsg.), Grundfragen der Rechtssetzung* (Tübingen 1979) pp. 295 *et seq.*

[9] See K. Schmidt, *Die Zukunft der Kodifikationsidee: Rechtsprechung, Wissenschaft und Gesetzgebung vor den Gesetzeswerken des geltenden Rechts* (Heidelberg 1985).

The 20th century marked the starting point of a process of harmonization and unification of private and commercial law. However, the unification has remained limited to fragments of civil law. Among social relations organized by the classical civil law, unification was accomplished mostly in the field of new problems or problems examined from a new legal approach, such as product liability and consumer protection. The national characteristics of the hard core of the law of obligations have not lost their colour, let alone the provisions of property law, family law and law of succession linked strongly with local traditions.[10]

Up to now the unification of private law rules within the Member States of the EU,[11] recently extended to other states by the association agreements, has created only little islands in the sea of national laws. The accelerating unification at the end of the century has not changed the century-old tradition that civil law legislation happens in a nation-state framework and the unified law has conquered only segments of the legal system. Today it is out of question that any European state would think about giving up its national code in favour of the European integration of civil law. Such an idea would be even absurd in the present fragmented state of common European civil law.

From the point of view of the projected Code it may be an advantage that Hungary's Civil Code in force – with its 40 years of age – is considered young. Hungary's judicial practice did not have sufficient time to become hardened as did those of the century-old codes. This situation may – as it often happened in history – offer 'the advantage of the late-comers' and contribute – apparently in a paradoxical way – to the success of codification. It is useful to learn from the positive or negative examples of other legal systems. Hungary may escape the pitfalls and, above all, there is no intellectual ballast which a 100 or 200 year old code with its legal practice and legal literature may put unavoidably against the reform.

The fact that the Code is to be made within a national framework does not release the legislator from the obligation to implement the unified law and to participate in the ongoing unification process. This is a very noble and proper endeavour and Hungary must participate in its successive realization.

D. The New Civil Code Should be Based on the Model of Social Market Economy

The objectives of social policy in Hungary since 1990, and the constitutional guarantees for their realization, are based on the widespread model of social

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[10] See howewer A. Hartkamp *et al.*, *Towards a European Civil Code* (Nijmegen 1998, 2nd ed.).

[11] See P.-C. Müller-Graff, *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (Baden-Baden 1999, 2nd ed.); M. Paschke, *Europäisches Privatrecht* (Hamburg 1998).

structure in today's advanced Europe, above all in the Member States of the EU: on the model of social market economy. This is the reason why the new Civil Code shall follow this objective.

In private law regulations, the social model of market economy means first of all the recognition of private property and private autonomy. This leads to further classical pillars of civil law: the general, equal and unconditional legal capacity and the principle of freedom of contract. These pillars of civil law have to be safeguarded even today and their limitation may be justified only in the case, and to such extent, as it is required by the social justness and if the limitation does not violate the basic conditions of free market competition.

The means of limitation of the private autonomy and the freedom of contract may be – in civil law – the requirement of transactional fairness. First of all the requirement of good faith and fair practice, the requirement of reciprocal disclosure of relevant information in a wide range of cases and – if the previous provisions are insufficient – the extraordinary possibility of legal (judicial) intervention into the content of civil law relations. The latter intervention may be achieved by mandatory rules – as an exception from the principle of deviation permissive (*non cogens*) regulation – and by judicial control concerning the content of civil relations (e.g. in the case of contracts concluded on the base of standard forms).

The civil law limitations of social purpose based on the ground of ethical influence (e.g. the protection of the consumer and the so-called weaker party) must be in conformity with the preconditions of the free market so as not to jeopardize the requirement of equality in competitive markets (e.g. an overstrained system of product liability or the introduction of a general insurance system would be contrary to the free market).

E. The Renewed Civil Law Regulation Should Meet the Needs of a Code

The Code is the comprehensive systematization of all norms relating to the relations regulated by homogenous legal methods and it summarizes the whole material of a given field of law in a logically consistent, clearly arranged way without unnecessary repetition in a closed unit. The Code is not a compilation of rules, that is, a leather-bound collection of existing rules. Neither is the Code a framework referring to separate laws, which has the only function to indicate – as a compass – the unexpressed inter-connection of the given field of law. Therefore, the main merit of a code is not the fact that the practitioners and private users are able to find the neighbouring norms physically at the same place, though this advantage is not to be underestimated. Code making enables the legislator to gather as much as possible, by applying concepts abstracted on an adequate level and by establishing the system of different norms being in relation of generality and speciality. In addition, this is

the best way to create the unity of regulative, systematic methods and that of terminology within a coherent system of norms. Code making is the legislative work requireing the highest demands with extraordinary standards. The new civil law regulation should be created as a code in the real sense of the word.

Concerning the level of abstraction of rules, it has to be decided whether the new Code should include – like the German BGB – a general part which puts, inter alia, the juristic act to the beginning of the Code. Another, more adequate solution is provided by the Dutch Civil Code: its Third Book comprizes general rules of property law, the law of obligations and the law of succession. The general chapter of the Dutch Civil Code includes rules about disposing capacity, juristic acts, and their validity, representation, transfer of 'goods' (movable, real estate, negotiable instruments, etc), limitation, usucaption, possession and *detentio*, personal servitude, mortgage and joint ownership of rights. Neither the German BGB nor the Dutch Civil Code seem to be a structural solution to be copied by the new Civil Code. However, both of them consist of elements which are useful for Hungary to adopt in order to eliminate the structural deficiencies of the Civil Code in force: for instance to find the place of the rules about juristic act, mortgage, limitation; the rules about abstraction of 'goods' and about their transfer are well-worth taking into consideration.

F. The New Civil Code Should Cover the Widest Possible Range of Civil Law Norms

The broader the scope of norms which are codified, the greater the benefits which may be achieved. Therefore, the scope of the new Civil Code should be enlarged – in principle – to such an extent that all the positive effects of codification (first of all the methodological homogeneity of integrated norms, terminological unity and the possibility of gathering and shortening) may be realized. The extension of the scope of the Civil Code may be limited by a different regulative method of the given field of norms (e.g. procedural or administrative rules). It also has to be borne in mind that an excessive extension may jeopardize the perspicuity of the system.

Arguments based on traditions, customs or the origin of the norms from international conventions shall be accepted under reserve, since they are often attributable only to eventuality and not based on due consideration, and in most cases cannot be justified by material reasons. All these factors require a thorough analysis in each case because Hungary has to set herself the aim of the creation of the most possible comprehensive code. (As an example the Dutch Civil Code, which is doubtless the most successful codification of the last decades, may be referred to, which ranges from the personal and family law through the classical field of the law of goods to business companies and commercial transactions. Moreover, it is

planned to comprise the law of intellectual property and international private law in further two books.)

Hence it follows that further studies have to examine whether the following fields of law can be incorporated into the new Code:

(1) family law;[12]
(2) intellectual property law (copyright, patent law and trade mark law);
(3) company law;
(4) substantive law of securities;
(5) law of labour contract.

G. The New Civil Code Should be Based on the Principle of Monism, i.e. it Shall Cover Commercial Transactions

The authoritative foreign examples prove that the time of separate regulation of commercial transactions has been over for at least 100 years. The recent examples of some East-European countries are not decisive.

It was the Swiss Act on Obligations which first put an end to the separation of commercial transactions, and instead 'commercialized' the entire law of contracts. Such a reform could be justified by the development of skills and experience in commerce and education of the people at large. The new Dutch Civil Code has adapted the same concept.

The specific types of contracts of professional business may be integrated into the modernized law of contract – their separate 'commercial private law regulation' is unnecessary. This is proven by the history of the commercial codes of the last century: the special contractual rules of commerce have lost ground step by step. The development of law in the 20th century makes it clear that contracts in business life do not require separate regulation from a modernized general civil law. It also has to be borne in mind that even the subjects of the professional business life (companies, etc) enter into 'non commercial' contracts in many cases.

The concept of monism has the further advantage that the general part of the Code, the general rules about juridic acts and contracts, relate to the commercial transactions too; therefore, it is unnecessary to double – even partially – these rules in a commercial code.

The problem of consumer protection is a special issue that can not be evaded in the case of a dualistic system either, *viz.* in separating regulation of commercial transactions.

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[12] See E. Nizsalovszky, *Order of the Family* (Budapest 1968).

H. The Regulation of the Consumer Protection in the Civil Law Shall Comply with the Requirements of the European Union

The means of civil law for consumer protection shall be inserted into the new Civil Code. This requirement shall be fulfilled even in the case of the directives of the EU implemented into Hungary's legal system by separate laws. The provisions of product liability can be inserted into the chapter on tort liability. The particularities of the so-called distance contracts may be dealt with among the general rules of contracts; the norms of the consumer credit, the travel contract and the time-sharing contracts may be fit into the chapters on the specific contracts. The real problem will be how an organically structured code would be able to adopt the fragmented legislation of the EU (already today streaming e.g. in the field of consumer protection) in the future.

Attention must be called to the fact that many requirements of the civil law (e.g. requirement of reciprocal disclosure of relevant information), that were formulated under the slogan of consumer protection, can be, as a matter of fact, conceived as general rules of contracts.

I. In the Elaboration of the New Civil Code both the Separate Civil Law Acts and Judicial Practice Should be Taken into Consideration

A significant part of the material of the civil law can be found today in separate laws or have been formed in the judicial practice. In the course of drafting the new Civil Code all the material of civil law has to be taken into consideration and – fulfilling the requirement of the comprehensive codification – inserted into the new Code, as far as possible. The new Code will provide for the civil law rules remaining in separate laws with supporting background norms of subsidiary nature. The conformity of the contents and terminological unity between the new Civil Code and the separate laws shall be established. It has to be emphasized that administrative executive norms shall be attached to the future Civil Code only in extraordinary cases (e.g. neighbouring rights). It is a very important task to scrutinize the judicial practice critically and to implement its results, since the gaps of the Civil Code were filled by the judge made law and the legal practice revealed (and corrected) the deficiencies of the Code. The judgments concerning the problem of the use and termination of joint ownership and warranty may be referred to as examples from several judgments in the field of property law, law of obligations and law of succession.

The two century long history of the great codification should alert one to the fact that even the most successful codification may be effective in the long run only with

the expressed acceptance of judge made law. Therefore a large scope must be offered to judicial practice to be able to develop the legal system by filling the unavoidable gaps of written norms. A judicial practice of high standards is able to correct the 'amortization' of the Code. In the case of a Code created in such a way, the legislator has to rectify the Code only because of real social, ethical or ideological changes, as it occurred in family law in the second part of 20th century (exceptionally first in the Eastern and later in the Western part of Europe).

J. The New Civil Code Does not Follow any Specific Foreign Model, but Several Foreign Examples May be Relied Upon

Comprehensive codification has always relied on foreign examples. That too has happened in the history of the Hungarian civil law codification: the drafts at the beginning of the century followed mostly the Austrian and the German Codes, the draft in 1928 similarly followed the Swiss ZGB.

Among the latest codes made in a national framework, the Dutch Civil Code can be considered as the most modern and, therefore, as the best model in many aspects. International conventions are additional models – mostly in the field of contracts. First of all, the Vienna Sales Convention is worth studying. In spite of many compromises, it has a reputation of achieving high standards, many of its provisions seem to be adequate. In addition, it has the advantage of being widespread (in about 50 states). However, it also has to be taken into account that its provisions are intended to deal with international (and not domestic) sales contracts.

The reform of the Hungarian law of contracts should also rely on the recent privately elaborated and published restatements: UNIDROIT Principles of International Commercial Contracts (1994) and The Principles of European Contract Law (1997).[13] These outstanding drafts have received great professional approval. They influence the international legal practice in various ways: as models of national and international legislation, in the course of negotiations to conclude contracts, chosen as applicable law in contracts, referred to in lawsuits and judgments, etc.

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[13] See (1998/1999) 1:3 *European Journal of Law Reform* pp. 345–363, and pp. 365–393.

K. Simultaneously with the Preparation of the Code, Registration, Procedure and Enforcement of the Realization of the Civil Law Rules are to be Modernized

The effect of even the most successful codification may break down, if the necessary procedural conditions leave much to be desired. Therefore, the reform of the judicial structure and the civil procedure has to be accomplished soon. The modernization and the guarantee of authenticity of registers with constitutive effect on individual rights (first of all that of the land register) are even more urgent. The strengthening of the proceeding of distraining is essential as well.