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Development of Private Law in European Context



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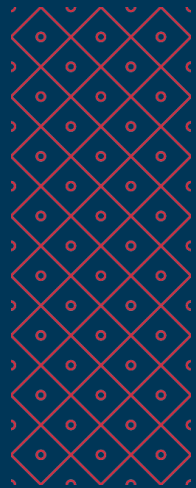


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Chapter 1

Fundamental notions



Jean-Étienne-Marie Portalis:

« De bonnes lois civiles sont le plus grand bien que les hommes puissent donner et recevoir; elles sont la source des mœurs, le palladium de la propriété et la garantie de toute paix publique et particulière: elles le maintiennent; elles modèrent la puissance et contribuent à la faire respecter, comme si elle était la justice même. »

“Good civil laws are the greatest good that men can give and receive; they are the source of morals, the palladium of property, and the guarantee of all public and private peace: they maintain it; they moderate power and contribute to its respect, as if it were justice itself.”

Portalis, J.-É.-M.: Discours préliminaire du premier projet de Code civil, 1801, p. 13.



Fundamental notions: law X right

Q: Is there a difference between law, and right?



Fundamental notions: law X right

Q: Is there a difference between law, and right?

Distinguish:

law =

a set of legal norms (rules of conduct) that are

- binding
- enforceable (by the authority of the state) and
- constitute the legal system of a given state

X

right =

the extent (and manner) of allowed (permissible) behaviour

the subject may or may not choose to exercise it

= entitlement



Fundamental notions: law X right X duty

Q: What is (legal) duty?



Fundamental notions: law X right X duty

Q: What is (legal) duty?

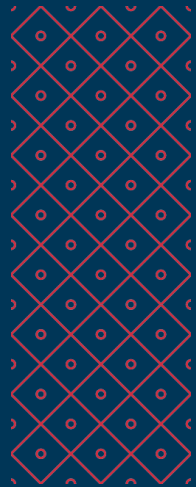
it is an opposite of right

the extent (and manner) of **necessary** (prescribed) behaviour

Right of one subject usually corresponds to a duty of another subject

e. g. the right of a creditor to ask for some performance === the duty of a debtor to perform

X ownership = absolute right = no corresponding duty



Chapter 2

Division of Laws



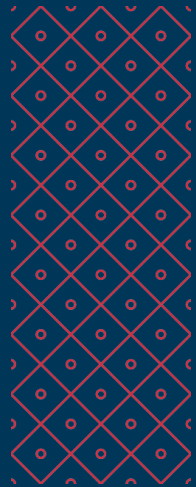
Division of Laws

Different criteria to be applied:

subject-matter of regulation: Substantive (material) **X** Procedural (formal)

geography + historical development: Continental **X** Anglo-Saxon **X** Islamic
(large legal systems)

the nature of subject involved: Private **X** Public



Chapter 3

Private and Public Law



Private and Public Law

Origins in ancient Roman Law:

“Publicum ius est quod ad statum rei romanae spectat, privatum quod ad singulorum utilitatem...”

D. 1, 1, 1, 2 (Ulp. 1 inst.)

“Public law is that which has reference to the administration of the Roman government; private law is that which concerns the interests of individuals...”



Private and Public Law

Origins in ancient Roman Law:

*“**Huius studii duae sunt positiones**, publicum et privatum. Publicum ius est quod ad statum rei romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim. publicum ius in sacris, in sacerdotibus, in magistratibus constitit. Privatum ius tripartitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus.”*

D. 1, 1, 1, 2 (Ulp. 1 inst.)

*“**This study has two divisions**: public and private. Public law is that which has reference to the administration of the Roman government; private law is that which concerns the interests of individuals; for there are some things which are useful to the public, and others which are of benefit to private persons. Public law has reference to sacred ceremonies, and to the duties of priests and magistrates. Private law is threefold in its nature, for it is derived either from natural precepts, from those of nations, or from those of the Civil Law.”*



Private and Public Law

Different theories to distinguish between private and public law...

Interest Theory

Public interest, common good vs. individual interest

Power Theory (Theory of Subordination)

Subjects are in superior-subordinate relationship vs. subjects have equal (legal) status

Organic Theory (German: Subjektstheorie)

At least one subject acts as a sovereign public authority

(this subject is endowed with powers, organisation and responsibility)

Private and Public Law

Features of Public Law

Involves public interest

One subject has superior status over another

At least one subject exercises public authority

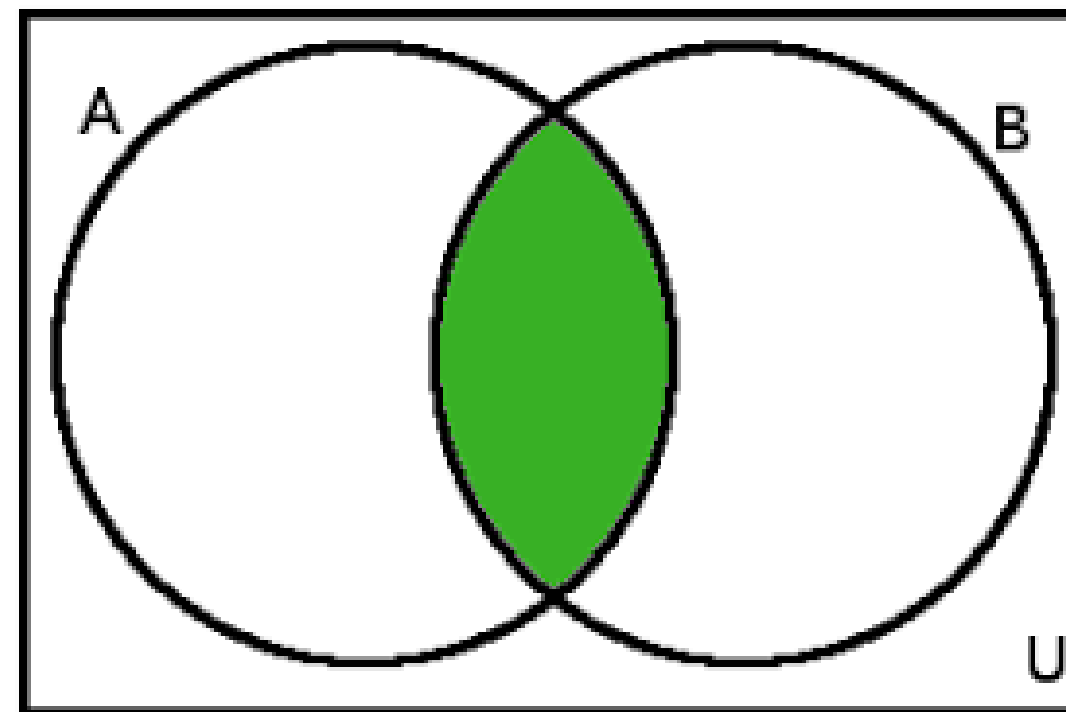
X

Features of Private Law

Public interest not involved

Equal status of subjects

Relationship between individuals





Private and Public Law

This division is deeply rooted in Czech jurisprudence – it is reflected also in Civil Code:

Sect. 1 para 1:

The provisions of the legal **order governing the mutual rights and duties of persons together constitute private law**. The application of **private law** is **independent** of the application of **public law**.



Private and Public Law

The legal system is unified and should be internally coherent

= Private and public law are not two separate (independent) sets

*“Today, private and public law **are not separated by a ‘Chinese wall’**. There is increasing and closer intermingling, combination, and mutual influence of private and public law elements.”*

Constitutional court of the Czech Republic, Case No. Pl. ÚS 33/2000



Private and Public Law

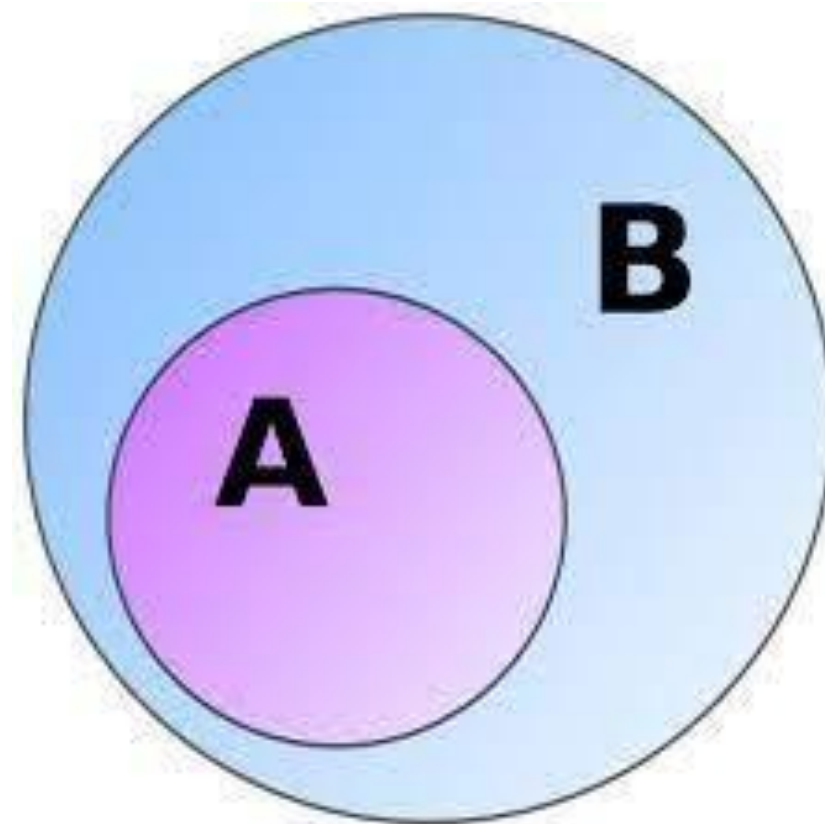
The Supreme Administrative Court proceeds from the thesis that public and private law in modern society **are not two worlds separated by a ‘Chinese wall’**, in which entirely and fundamentally different rules apply, **but rather two spheres of a single, essentially unified and coherent legal order**. The relationship between private and public law is understood by the Supreme Administrative Court in accordance with prevailing doctrinal trends of recent times [...] **as a relationship between general and special law**. [...] **private law governs the rights and obligations of legal subjects regardless of their specific nature in terms of their role in exercising public authority** (in this sense, the state has the same status in private law as any other legal or natural person); whereas public law comprises such a subset of all legal relationships that is characterised by the fact that at least one of its subjects exercises public authority

Supreme Administrative Court of the Czech Republic, Case No. 2 As 50/2005

Private and Public Law

The theory of public law as special law to the ‘general’ private law is valuable in practice [...] **because it allows for the ‘subsidiary’ application of private law norms in public law where the public law regulation is missing or fragmentary**, and where it is unreasonable to conclude that the absence or fragmentariness of regulation has its own independent meaning and purpose.

*Supreme Administrative Court of the Czech Republic,
Case No. 2 As 50/2005*



Picture source: <https://www.hackmath.net/sk/priklad-uloha/3954> [visited 2025-12-30]



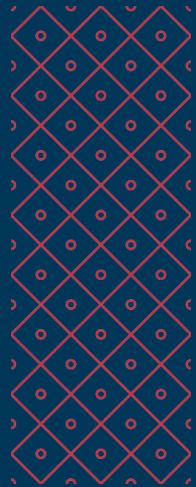
Private and Public Law – consequences of Sect. 1 para 1 CC

[...] The application of **private law** is **independent** of the application of **public law**.

Inspired by Sect. 3a para 1 (of repealed) Commercial Code (Unauthorised Undertaking):

The nature or validity of a legal act is not affected by the fact that a person is prohibited from conducting business or lacks authorisation to do so; [...]

Example: Lease agreement on lease of non-residential premises for residential use



Chapter 4

The Development of Private Law



The Development of Private Law – Roman Law

Ius civile (proprium Romanorum)

Law of Roman citizens (personality of law)

Based on the Law of the Twelve Tables, customs (*mos*) of ancestors

X

Ius privatum

Regulation of mutual relations through legal acts of individuals

Already in the Republic: all law relating to personal, family, property, and inheritance relations, including part of procedural (formal) law



The Development of Private Law – Middle Ages

Particular Character of Law:

Personal (Estate-based)

Nobility **X** Burghers **X** Clergy

Land law **X** Municipal law **X** Ecclesiastical (Canonical) law

Local (geography)

Bohemia **X** Moravia

Bohemian **X** Moravian land law

Magdeburg **X** South German municipal law



The Development of Private Law – Middle Ages

Unification Efforts – Municipal Law takes the lead

1548: Appellate Court (Council of Appeals, *consilium apellationum*; Frederick I of Habsburg)

Pavel Kristián of Koldín: Municipal Law of the Kingdom of Bohemia

Influence of Roman law

Subsidiarity of Municipal Law also in the Renewed Provincial Order of 1627 (*Verneuerte Landesordnung des Erbkönigreichs Böhaimb*), 1628 (*Verneuerte Landes-Ordnung des Erb-Markgrafthums Mähren*)



The Development of Private Law – Codex Theresianus

1753: Maria Theresa

3 Parts (Personal Law, Property Law, Obligations)

Subjected to criticism

Served as a basis for further work

Enlightenment = the **absolutist monarch** voluntarily limits his power



The Development of Private Law – Codex Theresianus

“All law is based on the following: To live honourably, to harm no one, and to give each person what is theirs, for it is precisely this that creates justice, which is the goal and outcome of all laws. [...]

Above all, this is **natural law** (*ius Naturale*), which reason alone leads man to cultivate good and condemn evil. This law was instilled in man by **LORD GOD** [...]

Theory of natural law of supranatural origin – it originates from Lord God.



The Development of Private Law – Other European Codifications

Codex Maximilianeus Bavaricus Civilis (1756)

Das Allgemeine Landrecht für die Preußischen Staaten

(1794, ALR – General Land Law; codification of almost the entire legal system)

West Galician Code (1797, “experimental”, to be tried before ABGB)

Code civil des Français (1804)

Main ideas: Natural law; liberty, equality, fraternity (*liberté, égalité, fraternité*)



The Development of Private Law – ABGB

Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie

Main author: Franz von Zeiller

Promulgation patent no. 946/1811 dated 1 June 1811

Effective from 1 January 1812

§ 16: “Every human being has **innate rights, recognisable by reason**, and must therefore be regarded as a person. Slavery or serfdom and the related exercise of power are not permitted in these lands.”

Influence of Roman law and natural law theory

Natural law which can be recognised by reason itself – no more supranatural origin.



The Development of Private Law – ABGB

Does not contain regulation of political rights or procedure

General applicability, uniformity – applies to:

all Austrian lands

all persons (except military status)

Completeness, exclusivity

repeals older private law regulations

customs recognised only if referred to by law (§ 10)

does not recognise judicial law-making (§ 12)



The Development of Private Law – BGB

German Pandectism

1896, effective from 1 January 1900, BGB

1st Book: General Part (§ 1–240)

2nd Book: Obligations (§ 241–835)

3rd Book: Property Law (§ 854–1296)

4th Book: Family Law (§ 1297–1921)

5th Book: Inheritance Law (§ 1922–2385)

Influence on legal regulation in Greece, Japan



The Development of Private Law – Swiss Civil Code (ZGB)

1907, effective from 1 January 1912, ZGB

Introduction (Art. 1–10)

Part One: Law of Persons (Art. 11–89)

Part Two: Family Law (Art. 90–456)

Part Three: Inheritance Law (Art. 457–640)

Part Four: Property Law (Art. 641–977)

Part Five: Law of Obligations / Federal Act supplementing the Swiss Civil Code (Art. 1–1186 OR)

“Commercialised Civil Code“

Influence on legal regulation in Italy, Netherlands, Turkey



The Development of Private Law – the Czech Republic

Part of A-H Empire

1811 ABGB (Austrian General Civil Code)

The 28th October of 1918

Czechoslovakia founded as new democratic state

No. 11/1918 Coll. „Reception Act“

Private law of A-H Empire taken over to be private law of Czechoslovakia

= Two regions with totally different private law

Czech part = ABGB

Slovak part = mostly legal customs

(+ Hlučínsko region: BGB in force)



The Development of Private Law – the Czech Republic

= a need for new codification unifying the private law for the whole country

Draft finished in **1937**, but not adopted (1938 and WWII)

1948 communist turnover = Czechoslovakia no more democratic state (absolute power of communist party, restrictions of political freedoms, of ownership, expropriations...)

“Two years plan” in the branch of law (to simplify the law, to make it easy to understand for the „working class“) – **outcomes:**

No. 265/1949 Coll. = Act on Family Law

No. 141/1950 Coll. = Civil Code



The Development of Private Law – the Czech Republic

1960: New constitution (“socialistic”)

No. 94/1963 Coll. = Act on Family

No. 40/1964 Coll. = Civil Code

1969: Unitary state of Czechoslovakia turned into federation (from 1st January 1969)

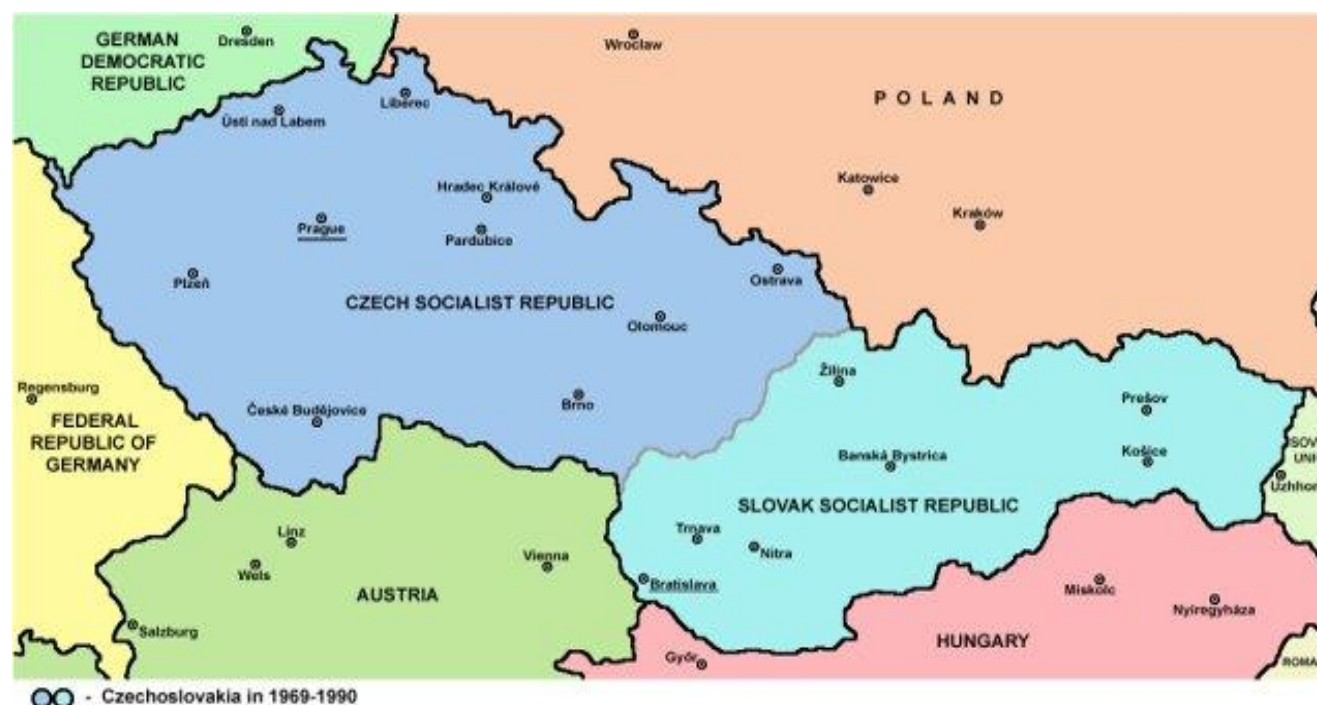
1989 = “Velvet revolution” (17th November)

end of totality

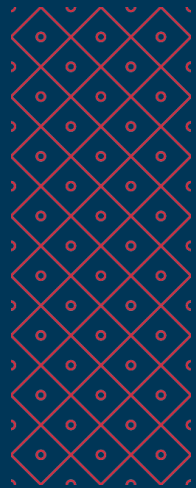
= Czechoslovakia returns to **principles of democracy and rule of law** (incl. the respect to fundamental human rights and freedoms)

The Development of Private Law – the Czech Republic

Federation ends on the 31st of December of 1992. From the **1st January of 1993** The Czech Republic and the Slovak Republic are independent subjects of international law.



Picture source: https://cs.wikipedia.org/wiki/Soubor:Czechoslovakia_cs.png [visited 2025-12-30].



Chapter 5

Civil Code of the Czech Republic



Civil Code of the Czech Republic

No. 89/2012 Coll. = Civil Code

In force from **1st January of 2014**

Number of sections: 3081

Inspired by:

- 1) ABGB + Draft from 1937
- 2) Civil codes of France, Germany, Switzerland, Italy, Spain (+ Quebec)
- 3) law from 1949-1989

Prepared during 2001 - 2011



Civil Code of the Czech Republic

Basic structure follows **three key institutions of private law**

Family (marriage)

Ownership

Contract

The structure reflects the value orientation of the draft (human being is in the centre)



Civil Code of the Czech Republic – structure

I. General Part

General provisions, persons, legal facts, etc.

II. Family Law

Marriage, parents and children, substitute care etc.

III. Absolute Property Rights

Ownership rights, rights in rem to another's property, inheritance law

IV. Relative Property Rights

Obligations (especially from legal acts, torts) (obligations *ex contractu*, *ex delicto*)

V. Common, Transitional and Final Provisions



Civil Code of the Czech Republic – structure

Continuity and Discontinuity of Substantive Solutions in the Civil Code:

Goal: To build a private law code comparable to standard codes of European legal culture

Means: Discontinuity where necessary due to the state of previous legal regulation
(i.e., discontinuity is not a goal in itself, but a rational means to achieve the set goal)

Continuity: Family law, obligations

Discontinuity: e.g. inheritance law



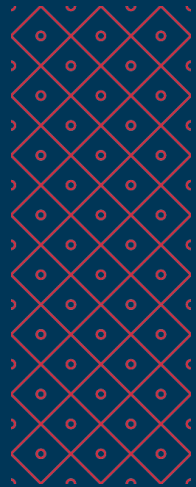
Civil Code of the Czech Republic – structure

Value orientation of the 2012 Civil Code:
(the “spirit“ of the Code)

1) Respect for Human Freedom

2) Emphasis on Responsibility for One’s Own Actions

The Civil Code is not value-neutral



Chapter 6

Civil Law as General Private Law



Civil Law as General Private Law

Internal Structure of Private Law Branches

Civil law = general private law

(it is generally applied to all subjects of law)

X

Special private laws

(it is applied only to particular subjects of law)



Civil Law as General Private Law

Special private laws (especially):

Corporate Law

Act No. 90/2012 Coll., on Commercial Companies and Cooperatives (Business Corporations Act)

Labour Law

Act No. 262/2006 Coll., Labour Code

Intellectual Property Law

Especially Act No. 121/2000 Coll., on Copyright, Rights Related to Copyright and Amendments to Certain Acts (Copyright Act)

Private International Law

Act No. 91/2012 Coll., on Private International Law



Civil Law as General Private Law

X Distinguish – procedural (formal) sources of law = a part of **Public Law** (not a part of Private Law!)

Act No. 99/1963 Coll., Civil procedure code (litigation)

Act No. 292/2013 Coll., on Special Judicial Proceedings (non-adversary proceedings; non-litigious proceedings)

Act No. 120/2001 Coll., on Bailiffs and Enforcement Activity (Enforcement Code)

Act No. 182/2006 Coll., on Bankruptcy and Methods of its Resolution (Insolvency Act)



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Relevant provisions of Czech Civil Code:

Sect. 1

Case law:

CZ: CC Case No. Pl. ÚS 33/2000

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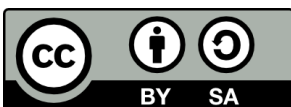
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