

Protection of Personal Rights in the Czech New Civil Code

I Introduction – the New Civil Code Structure

The New Civil Code¹ (hereinafter ‘NCC’) is based on the principles arising out of the *ius naturalis* approach. Natural rights are protected under the Czech Charter of fundamental rights and basic freedoms² following the Universal Declaration of Human rights and European Convention of Human Rights.³ The protection of dignity and freedom of an individual and their natural right to pursue their own happiness and the happiness of their family or people close to them in a way that does not unjustifiably harm others is the proclamation of the aim, purpose and basis of interpretation of the Civil Code. Demonstratively, the main principle is that everyone has the right to protect their life and health, as well as freedom, honour, dignity and privacy.⁴

In comparison to the previous Civil Code, Act No. 40/1964 Coll., the NCC, in respect of personal rights, does not constitute a diversion from the basis of protection. The NCC continues the established rules and follows case law. It provides a comprehensive overview of personal rights, exemptions and remedies in much more detail. The scope of the provisions compared to previous act has been significantly increased, from four articles to almost sixty.

The protection of personal rights is regulated in the General Provisions of Art. 81 – 117 NCC. One’s name is protected in Art. 77 – 80 NCC. Remedies are stated in the part related to obligations arising from the tort in Art. 2951 – 2971 NCC.⁵

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¹ Act No. 89/2012 Coll. in force 1.1.2014.

² Act No. 2/1993 Coll.

³ The explanatory memorandum of NCC, p. 34.

⁴ S. 3 NCC.

⁵ Complementary protection is to be found in the Press Act, Act No. 46/2000 Coll., the Radio and Broadcasting Act No. 231/2001 Coll. and the Data protection Act No. 101/2000 Coll. The liability of Internet service providers is stated in the Information society services Act No. 480/2004 Coll. Defamation is subject to the public law as well. Criminal libel is a crime under the s 184 of the Czech Criminal Code, Act No. 40/2009 Coll.

II General Clause with Demonstrative Listing of Personal Rights

The Czech Charter of Fundamental Rights and Freedoms provides for privacy rights protection. It provides for the general protection of the inviolability of the person and of their privacy, which may be limited only in cases specified by law. Article 10 states, '(1) everybody is entitled to the protection of his or her human dignity, personal integrity, good reputation, and his or her name. (2) Everybody is entitled to protection against unauthorised interference in his or her personal and family life. (3) Everybody is entitled to protection against unauthorised gathering, publication or other misuse of his or her personal data.' Article 13 states, 'Nobody may violate the secrecy of letters and other papers and records, whether privately kept or sent by post or in another manner, except in cases and in a manner specified by law. Similar protection is extended to messages communicated by telephone, telegraph or other such facilities.' These fundamental rights are subject to specification in the Civil Code. The previous Act provided a general clause in Article 11, which states, 'An individual shall have the right to the protection of his or her personality, in particular of his or her life and health, civic honour and human dignity as well as of its privacy, name and expressions of personal nature.' It is followed by Article 12, which described specific cases in respect of those records with a depiction of the person. The NCC created minor changes to the principle but followed a new pattern derived from the case law. The NCC states⁶ that the human personality including all its natural rights, is protected. Everyone is obliged to respect the free decision of man to live on their own. Life and dignity, health and the right to life in a comfortable environment, esteem, honour, privacy and expressions of a personal nature are the main items protected.⁷ The expressions used are more vague and the demonstrative listing of personal rights has been slightly amended. However, rights that European Court of Human Rights constantly emphasised are missing, specifically the right to family life.

1 Right to Name⁸

The name of an individual is composed of his given name and surname and his other names, where applicable, and surname at birth which pertain to them by law. Every individual has the right to use their name in legal transactions, as well as the right to the protection of and respect for their name. The NCC newly provides protection for pseudonyms⁹ on the condition that the assumed name becomes widely known.

If the individual whose rights have been infringed is absent or lacking legal capacity, the right to bring the claim to protect the right to name must be by their spouse, descendant, ancestor or partner, unless they made their intention to the contrary expressly clear.

⁶ S 81 NCC.

⁷ J. Švestka, J. Dvořák, J. Fiala a kol.: r. *Občanský zákoník. Komentář. Svazek I.* (Wolters Kluwer, a. S. 2014 Praha) 285.

⁸ S 77–79 NCC.

⁹ So far protected only by provisions of the Copyright Act, Act No. 121/2000 Coll. and the Trademark Act, Act No. 441/2003.

The new institution is the family name. In the event of an infringement of the family name and the family interest, protection may be individually claimed by the spouse or another close relative.

The finally innovation in the area of right to name is the entitlement of legal entities¹⁰ to bring a claim in the event of an infringement related to the person whose activities are connected with the company.¹¹

2 Image Rights¹²

The concept of protection is based on the autonomy of will and freedom to decide whether one allows a picture to be taken and consents to the images to be distributed. If anyone consents to having their image captured under circumstances which make it evident that the image will be distributed, they are conclusively presumed to also consent to its reproduction and distribution in the usual way, as they could reasonably expect under the circumstances; however, they may withdraw their consent anytime, even when granted for a definite period.

According to the ECHR case law, the image right is protected even outside the intimate sphere.

In accordance with established principles in the previous Civil Code, the NCC stipulates legal licences and exemptions from the required consent.¹³

Consent shall not be required if the documents of a personal nature, pictures and image and sound recordings are to be used for official purposes on the basis of a law. The official purpose is also the situation when a person acts in a public interest matter.

Image, pictures and sound recordings may be taken or used without the proper consent of the individual also for purposes of science or art and for the purposes of press, motion picture, radio, television or other similar news services (Internet).

However, such use must be in accordance with the lawful interests of the person and must be proportionate.

The NCC creates a new legal licence for the purpose of use or to defend the rights of the perpetrator if they have a lawful interest.¹⁴ It aims in particular at unbalanced possibilities to use evidence in civil and criminal procedures, while in civil proceedings the parties cannot use illicitly gathered evidence, despite it showing the wrongful act, in court hearings.

3 Right to Privacy¹⁵

The private and intimate sphere is protected from all infringements without legal justification for such infringement. The Act provides a demonstrative listing of possible infringements.

¹⁰ S 83 par. 1 NCC.

¹¹ Švestka, Dvořák, Fiala a kol. (n 7) 305.

¹² Right to own image S 84–85, 87–90 NCC.

¹³ S 88–89 NCC.

¹⁴ S 90 NCC.

¹⁵ S 86, 90 NCC.

- disturb the private places of a person without their consent;
- monitor their private life;
- take an audio or video recording of their private life;
- use such a private recording or other recording of the intimate life made by a third party or to distribute such a personal recording to the public.

The NCC, liked the previous Code, does not differentiate between ordinary individuals and public figures. It is up to case law to apply the borders of the concurrent fundamental right of the right to speech. If there is interference into someone's private life, the legal justification and the act has to be proportionate and not in contrary to the legitimate interest of the person.¹⁶

4 Right to Family Life

As mentioned above, the general clause does not include the right to family life. The Constitutional Court however several times stated that family life is part of privacy and therefore is subject to the same protection. The right to privacy encompasses the protection of family life.¹⁷ From the subjective public rights perspective, it is also protected by the Article 8 of the European Convention on Human Rights and by Article 10 par. 2 of the Czech Charter of fundamental rights and freedoms. Article 32 par 4 of the Czech Charter guarantees parents the right to take care of their children and the right to raise them. The child is guaranteed by the same provision the right to be given parental custody and care. Article 8 of the ECHR primarily aims to protect the individual against the wilful infringement of the state, but it also imposes on the state the positive obligation of effective respect for family life. The Czech Republic was subject to eight ECHR decisions regarding cases when the parent who was entrusted with custody unreasonably denies the other parent the access to child infringes the personal rights of the other parent, particularly their right to family life and privacy.¹⁸ The European Court of Human rights emphasised that, after the end of the coexistence of the biological parents, the rights of the other parent (who does not provide full parental care) do not come to end. The parent has the right of access to their children. If the state does not ensure this right, the state violates the personal rights of the infringed parent.

III Post-mortem Protection of Personal Rights

Post-mortem protection in the previous Code was stated in Art. 15 of the Civil code and was asserted by their spouse (registered partner) or children or, if there is no spouse or children, to their parents. Those entitled person could bring their own claim if the statement or activity

¹⁶ Švestka, Dvořák, Fiala a kol. (n 7) 321.

¹⁷ *Niemitz v. Germany*, no. 13710/88, 16. December 1992. Similarly The Czech Constitutional Court finding No. II. ÚS 517/99 from 1. 3 2000 (N 32/17 SbNU 229).

¹⁸ *Pedovic v. the Czech Republic*, no. 27145/03, 18 July 2006; *Zawadka v. Poland*, no. 48542/99, 23 June 2005; *Koudelka v. Czech Republic*, no. 1633/05, 20 July 2006.

reflects on their own reputation and causes harm; it was possible to ask for a non-pecuniary damages. The NCC broadens the scope of the entitled person according to the German concept of close relatives (not only spouse or registered partner, children and, parents, but also grandchildren, siblings, brothers/sisters-in-law, and other close persons). The executor or the successors will be allowed to continue in action that has been raised by the claimant prior to his death. Monetary compensation will be inheritable.¹⁹

If the personal features of the Deceased are exploited for commercial use, according to Art. 3004, the plaintiff may recover twice the value of the plaintiff's profits that are usual in these circumstances (a similar legal basis as in the Copyright law).

IV Remedies

The substantial conditions for the civil remedy for damage caused by a violation of personal rights are set in Art. 2951–2971 NCC. The liability for the protection of personal right arises under three conditions. First, the unjustified infringement capable of causing moral damage must exist; second, the moral damages caused to the natural person must exist and, third, there is a causal connection between the infringement and damage to the personal rights.²⁰ Even if only one of the conditions is not met then liability does not occur. In each situation, one has to consider the severity of the declared infringement and whether the infringement oversteps what is admissible in such a way that it is no longer acceptable in democratic society. The Act does not specify the intervention nor serve the forms of infringement; the form might be passive or active, or even the omission of some duties might be considered as an infringement of personal rights. The infringement of personal rights is unjustified if it is contrary to the objective law. The violation must be assessed objectively with the consideration of the concrete situation, as well as of the person concerned.

In respect of non-material harm, there was a significant change in the legislation in terms of awarding damages. The previous Act preferred moral satisfaction as a primary remedy; pecuniary satisfaction was awarded if the moral form was not satisfactory. The NCC set a new rule that satisfaction must be provided in money unless real and sufficiently effective satisfaction for the harm incurred can otherwise provide satisfaction.²¹ Non-material harm newly includes mental suffering as well.²²

The NCC lacks the demonstrative listing of what constitutes moral satisfaction. In comparison to the previous code, it is however detailed in respect of the conditions that have to be considered by the court when determining adequate damages and, not expressively but in fact, establishes *aggravated damages* in the Czech legal system. The manner and amount of adequate satisfaction

¹⁹ S 83 par 2 NCC.

²⁰ Jiří Švestka, Jiří Spáčil, Marta Škárková, Milan Hulmák, a kol., *Občanský zákoník I, II. 2.* (CH Beck 2009, Prague) 186.

²¹ S 2951 par 2 NCC.

²² S 2956 NCC.

must be determined so as to compensate for the circumstances deserving special consideration, too. These circumstances shall mean causing intentional harm, including, without limitation, causing harm by trickery, threat, abuse of the victim's dependence on the tortfeasor, multiplying the effects of the interference by making it publicly known or as a result of discriminating against the victim with regard to the victim's sex, health condition, ethnicity, creed, or other similarly serious factors. Account is also taken of the victim's fear of loss of life or serious damage to health if such fears were caused by the threat or other causes.²³

The secondary victims principle, derived from case law, has been adapted into the NCC. Under special circumstances of an unlawful act, gross negligence, breach of an important legal obligation or damage caused intentionally from a desire to destroy, the perpetrator is obliged to pay pecuniary damages to any person who suffers due to the infringement of those in close proximity.²⁴

To present a complete overview of the possible remedies in the event of an infringement, a restraining order could be released as an additional means to both satisfactions. In the case of severe breach that is anticipated by the victim or has to be stopped, the court, prior to the trial, may issue a preliminary injunction if the situation of the parties must be temporarily adjusted or if there is a fear that the enforcement of the judgement could be endangered. In the interim injunction, the Court may order something to be done, that someone refrains from delays or continues doing something, or not to manipulate, according to the situation that is the subject of the application and serves the purpose the best. If required by the circumstances of the case, or if there is danger in delay, the presiding judge immediately announces the party to whom the obligation is made in the interim order. If a third party is obliged by the interim injunction, this party also has to be informed. A copy of the resolution ordering interim measures shall be sent to the participants, or their representatives, and to those who had been ordered to the preliminary injunction, within three days from the date of publication of the order or, if not published, within three days from the date of issue. The resolution ordering the preliminary injunction is enforceable upon publication. If it was not published, it is enforceable as soon as it was delivered to the obliged party.

An interim injunction expires if *a)* the petitioner did not file within the statutory period or within the period specified by the court the claim to initiate proceedings; *b)* the claim was rejected on the merits; *c)* the claim was rejected on the merits and fifteen days passed from making a decision on the matter; *d)* specified elapsed time that would take. The interim injunction may be revoked if the reasons for which it was ordered no longer exist.²⁵

With the New Civil Code and strengthening of personal rights, there is a clear way how interim injunctions might be widely used, first, for example, to prevent the publication of private images, images taken without consent or the dissemination of private information.

²³ S 2957 NCC.

²⁴ S 2971 NCC.

²⁵ S 74, the Civil Procedure Code, Act No. 99/1963 Coll.

V Unjust Enrichment and Publicity Right

Image rights, the right to use and protect one's own image, is the core of those fundamental personal rights creating the notion of the personality. It is a personal right but as well a property right if its use serves commercial exploitation. The subjects of protection are not only celebrities, for whom their picture is a valuable asset, but it is a right of every human being to control the commercial use of their identity: this protects the individual's identity from being misappropriated by another for commercial use.

To establish that the use is unauthorised, the plaintiff must show four conditions: (1) the defendant's use of the plaintiff's image [or the above-mentioned other personal aspects (name, voice, likeness, signature, photos)]; (2) the appropriation of the plaintiff's image for the defendant's commercial advantage (3) the lack of consent; and (4) resulting damage/injury/loss. If the conditions are met, the appropriate remedy for the breach of the image right (exploitative use) is to claim moral remedy, injunction and damages.

According to the NCC, a person who is enriched at the expense of another without just cause must, to the extent of their enrichment, make restitution to the impoverished person.²⁶ The NCC expressly states that if there is an infringement of personal values, the plaintiff may recover twice the value of the plaintiff's profits usual in these circumstances (a similar legal basis as in copyright law).²⁷

VI International Liability

The New Act on International Private Law, Act. No. 91/2012 Coll.²⁸ deals with the applicable law and jurisdiction (forum). This Act stipulates, in relations with a cross-border element, the law of which state shall govern private-law relations, including the application of other laws than the designated applicable law and legal status of foreigners and foreign legal entities in a private law relationship.

In respect of non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, the law of the state to be followed is the one in which the violation occurred. Nevertheless, the affected (injured) person may choose the law of the state in which

- a) the affected person has their habitual residence or company offices registered office),
- b) the perpetrator has their habitual residence or company offices, or
- c) the result of the conduct in violation appeared, if the perpetrator could predict it.²⁹

²⁶ S 2991 NCC.

²⁷ The explanatory memorandum of NCC, 586.

²⁸ In force since 1.1.2014 as a part of new civil legislation.

²⁹ S 101 PLC.

The Czech adaptation is fully compliant with the ECJ case law. According to *Olivier Martinez v MGN*³⁰ 'In the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the presiding court.'

VII Conclusion

The New Civil Code follows the established case law in respect of the protection of personal rights and is in compliance with the binding treaties and European Court of Human Right case law. While it has strengthened protection and sanctions for infringements, it did not fully use the chance to provide modern and comprehensive legislation.

However, much more significant change has been made in the Civil Procedure Code due to the amendment to provide new accompanying legislation for the NCC. From 1.1.2014 the court of first instance in cases dealing with the protection of personal rights are the lower courts instead of the regional courts, which are now the Courts of Appeal. The substantial change has brought many side-effects, not predicted by the New Civil Code. First, the judges dealing with personal rights protection cases are no longer specialised; second, the case law from the lower courts is not publicly available and therefore we might be missing unification, which is always very important with new codes.

³⁰ Joined cases C-509/9 *eDate Advertising GmbH v X* [2009] and C-161/10 *Olivier and Robert Martinez v MGN Limited* [2011].