ABSTRACT

The Civil Action and Law of Actions

(A Comparative Law Study of the Fundamental Questions)

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This thesis deals with the action (and law of actions) in civil procedural law. Although it is a fundamental topic that forms the basis of the entire civil procedure, it has not yet received sufficient theoretical attention in the Czech Republic. Thus, even the most basic questions either remain unanswered or have not been asked at all. This is then reflected in particular in the conclusions of decision-making practice, which often reaches for simplistic solutions that do not take into account all aspects of the applied institutes.

The thesis covers the basic issues of the topic in a cross-sectional way on a comparative basis. Austrian and German law is chosen for comparison, and not by chance. The thesis assumes that the legal systems are historically and legally-systemically related, which is especially true for Austrian law, which was in force for a relatively long time in the Czech lands until the advent of communism. The aim of the thesis is to analyse (at least) the basic issues of the action in order to create a theoretical basis for further elaboration of specific topics.

The starting point of the work is, however, limited by the current state of civil procedural law in the Czech Republic, including the institution of the action. This state of affairs is conditioned by the still effective Code of Civil Procedure from 1963, which has undergone many amendments, but no consistent conceptual change. This fact is all the more depressing as the recodification of civil law has already - quite successfully - taken place in 2014.

The structure of the thesis follows its objectives.

The first part of the thesis outlines the development of theories of the law of actions from the Roman law to the contemporary concept of the right to judicial protection, which is guaranteed by both national constitutional law and international law. In addition to an analysis of the views of individual theories and authors, the thesis identifies areas in which remnants of theories that have been overtaken are still present today.

In the second part of the thesis, the action as a pillar of civil court proceedings is discussed. The thesis deals with its nature and function, as well as its effects. In particular, the institute of objective accumulation of actions is discussed.

In the third part of the thesis, the content and form of the action are discussed. A fundamental attention is paid to how to set the requirements for defining the procedural parties and especially the subject matter of the dispute in the action. Particular attention is paid to the issue of the relief, the formulation of which poses problems in practice, especially with regard to claims for non-monetary benefits. The issue of composite reliefs is also included. The thesis tries to grasp the contingent relief, which is underestimated in practice and contemporary theory.

The fourth part of the thesis deals with the types of actions. It is based on the traditional division into 3 types of actions - actions for performance, actions for determination and actions for the creation of law. The different types of actions are then discussed in more detail.

The fifth part of the thesis deals with the amendment of the action, on the one hand, on the basis of the principle of disposition and the related possibility of the plaintiff to amend the action and,

on the other hand, the defendant's right to insist on a substantive decision on the claim in its original form.

The sixth part of the thesis deals with another dispositive act of the plaintiff, namely the withdrawal of the action. Here, too, the plaintiff's freedom of disposition and the defendant's right to a substantive decision on the claim are pitted against each other. The issue of limitation of the action (i.e. partial withdrawal of the action) is also part of the discussion of the withdrawal of the action.

In the last, seventh part of the thesis, the counter-claim is analysed, including the prerequisites for its consideration in a single proceeding with the main action.

As mentioned above, the work is based on the state of Czech law, including theoretical opinions and conclusions of case law. In addition to these, the thesis presents the views of Austrian and German law, but does not attempt to adopt them uncritically. On the contrary, in some places it reaches conclusions that confirm the correctness of the Czech approach.

Due to the breadth of the subject matter and the defined approach to processing, it is obvious that it was not possible to discuss all the details of the topic in the thesis, as the chosen topic penetrates more or less indirectly into other thematic areas of civil procedure. Therefore, some passages of the thesis are limited to a short overview or some partial issues are omitted.

The thesis works mainly with a comparative method, presenting the approaches of all three compared legal systems, not limiting itself to the conclusions of theory, but also observing how the judicial practice in the mentioned countries looks and develops. Based on the results of the legal comparison, specific conclusions are then drawn for Czech law, always at the end of each part of the work.

Overall, however, it can be concluded that the given picture of Czech, Austrian and German law shows that the current Czech civil procedural law cannot reliably fulfil the purpose of civil procedure in the future on the basis of the current legal regulation contained in the Code of Civil Procedure, which is the protection and enforcement of subjective private rights on the one hand and the general protection of the law on the other.

There are several reasons for this and they follow from the conclusions of this thesis. The first reason is that the Code of Civil Procedure is not based on a consistent implementation of a particular conception of civil procedure. Although there are elements of the *Klein*s social concept of civil procedure, it cannot be said that the Code is consistently based on it. On the contrary, there are remnants of the concepts advocated under socialism, particularly in the form of a unified judicial procedure comprising contentious and non-contentious proceedings, the suppression of the parties' freedom of disposition and the tendency towards judicial control of dispositive acts, and the absence of certain instruments which are traditionally part of the civil procedure codes but which were deleted under socialism and have not been reinstated. Thus, they are still absent in practice today, and their absence has also led to the adoption of problematic solutions and to a worsening of an already unsatisfactory situation (in particular, the interlocutory action for determination or the objective accumulation of actions).

In addition, the current Czech legislation does not reflect an appropriate balance between the roles of the parties and the court, which can be defined on the basis of the principles of party disposition and adversarial principle. The parties' disposition has been suppressed and the legislation underestimates the position of the defendant, which is particularly evident in the

institution of amendment of the action and withdrawal of the action. This goes hand in hand with an emphasis on the paternalistic role of the court, whose interference is apparent in almost all areas of the law on actions which should be reserved to the parties' dispositions. Moreover, it can be observed that the control of dispositive acts by judicial decisions is based on rather vague criteria which make the law of action unpredictable for the parties. It cannot be overlooked that in some cases the party disposition is not only limited, but also directly excluded by law (cf. the prohibition of withdrawal of the action in Czech law).

It is therefore necessary that the procedural rules (not only in the area of actions) are based on a unified concept, namely *Klein*'s social concept included principle of party disposition, the modified adversarial principle and the principle of procedural economy. This objective, however, cannot be achieved by hundreds of further amendments to the existing rules, but, as in the area of substantive law, by a complete recodification.

This is all the more true as the civil process will face new challenges in the future, especially digitisation, automation and the use of artificial intelligence. These influences, their advantages and disadvantages, and their relevance to the civil process are already very apparent today. The current readiness of Czech civil procedural law, which lacks a concept and is still largely based on the ideas of socialist legislation, cannot be assessed as anything other than inadequate.