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EXTRAORDINARY WILLS IN CZECH LAW – RETURN TO EUROPEAN TRADITION

Abstract

The Czech Civil Code of 2012 (Act no. 89/2012 Coll.) reintroduced extraordinary wills, which had been absent since 1950, into Czech law. This article provides a basic overview of the regulation of extraordinary wills in Czech law. It conducts a comparison both in the historical-legal context within the development of Czech law since the early 20th century and compares the regulation with the legal frameworks of countries that inspired the Czech Civil Code. Through this comparison, it highlights the differences and specifics of the current Czech regulation, as well as its potential weaknesses or strengths. The text reflects, not only the legal regulation, but also the existing case law, and points out the limits of the applicability of the Czech regulation of extraordinary wills.

Keywords

civil law; extraordinary will; military will; will on board a vessel or plane; three-witness will; law of succession

Introduction

Extraordinary wills are a specific type of will whose roots go back to Roman law. As a rule, their task was to provide the testator with certain

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reliefs from formal requirements. The reason for these reliefs was the fact that he was usually in an unfavourable situation, which was also life-threatening.

Although these wills have been one of the traditional institutes of inheritance law since Roman law, they were not part of the legal system in the Czech (or Czechoslovak) legislation for a long time from 1950 to 2014. To this day, Slovak law does not contain such wills.

In the Czech Republic, the topic of extraordinary wills receives little attention in professional journals. There are only a few texts, but they provide only a general overview.[1] All of them are written only in Czech, and there is practically no special text in the Czech Republic on the issue of extraordinary wills. The aim of this article is to remedy this shortcoming. The following article introduces the legal regulation of extraordinary wills under the Czech Civil Code 2012 (Act No. 89/2012 Coll., hereinafter referred to as CzCC 2012). However, it does not focus only on the law itself, but places this regulation in the historical context of the issue under consideration. At the same time, it tries at least briefly to reflect the sources of inspiration for the regulation of extraordinary wills in CzCC 2012.

Within the framework of the extensive changes brought by the CzCC 2012, extraordinary wills are a relatively marginal topic. That is why they are given little attention in the Czech professional literature, and the following text is based primarily on an analysis of the text of the law itself. The application practice to date is also very small – there are only two judgments of the Czech Supreme Court on the issue since the law came into effect.

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[1] K. Eliáš, "Privilegované závěti a osnova českého občanského zákoníku" ["Privileged wills and outline of the Czech Civil Code"], in V. Knoll (ed.), *Pocta Stanislavu Balíkovi k 80. narozeninám* [*Honour to Stanislav Balík on his 80th birthday*], A. Čeněk, Plzeň, 2008, p. 79–90; M. Křivská, "Privilegované závěti" ["Privileged wills"], *Ad Notam*, 2013, Vol. 19, Issue 5, p. 9–10; P. Salák, "Mimořádné závěti v novém občanském zákoníku" ["Extraordinary wills in the new Civil Code"], *Ad Notam*, 2017, Vol. 23, Issue 3, p. 3–8.

I. The Historical Overview

1. From Interwar Czechoslovakia to the Fall of Communism

On the basis of Act No. 11/1918 Coll., the newly established Czechoslovak Republic adopted the law that was valid at that time in the individual territories of that state. In the area of Bohemia, Moravia, and Silesia it was Austrian law – i.e. in the matter of civil law – ABGB (Austrian Civil Code 1811). This law was adopted in the form in which it was in force in 1918 – that is, including all three partial amendments from the First World War ("Teilnovelle" 1914, 1915, 1916). Inheritance law was mainly affected by the third amendment (1916), but extraordinary wills (specifically Sec. 597 of the ABGB) were particularly affected by Teinovelle I (1914, Sec. 58 of the amendment).[2] On the territory of Slovakia and Carpathian Ruthenia, Hungarian law was taken over by Czechoslovakia. Here, the basis of civil law was customary law, but there were also partial laws. Of particular importance was the statutory article (Act) No. XVI/1876, which regulated the formalities of wills, inheritance contracts, or donations *mortis causa*.[3] The German law, which was valid in the Hlučín region, was replaced by Austrian law at the beginning of 1920.

Austrian law (Sec. 597–600 of the ABGB in its original version) recognised three types of extraordinary wills, but in reality only two of them were regulated in the ABGB. They were the so-called "plague testament" and the will on board a ship. These wills could also be made by a person of 14 years of age, and only two people were needed as witnesses. In the case of a "plague will", they did not have to be present at the same time. It should be noted that according to the ABGB, a regular will in oral form was possible at that time in addition to a written private will.

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[2] K. Staudigl-Ciechowicz, "Die Teilnovellen als letzter Akt der österreichischen Zivilgesetzgebung in Mitteleuropa", *BRGÖ*, 2020, Issue 2, p. 286–294.

[3] A. Švecová, *Formálno-právna stránka zriadenia úkonov posledného poriadku na Slovensku do roku 1950* [*Formal and legal aspects of the establishment of the acts of the last order in Slovakia until 1950*], Veda, Bratislava, 2010, p. 85–87 (before 1848), p. 103 (1848–1876) and p. 152–154 (1876–1950).

The third type of extraordinary will – military will § 600 ABGB (in the original version) – was not regulated in the Civil Code according to the provisions of the Civil Code. In accordance with the German legal tradition,[4] its form was regulated by military regulations (Service Regulations – "*Dienstreglement*"). This was the reason why the military will in Czechoslovakia was the first to expire in the interwar period. While the Austrian ABGB remained in force (albeit amended) until 1950, in 1920 a new Czechoslovak Military Act (1920) and the subsequent new Service Regulations for the Czechoslovak Army (1922) were adopted. None of these laws provided for a military will, so from 1922 onwards it was no longer possible to make a military will.[5]

Legal dualism in the territory of Czechoslovakia was to be resolved by recodification, which was supposed to unify and also modernize civil law. Work on this recodification began at the beginning of 1921. The work was divided between subcommittees, which published their results separately in the years 1923–1925. The first complete version was in 1931 (known as the Draft 1931), and the final draft was submitted to the legislative process in the spring of 1937 (known as the Draft 1937). However, owing to the deteriorating political situation, it was never accepted, although it was the starting point for the post-war Civil Code Draft (known as the 1946 Draft). This bill was also unfinished owing to the Communists coming to power in February 1948. It is characteristic of all these proposals that it was an extensive amendment to the ABGB rather than a completely new "modern" Civil Code (for recodification in general, see Salák 2018, and for inheritance law in particular, Horák in print).

The basic types of extraordinary wills in the Draft 1937 were therefore based on the ABGB. Even so, the extraordinary wills in the Draft 1937 were much more modern, and in some ways even ahead of their time. The concept of the "plague testament" has been somewhat expanded. There was also the possibility of a will in the event of a natural disaster and an emergency situation in the event of an industrial accident. Another type of extraordinary will was included in the legis-

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[4] J. Rudnicki, "The Axiology of Military Wills – a Comparative Analysis", *European Journal of Comparative Law and Governance*, 2015, Vol. 2, Issue 1, p. 13–15.

[5] P. Salák, "Návrat vojenského testamentu" ["Return of Military Testament"], *Právník*, 2017, Vol. 156, Issue 4, p. 290.

lation – the war-time will. While the Austrian military testament was conceived on the principle of the status, in peacetime it could be made only by someone who was considered a military person (soldiers and veterans in the Houses of invalids), and by non-military persons accompanying the army only in wartime. Newly in the interwar drafts, however, a will was bound "in time of war" – that is, regardless of who drew it up, whether a soldier or a civilian.[6] This concept only became more popular after World War II.[7]

After the Communists came to power, however, a big change occurred. The idea of freedom of disposition was not preferred, both in *inter vivos* and *mortis causa* negotiations. In inheritance law, intestate succession was generally preferred, so the possibility of wills was limited to written ones only. None of the Civil Codes from 1948–1989 (CzCC 1950, CzCC 1964) regulated extraordinary wills. The explanatory memorandum to CzCC 1950 commented on this in the spirit of the ideology of the time: "(...) *This code is being prepared for peacetime,… so there is no need to amend the special testaments for wartime* (...)".[8]

2. Czech Civil Code 2012 – Genesis

After the fall of communism in 1989, it was understandably necessary to change the legal system to meet the new social conditions. Given that the priority was to create a market environment, the codification of commercial law was preferred. Therefore, only the Civil Code has been amended. These amendments were intended to amend the Civil Code so that it would correspond to a democratic and market society – this concerned in particular property rights and contracts. However, the fact was that the main sources of inspiration for these amendments were the

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[6] P. Salák, "Tschechoslowakei: Rekodifizierung des Bürgerlichen Rechts" ["Czechoslovakia: Recodification of Civil Law"], in M. Löhnig, S. Wagner (eds), *Nichtgeborene Kinder des Liberalismus? Zivilgesetzgebung im Mitteleuropa der Zwischenkriegszeit* [*Unborn children of liberalism? Civil legislation in Central Europe between the wars*], Mohr Siebeck, Tübingen, 2018, p. 91–147, 133, fn. 208.

[7] Rudnicki, *supra* note 4; J. Rudnicki, *Testament żołnierski i testamenty wojskowe w europejskiej tradycji prawnej*, Wydawnictwo OD.NOWA, Kraków, 2015, *passim*.

[8] *Občanský zákoník* [Civil Code], Orbis, Praha, 1950, p. 304.

Civil Code of 1950 and the Private International Law Act of 1963. The law of inheritance has not been significantly changed.

Since the early 1990s, there have been several attempts to create a new Civil Code, but none of these recodification efforts has had sufficient political support. It was only the proposal of Prof. Eliáš at the beginning of the 21st century which was accepted in 2012. At the same time, his proposal did not follow any of the previous proposals. CzCC 2012 is very often known in Czech sources as the "NOZ" (abbreviation "New Civil Code" in Czech) and came into force on 1.1.2014. This law clearly harks back to the continental tradition of the great codifications of the 19th century – in particular, the ABGB (in its original version) and the BGB. The 1937 draft is also one of the main sources of inspiration.[9]

Inheritance law in the CzCC 2012[10] distinguishes three types of legal acts in the event of death: inheritance contract, last will and testament, and codicil, as was the case in the ABGB (before the amendments in the 21st century). A will and a codicil have the same formalities, they differ in that an heir can only be established in a will, so a codicil can only contain a legacy. A regular will can only be in written form, a testament can be a private holographic or allographic testament, and it can also be drawn up by a notary, which then has the character of a public instrument. Unlike the original wording of the ABGB (before 2005) or the redodicification proposals, the CzCC 2012 (and the ABGB after the amendments to FamErbRÄG 2004 and ErbRÄG 2015) do not recognise a proper will made orally. This is reserved only for extraordinary testaments.

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[9] To the CzCC 2012 in general in Polish see O. Horák, P. Dostalík, "Zmiany w czeskim prawie prywatnym", *Forum Prawnicze*, 2014, Issue 4, p. 16–25. About the history of law of inherentence in Czechoslovakia and Czech republic see also P. Salák, O. Horák, *Law of succession in the Middle-European area*, Spolok Slovákov v Poľsku – Towarzystwo Słowaków w Polsce, Cracow, 2015.

[10] O. Horák, F. Plašil, M. Valentová, "České dědické právo a význam tradice" ["Czech inheritance law and the importance of tradition"], in F. Melzer, P. Tégl (eds), *Občanský zákoník. § 1475–1720. Velký komentář* [*Commentary to CzCC 2012. Part Sec. 1475–1720. Great Commentary*], C.H. Beck, Prague, 2024, p. XXVII–XLII.

II. Extraordinary Wills in CzCC 2012

1. Basic Structure

Extraordinary wills are regulated in Sections 1542–1549 of the CzCC 2012. This regulation can be divided into two parts. The provisions of Sections 1542–1545 govern the various types of extraordinary wills. The remaining provisions of Sections 1546–1549 are something like "general provisions" – they concern witnesses, the formalities of recording a will, or the time limit on the validity of this type of will.

CzCC 2012 distinguishes the following types of extraordinary wills:

- "Testament before three witnesses" (Sec. 1542);
- "Will made by the mayor of the municipality" (Sec. 1543);
- Testament on board a naval vessel or aircraft (Sec. 1544);
- Military will (Sec. 1545).

In the case of the first two wills, the clear source of inspiration is German law – i.e. the BGB. In the case of the other two types, the situation is no longer entirely clear. The explanatory memorandum mentions several jurisdictions in the case of a will on board (German, Dutch, ...), while in the case of a military will, it does not mention any. What is certain, however, is that neither the ABGB nor the interwar proposal from 1937 were in any way the inspiration for extraordinary wills (final version of the CzCC 2012), unlike most other provisions of inheritance law.

According to Sec. 1498 CzCC 2012, second sentence: "*What is stipulated about a will applies mutatis mutandis to the codicil*" (the text here as well as other quotations from CzCC 2012 in italics are taken from the translation of CzCC 2012, which was taken over for the purposes of recodification and is available on the web – see links below). As well as an extraordinary will, it is also possible to make an extraordinary codicil, which will not contain the institute of inheritance, but only the determination of the legacy. It is also possible to revoke a regular will (without making a new one) in an extraordinary form. Unfortunately, the law does not address whether a will cancelled in this way is limited in time or is valid permanently. However, logic dictates that even this extraordinary cancellation would be limited in time. On the contrary, Sec. 584 para 2 of the ABGB, as amended by the ErbRÄG 2015, expressly states this.

2. Types of Extraordinary Wills in CzCC 2012

2.1. Testament of Three Witnesses

The First Extraordinary Testament is the Czech equivalent of the German "*Drei-Zeugen Testament*" (Sec. 2250 BGB). It is an oral type of will that is made in the presence of three witnesses. This will according to CzCC 2012[11] can be used in two situations:

1. *a person who is under imminent threat to life due to a contingency*;
2. *a person in a place where usual social intercourse is paralysed as a result of a contingency.*

This will is of the most general nature. And it also has the fewest formal requirements. For this reason, too, its validity is limited to only two weeks (Sec. 1549 CzCC 2012). Although a similar type of will can also be found in the laws of neighbouring countries: Germany (Sec. 2250 BGB), Poland (Article 952 of the Polish Civil Code, KC 1964), Switzerland (Articles 506–508 of the ZGB), and Austria (Sec. 597 of the ABGB, after the amendments of 2004, Sec. 584 after the amendments of 2015), the rules in these regulations are not the same. Although these are only details, they are often very important. At first glance, there is a noticeable difference in the number of witnesses – only Czech and German regulations require the presence of three witnesses at the same time – in other countries two witnesses are sufficient. However, there is a much more important difference, which is best highlighted in the difference between Czech and Austrian legislation (especially after the amendment to the ErbRÄG 2015).

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[11] Section 1542 CzCC 2012: (1) "*A person who is under imminent threat to life due to a contingency has the right to make a testament orally before three witnesses present at the same time. A person in a place where usual social intercourse is paralysed as a result of a contingency and who cannot be reasonably required to make a disposition mortis causa in another form has the same right*". (2) "*If witnesses do not make a record of the decedent's last will, the succession of heirs will be based on a judicial protocol of the examination of witnesses*". The text of the English translation of the provisions of the Act is taken from the translation that was made in connection with the recodification and is available on the website: http://obcanskyzakonik.justice.cz/ [last accessed 9.9.2025]. Although this translation is made officially, it is not an authentic text – only the Czech language is. The text of the translation corresponds to the text of the law adopted in 2012. Amendments have not been incorporated into the translation.

The question is how to interpret the words "*imminent threat to life due to a contingency*". Austrian law considers that subjective conviction is the decisive factor in assessing the situation. While the 2004 amendment was not yet entirely certain, the 2015 amendment[12] stated this quite explicitly in Sec. 584 (1) ABGB (after the amendment to the ErbRÄG 2015): "*Droht aus Sicht des letztwillig Verfügenden* (…)", i.e. – From the testator's point of view (...). However, Czech law does not have this approach.[13] Judicial practice, on the other hand, has tended towards an objective interpretation. In other words, there must have been a real threat to life at the time, and that threat was "imminent". This is also the only question that is already reflected in the case law of the Supreme Court of the Czech Republic in connection with extraordinary wills. Both of the above-mentioned judgments agreed on the objective concept, and in both cases the extraordinary will was declared invalid on the grounds that the condition of sudden and imminent threat was not met. The first case concerned a situation where a person was suffering from a progressive serious illness. In this case, the extraordinary will was made at a time when the illness worsened. To clarify the situation, it can be added that he was hospitalized within two days and the person died within a week. The court noted that the deterioration of his condition in this case was not a sudden event, as the person in question had been ill for a long time, was aware of his illness, and his overall condition was gradually deteriorating. The situation in which he found himself was therefore expected and not unexpected – the judgment of the Supreme Court of the Czech Republic, 2018, 21 Cdo 4333/2017. The court made a similar decision in the second case – the judgment of the Supreme Court of the Czech Republic, 2019, 24 Cdo 2941/2019. In this case, the testator suffered a heart attack on 27.1.2014, was hospitalized, fell into a coma, in which he remained until 17.2.2014, after which his health improved to such an extent that he was able to receive visitors, communicate with them (even if only in a whisper or by writing in a spreadsheet or notebook), watch movies, watch hockey, but his condition was still

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[12] A. Fenyves *et al.*, *Klang Kommentar ABGB – §§ 526–646* [*Klang Commentary to ABGB – part sec. 526–646*], Verlag Österreich, 3rd ed., 2017, p. 270–271.

[13] P. Salák, in F. Melzer, P. Tégl (eds), *Občanský zákoník. § 1475–1720. Velký komentář* [*Commentary to CzCC 2012. Part sec. 1475–1720. Great Commentary*], C.H. Beck, Prague, 2024, p. 432–434.

serious. At that time, on 21.3.2014, he made an extraordinary will. After some time, his condition deteriorated again in mid-April 2014 and he subsequently died. Although the court stated that a heart attack was an extraordinary event, he was in hospital at the time he made the will, his condition was serious, but at that moment any deterioration was no longer unforeseeable or surprising. Moreover, according to the court, the fact that he communicated (albeit to a limited extent) proves that nothing prevented him from making a will in proper form. As an aside, it may be added that the deceased had no legal heirs and his property thus fell to the state, which was the defendant in the dispute. The interpretation of the Czech courts is therefore very restrictive, and very close to that of the German courts.[14]

The second situation in which this will can be used is in the case where a person is "*in a place where usual social intercourse is paralysed as a result of a contingency*". In this case, the imminent risk of death of the testator is no longer a prerequisite. The danger here may not be imminent, but it can still be potentially imminent. There is one more condition for the validity of this will: he cannot reasonably be required to procure in any other form. The word "reasonably" should be emphasized here – this means that even if there was a possibility of performing it in another (typically written) form, its use is not reasonable. This may be caused, for example, by the fact that the text of a properly drafted will would be jeopardized by an extraordinary event. It may have been burned during fires or soaked during floods.

Another problem with this will is its record. First of all, there is no provision that witnesses must do this together – unlike the BGB (Sec. 2250 (3) BGB). It is not even stipulated that they have to do it. Polish law, on the other hand, requires that record be made no later than one year after the oral will was made (Article 952 (2) of the Polish KC 1964). It is not even specified what form the record should take. The law only states: "*If the witnesses fail to record the testator's will, the succession of the heirs shall be based on the court record of the examination of witnesses*" (Sec. 1542 (2) CzCC 2012). The law is imprecise – the decedent's will is the decedent's

[14] Decision of the Higher Regional Court of Rhineland-Westphalia (OLG Hamm) of 10.2.2017, file No. 5 W 587/15 (see below), similarly also the decision of the Higher Regional Court of Bremen (OLG Bremen) of 5.1.2016, file No. 5 W 25/15.

will, not the protocol.[15] However, there is another problem. Likewise, the law does not contain a rule that a will be valid only to the extent that all witnesses agree with the declaration. This is stipulated in Sec. 597 (1) ABGB (2004–2016) and 584 (1) ABGB (from 2017).[16] This imperfection of the Czech legislation leads to the fact that, technically speaking, only one of the witnesses would be sufficient for the record of the hearing, which is certainly not a completely appropriate approach.

2.2. Will in the Presence of the Mayor of the Municipality (Sec. 1543)

The second type of will was also inspired by the German BGB (*Burgermeistertestament*, *Dorftestament*). It is a will that is taken in the presence of the mayor of the municipality.[17] In this case, the condition is no longer an imminent threat to life, but that the testator could die before making the will in the form of a public instrument. In order to better understand the significance of this will in Germany, the following circumstances must be taken into account. German inheritance law preferred a public will (will in the form of public instrument) to a private one, which was regulated by the BGB, but originally with relatively strict formal conditions. However, getting to a notary, who is usually based in the city, in winter could be very problematic, especially in high mountainous areas such as the Alps. This type of extraordinary will was created just for these cases.[18]

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[15] M. Šešina, K. Wawerka, in: J. Švestka, J. Dvořák, J. Fiala (eds), *Občanský zákoník. Komentář* [*Civile code. Commentary*], Vol. IV (§ 1475–1720), Wolters Kluwer, Praha, 2014, p. 147.

[16] Fenyves, *supra* note 12, p. 269–270.

[17] Section 1543 CzCC 2012: "*Where there is a reasonable concern that a decedent would die before he can make a testament in the form of a public instrument, his last will may be recorded, in the presence of two witnesses, by a mayor of the municipality in whose territory the decedent is located. A person entitled to exercise the powers of a mayor under another legal regulation may, under the same conditions, also record a decedent's last will*".

[18] W. Baumann, in J. Staudinger, J. von Baumann *et al.*, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch. Buch 5. Erbrecht. §§ 2229–2264*, Selier-de Gruyter, Berlin, 2012, commentary on § 2249, p. 170–171.

However, the Austrian (and thus also Czech) legal tradition did not have such a formalized private will. The possibility of introducing this extraordinary will was also discussed in the interwar period, but it was found to be unnecessary.[19] However, the authors of CzCC 2012 introduced this type into our codification, again with minor deviations. According to the Czech legislation, this will can be made only by the locally competent mayor – i.e. only in the cadastre of the municipality where he or she is the mayor. In Germany, on the other hand, it is also possible to do so in front of a mayor outside the cadastre of his municipality. However, the truth is that this change did not take place in Germany until 1.1.1970 and does not result from the BGB itself, but from Sections of the *Beurkundungsgesetz* ("Certification" Act –Witness Law). However, there is no such special law in the Czech Republic.

Compared to the previous will, this will provides several advantages to the testator. To obtain it, the requirement of suddenness is lacking. Also, the threat to life does not have to be imminent, but *"a reasonable concern that a decedent would die before he can make a testament in the form of a public instrument*" (Sec. 1542 CzCC 2012) is sufficient. This makes it clear that this is a subjective rather than an objective criterion. Nor is it necessary for the testator's concern to be justified. It may also be the concern of another person, e.g. his relatives, on the basis of which the testator agrees to make this type of will. The fact that this concern was erroneous does not affect the validity of the will. Another advantage is the fact that if the conditions of Sec. 1547 are met, this will be in the nature of an authentic document. Unfortunately, this provision is also very problematic (see below).

Although this seems to be a very appropriate type, it should be noted that the mayor is not obliged to comply with the testator's request to draw up this will. The law does not impose this obligation on him, but it is left to his discretion, or his will, because it is not even an administrative decision. So if the mayor refuses, it is hard to get him to cooperate on a will.

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[19] *Sněmovní tisk 844. Vládní návrh zákona, kterým se vydává občanský zákoník* [*House press 844. Government draft law issuing the Civil Code*], Státní tiskárna, Praha, 1937, p. 290.

2.3. Will on Board a Czech Vessel or Aircraft (Sec. 1544)

Again, a will on board a ship is one of the typical extraordinary wills, especially for coastal states. It was also known by Austrian law in the ABGB and thus by the domestic legal system until 1950. However, its applicability in interwar Czechoslovakia was very limited. This will could only be used at sea, not on a lake or river, for example – this was the prevailing opinion.[20] Stuberauch took the opposite view in his commentary, but this position was unique and contrary to the sources of inspiration of the ABGB – French and Prussian law understood only a will at sea.[21] It is true that interwar Czechoslovakia also had a merchant navy at sea, but there is no information about the case when this form of will was used. After all, even the Draft 1937 rejected the will on board a ship and a plane.[22] In the case of the ship, the reason was to increase the safety of navigation, but at the same time it was stated that if an emergency occurred, there would be no time to make a will. In the case of the aircraft, there was also a risk that any witnesses would die in the crash, probably together with the testator.[23]

The legislator CzCC 2012[24] was not inspired by interwar drafts, but (apparently) by Dutch law. Compared to the first version, there has been

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[20] F. Rouček, J. Sedláček *et al*., *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a Podkarpatské Rusi* [*Commentary on the Czechoslovak General Civil Code and civil law applicable in Slovakia and Subcarpathian Ruthenia*], Vol. 3, V. Linhart, Praha, 1936, p. 162.

[21] L. Pfaff, F. Hofmann, *Commentar zum österreichischen allgemeinen bürgerlichen Gesetzbuche* [*Austrian Civil Code. Commentary*], Vol. I, Manz, Wien, 1877, p. 201–202.

[22] Provisions regarding wills on board aircraft were also not accepted, because "(...) *if danger arises on board an aircraft, there will be hardly any time to make a will, and there will be little probability that, if the testator perishes, the witnesses will be saved*". *Sněmovní tisk 844*, *supra* note 19, p. 291.

[23] *Ibid*.

[24] Section 1544 CzCC 2012: (1) "*If a decedent has a serious reason, his last will may be recorded in the presence of two witnesses aboard a naval vessel sailing under the national flag of the Czech Republic or an aircraft registered in the Czech Republic by the commander of the naval vessels or aircraft, or by his representative, unless he is prevented from doing so due to considerations of safety of the voyage or flight. The validity of a testament may not be denied by claiming that the decedent had no serious reason to make the testament*". (2) "*If a testament has been made under Subsection (1) on board of: a) a naval vessel, the commander shall record the testament in the logbook and hand it over without undue delay to an embassy of the Czech Republic closest to*

one change in the text of the law. The original term "ship" has been replaced by the term "vessel",[25] because this will can only be used on board a vessel with the Czech flag. Owing to the fact that after 1989 the Czechoslovak fleet was liquidated during privatization, today not a single ship sails under the Czech flag. The term "vessel" is broader, as it also includes yachts[26] (Act No. 61/2000 Coll. – Maritime Navigation Act). Given that no seagoing vessel currently sails under the Czech flag, the provision applies only to these other vessels. With regard to the wording of the provision, it is practically impossible for this will to be made in the territory of the Czech Republic, as this provision cannot be applied to inland vessels (Act No. 114/1995 Coll. – Inland Navigation Act). The only theoretical situation would be for the vessel to be registered in both the maritime register and the navigation register (according to the above-mentioned laws) so that it could sail not only at sea but also on inland waterways.[27] However, the practical applicability of this will is currently very limited, also because there is no obligation to cooperate on the part of the personnel of a vessel or aircraft if they are prevented from doing so by considerations of the safety of navigation or flight. Some commentaries infer from the literal wording of the law that only the captain (commander) has this right, not his deputy.[28]

The obligation to hand it over without undue delay to the Czech embassy closest to the port (airport) to which the sea vessel (aircraft) arrives also seems to be problematic. Again, this obligation may be one

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the port to which the naval vessel arrives, or to the public body which maintains the naval register in which the naval vessel is registered, or b) an aircraft, the commander shall record the testament in the logbook and hand it over without undue delay to the embassy of the Czech Republic closest to the place abroad where the plane landed, or to the public body which maintains the aircraft register in which the aircraft is registered".

[25] This is evidenced, among other things, by the text of the explanatory report, where the original term "ship" was retained. This text also speaks of the optimism of the authors, who were aware of the uselessness of the provision in a way: "*The fact that no merchant ship is currently registered in the Czech Republic does not exclude a possible change in the situation in the future*" (explanatory report to the CzCC 2012, special part, sec. 1542–1549).

[26] This means a vessel with a length of 2.5 to 24 m, which is powered by sails, an engine or both.

[27] P. Duda. J. Petrov *et al*., *Občanský zákoník. Komentář* [*Civil Code. Commentary*], C.H. Beck, 2nd ed., Praha, 2019, commentary on § 1544, p. 1613.

[28] *Ibid*.

of the reasons why captains can be expected to refuse to cooperate in such a will.

2.4. Military Testament (Sec. 1545)

The last type of extraordinary will is a military will.[29] Here, again, there is no clear source of inspiration. However, it is probably closest to the Italian Civil Code.[30] In contrast to the original Austrian concept, the will is regulated directly in the Civil Code and can be used only in a situation of armed conflict or military operations. It does not necessarily have to be a war, but it can also be, for example, foreign missions, or probably even military exercises.

The original wording envisaged that this will could only be made in front of a commander of the Army of the Czech Republic of the rank of officer. However, the Ministry of Defence has proposed a change that is more in line with the reality of foreign missions. The text of the law thus states that "*it may be recorded in the presence of two witnesses by the commander of a military unit of the Czech Republic or by another soldier of officer or higher rank*". There was a problem, for example, with military hospitals, where the doctors were officers, but the commander was not a doctor, but a soldier of the protective unit of this hospital. However, he usually does not have an officer's rank, but is perhaps only a sergeant first class. A literal interpretation of the text of the law leads to the fact that a will can be made in front of the commander of a unit of the Army of the Czech Republic or an officer. However, it does not say that it necessarily has to be an officer of the Army of the Czech Republic. Thus, there is a theoretical possibility that this could be done in front of another officer, such as an Allied army officer. Of course, the condition is that both

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[29] Section 1545 CzCC 2012: (1) "*When participating in an armed conflict or military operations, the last will of a soldier or another member of the armed forces may be recorded in the presence of two witnesses by a commander of a military unit of the Czech Republic or another soldier at the rank of officer or higher. If a testament is made in this manner, its validity is not to be denied*". (2) "*A commander shall, without undue delay, deliver the testament made under Subsection (1) to a commander of superior command, who shall, without undue delay, hand it over to the Ministry of Defence of the Czech Republic*".

[30] Salák, *supra* note 5, p. 286–300.

the person and the witnesses understand the language in which the testator makes the will.[31]

There is also the question of the circle of beneficiaries who can make a will. The law refers to a soldier or other member of the armed forces. However, it is not clear whether the term "armed forces" refers to the definition of this term in the "Armed Act" No. 219/1999 Coll. According to this law, members of the military police are not members of the armed forces.[32] It is therefore unclear whether members of the military police can also make such a will (although the prevailing opinion is that they can).

The validity of this disposition is not affected by whether or not the testator had the opportunity to acquire it from a notary. However, if he had this option, the respective commander (or officer) has the option to refuse the soldier. However, he/she may also refuse to do so if the making of the last will and testament would prevent the primary tasks and duties of the commander (officer), witnesses or the testator himself.[33]

3. Common Provisions in Sec. 1546–1549

These provisions can be described as common, although they do not always apply to all wills. They relate mainly to wills according to sec. 1543–1545.

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[31] However, this language does not necessarily have to be Czech: the Civil Act allows a will to be made in any language – both theoretically and fictitiously, for example from The Lord of the Rings. For missions, English seems to be the most likely. Salák, *supra* note 13, p. 392; Judgment of the Czech Supreme Court, file No. 21 Cdo 2704/2017 of 4.7.2018.

[32] L Skoruša, O. Horák, R. Vičar, T. Zbořil, "Ozbrojené síly v institucionálním a funkčním pojetí. K vymezení a výkladu pojmu ozbrojených sil a jeho praktickým důsledkům" ["Armed forces in an institutional and functional concept. To define and interpret the concept of armed forces and its practical consequences"], *Vojenské rozhledy*, 2022, Vol. 31, Issue 4, p. 3–22.

[33] O. Horák, J. Razim, T. Zbořil, "Rekodifikace soukromého práva a příslušníci ozbrojených sil" ["Recodification of private law and members of the armed forces"], *Vojenské rozhledy*, 2016, Issue 4, p. 142.

The first one – sec. 1546[34] – aims to ensure that a record of a will that has been made under Section 1543–1545 is preserved. It imposes an obligation on the person to arrange for the will to be deposited with a notary without undue delay. However, this obligation does not lie with the testator, but with the person who made the recording – typically the mayor, the captain of a vessel or aircraft, or the commander. But the problem is that depositing a will with a notary is not free – it is subject to a fee. No provision of the law exempts wills drawn up under sec. 1543–1545 from this charge. It is a total amount of approximately 35–40 euros, which is not a large amount, but it is still a cost on the part of the person who made the recording. The idea that at the time of making an extraordinary will, the person concerned will at the same time demand payment of that amount from the testator is absurd. However, the second possibility, which is that the person in question (captain, mayor) should do so at his own expense and then recover this amount from his heirs, seems equally absurd. Actual enforceability could be problematic.

Sec. 1547[35] is more important. Paragraph 1 of that section provides that the person making the record must also sign it together with the two witnesses and read it to the testator in the presence of the two witnesses, and the testator must certify that the record is an expression of his will. A will drawn up in this way is to be regarded as a public document. This improves the position of the heirs, since the content of the

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[34] Section 1546 CzCC 2012: "*If a testament was made under Section 1543, the municipality shall, without undue delay, ensure that the testament is deposited with a notary. If a testament was made under Sections 1544 or 1545, the same is provided for by the authority to which the testament was handed over*".

[35] Section 1547 CzCC 2012: (1) "*If a decedent has made a disposition mortis causa under Sections 1543, 1544, or 1545, the person making the record must also sign it together with both witnesses and read it to the decedent in the presence of both witnesses, and the decedent must confirm that the record constitutes the expression of his last will. A testament so made is to be considered a public instrument*". (2) "*Where a testament is made under Sections 1543, 1544, or 1545 and the prescribed formalities are not adhered to, in particular where the instrument lacks the signatures of the witnesses present, although they are required, but it is nevertheless certain that the instrument reliably records the decedent's last will, it does not cause the testament to be invalid; however, such an instrument is not to be considered a public instrument*".

authentic document is presumed to be authentic unless someone proves otherwise.[36]

The provisions of Sec. 1547 (2) are again an example of inspiration in the German BGB. However, the text of the CzCC 2012 differs in detail from that of the BGB, and therefore the use of commentaries and case law on the BGB is very limited.[37]

The first difference between the BGB and the 2012 Code of Civil Procedure is that the BGB regulation applies only to wills before the mayor, while the provisions of the 2012 Code again apply to all three wills under Sections 1543–1545. However, the main difference is something else. The BGB text talks only about the errors that occurred during the upload.[38] However, the text of CzCC 2012 talks about mistakes that were made during the actual making of the will. This is de facto contrary to the BGB. According to the BGB, if mistakes are made when making a will, this will result in nullity. In Czech law, however, there is a situation where some errors in the making and making of a will do not affect the validity of a will as a public document, some result in the will being valid, but only as a private will, and finally some lead to the invalidity of the will. However, the legislator itself does not provide an exhaustive list of what errors are involved in individual situations. Pursuant to the provisions of Section 1547 (1) the record should be signed. If it is not signed, it will have the nature of a private will. However, this does not follow from Sec. 1547 (1) of the CzCC 2012, but from Sec. 1548 (2) and its validity remains unaffected if it is not signed by the testator or a witness because he was unable to write or because of any other serious impediment, if this is expressly provided for in the document. However, the law is completely silent on other defects. The determination of the boundaries between the various situations in which a will will continue to be valid as a public document, valid as a private will, or even be an invalid will, will be primarily a matter of case-law. These include, for ex-

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[36] Křivská, *supra* note 1, p. 10.

[37] Salák, *supra* note 13, p. 461–463.

[38] Errors that do not affect the validity of the will are, for example, incorrect functional designation of the notary mayor, witness as "*Protokollführer*", or the fact that the text did not state that it was not possible to draw up the will at a notary (obligation given by § 2249 (2) BGB), as well as all incorrect formulations in the text in general. Baumann, *supra* note 18, commentary on § 2249, p. 176–177.

ample, the following situations: the testator dies before he can confirm the record with his signature, when the record is not made in written, but in audio form, when the record does not explicitly state why the testator cannot make a will with a notary, etc.

That provision has, among other things, another consequence. Technically, there are not four extraordinary wills in Czech law, but seven. Wills according to Sec. 1543–1545 may be in the nature of an authentic public instrument, or a private will.[39]

The provisions of Sec. 1548[40] relate to certain concessions for witnesses of extraordinary wills. In particular, with regard to age, witnesses may be persons who have reached the age of fifteen years and persons whose legal capacity has been restricted, provided that they are capable of credibly describing facts relevant to the validity of the will. Sec. 1548 (2) has already been mentioned above.

Finally, Sec. 1549[41] limits the duration of an extraordinary will. This provision also has a rather complex genesis. Initially, it was discussed whether the validity of extraordinary wills should not be limited in time. In general, however, the authors of the law agreed that it should be limited. In the original bill (Draft 2005 and 2007), there was one time limit, namely six months from the end of the year in which the extraordinary will was made. This deadline was apparently inspired by the Draft 1937.[42] However, in the course of the legislative

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[39] Salák, *supra* note 1, p. 4.

[40] Section 1548 CzCC 2012: (1) "*Where a testament with relief is made, persons who have reached the age of fifteen and persons whose legal capacity has been limited may also be witnesses if they have the capacity to credibly describe facts relevant to the validity of the testament*". (2) "*Where a testament with concessions is made, its validity shall remain unaffected if it is not signed by the decedent or a witness because he could not write or due to another serious obstacle provided that it is explicitly stated in the instrument*".

[41] Section 1549 CZCC 2012: "*If a decedent is alive, a testament made under Section 1542 shall lose its validity after two weeks, and a testament made under Section 1543, 1544, or 1545 shall lose its validity after three months from the date on which it was made. However, these periods neither commence nor run until the decedent can make a testament in the form of a public instrument*".

[42] Sec. 439 draft 1937: "*When six months have passed since the end of the year in which the acquisition under §§ 435 to 437 was made, it shall cease to be valid, unless it is an acquisition by a testator who was not capable of acquiring from the end of that period until his death. This also applies to the last war acquisition, but the six-month period shall be counted from the end of the period in which war acquisitions may be made*".

process, there was a change and the deadline was shortened and divided into two parts.

As already mentioned, for a will under Section 1542, the time limit is fourteen days (influenced by Swiss law – Article 508 of the ZGB).[43] For all others, the law sets a time limit of three months (effect of Sec. 2258 (1) BGB). A will made under sections 1543, 1544, or 1545 shall thus cease to be valid after three months from the date on which it was made. However, neither period begins or runs until the deceased can make a will in the form of an authentic document. Here again, we can see how the legislator himself is not accurate – the German model speaks of a will with a notary. The legislator contradicts himself in the Czech text – after all, wills made under the provisions of Sec. 1543–1545 are subject to the fulfilment of the conditions set out in Sec. 1548, which speaks of the form of a public instrument. This is therefore a manifest inaccuracy on the part of the legislature and in fact means the possibility of obtaining a proper testament from a notary in the form of a public instrument.

However, the Czech legislator was not consistent here either. The German regulation (Sec. 2252 BGB) states not only that the will loses its validity, but also declares that it should be considered as unwritten.[44] This idea was also adopted by Austrian law through an amendment in 2015. This is significant when there is an older valid will. This minor change means that upon the expiration of the extraordinary will, not only does the extraordinary will cease to exist, but the older will, which it revoked, regains its validity. Although Austrian law added another sentence that could relativize this approach, it is unlikely to be applied.[45] However, Czech law completely ignores this potential problem,

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[43] Art 508 ZGB: *c. Verlust der Gültigkeit*. "*Wird es dem Erblasser nachträglich möglich, sich einer der andern Verfügungsformen zu bedienen, so verliert nach 14 Tagen, von diesem Zeitpunkt an gerechnet, die mündliche Verfügung ihre Gültigükeit*".

[44] Sec. 2252 (1) BGB: "*Ein nach § 2249, § 2250 oder § 2251 errichtetes Testament gilt als nicht errichtet, wenn seit der Errichtung drei Monate verstrichen sind und der Erblasser noch lebt*".

[45] Sec. 584 (2) 2nd sentence ABGB (from 2017): "*Im Zweifel ist damit auch der durch das Nottestament erfolgte Widerruf einer früheren letztwilligen Verfügung (§§ 713 und 714) aufgehoben*". (In case of doubt, the revocation of a previous testamentary disposition effected by the emergency will (§§ 713 and 714) is also annulled.) The problematic passage of the sentence is "*im Zweifel*". See Fenyves, *supra* note 12, p. 272.

and according to the wording of the CzCC 2012, it seems more likely that even after the expiration of the period, the older will would remain invalid.[46]

Conclusions

The introduction of the possibility of making an extraordinary will part of Czech law is certainly a positive feature compared to the situation between 1950 and 2014. In addition, the legislator has decided to provide the maker with several types of extraordinary wills. In this area, CzCC 2012 follows the continental (Roman law) tradition of extraordinary wills determined on a case-by-case basis according to individual specific situations. The law thus follows a concept that was typical in the codifiactions of the 19th century. In the 21st century, it seems to be an anachronism. It would be much more practical to have one general type of extraordinary will (compare the ABGB amendments of 2004 and 2015), possibly in addition to a special military will.

The second shortcoming is the fact that CzCC 2012 was only inspired by its models in the issue of extraordinary wills, and there was no literal adoption of legal texts. This gave rise to differences in the Czech legislation from the original legislation. Even though it seems that these are trifles, the real impact is that it is practically impossible to use the application practice of inspiration sources and it will be necessary to build the application practice almost entirely on a domestic basis. This is further complicated by the fact that, in addition to notaries, judges were among the professional groups that were highly critical of the extension of the power of *mortis causa*. This is one of the reasons why judges tend to have a negative attitude towards these wills.

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[46] A different opinion is based on German law and does not reflect the fact of the different wording of the German regulation. See F. Plašil, in F. Melzer, P. Tégl (eds), *Občanský zákoník. § 1475–1720. Velký komentář* [*Commentary to CzCC 2012. Part sec. 1475–1720. Great Commentary*], C.H. Beck, Prague, 2024, p. 576–577.

Although the new CzCC 2012 theoretically provides relatively extensive disposition options, in practice there is a risk that wills made in this way will be found invalid by a strict interpretation of the courts. That risk therefore leads to only a minimal possibility of making the will by the provisions of Sec. 1542–1549 CzCC 2012.