CHAPTER TEN
VICARIOUS LIABILITY OF JURISTIC PERSONS

(A HISTORICAL, COMPARATIVE AND PHILOSOPHICAL STUDY)

10.1 Introduction

When we theorise about liability of juristic persons, we cannot omit exploring the idea of vicarious liability. Vicarious liability is a well-established institute that has its roots in common law systems and, in short, is underpinned by an idea that a person may be held (vicariously) liable for someone else's legal wrong.[348] So, unlike with fault-based or strict liability, vicarious liability is merely a tool for attributing liability to someone different from the actual wrongdoer, regardless of the fault-based or strict nature of the underlying wrong.[349] For instance, an employer may be held vicariously liable for the acts of its employees, or parents may be held vicariously liable for the acts of their children.

The legal concept of vicarious liability is alien to Czech law and, to some extent, also to continental legal thinking generally.[350] The Czech legal system, which belongs to the continental tradition, only recognises liability for the acts of an assistant (Section 2914 of the Civil Code), liability for payment of a contractual debt through a third person (Section 1935 of the Civil Code), or generic liability of juristic persons for unlawful acts by its representatives, employees or duly appointed agents (Section 167 of the Civil Code). None of these concepts equals to vicarious liability, although they resemble vicarious liability in many important aspects. Put simply, the current Czech black-letter law does not recognise vicarious liability.

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348 E.g., GILIKER, P. *Vicarious Liability in Tort: A Comparative Perspective*. Cambridge: Cambridge University Press, 2013, p. 1.

349 See Chapter 8 and Chapter 9 of this volume, which deal with fault-based and strict liability of juristic persons.

350 Cf. GILIKER, P. *Vicarious Liability in Tort: A Comparative Perspective*. Cambridge: Cambridge University Press, 2013, especially ch 9.

In theory, however, the situation looks different. It was already 1930s in Czechoslovakia when the Normative Legal Science (NLS) arrived at the concept of vicarious liability by analysing the nature of legal duties. According to the NLS, we can distinguish between liability for the person's own duties and liability for duties that the law imposes on other entities—vicarious liability. It is interesting that the NLS, in this text represented mainly by František Weyr's scholarship,[351] advocated a theoretical concept of vicarious liability even though Czech legal scholarship did not recognise any such category at that time. In this chapter, I present this concept of vicarious liability—which Weyr called *"ručení"* in the Czech language.

One purpose of the present chapter is to present the genealogy of the concept of liability *("ručení")* in Czech legal theory and, thereby, to cast new light on the concept of vicarious liability. In particular, I reconstruct and further develop an argument of the NLS according to which it is logically necessary for a legal system to have at least a theoretical concept of vicarious liability. Then I explore what essential features—from the perspective of the NLS—the category of vicarious liability entails. The added value of such research translates to both the theory of vicarious liability and to general understanding of the NLS, which is most widely associated with Hans Kelsen's *Pure Theory of Law*.

The second purpose of this chapter is to explore the concept of vicarious liability in relation to juristic persons. Since this part of the book is primarily concerned with juristic persons' wrongful conducts, i.e. with the liability generating events, I argue for a novel claim that juristic persons cannot be individually responsible or directly liable. Instead, I argue that, due to their nature and due to the nature of the rules of attribution that leads to their liability,[352] we may only conceptualise their liability as vicarious—juristic persons and other artificial legal entities can be held liable only vicariously.

This chapter is based mainly on the philosophical and historical method of legal research and it does not attempt to provide any compelling doctrinal or comparative analysis of the law of vicarious liability. Instead, what I analyse and refine here is merely the theoretical frame of vicarious liability. Since there is an imminent danger that, when explaining the NLS theory of liability, my reader will fall into a trap of technical and nationally-specific legal language, I will start this chapter by providing an overview of the relevant Czech law, its terminology and will compare this view with the common law concept of vicarious liability (Section 10.2). After this preliminary work, I will navigate through the historical context of the NLS theory of liability, showing that Weyr arrived at the concept of vicarious liability when he tried to solve the terminological issue in the Czechoslovakian law, namely that it was not able to distinguish between liability and responsibility (Sections 10.3 and 10.4). In the subsequent section,

[351] František Weyr (1879–1951) was a Czech jurist, philosopher and a founding figure of the Normative Legal Science (in Czech "normativní právní věda"), sometimes simply referred to as "normativism" or "or legal normativism". Normative Legal Science has multiple common features with Hans Kelsen's *Pure Theory of Law* but is distinct from it.

[352] In more detail on the nature of juristic persons and on the nature of attribution rules, see Chapter 2 of this volume.

I reconstruct Weyr's argument in defence of vicarious liability[353] and I advance it by making a more general claim that vicarious liability is a necessary theoretical construct for any legal system that features some basic ideas promoted by the NLS (especially the idea of a legal norm, and the idea of individual normative point to which liability can be attributed under such norm). In the same section, I try to anticipate and deflect criticism that this claim may trigger (Section 10.5). Lastly, by combining the NLS theory of liability and adopting a strict distinction between liability and responsibility, I argue that juristic persons may be held liable only vicariously (Section 10.6).

10.2 Vicarious liability and similar concepts in the Czech Civil Code

As I have noted earlier, the black-letter Czech law does not recognise the term vicarious liability. In the Czech Civil Code, there are three provisions that address closely related questions of liability—liability for the acts of an assistant (Section 2914 of the Civil Code), liability for payment of a contractual debt through a third person (Section 1935 of the Civil Code), and liability of juristic persons for acts of its representatives, employees, and agents (Section 167 of the Civil Code)—yet they are different from vicarious liability.

In the case of Section 2914, the duty to compensate damage is attributed to *"[a] person who uses an agent, employee or other helper in conducting his activities"*.

> [Such person] shall be obligated to compensate damage caused by this agent, employee or other helper in the same way as if he had caused the damage himself. If a person undertakes to carry out a certain activity independently but this performance serves as another person's performance of his obligation, the person acting independently shall not be deemed the other person's helper. If the other person did not choose him diligently or did not supervise him sufficiently, that person shall guarantee the fulfilment of his duty to compensate for damage.[354]

Unlike in the case of Section 1935 in which a person is obliged to pay damages for any damage caused within a contractual relationship, where a contractual debt is fulfilled through a third person (Section 1935 of the Civil Code), the previous provision specifies conditions of liability to pay damages for damage caused by torts (delicts) of others.

Both in the case of Section 2914 (liability in tort) and Section 1935 (liability in contract), however, the Czech Civil Code does not specify that the person, who must

[353] This argument was presented by Weyr in his 1933 journal article—WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933, pp. 16–36.

[354] Translation coped from HRÁDEK, J., BELL, A. (trs). Compensation for Damage in the New Czech Code: Selected Provisions in Translation. *Journal of European Tort Law*. 2016, No. 7, p. 312.

compensate the victim for their damage is vicariously liable. Nor does the Code expressly state that the person is liable for a wrong. The intellectual construction of both statutory provisions is that the law *ascribes* or *allocates* the duty to compensate to that person. In contrast, neither of these statutory provisions *ascribes* wrongdoing to that person—meaning that the person is not liable for, but has a duty to compensate, damage. It is more like when an insurance company compensates damage caused by an insured person, rather than when a juristic person is held liable for acts of its employees. The law here ascribes the duty to compensate, not liability.

In Section 167 of the Civil Code (regulating transactions and liability of juristic persons), the intellectual construction is different. Here a juristic person is deemed liable for the acts of its representatives, employees, and lawfully appointed agents. Under this construction, the person is considered liable, meaning that the law looks at such juristic person as if it committed the wrong itself. In this case, thus, the law ascribes liability to the juristic person (which usually also implies a duty to compensate). This invites multiple conceptual problems. One is how we ascribe actions and intentions of the representatives, employees, and agents to the juristic person. I have addressed this issue elsewhere, arguing that the extent of liability of juristic person must be, due to this statutory intellectual construction, always at least as large as the extent of liability of the representing agent. In most cases, it will be even larger.[355] Another problem is that the law does not specify whether the person is liable vicariously for other persons' legal wrong or whether it is directly liable for its own wrongs, committed by legally relevant actions of its representatives, employees, or agents.

In fact, this is one of the most important novelty that was introduced by the new Czech Civil Code (in effect from 2014). It largely avoids using the concepts of liability or responsibility and only specifies criteria for ascription/allocation/reallocation of duties to compensate. The reason for such method of regulation (regulation without using the terms "liability" and/or "responsibility") stems from a long-standing problem of Czech scholarship and doctrine of private law where said two terms (liability and responsibility) were explored as highly controversial—the controversy, in short, was that a person has duty to pay damages because she is liable, and, at the same time, is liable because she has duty to pay damages.[356] Such circular argumentation led to many inconsistencies and both liability and responsibility were thus abandoned in the new legislation. Moreover, due to peculiar historical developments, the Czech law has become unable to distinguish conceptually between liability and responsibility. This has been the case since 1940s and has triggered further problems.[357] I will follow-up on some of these remarks in Section 10.6 below.

At this point, it is important to note that when it comes to liability of juristic persons, Section 167 of the Czech Civil Code is a rare example where the law expressly ascribes

[355] See more in JANEČEK, V. Nerovná subjektivní odpovědnost [Unequal Fault-Based Liability]. *Jurisprudence*. 2016, No. 5, pp. 15–21.

[356] More on this issue, see JANEČEK, V. *Kritika právní odpovědnosti [Critique of Legal Responsibility]*. Prague: Wolters Kluwer, 2017.

[357] Ibid.

"liability" for actions of others (actions which may constitute a legal wrong), rather than ascribing some specific duty (e.g. a duty to compensate) to the person. However, Section 167 of the Civil Code does not specify whether it also ascribes vicarious liability for wrongdoing of others. We can thus argue that Czech law can, at least implicitly, absorb the concept of vicarious liability with regard to liability of juristic persons. To examine this hypothesis, I will first need to unfold some historical developments of the concepts of liability, responsibility, and duty in the Czech law. The main purpose of such analysis will be to unpack the genealogy of the concept of liability in relation to the concepts of duty and responsibility. Later in this chapter, it will allow me to show whether, and to what extent, a juristic person can be held vicariously liable for wrongs of others in the Czech law. It is important to note up front that the following two sections will be heavy on terminological obscurities stemming from fundamental indeterminacy of translation from Czech legal terminology to English. To map the adventurous genealogy of the Czech term liability *("ručení")*, there is however no way around these terminological obscurities, at least as far as I can see. Accordingly, the reader will hopefully excuse some inelegancies of expression in the following sections.

10.3 Liability and responsibility in the Czech legal theory

Any considerations concerning the Czech theory of responsibility require a historical overview that will provide at least a brief insight into the reasons why the Czech legal scholarship abandoned its earlier differentiation between the terms liability *("ručení")* and responsibility *("odpovědnost")*. The origins of this abandonment can be traced back to the 19th century, when the term responsibility *("odpovědnost")* was first introduced into Czech legal terminology.

From a historical perspective, the Czech legislation has always been influenced by the German laws and jurisprudence, which is attributable, *inter alia*, to the geographic vicinity and similar cultural traditions of the two countries, as well as to commercial and personal relations between the Czech and German nationals and their common historical and political background. Moreover, we should bear in mind that until the 19th century, comparative jurisprudence was an unknown concept and access to any foreign literature, let alone other than the German literature, was significantly more complicated than today. The German influence over laws written in Czech and the Czech language was natural and understandable, given that their German-speaking neighbours provided the easiest reference for Czech authors. The influence of the German language over the construction of Czech thinking was further strengthened under the Habsburg reign over the Czech lands. Finally, we cannot disregard the fact that, historically, the German element was also present at the Prague University, which naturally also affected the thinking of the Czech-speaking national academic elite. Hanel says: *"[t]here in not a single period in the history of Czech law where*

a historian would find no trace of the German influence".[358] Another legal historian, Stieber, believed that the questions regarding the legal concepts of responsibility and liability were no exception in this respect either.[359]

The term responsibility *("odpovědnost")*, when first introduced into the Czech legislation in the Austrian General Civil Code of 1811 (ABGB), was a translation of two different German terms—*"Verantwortung"* and *"Haftung"*.[360] At the beginning of the 19th century, i.e. at the time of adoption of the ABGB, it was indeed quite common for the Czech lawyers to discuss and publish their work in German. For example, Professor Schuster from Prague or the lawyer Luksche from Brno wrote their commentaries on the ABGB in German.[361] Indeed, the Czech translation of the ABGB itself, which contained the single term "responsibility" to cover both the two aforementioned German notions, was not widely disseminated in the Czech lands, whereas the German version of the Code was used much more frequently. In the mid-19th century, Czech lawyers therefore undertook the task of at least acquainting the Czech nation with the contents of the ABGB through new translations. In this context, Petržilka states in the Preface to his translation of 1857 that *"the Czechoslavic citizens of the Austrian Empire"* had not yet had the opportunity to acquaint themselves with the contents of the ABGB *"since the obsolete translation of the Code alone, made in 1812, has long been sold out and a great portion of the more recent body of legislation relating to the Civil Code has never been translated into the Czech language"*.[362] Moreover, we should bear in mind that the Czech National Revival movement was only gradually gaining force at that time.

Consequently, we can conclude that the Czech language had only a limited influence over the academic discourse on law in the relevant period and any detailed legal assessment of the notion of responsibility, either in the sense of *"Verantwortung"*,

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358 HANEL, J. K otázce o recepci práva německého v českém právu zemském [On the Aspect of Reflection of German law in the Law of the Czech Lands (Landrecht)]. In: *Pocta podaná českou fakultou právnickou panu Dr. Ant. rytíři Randovi k sedmdesátým narozeninám dne 8. července 1904 [Tribute from the Czech Law School to Knight Antonín Randa on the Occasion of his 70th Birthday, 8 July 1904]*. Prague: Bursík & Kohout, 1904, p. 131. Unless otherwise stated, all traslations of the original Czech texts in this chapter are my own.

359 STIEBER, M. *Dějiny soukromého práva v střední Evropě [History of Private Law in Central Europe]*. Prague: private publication, 1930, pp. 22 et seq.

360 Including their various forms (as verbs and adjectives) and derivative words. In this respect, I base my considerations on a comparison between the original German version of the ABGB (*Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie*. Wien: Aus der k.k. Hof- und Staats-Druckerey, 1811) and the Czech version retrieved from the ASPI legislation database (as at 4 March 2016), which I have compared with PETRŽILKA, J. *Kniha všeobecných zákonův občanských říše rakouské [Austrian General Civil Code]*. Prague: B. A. Credner, 1857.

361 SCHUSTER, M. *Theoretisch-praktischer Kommentar über das allgemeine bürgerliche Gesetzbuch (Bd. 1)*. Prague, 1818; LUKSCHE, J. *Das alte und neue Recht Mährens und Schlesiens, k. k., öster. Antheils, nach der Ordnung des bürgerlischen Gesetzbuches (Teil I–II)*. Brünn, 1818 [both references taken from BERAN, K. *Pojem osoby v právu: (osoba, morální osoba, právnická osoba) [The Concept of a Person in Law (Person, Moral Person, Juristic Person)]*. Prague: Leges, 2012, pp. 54–57.

362 PETRŽILKA, J. *Kniha všeobecných zákonův občanských říše rakouské [Austrian General Civil Code]*. Prague: B. A. Credner, 1857, cit. from the Preface (pages unnumbered).

or *"Haftung"*, had to be primarily conceived in German. Nonetheless, on the same grounds, we can also assume from the onset that the conceptual ambivalence, specifically linking the term responsibility *("odpovědnost")* to both the terms *"Verantwortung"* and *"Haftung"*, was thoroughly justified and did not occur by accident. There certainly was a reason for Czech lawyers to adopt a single Czech expression, albeit not consistently, for both German terms *("Verantwortung" as well as "Haftung")*. While, on the one hand, the noun *"Verantwortung"*, or the verb *"verantworten"*, is translated as responsibility *("odpovědnost")*, or to have a duty to respond *("odpovídat")*, in virtually all cases,[363] the words *"Haftung"*, *"haften"* (in various forms) are translated into Czech not only as responsibility, but in several cases also as liability, to be liable *("ručení"*, *"ručit")*. On the other hand, the Czech word *"ručení"*, *"ručit"* (liability, or to be liable) has only one equivalent in the German ABGB, i.e. wherever the words *"ručení"*, *"ručit"* are used in the Czech translation, we always find the term *"Haftung"*, or the verb *"haften"*, in the original German version.

Why, then, did Czech lawyers, whose parlance certainly allowed them to distinguish amongst (1) responsibility in the sense of *"Verantwortung"*, (2) responsibility in the sense of *"Haftung"*, and (3) liability in the sense of *"Haftung"*, used the words responsibility and liability identically to a certain extent?[364] In other words, why did they partially understand liability and responsibility as having the same meaning? And what was the consequence of this overlapping? It should be noted that German jurisprudence indeed uses the term *"Haftung"* for liability in a doctrinal sense (similarly to the Czech term *"ručení"*), while the term *"Verantwortung"* is interpreted as responsibility in philosophical sense. Hence, why and how were the two terms entwined?

There is another aspect that plays an important role in this context. In the first half of the 20th century, Czech jurisprudence and case law used the terms liability and responsibility *identically*, albeit inconsistently, in my opinion.[365] This might seem incomprehensible today. The current meaning of the Czech term *"ručení"* is rather different from that historically attributed to it and rather corresponds to the English term suretyship. The current notion of *"ručení"* (in the sense of suretyship) refers to a legal relationship where a surety (being a person different from the debtor) satisfies the creditor in case of the debtor's default.[366] Until as late as the first half of the 20th century, the same concept was commonly called *"rukojemství"*—suretyship

[363] Technically, there is one exception, where the verb *"verantworten"* is translated as *"je zavázán"* (is liable)—Section 930 ABGB. I nonetheless believe that this approach fully complies with the nature of responsibility as an obligation—a person "is liable" to respond in a prescribed manner.

[364] I describe the reasons particularly in the analysis accompanying footnotes 366 to 371 below.

[365] For example, SEDLÁČEK, J. *Obligační právo [The Law of Obligations]*. 2nd edition. Brno: Právník, 1933, pp. 268–272; RANDA, A. *O závazcích k náhradě škody [On Obligations to Indemnification]*. 7th edition. Prague: J. Otta, 1912, passim, and others. For secondary sources, see, e.g., LUBY, Š. *Prevencia a zodpovednosť v občianskom práve I [Prevention and Liability in Civil Law I]*. Bratislava: SAV, 1958, p. 32 or VÍTEK, J. *Odpovědnost statutárních orgánů obchodních společností [Responsibility of Governing Bodies of Juristic Persons]*. Prague: Wolters Kluwer, 2012, pp. 13–24.

[366] In this sense, see Section 2018 (1) of the New Civil Code or Section 546 of Act No. 40/1964 Coll. (the previous Czech Civil Code.).

(rather than *"ručení"*), which was an *abstractum* derived from the notion designating the person standing surety—a surety.[367] At that time, the meaning of the term *"ručení"* was substantially more general and corresponded to the term liability, as still reflected in current common Czech. People still may use *(in Czech)* expressions such as: "We assume no liability for items left unattended."; "Stop teasing me, or I'll not be liable for my actions!"; "Can you assume liability for this?"; "Limited liability company.". None of the above examples in fact refers to suretyship.

To summarise the above, the two aforementioned notions—*"ručení"* (in the sense of liability) and *"odpovědnost"* (responsibility) were assigned an identical meaning in the first half of the 20th century. This brings us to the question how the meaning of the two partially overlapping concepts, i.e. liability and responsibility, evolved in law and gradually became identical in the period between 1811 and the first half of the 20th century, and how this development affected the theoretical concept of liability, including the concept of vicarious liability in private law.

10.3.1 Liability in the ABGB

The codification of private law in the Czech and Austrian lands in the 18th century was fundamentally informed by Roman law, rationalism and the natural-law theory.[368] This applied not only to the preparatory works on the new code of civil law, which resulted in a rather academic work entitled *Codex Theresianus* (completed in 1766), but also to teaching of law at the Prague and Vienna Faculties of Law.[369] The *Codex Theresianus* (the predecessor of the ABGB) represented a compilation of law that had developed in the lands where the *Codex* was to be applicable. The *Codex* was dominated by the Czech element, thanks to authors with Czech roots (Azzoni, Zencker), and *"supplemented with 'common sense and the general natural law and the law of nations' (in the sense of ius naturale and ius gentium as defined in The Institutes of Justinian)"*.[370] Accordingly, where Article XVII of the *Codex Theresianus* stipulates that *"a person shall be liable for legal consequences"*, this expression reflects liability as understood before adoption of the ABGB, i.e. as a separate obligation.

However, at rather an early stage, the focus of the preparatory work preceding the adoption of the ABGB shifted from codification of the local laws to the creation of new laws, based on rationalism and naturalistic philosophy. Even stronger natural-law

[367] See Section 288 of Act No. 141/1950 Coll.; Section 1185 of the Czechoslovak Civil Code; or Section 1346 ABGB.

[368] See, e.g., KUKLÍK, J., SKŘEJPKOVÁ, P. *Kořeny a inspirace velkých kodifikací [Roots and Inspirations of Major Codifications]*. Luzern, Prague: AVENIRA Stiftung, 2008, p. 101.

[369] Ibid., pp. 103–105.

[370] KRČMÁŘ, J. *Právo občanské I. díl: Výklady úvodní a část všeobecná [Civil Law, Volume I: Preamble and the General Part]*. Prague: Všehrd, 1927, p. 8.

elements can thus be found in Horten's draft of the ABGB,[371] while the later preparatory work gradually abandoned the aforementioned aspect of collecting period and local customs[372] in favour of reception of Roman law, which applied in countries north of the Alps *(usus modernus Pandectarum)*. The final stage of the preparation of the ABGB hence already conceived responsibility and liability as part of a wider system of obligations (duties) informed by the reception of Roman law and transformed into a general—as opposed to casuistic—set of rational and natural-law principles.[373] Where, at the time of adoption of the ABGB, the term responsibility (duty to respond) was interpreted as a sort of obligation to provide response under the legal order, we have to bear in mind that the notion of a legal order (under which one was expected to respond) referred to the order of natural law, which was strongly influenced by rationalism, at the beginning of the 19th century.[374]

I consider this shift of focus an important milestone for a change in the perception of the relationship between responsibility and liability. Indeed, the legal thinking of the early 19th century surpassed the local contextual background and evolved, to a substantial degree, into a rationalising and abstract exercise aimed in particular towards systemically addressing the basic principles of law, including the principles of responsibility under private law. In simplified terms, such an approach prevailed throughout the first half of the 19th century, until it diminished under the influence of the so-called Historical School of Jurisprudence.

From the viewpoint of such a naturalistic-rationalistic philosophy of law, liability *("Haftung")* indeed could represent just one type of a duty to respond or just one type of responsibility. As I explained elswhere, "responsibility" (also referred to as a duty to respond) appeared in three different meanings in the pre-1811 legal texts: (1) primary responsibiliy to respond with one's own reasons that excuse or justify the person's action, the action for which the person migh be held liable; (2) secondary responsibility to give a substitutive response that excuses or justifies the person's action (e.g. a substitutive money payment); (3) secondary responsibility to give a sanctional or penal response for the contested action (e.g. a penalty for some wrong).[375] Now, liability represented a duty to provide the substitutive as well as the sanctional (penal) response and, in this sense, it was not different from the abstract concept of responsibility *("Verantwortung")*. It was rather a sub-type of responsibility. By the same token, we could replace the word "dinner" with "meal". Liability is a type of

371 For example, Krčmář also shares this opinion on Horten's draft (ibid., p. 10).

372 Ibid., p. 11.

373 Ibid., p. 18.

374 HANEL, J. J. O pojmu i objemu historie práva rakouského [On the Concept and Scope of the History of Austrian Law]. *Právník*. 1880, Vol. 19, pp. 217 et seq.; WIEACKER, F. *A History of Private Law in Europe*. Oxford: Oxford University Press, 1995, p. 267. For further details, see, e.g., MARŠÁLEK, P. Přirozenoprávní aspekty Všeobecného občanského zákoníku [Natural-law Aspects of the General Civil Code]. In: DVOŘÁK, J., MALÝ, K. (eds.) *200 let Všeobecného občanského zákoníku [200th Anniversary of the General Civil Code]*. Prague: Wolters Kluwer, 2011, pp. 294–300.

375 JANEČEK, V. *Kritika právní odpovědnosti [Critique of Legal Responsibility]*. Prague: Wolters Kluwer, 2017, ch 2.

responsibility, in the same way as dinner is a kind of meal. What is important in this context is the question why we should replace the former term with the latter, and what difference we would thus obscure.

We should remind ourselves in this context the essential difference between the terms *"Verantworung"* and *"Haftung"* as perceived by contemporary German theory. *"Verantwortung"*, on one hand, represents a general, jurisprudential responsibility, while *"Haftung"*, on the other hand, designates legal, or doctrinal responsibility. Put simply, *"Verantwortung"* refers to responsibility under any normative system, whereas *"Haftung"* refers to responsibility under the system of positive law. However, the duality of natural and positive laws was denied at the outset of the ABGB. The meaning of any and all responsibility was hence necessarily assessed from the perspective of natural law, whether incorporated in a code or embedded in the minds of rationally thinking individuals. Nonetheless, it follows from the above, *inter alia*, that responsibility in a jurisprudential and doctrinal sense both necessarily referred to the same concept. The perception of law at that time simply enabled such approach. The terms responsibility and liability were therefore interchangeable, without prejudicing the comprehension as to under which system of rules (natural or positive rules) a person should respond.

In addition to the above-described influence of natural law we also need to consider that, at the time of adoption of the ABGB, the Czech term *"ručení"* referred both to liability in the technical sense and to implicit liability (general liability through one's assets and general liability through one's honour and faith (as in "good faith"), which had secured any debt before the adoption of the ABGB). Already in 1811, it was thus impossible to clearly distinguish, from a linguistic viewpoint, between (i) universal liability, the binding nature of which could be derived from an implicit agreement between parties as well as from the natural-law obligation to abide by one's promise, and (ii) liability in the technical sense, the binding nature of which followed in principle from compliance with the prescribed form in concluding such a positive-law security obligation. Indeed, I am convinced that general implicit liability in conjunction with the natural-law understanding of obligations and a normative system of law permitted bridging the conceptual divide between responsibility and liability.

The aforementioned influencing factors were supplemented by a third factor, namely the unclear meaning of liability. As mentioned above, at the time of adoption of the ABGB, liability in the sense of a security obligation was almost, but not completely, overlapping with the two types of responsibility—substitutive and sanctional (penal), as distinguished in theory. Simultaneously with the previous sense of the term, liability *("ručení")* was also conceived as a separate debt (obligation) and hence it could also represent a duty to respond in the very original sense of the word; theoretically speaking, liability in itself could thus provide a relevant ground for the defendant's acts *(response)*.

Having regard to the above, I conclude that the above-explained development of the notion of liability contributed to the partial overlapping of liability and responsibility in the Czech translation of the ABGB. Consequently, the German

words *"Haftung"* (liability) and *"Verantwortung"* (duty to respond) were translated as *"odpovídání"* (responding) and *"(z)odpovědnost"* (responsibility) in the Czech version of the ABGB.[376] The Czech version of the ABGB thus uses the term *"(z)odpovědnost"* (responsibility) and its various forms 46 times[377] to translate various words derived from the verb *"verantworten"* (32 times) and the verb *"haften"* (14 times).[378]

Given the inconsistencies in the translation, it is also interesting to look into how the verbs *"haften"* and *"verantworten"* (and their variations and derivatives) were translated in the Czech version of the ABGB. The verb *"verantworten"* is translated into Czech as *"je zavázán"* (he is obliged to) in one case.[379] The verb *"haften"* (and its various forms) is translated as *"ručit"* (to be liable) 66 times,[380] but also as *"váznout"* (to encumber, as in an encumbering burden) 16 times and, what is important, again as *"je zavázán"* (he is obliged to) in two cases.[381] This also shows that the Czech lawyers at that time perceived the notions of responsibility, liability and obligation as partly interchangeable in their considerations (or at least in how they expressed these considerations linguistically).

A thorough linguistic analysis of the Czech translation of the ABGB[382] nonetheless reveals another interesting aspect. The Czech word *"ručit"* (to be liable) and words derived from it are always translations of the German word *"haften"*. In this context, the Czech word *"ručení"* is used in the translation of the ABGB only in cases which we could describe as the aforementioned general liability through one's assets. The term *"rukojemství"* (suretyship) or *"zástava"* (lien) was introduced for liability in the technical sense. The codification of civil law in the ABGB hence achieved two goals: firstly, a general implicit form of liability through one's assets was expressly stipulated in a legal regulation and therefore no longer needed to be justified by natural-law theory and, secondly, this general liability was linked to a certain legal fact for which

376 See also VÍTEK, J. *Odpovědnost statutárních orgánů obchodních společností [Responsibility of Governing Bodies of Juristic Persons]*. Prague: Wolters Kluwer, 2012, pp. 13–18, who comes, on slightly different grounds, to the same conclusion as to the confusion of responsibility and liability.

377 Out of which the notions *"zodpovědnost"* and *"odpovědnost"* (which have identical meaning in Czech) are used 21 and 26 times respectively.

378 As a third possible meaning, responsibility is used once in the sense of a quality warranty, being a translation of the expression *"er leistet Gewähr"* appearing in the German original (Section 922 ABGB). Nonetheless, I consider the last-mentioned interpretation an insubstantial inconsistency, which also applies to the Czech translation of the verb *"gestaned"* as *"zaručit se"* (to assume liability in the sense of standing surety) in Section 881 ABGB. Similarly, I disregard the cases where the notion *"odpovědnost"* (responsibility) is used (in the currently obsolete sense) to mean "sameness", in the sense that X (cor)responds to Y—such use of the word can be found in Sections 217, 581, 1270, 1456, 1481 ABGB.

379 Section 930 ABGB.

380 To the contrary, the Czech word *"ručit"* (to be liable) has virtually only one German equivalent, i.e. wherever the Czech word *"ručit"* is used in the Czech version, it corresponds to the word *"haften"* in the German version.

381 Incidentally, I note that the term suretyship (in Czech formerly *"rukojemství"* and currently *"ručení"*) corresponds to German term *"Bürgschaft"*.

382 See footnote 360 in this part.

such liability was established. Liability was thus systemically related to a primary duty or to some other fact, which in my opinion paved the way for the dependent nature of liability obligations—liability under positive law thus newly referred only to a duty to provide substitutive or sanctional response, which was always associated with a primary obligation, or a primary debt.[383] In other words, liability was logically linked with a primary obligation which was sanctioned by liability.

By contrast, non-pecuniary liability through one's honour and faith was not thus codified, which was most likely caused by the strong emphasis the ABGB placed on proprietary rights. The civil-law doctrine tended to disregard any legal conflicts lacking a proprietary or appraisable nature. From the positive-law perspective, the moral aspect of a promise and the obligation to bear liability through one's honour and faith was thus suppressed to give precedence to the proprietary or market dimension. Notwithstanding the above, the moral facet found its use in interpretation of obligations. Honesty, good faith and fairness actually became interpretative correctives of the aforementioned rationalistic and naturalistic law, which is indeed reflected in the well-known Ulpian's axiom *"honeste vivere—neminem ledere—suum cuique tribuere"*.[384] In simplified terms, only an obligation arising honestly, fairly and in good faith was enforceable. It follows from the above that the aforementioned implicit liability through one's honour and faith was also transformed into a general precondition for enforceability; it was nonetheless systemically and conceptually separated from the obligation (duty) to bear liability. This could not but lead to further blurring and loosening of the originally legal notion of liability, which also was a technical term of the art.

At the time around the adoption of the ABGB, the systemic classification of the institute of liability *("ručení")* hence rather radically changed in the Czech legal thinking. This ultimately allowed for partial overlapping of the terms liability and responsibility and blurred the boundary line between the individual types of a duty to respond (responsibility). Responsibility *("odpovědnost"—"Haftung")*, on the one hand, referred to all types of a duty to respond *("odpovídání")*, whereas liability *("ručení"—"Haftung")*, on the other hand, referred only to a secondary duty to respond, whether in the form of a substitutive response or a sanction. The comparative analysis of the relevant language versions of the ABGB in the light of the historical developments of the notions *"ručení"* (liability) and *"odpovědnost"* (responsibility) in the Czech language therefore reveals that the Czech terms *"ručení"* and

[383] Even though, for example, liability for accidental damage (*casus minor*) (e.g. Sections 338, 460, 964 ABGB) is, theoretically speaking, in fact an independent debt arising regardless of breach of a duty.

[384] In the original: *"iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere"*. (Ulp. Dig. 1, 1, 10, 1, available at URL: <http://droitromain.upmf-grenoble.fr/Corpus/d-01.htm#1> [https://perma.cc/E9PH-9F6Q]). These principles indeed often serve as the fundaments for explanation of the entire body of private law (ELIÁŠ, K. Nad legislativním záměrem zásad obecné části nového občanského zákoníku aneb kterak se promeškávají historické příležitosti [On Legislative Intention of the Principles Governing the General Part of the New Civil Law, or How Historical Opportunities Are Being Lost]. *Právní rozhledy*. 1996, No. 1, pp. 12–13).

"odpovědnost" (both being a translation of the German *"Haftung"*) overlap in the translation of the ABGB, thus obscuring the difference in their jurisprudential foundations. Liability nonetheless was still not entirely identical with responsibility, even though it also gave rise to a duty to respond.

We can conclude that at the time of the adoption of the ABGB (1811), Czech lawyers did not consistently distinguish amongst the notions of liability *("ručení")*, obligation *("závazek")* and responsibility *("odpovědnost")*. However, a notional relationship between liability and responsibility already existed in the Czech language (which was not present in the German language). In the following text, I focus on the further developments of the said concepts. As mentioned above, liability and responsibility overlapped in the Czech legal theory and terminology of the first half of the 20th century. Consequently, I need to answer the question of why and how the complete overlapping of liability and responsibility could have occurred.

10.3.2 Liability as an integral part of an obligation

In the period shortly after the adoption of the General Civil Code in 1811 (the ABGB), the Czech legal theory held that, at least in principle, every debt (obligation) gave rise to responsibility *("odpovědnost")*, i.e. a duty to respond according to some legal system. Conversely, only in cases expressly stipulated by the law, a separate obligation to bear liability *("závazek ručení")* arose together with a debt, as a general duty to provide the creditor, under certain conditions, with a substitutive or sanctional response. Accordingly, in the first half of the 19th century, it was still possible to conceive of an obligation that was not associated with liability *("ručení")* or secondary responsibility in the sense of liability.[385] Nonetheless, this perception changed as jurisprudence evolved.

The German Historical School of Law presented a counterweight to the adoption of the ABGB which was based on the rationalist and natural philosophy. This historical school criticised the idea of codification and was particularly influential in the first half of the 19th century. At that period, law was studied and systemised in Germany primarily through the analysis of Roman law, which was later enriched with and put into the context of the spirit of the German nation *("Volkgeist")*. Contrary to the philosophy of rationalism, the German Historical School of Law aimed at placing law in its true historical (Roman) or social *("Volkgeist")* context, instead of building an a-temporal abstract and rational knowledge of the law.[386] According to the Historical Law School, the legal thinking was supposed to refocus on the relations existing in the

[385] The situation was, of course, further complicated by the fact that every valid and enforceable obligation was newly subject to the requirement of honesty or good faith, whereby liability through one's honeour and faith was established in a substantive sense. Technically, though, the term liability *("ručení")* no longer encompassed liability through honour and faith.

[386] For a brief and comprehensible overview, including the relevant sources, see, e.g., GORDLEY, J. The Architecture of the Common and Civil Law of Torts: A Historical Survey. In: BUSSANI, M.,

real world and real society where the law applies, hence to abandon those abstract rationalist and natural-law categories. Indeed, the Historical School of Law had realised that law and legal texts were best understood in the societal context, which breathes life into the law, and that it was indeed the national characteristics and history (rather than legislative texts or a-temporal rationalistic considerations) that truly shaped the law. The advocates of the Historical School of Law therefore studied their subject in consideration of the relevant historical background, in particular Roman law, which clearly informed the development of German law. In the 19th century, private law within all of central Europe was indeed largely based on Roman law (or the *ius commune*) and it was hence only logical that Roman law was studied and systemised.

The German Historical School of Law adopted a novel approach in that it did not search for some universal and abstract rationalistic concepts in Roman law that could be subsequently codified, but rather identified the historical and cultural predetermination of various legal solutions. Such perception actually instigated new scrutiny of the institute of liability *("Haftung")* in relation to its previous forms in which it appeared in German law.

One of the achievements of the above-described methodical approach consisted in linking the Roman-law obligation to the old German notions of *"Schuld"* (debt) and *"Haftung"* (liability). This was the fundament of the *Schuld und Haftung* doctrine, established in 1874.[387] The doctrine holds that, by definition, liability is part of every obligation and a shadow of every debt. Debt thus newly implies liability, in the like manner as liability implies the existence of a debt [388], and the two elements together create an obligation. Following such a concept, the Czech theorist Vážný explained in 1924, quite as common knowledge, that *"[a]n obligation means a legal relationship between two persons, where one of the persons is obliged to provide a performance (a payment, service or work) to the other and is liable through his assets for proper fulfilment of his duty"*.[389] Accordingly, an obligation (as a term) newly meant more than just a sole duty; it meant that *"a debtor is obliged (to perform) and liable (for his performance)"*.[390]

This was a rather fundamental step for Czech law as concerns the perception of the institutes of liability, obligation and, given the unclear terminology, also responsibility as such. That having been said, I first briefly explain the creation and attractiveness of the *"Schuld und Haftung"* doctrine, which allows me to derive more general conclusions in the next chapter as to how Czech law and the theoretical concept of legal responsibility changed through acceptance of this doctrine.

SEBOK, A. J. (eds.) *Comparative Tort Law: Global Perspectives*. Cheltenham: Edward Elgar, 2015, pp. 195–199.

387 BRINZ, A. Der Begriff Obligatio. *Zeitschrift für das Privat- und Öffentliche Recht*. 1874, No. 1, pp. 11–40.

388 Including a debt of honour, where liability through one's honour applies.

389 VÁŽNÝ, J. *Římské právo obligační. Část I [The Roman Law of Obligations. Part I]*. Bratislava: Comenius University, 1924, p. 5. In this context, Vážný expressly refers to the original German essay *(on obligations)* by von Brinz of 1874.

390 Ibid., p. 5.

10.3.2.1 Schuld und Haftung (1874)

Von Gierke argued that no research in the area of the history of private law had had such unprecedented and far-reaching consequences as that which resulted in the clear doctrinal differentiation of *"Schuld"* (debt) and *"Haftung"* (liability) in the old German law.[391] Nonetheless, later studies show that, rather than a discovery, this was in fact a doctrinal invention because the old German law simply knew no such conceptual differentiation.[392]

The differentiation between the terms *"Schuld"* and *"Haftung"* within the concept of an obligation was first expressed by Roman-law scholar von Brinz in his essay *Der Begriff Obligatio.*[393] Von Brinz argues that an obligation means simply an active receivable and a passive debt, or more precisely a legal debt—duty to provide performance *("rechliche Verpflichtung")*, where the two elements together create an obligation *("Verbindlichkeit")*. Liability *("Hafung")* is a state inseparably linked to every debt, in the sense of something that shall be done *("Schuld")*.[394] Interestingly, the doctrine *"Schuld und Haftung"* was embraced by members of both lines of thought within the Historical School of Law, i.e. the one building on Roman tradition (e.g. the above-cited von Brinz[395]) and the one building on German tradition (e.g. the above-cited von Gierke).

German jurisprudence was aware that liability was a separate reason for fulfilment of a duty, i.e. that liability represented a separate debt in a technical sense of the word; nonetheless, an opinion prevailed that, where liability was linked to another (primary) obligation, it actually represented liability in the non-technical sense of the word. They designated such non-technical liability as potential legal force, *enforceability*, or simply a claim.[396]

By contrast, separate liability, or liability in the technical sense, as von Gierke would call it, arises only if it has been previously expressly agreed in an agreement for

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391 GIERKE, O. *Schuld und Haftung im älteren deutschen Recht, insbesondere die Form der Schuld- und Haftungsverhältnisse.* Breslau: Verlag von M. & H. Marcus, 1910, p. 1.

392 See, e.g., DIESTELKAMP, B. Die Lehre von Schuld und Haftung. In: CONIG, H., WILHELM, W. (eds.) *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert. Teil VI*. Fankfurt am Main: Klostermann, 1982, pp. 21, 25–28; or STIEBER, M. *Dějiny soukromého práva v střední Evropě [History of Private Law in Central Europe]*. Prague: private publication, 1930, pp. 22 et seq., 152.

393 BRINZ, A. Der Begriff Obligatio. *Zeitschrift für das Privat- und Öffentliche Recht*. 1874, No. 1, pp. 11–40. For critical review, see RÜMELIN, G. Obligation und Haftung. *Archiv für die civilistische Praxis.* 1885, No. 68, pp. 151–216. In the secondary literature, see in particular GIERKE, O. *Schuld und Haftung im älteren deutschen Recht, insbesondere die Form der Schuld- und Haftungsverhältnisse.* Breslau: Verlag von M. & H. Marcus, 1910, p. 1.

394 Also GIERKE, O. *Schuld und Haftung im älteren deutschen Recht, insbesondere die Form der Schuld- und Haftungsverhältnisse.* Breslau: Verlag von M. & H. Marcus, 1910, p. 7.

395 It is interesting that, before leaving for Tübingen, Germany (in 1866), Brinz obtained the academic title of Professor of Roman Law at the Charles-Ferdinand University in Prague (1857)—BEHRENDS, O. (Hrg.). *Rudolf von Jhering: Beiträge und Zeugnisse.* 2. Auflage. Göttingen: Wallstein Verlag, 1993, p. 112.

396 GIERKE, O. *Schuld und Haftung im älteren deutschen Recht, insbesondere die Form der Schuld- und Haftungsverhältnisse.* Breslau: Verlag von M. & H. Marcus, 1910, pp. 12–13.

the purpose of securing an obligation. Hence, an agreement, rather than a breach of an obligation, was the primary legal ground for such specific liability.[397] Von Gierke accordingly concluded that general liability through one's assets need not be separately agreed in a contract and therefore represents a fully universal enforcing element, which transforms a duty (a debt) into an enforceable and claimable duty, thus giving rise to the idea of an obligation.[398] General liability through one's assets thus newly became an essential element of an obligation, which was the root of the well-known saying that liability is the shadow of a debt.

The novel idea introduced by von Brinz was that a debt was, by definition, associated with liability; and every obligation was thus, by definition, enforceable because liability formed an integral part of every obligation (or of a debt in the sense of a Roman-law obligation). Von Brinz indeed perceived enforceability in the very possibility of a sanction—liability. Besides, general liability through one's assets was a rule in the German and Czech lands alike. Consequently, von Brinz concluded that every debt had a shadow in the form of liability and that every debt was therefore enforceable. Conversely, a debt without liability became unenforceable and represented a mere natural obligation. At this point, it is appropriate to place the above considerations in the context of Czech law and the perception of the institutes of liability, obligation and responsibility on the background of the ABGB.

10.3.2.2 Reception of the "Schuld und Haftung" doctrine in the Czech environment

We have seen above that the idea of a universal *Roman-law* obligation, i.e. an obligation with a sanction (liability) as its essential element,[399] was introduced into the Czech legal thinking only as jurisprudence gradually evolved, having re-constructed and changed the meaning of the institute of liability.[400] Until then, liability had been conceived as an *obligation* to respond, but the scope of its functional meaning was substantially narrower than that of a *Roman-law* obligation. It should be noted in this respect that, before the adoption of the ABGB, the term *"ručení"* (liability) referred (1) firstly, to a set of specific concepts, or forms, of liability and, in this sense, also to specific debts (obligations) assumed by the obliged person (or a surety, as the case may be) in case of non-fulfilment of the main obligation, (2) secondly, to implicit liability through one's assets, and (3) thirdly, to implicit liability through one's honour and faith. The adoption of the ABGB narrowed the meaning of the term *"ručení"* to general liability through one's assets, which nonetheless applied only in cases stipulated by the law.

397 Ibid., pp. 19–20.

398 Ibid., p. 20.

399 Vážný was among the first Czech authors to use the term in this sense, in: VÁŽNÝ, J. *Římské právo obligační. Část I [The Roman Law of Obligations. Part I]*. Bratislava: Comenius University, 1924, p. 5.

400 STIEBER, M. *Dějiny soukromého práva v střední Evropě [History of Private Law in Central Europe]*. Prague: private publication, 1930, p. 153.

Still, the wording of the ABGB also allowed for a broader interpretation to the effect that such general liability could constitute a defining element of every debt, or of every obligation. In other words, the ABGB was compatible with the idea of an obligation that is enforceable by definition and that is always secured through liability. This being the case, it did not take long until the German *"Schuld und Haftung"* doctrine found its way into the Czech and Austrian jurisprudence.

Upon adoption of the *"Schuld und Haftung"* doctrine, Czech legal scholarship, too, newly conceived an obligation as meaning *"a legal relationship where the law attributes to a person, on certain grounds, a licence to claim certain performance from another person (in the form of an act, tolerance or omission) and simultaneously imposes on the other person a duty to provide such performance, under penalty for default"*.[401] *"A debt alone has no force. It is the liability from which the legal force stems."*[402]

The binding nature of a debt was thus derived from the existence of liability. Nonetheless, in the context of the Czech legal history, it is unclear whether the force *(enforceability)* of a debt really stemmed solely from general liability through one's assets, which was later embodied in the legislation by virtue of the ABGB, or whether the idea of the binding nature of a debt also reflected the older Czech tradition of liability through one's honour and faith. I was unable to find an answer to this question in either the primary or the secondary literature. However, I suspect that, similarly to the German Historical School of Law which studied the development of their nation's laws and examined the transformation of the German notion of liability, Czech jurists most likely studied the development of the concept of liability in their country. Consequently, it is possible that the *"Schuld und Haftung"* doctrine was embraced *inter alia* for the reason that, under older Czech laws, a debt (i.e. a promise, an obligation) had been implicitly secured by means of liability through one's honour and faith. In this respect, too, the ABGB allowed for various interpretations.

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401 KRČMÁŘ, J. *Právo občanské III. Právo obligační [Civil Law III. The Law of Obligations]*. 4th edition. Prague: Wolters Kluwer, 2014 (orig. 1947), p. 4. For more, see, e.g., SATURNÍK, T. *O právu soukromém u Slovanů v dobách starších [On Private Law of Ancient Slavs]*. Prague: Czech Academy of Art and Science, 1934, pp. 131–132, 226; RAUSCHER, R. *Několik úvah o programu a cílech slovanských právních dějin [Considerations Concerning the Plans and Objectives of the History of Slavic Law]*. Bratislava: Comenius University, 1934, p. 48; ROUČEK, F., SEDLÁČEK, J. et al. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl IV [Commentary on the Czechoslovak Civil Code and Civil Law Applicable in Slovakia and in Carpathian Ruthenia. Part IV]*. Prague: V. Linhart, 1936, pp. 5 et seq.; WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933; TILSCH, E. O příčinném spojení v právu soukromém [On Causal Link in Private Law]. In: *Pocta podaná českou fakultou právnickou panu Dr. Ant. rytíři Randovi k sedmdesátým narozeninám dne 8. července 1904 [Tribute from the Czech Law School to Knight Antonín Randa on the Occasion of his 70th Birthday, 8 July 1904]*. Prague: Bursík & Kohout, 1904, pp. 277–298.

402 STIEBER, M. *Dějiny soukromého práva v střední Evropě [History of Private Law in Central Europe]*. Prague: private publication, 1930, p. 22.

Even though the ABGB did not expressly stipulate that liability was a defining element of every debt, the wording of this statutory text nonetheless allowed such understanding, or interpretation, of a debt. The meaning of liability, or indeed the sense of only certain selected instantiations of the individual types of liability (substitutive or sanctional), thus substantially changed again, because the adoption of the *"Schuld und Haftung"* doctrine newly defined the legal order under which this type of liability is to be assessed. The substantive contents of the normative system thus shifted from liability applicable in certain cases towards liability applicable in all cases. Moreover, this happened at a time when legal thinking was no longer dominated by the theory of natural law. Legal practice and case law indeed already chose to prefer legal positivism at that time.[403]

The problem of the Czech law was that, at that time, the German term *"Haftung"*, as applied in the Czech doctrine, was interpreted rather loosely and its meaning and sense were no longer identical to those of the German notion of *"Haftung"*. This dissimilarity between the Czech and German legal concepts was completely disregarded by both legal theoreticians and practising lawyers. This was a problem, because the reasons for such notional confusion (see above) have already at least partially disappeared. This can be well substantiated by historical as well as more recent literary sources. The ignorance of the dissimilarity was probably one of the main causes of the subsequent overlapping of the terms liability and responsibility in the Czech law.

10.3.3 Liability in the sense of responsibility

In hindsight, I believe that three fundamental stages can be identified in the development of the relationship between liability and responsibility in the period before World War II. In the first stage, before the adoption of the ABGB, a duty to respond *("odpovídání")* was clearly distinguished from liability *("ručení")*, where liability represented a specific form of the duty to respond. Subsequently, in the second stage, i.e. after the adoption of the ABGB, the difference between the two terms became blurred; ultimately, in the third stage, i.e. from the end of the 19th century onwards,

[403] In this sense see, e.g., KUKLÍK, J., SKŘEJPKOVÁ, P. *Kořeny a inspirace velkých kodifikací [Roots and Inspirations of Major Codifications]*. Luzern, Prague: AVENIRA Stiftung, 2008, p. 141. For period literature, cf. also TRAKAL, J. Obnova problému přirozeného práva v soudobé literatuře právovědné a sociologické [Renewal of the Aspect of Natural Law in Current Legal-Theory and Sociological Literature]. In: *Pocta podaná českou fakultou právnickou panu Dr. Ant. rytíři Randovi k sedmdesátým narozeninám dne 8. července 1904 [Tribute from the Czech Law School to Knight Antonín Randa on the Occasion of his 70th Birthday, 8 July 1904]*. Prague: Bursík & Kohout, 1904, pp. 1 et seq. In the secondary literature, see, e.g., MARŠÁLEK, P. Česká právní věda mezi dvěma světovými válkami a její metodologie [Czech Jurisprudence and Methodology between the World Wars]. In: MALÝ, K., SOUKUP, L. (eds.) *Československé právo a právní věda v meziválečném období (1918–1938) a jejich místo ve střední Evropě. Svazek I [Czech Law and Jurisprudence in the Period between the World Wars (1918–1938) and their Place in the Central Europe. Volume I]*. Prague: Karolinum, 2010, pp. 61 et seq.

the terms overlapped, and liability was gradually replaced by the term responsibility. Paradoxically, the relationship between liability and responsibility have completely twisted and turned into an opposite relationship that they had initially. Their dissimilarity turned into thier sameness. How did this happen? Some of the factors that allowed for such a transformation of the relation between liability and responsibility have already been explained above. Nonetheless, I will provide a brief recapitulation of the main factors.

First, the basic paradigm had changed, having shifted from natural-law towards positive-law perception of rights, which was associated with emphasizing the positive-law meaning of responsibility *("Haftung"* instead of *"Verantwortung")*. Consequently, where responsibility was perceived as a duty to respond under the order of positive law, juristic considerations necessarily had to use the term responsibility-liability *("Haftung")* substantially more often than responsibility *("Verantwortung")*.

Secondly, liability through one's assets was a general and common concept, further supported by the *"Schuld und Haftung"* doctrine, which turned responsibility-liability *("Haftung")* into a universal way of responding to a debt. To a substantial extent, the question of responsibility could thus be reduced to the question of liability, given that liability referred to a whole set of secondary, i.e. substitutive or sanctional, responses available to the creditor under the given legal order. Lawyers embracing the philosophy of positive law therefore considered the terms of liability and responsibility to be interchangeable in a great majority of cases (with the exception of primary responsibility).

Thirdly, the Czech version of the ABGB was conceptually unclear, as it simply did not follow the original German wording and repeatedly disregarded the difference between responsibility-liability *("Haftung")* and *(general)* responsibility *("Verantwortung")*. That being the case, it was possible, on the one hand, rigorously to perceive *Haftung* as liability, as indeed mostly happened. On the other hand, it was simultaneously fully permitted and correct to conceive the same matter as a question of responsibility. I believe that the original sense of responsibility was thereby gradually narrowed or even voided, since responsibility in the form of liability *("Haftung")* undoubtedly has a substantially narrower sense and meaning than general responsibility *("Verantwortung")*.

Fourthly, the proprietary perception of civil wrongs (emphasising the result) at that time was another important factor leading to levelling of the differences between responsibility and liability. Tilsch, for example, aptly expressed this principle, stating that *"any and all civil wrongs are based on the result in the sense of criminal law. […] A human act, albeit very dangerous and driven by gravely malicious intents, has only potentially binding nature under civil law, subject to a suspensive condition that damage was incurred as a consequence of the act."*[404] Nonetheless, where such an act violated a legal norm and simultaneously caused damage, the wrongdoer always bore

[404] TILSCH, E. O příčinném spojení v právu soukromém [On Causal Link in Private Law]. In: *Pocta podaná českou fakultou právnickou panu Dr. Ant. rytíři Randovi k sedmdesátým narozeninám dne*

responsibility, or liability, through all his assets.[405] In this context, it should be noted that only proprietary damage was relevant for liability in the Austrian and Czech laws of the first half of the 20th century and this was embedded in the legislation by virtue of Section 1293 of the ABGB. Yet the duty to respond, which followed simply from the binding nature of a promise and faith enshrined outside proprietary values (the duty of honour and good faith) was completely overlooked. This was associated, *inter alia*, with the declining interest in natural law and the attempts to exclude from law and jurisprudence any elements that could not be scientifically described or exactly defined.[406]

At the same time, the Historical School of Law, which introduced the *Schuld und Haftung* doctrine, proclaimed as one of its principles that subjective rights *had already existed before establishment of the legal order*, i.e. that subjective rights were prepositive; in this respect, the right to property was considered a subjective right *par excellence*,[407] which only illustrates the ideological and property-oriented line of thought of jurisprudence in that period, later described as exploitative by the socialist jurisprudence.[408] The thus-narrowed focus of jurisprudence to proprietary interests alone had an important consequence, namely that only proprietary obligations could have been perceived as genuine legal obligations. In other words, the question of liability for a debt was considered resolved by the assertion that a person was liable only for proprietary debts, and that only such debts could be considered as pre-positively binding, wherefrom the legitimacy of automatic liability through one's assets stemmed. Consequently, the replacement of responsibility with liability not only restricted the meaning of responsibility, but also restricted liability as such to liability for debts of a proprietary nature. Liability thus newly meant only liability through one's assets, which liability was universal and interchangeable with responsibility, as explained above.

Figuratively speaking, the circle of reasoning has thus been closed and we can see the causes that led to complete overlapping of liability and responsibility. Moreover, it

8. července 1904 [Tribute from the Czech Law School to Knight Antonín Randa on the occasion of his 70th Birthday, 8 July 1904]. Prague: Bursík & Kohout, 1904, pp. 278–279.

405 STIEBER, M. *Dějiny soukromého práva v střední Evropě [History of Private Law in Central Europe]*. Prague: private publication, 1930, pp. 153–154. See also Section 1204 ABGB.

406 For more details, see MARŠÁLEK, P. Česká právní věda mezi dvěma světovými válkami a její metodologie [Czech Jurisprudence and Methodology between the World Wars]. In: MALÝ, K., SOUKUP, L. (eds.) *Československé právo a právní věda v meziválečném období (1918–1938) a jejich místo ve střední Evropě. Svazek I [Czech Law and Jurisprudence in the Period between the World Wars (1918–1938) and their Place in the Central Europe. Volume I]*. Prague: Karolinum, 2010, pp. 66–73 or TRAKAL, J. Obnova problému přirozeného práva v soudobé literatuře právovědné a sociologické [Renewal of the Aspect of Natural Law in Current Legal-Theory and Sociological Literature]. In: *Pocta podaná českou fakultou právnickou panu Dr. Ant. rytíři Randovi k sedmdesátým narozeninám dne 8. července 1904 [Tribute from the Czech Law School to Knight Antonín Randa on the occasion of his 70th Birthday, 8 July 1904]*. Prague: Bursík & Kohout, 1904, p. 35.

407 For a critical review, see KELSEN, H. *Ryzí nauka právní [Pure Theory of Law*]. Prague: Orbis, 1933, pp. 25–27.

408 Ibid., p. 27.

is quite clear that liability and responsibility no longer had the same meaning as that ascribed to them before the adoption of the ABGB. The above-explained inconspicuous and, in hindsight, rather implicit development of the line of thought concerning private law and the concept of responsibility ultimately resulted in a disappearance, or more precisely narrowing, of the natural sense of the term responsibility and its replacement with a stricly positive-law sense of the term. Responsibility became liability. Liability became responsibility. Works published in that period, even the most representative and influential ones, started to use the terms responsibility and liability as if they had an identical meaning.[409]

10.4 A circular relationship between responsibility (liability) and duty

In the first half of the 20th century, the principle applied that, where a person was liable or responsible, for his debt, the debt simply and clearly represented a legally enforceable duty. From a theoretical point of view, this was certainly an interesting and novel finding,[410] which indeed predestined the future of responsibility in the Czech lands. Responsibility newly referred to a general sanction that secured a debt (the debt was still also referred to as an obligation), being in fact a mere secondary duty to bear responsibility of a punitive (negative) nature. In other words, the civil-law doctrine thus advocated an argument by tautology: a person who had a duty also bore responsibility (liability); and a person who did not bear responsibility (liability) did not have a duty.

In the above-described line of interpretation, the notions of duty, liability and responsibility logically implied each other. Naturally, such considerations were reflected in jurisprudence of that time, which newly engaged in serious research concerning the relationship between liability/responsibility and duty and strove to find a solution to the issues arising from such a shift. Initially, the essential difficulty in this respect lied in the new circular relationship between a duty and responsibility (liability). I will now look to into this problem in more detail.

Imagine a situation where I own a horse and you want to ride it. Following the school of legal thought of the first half of the 20th century, I have a subjective right, guaranteed by the positive law, to prevent anybody from riding my horse without my permission. Put in positive terms, everybody has a duty to refrain from riding my

409 Cf., for example, the publications mentioned in footnote 401 or SEDLÁČEK, J. *Obligační právo [The Law of Obligations]*. 2nd edition. Brno: Právník, 1933, pp. 268–272.

410 For example, Svoboda documents that Randa had not yet considered such shift at all in his influential opus *O závazcích k náhradě škody s přídavkem o úrocích [On Obligations to Pay Damages, and a Supplement on Interest]* (1899, 6th edition; 1912, 7th edition). Nonetheless, Svoboda argues that even Randa implicitly incorporated the idea that *"a person who is liable must compensate damage—and a person who has no such duty is not liable"* (SVOBODA, E. K otázce ručení za náhodu [On Liability for an Accident]. In: KRČMÁŘ, J. (ed.) *Randův jubilejní památník [Randa's Jubilee Memorial]*. Prague: Charles University, Faculty of Law, 1934, pp. 483–484..).

horse unless I grant them my permission. Where does the well-nigh magical binding force of such duty stem from?

The prevailing opinion of the Czech jurisprudence in the first half of the 20th century held that a penalty was the fundament giving rise to the binding nature of legal duties. Weyr, for example, asserted that *"[o]nly the fact that a punishment or enforcement may be imposed on a person for certain behaviour implies that the opposite behaviour 'shall be' (is desired), i.e. represents the person's duty"*.[411] Indeed, at that time already, the overriding perception of a legal norm (i.e. a statement of a legal duty) was that of a hypothetical imperative: If A, then B.[412] In this respect, jurisprudence and scientific research could not have taken account of psychological tendencies which conceived rights and obligations from a subjective perspective. To this psychologically-oriented jurisprudence, the obligation could have been understood only via a certain sense of a binding requirement that the person shall do something (for example because the required outcome or action is simply felt or considered as honourable). On the contrary, the notion of duty had to be analysed from an objective perspective.[413]

Considering the above, what can represent an objective indication of a duty? It was a sanction, often taking the form of a penalty. In civil law, a sanction indicates liability. Having a duty to do something means that I am liable; being liable for something means that I have a duty to do that. Nonetheless, liability, as a secondary responsibility, also represents a sort of a duty. Consequently, even liability becomes a binding duty only if secured by a sanction. It follows that the notions of duty, liability and responsibility imply each other and overlap to a certain degree. Moreover, both liability and responsibility apparently imply a duty in the same sense. The duty of others to refrain from riding my horse without my permission is secured (subject to a penalty) by means of liability and responsibility alike. Simultaneously, such a penalty represents a legal duty in objective terms. That having been said, why then do we need three notions referring to the same thing? Indeed, liability represents a duty as well as responsibility, which logically means that responsibility is a duty, too.

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411 WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933, p. 22.

412 In this sense, e.g. WEYR, ibid., p. 21; KELSEN, H. *Ryzí nauka právní [Pure Theory of Law]*. Prague: Orbis, 1933, pp. 15 et seq.; ROUČEK, F., SEDLÁČEK, J. et al. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl V [Commentary on the Czechoslovak Civil Code and Civil Law Applicable in Slovakia and in Carpathian Ruthenia. Part V]*. (Sections 1090 to 1341) [orig. 1937]. Prague: Codex Bohemia, 1998, pp. 669–670; SEDLÁČEK, J. *Obligační právo. 3. díl [The Law of Obligations. Part 3]* (orig. 1933). 2nd edition. Prague: Wolters Kluwer, 2010, p. 23; SEDLÁČEK, J. *Obligační právo. 1. díl [The Law of Obligations. Part 1]* (orig. 1933). 2nd edition. Prague: Wolters Kluwer, 2010, pp. 3–4; WEYR, F. *Teorie práva [Theory of Law]*. Prague: Orbis, 1936, pp. 34–35.

413 WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933, pp. 20, 23; KELSEN, H. *Ryzí nauka právní [Pure Theory of Law]*. Prague: Orbis, 1933, pp. 24–31.

10.4.1 A solution to the circular relationship by abandoning the notion of liability

Assuming that jurisprudence should be clear, elegant and use a minimum number of terms, we can understand why the Normative Legal Science (NLS) wished to clarify the theory of legal responsibility/liability/duty under civil law and remove either the circular relationship, or redundant terms in the Czech legal thinking of the first half of the 20th century. The NLS thus offered an interesting solution to the aforementioned issue of the circular definition, consisting in an idea that liability should be reserved for responsibility for a third-party duty. *"Where an enforcement act is aimed at a person other than the person whose conduct was a precondition for the enforcement act, we can describe the contents of such a duty as liability; there lies the difference between the notions of duty and liability, where liability appears to represent a special type of duty."*[414] *"The two notions—duty and liability—thus overlap if a negative precondition is met, namely that the merits for which the liability has arisen do not simultaneously give rise to a duty on the part of an entity other than the liable person."*[415] The notion of liability differs from the notion of obligation only in that "*the broader concept of 'liability for a thing' has been replaced with a more precise concept of 'liability for (a third) person'"*. [416]

Accordingly, the NLS believed that a third-party duty, rather than the duty of the liable person, constituted a precondition for arising of liability. This can be illustrated, for example, on liability of the owner of a car for an accident caused by the driver (a third person). While the car owner breached no duty of his own, the legal order usually imposes on him a duty to bear liability for the driver's acts. The concept of liability is thereby again redefined and obscured. Indeed, the available sources do not even allow clear determination of whether responsibility is to be reserved for responsibility-liability for one's own obligation *(Haftung)*, or whether it also encompasses responsibility-liability *(Haftung)* for a third person.

Interestingly, both Kelsen and Weyr played a key role in the re-definition of liability in relation to duty, although none of them expressly discussed the concept of "responsibility". Instead, they only focused on "liability" in their writings. Conceptually, their considerations were strictly confined to the notions of duty and liability (unlike the ABGB and the civil-law doctrine of the early 20th century). However, the elimination of the notion of liability actually meant that the problem of the circular relationship between liability and duty was transformed into an evident problem of a circular relationship between responsibility and duty. The reason is that once

414 KELSEN, H. *Ryzí nauka právní [Pure Theory of Law]*. Prague: Orbis, 1933, p. 28.

415 WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933, pp. 28–29.

416 Ibid., p. 29.

liability (for one's own obligation) ceased to constitute an essential element of a duty in Czech law, its role in this respect passed to responsibility to the full extent.

This might appear quite surprising, considering that the wording of the ABGB ascribed a different meaning to the notion of liability. The NLS, however, perceived liability as a theoretical concept, rather than a positive-law term. From a normativist viewpoint, this position was not unique. *"The normative legal science pointed out the logical inconsistencies of many terms used by the 'traditional' legal doctrine and offered their own terminology, [… where the focal] point of their line of thought was the notion of a norm[, which] always implies duties"*.[417] Consequently, it was not surprising for the NLS critically to review the concept of liability, which in their opinion represented an important sanctional element of a legal norm and to provide its theoretical re-definition.

Moreover, many principal representatives of the Czech civil-law doctrine embraced, to greater or lesser extent, the NLS and the normativist perception of a legal norm, including Rouček, Sedláček or Krčmář.[418] A way was thus opened for rapid incorporation of the new normativist theoretical definition of liability into the Czech legal scholarship. Around the end of the first half of the 20th century, the concept of liability for one's own duty *("Haftung")* had already been replaced with responsibility, whereas the term liability was reserved for additional liability of a third person for someone else's duty. The importance of such a solution and its actual impact on the perception of responsibility in private law can be documented not only with reference to the draft Civil Code of 1937, which draft followed the NLS and differentiated between the terms liability and responsibility, but in particular with reference to the legislative regime of liability adopted after World War II. Through the latter, the

[417] MARŠÁLEK, P. Česká právní věda mezi dvěma světovými válkami a její metodologie [Czech Jurisprudence and Methodology between the World Wars]. In: MALÝ, K., SOUKUP, L. (eds.) *Československé právo a právní věda v meziválečném období (1918–1938) a jejich místo ve střední Evropě. Svazek I [Czech Law and Jurisprudence in the Period between the World Wars (1918–1938) and their Place in the Central Europe. Volume I]*. Prague: Karolinum, 2010, p. 68.

[418] In this respect, see, e.g., ROUČEK, F., SEDLÁČEK, J. et al. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi. Díl V [Commentary on the Czechoslovak Civil Code and Civil Law Applicable in Slovakia and in Carpathian Ruthenia. Part V]*. (Sections 1090 to 1341) [orig. 1937]. Prague: Codex Bohemia, 1998, pp. 669–670; SEDLÁČEK, J. *Obligační právo. 3. díl [The Law of Obligations. Part 3]* (orig. 1933). 2nd edition. Prague: Wolters Kluwer, 2010, p. 23; SEDLÁČEK, J. *Obligační právo. 1. díl [The Law of Obligations. Part 1]* (orig. 1933). 2nd edition. Prague: Wolters Kluwer, 2010, pp. 3–4; KRČMÁŘ, J. *Právo občanské. I. díl: Výklady úvodní a část všeobecná [Civil Law. Volume I: Preamble and the General Part]*. Prague: Všehrd, 1927, pp. 70–71. For secondary literature, see WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933, pp. 30–31; or MARŠÁLEK, P. Česká právní věda mezi dvěma světovými válkami a její metodologie [Czech Jurisprudence and Methodology between the World Wars]. In: MALÝ, K., SOUKUP, L. (eds.) *Československé právo a právní věda v meziválečném období (1918–1938) a jejich místo ve střední Evropě. Svazek I [Czech Law and Jurisprudence in the Period between the World Wars (1918–1938) and their Place in the Central Europe. Volume I]*. Prague: Karolinum, 2010, p. 69.

normativist concept of liability was authoritatively embedded in positive law, which has remained in effect to the present.

The replacement of liability with responsibility within the structure of a legal norm inevitably transposed the original problem of the circular relationship between liability and duty into a problem of the circular relationship between responsibility and duty. A new question thus arose as to how the notions of duty (D) and responsibility (R) could be different where a duty implied responsibility and, simultaneously, responsibility implied a duty. Illustrated schematically, how is it possible that $D \neq R$, where $(D \Rightarrow R) \wedge (R \Rightarrow D)$? Indeed, it follows from the above that $(D \neq R) \wedge (D \Leftrightarrow R)$, which is logically a contradiction. The Czech jurisprudence dedicated more than half a century to solve the problem and still has not come to a satisfactory conclusion. But that is a problem for a different study.[419]

10.4.2 The first loss of the meaning of responsibility

At this stage, we can already arrive at quite a qualified conclusion that responsibility was deprived of its original meaning around the end of the first half of the 20th century. In fact, the re-consideration and subsequent abandonment of the term "liability" and its replacement with the general term "responsibility" completely changed the context that originally gave responsibility its meaning. Unlike in the time when responsibility was introduced into the Czech doctrinal legal discourse, i.e. when it meant a duty to respond or duty to provide legally relevant grounds for one's acts (primary, substitutive or sanctional responsibility), the term "responsibility" was doctrinally understood only as a secondary response within the context of a legal norm in around mid-20th century. The term responsibility newly described only a secondary response of either substitutive or sanctional nature. The original meaning of responsibility as a duty to give primary reasons of one's acts (primary responsibility) had therefore partly disappeared.

Moreover, in the realm of civil law, responsibility no longer applied to rights other than those pertaining to property, and thus to norms other than those protecting proprietary interests. Finally, this has lead to a third narrowing and a partial loss of the meaning of responsibility, consisting in the fact that responsibility was newly linked to a positive legal norm, and not to a general norm that makes part of the legal order (normative system) in the broadest sense of the word.

All the three aforementioned moments, i.e. (1) the loss of the meaning of responsibility as primary, rather than only secondary duty to respond; (2) the loss of the meaning of responsibility as a duty to respond under norms governing non-proprietary interests; and (3) the loss of the meaning of responsibility as a duty to respond under the order of law in the broadest possible, rather than merely positive-law, sense of

[419] See more in JANEČEK, V. *Kritika právní odpovědnosti [Critique of Legal Responsibility]*. Prague: Wolters Kluwer, 2017.

the word, actually affected doctrinal responsibility, i.e. responsibility-liability *("Haftung")*, and not to jurisprudential responsibility *("Verantwortung")*. Notwithstanding the above, the NLS, and later also the socialist jurisprudence, gave precedence to a structural and formalistic approach to law, which approach linked legal norms and legal responsibility with a formal positive stipulation of law, i.e. with the legislative text. Responsibility *("Verantwortung")* was thus completely disregarded by jurisprudence. Even today, it is still claimed in Czech jurisprudence that responsibility is not a legal notion, in reliance on an erroneous assumption that responsibility has only one meaning, either legal, or non-legal.[420]

Such a shift and loss of meaning of responsibility, which, for the above-explained reasons, could have only occurred in Czech jurisprudence and which were inconceivable, for example, in Austrian or German jurisprudence, have never been reflected in the current or older available literature. The overlapping of liability *("Haftung")* and responsibility *("Verantwortung")* is somewhat incidentally considered natural and Czech legal theory applies the same concepts in deliberations concerning foreign laws, where it errs, in my opinion. Ultimately, Czech jurisprudence thus unfortunately completely ignores foreign influences and lines of thought conceiving private-law responsibility outside the above-described conceptual framework which I consider arbitrarily distorted.

10.4.3 Interim conclusions

In the previous text, we saw why and how, in the Czech civil law, the term responsibility became identical to the German concept of *"Haftung"* (liability) which was indeed also translated as liability in the Czech version of the ABGB. Secondly, we saw how such overlapping might have affected our perception of responsibility. To find the answer, we went through a historical, doctrinal and comparative analysis of primary and secondary sources written in the Czech and German languages. This approach has revealed that, during the Czech legal history, the notions of liability and responsibility underwent quite dramatic doctrinal and positive-law changes which shaped the mutual relationship of those concepts.

In the analysis, we briefly scrutinised the institute of liability before the adoption of the ABGB (mainly by looking at liability through one's honour and faith, as well as through one's assets). We looked at how liability evolved, including how it evolved in its relationship with the institute of responsibility (mainly in the time around and after the adoption of the ABGB, as well as in the period until the end of the first half of the 20th century). Put briefly, the relationship between liability and responsibility has been completely reversed during the analysed period. Originally, responsibility

[420] For example, HANDLAR, J. Právní odpovědnost – netradiční zamyšlení nad tradičním pojmem [Legal Responsibility—Unconventional Considerations on a Conventional Term]. *Právník*. 2004, Vol. 144, pp. 1054–1065.

and liability had been clearly distinguished (responsibility for an act, debt or obligation had not been conditional on liability had or associated with enforceability; liability had represented an independent obligation); subsequently, upon adoption of the ABGB, the two notions started to overlap until eventually, at the turn of the 19th and 20th centuries, they have become completely identical, at least from the perspective of the then contemporary theory of law, under the influence of the *"Schuld und Haftung"* doctrine and due to other circumstances. At that time, i.e. at the end of the 19th century, the meaning of responsibility was restricted to a substitutive or sanctional duty securing an economic right, i.e. what can essentially be characterised as general liability through one's assets. A duty implied liability and liability implied the duty. Accordingly, liability and responsibility were, figuratively speaking, shadows of every debt.

Later, it was emphasized that liability could bind the debtor regardless of whether such liability secured a duty (an obligation) or a mere legal fact. Liability could mean both the shadow of a debt (one's own duty), but also an independent obligation. The latter meaning could be found, for example, in cases of liability for a third person or liability for accidental damage. The Normative Legal Science therefore subjected the institute of liability to a methodical scrutiny, leading to a necessary conclusion that the binding nature of a duty stipulated in a legal norm could not stem from liability. Consequently, the NLS reserved the term liability for a separate obligation that did not secure the liable person's own duty. Simultaneously, the notion of responsibility was thereby re-defined. The binding nature of the debtor's primary duty was thus newly derived from the fact that the debtor bore responsibility, i.e. that the primary legal norm was secured by a secondary legal norm stipulating responsibility. Around the end of the analysed period, i.e. around the end of the first half of the 20th century, the meaning of responsibility was thus diametrically different from its original meaning that was attributed to it upon its introduction into the Czech legal discourse in 1811.

Firstly, responsibility was newly defined only as a secondary duty to respond, the purpose of which was to secure a primary duty. Hence, responsibility was implicitly associated with only a substitutive and sanctional form of the legal response. Responsibility has thereby partly lost its meaning as responsibility to respond under a given legal order, including responsibility as giving primary reasons for one's acts.

Secondly, due to the strong proprietary orientation of civil law, where assets and ownership were of the utmost importance, the aforementioned secondary responsibility was defined merely as a duty to provide a response in the form of substitutive or sanctional proprietary performance, or in the form of substitutive or sanctional performance for a breach of a duty stipulated by a norm protecting the proprietary rights or proprietary interests of the injured person. This has lead to a further partial loss of the meaning of responsibility as a proper duty to respond under norms that would also protect non-proprietary interests.

Thirdly, responsibility was newly subjected to a legal order in the sense of positive law, meaning that the duty to respond had to be stipulated in a positive-law norm. The new definition of responsibility hence directly affected doctrinal responsibility

("Haftung") and not the general or jurisprudential responsibility *("Verantwortung")*. Nonetheless, this notional difference was completely blurred in the Czech legal thinking which conceived of both these types of "responsibility" as a single comprehensive institute. The above-described developments have substantially obscured the important non-positivist meaning of responsibility, which had been attributed to the abstract institute of responsibility upon its introduction into the juristic discourse in 1811. Responsibility was hence deprived of its meaning as a duty to respond under the order of law in the widest possible sense of the word, rather than merely in a positive-law sense.

That being the case, the subsequent development of Czech legal scholarship was based solely on a reflection of legal responsibility which had been largely deprived of its original meaning. At the same time, this curious genealogy of the terms responsibility and liability allowed the NLS to ask what difference (if any) existed between liability for one's own duty and vicarious liability for another person's duty. This will be our focus in the following section.

10.5 The normativist account of vicarious liability

We have now seen the context in which František Weyr presented his argument[421] in favour of what very closely resembles an institute that common law calls vicarious liability. In fact, we have seen that his argument was not directed at advocating vicarious liability but at solving a different problem, namely the problem of a legal duty in relation to secondary liability. The theoretical concept of vicarious liability, as opposed to liability, may thus be seen as a side effect of Weyr's NLS theory. In this section, I will focus on the normativist (NLS) theory of vicarious liability and aim to advance the NLS argumentation.

We have seen that Weyr argued for a strict separation of general liability for one's own duty from special liability for another person's duty. He suggested that we should call the first type of liability "responsibility", whereas the second type of liability should remain, according to him, entitled simply "liability". From a theoretical viewpoint, though, he could have also suggested that we call the first type of (general) liability simply as liability, and the second type of (special) liability as vicarious liability. Had he taken such step, the Czech private law scholarship would have probably developed in a way that would be much closer to the common law approach to vicarious liability.

Weyr, however, used different strategy and terminology, thereby affecting how normative legal theory understood the notion of responsibility. In particular, since he reserved the notion of responsibility as a term for liability for one's own lawful or

[421] WEYR, F. Povinnost a ručení [Duty and Liability]. In: ENGLIŠ, K., WEYR, F. (eds.) *Vědecká ročenka právnické fakulty Masarykovy university v Brně. Díl XII [A Scientific Yearbook of the Law Faculty of Masaryk University in Brno. Part XII]*. Prague: Orbis, 1933.

wrongful transactions, the term responsibility implicitly contained the ability of an agent to give secondary explanation (reasons) of their own actions. Analytically, had the person been responsible for actions of a person distinct form himself or herself, then such responsibility must have fallen under the scope of "liability" (in Weyr's terminology), or vicarious liability (in the common law terminology).

It is important to stress that the NLS understood both liability and responsibility as notions that are intertwined with a notion of a legal obligation, or more precisely a legal norm, in which both liability and responsibility can only arise as a result of some liability/responsibility generating event—in this case a breach of a duty. In cases that we would normally call cases of strict liability, i.e. where the liability generating event could be seen as a mere outcome, the NLS would describe such liability as a primary duty, i.e. as a duty that is not generated by a wrong. In other words, strict liability (such as in the case of Section 2914 or 1935 of the Czech Civil Code) could be better described by the NLS as a primary duty, rather than as a secondary remedy.

Now, if we accept such interpretation and restrict the meaning of the term liability and responsibility to *"a secondary remedial response to a breach of a primary duty (a legal wrong)"*, then it must be the case that every legal system that contain such remedial norms need to be able to construct, at least in theory, vicarious liability. The reason is that a person to whom a legal system ascribes a secondary remedial duty in response to a breach of primary duty can be held liable or responsible only for breach of either its own primary duty, or someone else's primary duty. In the first case, the person is individually responsible (and thus could be held, in the common law terminology, liable) for its own duties, whereas in the second, he could be held vicariously liable for duties of other's. Under the NLS framework, these two combinations of secondary liability exhaust the universe of all possibilities and, therefore, we can conclude that vicarious liability is theoretically a necessary feature of every legal system that contains remedial legal norms.

Let us expand on this argument by focusing on the concept of duty. One can argue that a person can be liable for breach of that person's own duty in two ways—either by legally relevant conduct of the liable person, or by conduct of a third person. The same would apply to vicarious liability for breach of duties of other persons—these duties can be breached either by the conduct of the liable person, or by the conduct of a third person. Such an approach seems analytically correct and implies a different distinction, namely a divide between liability for one's own conduct and for conduct of others.

From this viewpoint, one could easily formulate an objection that if we were to adopt such distinction, the NLS idea of vicarious liability would become irrelevant. If we would be distinguishing the types of liability by reference to an extra-normative notion of conduct (factual behaviour) of the liable person and of third persons, the difference between liability for one's own conduct and liability for one's own wrong would be blurred. Liability for conduct and liability for wrong are however not the same thing. By the same token, once we start combining legal considerations (a wrong) with factual considerations (conduct), we would not be able to distinguish

between vicarious liability for legal wrongs of others, and vicarious liability for conduct of others. Again, these are not the same thing. From the NLS viewpoint, liability as well as vicarious liability are, however, purely legal notions and they cannot be confused with attribution of the factual conduct. This objection must, therefore, be rejected.

10.6 Vicarious liability as the only form of secondary liability of juristic persons

The last point about factual conduct brings us to a peculiar conclusion regarding liability of juristic persons and other artifical legal entities. From a factual point of view, juristic persons cannot perform any conduct themselves. From a normative viewpoint, law thus cannot ask them ever to provide any explanation (reasons) for their own conduct or legal transactions. All their transactions are factually derived from the legally relevant conduct transactions of natural persons (human individuals). This means, conceptually, that juristic persons can only be attributed conduct of others, and therefore, they cannot themselves breach neither their own nor anyone else's primary legal duty. In other words, juristic persons cannot be liable themselves but must be (conceptually) attributed liability for conduct of third persons.

Now, should we accept the NLS distinction between responsibility for one's own legal wrongs and (vicarious) liability for third person's wrongs, it is, again conceptually, only possible for juristic persons to be liable vicariously. The reason is that a juristic person cannot be solely responsible for its own duties because these primary duties must always be also duties of the juristic persons representatives, employees or agents whose conduct and whose wrongful transactions are then ascribed or attributed to the juristic person. In other words, a juristic person can only be responsible derivatively (as set out expressly in Section 167 of the Czech Civil Code), meaning that it can only be liable vicariously.

Overall, by adopting the NLS terminology and its theory of liability and responsibility, we can argue that juristic persons cannot be individually responsible, or directly liable for their own actions. They can be liable only vicariously for *wrongs* of others. This notion of juristic persons' liability strongly resembles the common law concept of vicarious liability. A further comparison of the two concepts would, however, be needed if we were to advocate a claim that these two legal institutions are the same and that, analogically, in the common law juristic persons also can be held liable only vicariously. Finally, it is important to stress that the argument about juristic persons' vicarious liability does not apply to liability for outcomes (strict liability). It only applies to liability for duty-based wrongdoing, i.e. secondary liability.