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Two-Way Influencing of the Categories of Fundamental (Constitutional) Rights and Private Law Principles as the Result of Constitutionalization of Private Law in Light of the New Czech Civil Code

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Abstract

This paper focuses on the consequences of a situation having evolved from a process ongoing at both the level of the European Union and the individual national level of EU Member States, generally known as constitutionalization of private law, or as the horizontal effect of fundamental rights arising from international, European and national constitutional provisions on human rights, in the specific conditions of the Czech Republic. Czech lawmakers introduced references and even partially adopted into the text of the Civil Code fundamental/human rights, by which it bared the yet rather latent question of mutual definition and mutual relationship of fundamental constitutional rights and private law principles. Assessing this relationship and its impacts forms the core of this paper. In conclusion, the author offers a proposal for resolving systemic discrepancy of the effect of human rights in the conditions of private law.

Keywords: Fundamental rights; Human rights; Constitutionalization of private law; Direct/indirect/strong/weak effect of fundamental/constitutional rights on private law; Private law principles; Private law values; Total constitutionalization of law

Introduction

Uncertainties over the concept and systematic application of fundamental rights (in private law)

Horizontalization of fundamental/human rights, or Constitutionalization of private law, is a process received in widely varying ways in the European legal environment.

On one hand, there is the entrance of fundamental/human rights into a space previously exclusive to private law and its institutional protection provided by ordinary courts, perceived as a process having its own natural course, logic, apparent dimensions and ties to the system in which it is applied, and particularly its own aims. If certain attributes of this process are subjected to criticism or doubts, according to this part of opinions, it concerns aspects that are rather marginal, not doubting the fundamental dimensions of this process and its implacable logic of implementation.

On the other hand, a group of important authors expresses fundamental doubts regarding this process in wide measure, beginning with the basic essence and nature of fundamental rights and continuing to the specific correlation of application of fundamental rights in private law. An elementary barrier to the precision of research in this area is its terminological side: terms such as "principles", "values", "human rights", "constitutional rights" or "fundamental rights" are mainly used in juridical literature and commentaries, but also in case law, interchangeability, often lacking effort to make their content and scope more precise. One key contradiction is seen in the very nature of fundamental rights and in sources from which they are derived. A question to resolve here is whether fundamental rights are an expression of freedom, or whether their existence is conditional to their formulation or even publication. Also in the question of the reach of horizontalization of fundamental rights, consensus was not achieved and the existence of various models, reaching from direct effect, through strong indirect effect all the way to weak indirect effect are a reality that must be taken into account upon studying this area. Also differing is the content or scope of the term fundamental rights, amongst which there is no unity on incorporating social rights (Micklitz), or solidarity (Sefton-Green) into their group.

Today, it rather seems that those in the majority are proponents of the first trend supporting the course and stipulated aims of horizontalization of fundamental rights or constitutionalization of private law. This process is furnished by multiple sources, amongst which the European Court of Justice (ECJ), representing an institutional and functional tool of creation and Europeization of common European principles, plays a key role; today however, in its structure and competencies, ECJ activities focus on subduing the private and public element in its decision-making activity. While EU law is primarily focused on the area of public law, the ECJ works practically not only with sources of private law, but also with constitutional principles. This source was augmented legislatively and its content greatly expanded after adoption of the Lisbon Treaty, i.e., since 2009. The Lisbon Treaty established the legal status of the Nice Charter of Fundamental Rights of European Union and made it binding for those EU institutions and for Member States having implemented EU law. On the other hand, it is certainly necessary to mention the provisions of the Treaty on European Union, such as Article 6(1) or the Declaration attached to the Treaty, ruling out direct binding force of the Charter. The binding force of European principles is applied generally by applying secondary law, i.e., EU directives, national courts or by interpretation of the content of directives in the intentions of fundamental rights contained in the Charter.

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In the action of both sources (ECJ and the Charter), a synergistic effect is seen, where the ECJ applies the Charter as one of the sources when defining general legal principles. According to H Collins, the current horizontal effect of fundamental rights and principles of the EU is applied correctly by means of inserting an obligation to a national court, in the case of relevance of a fundamental right or fundamental principle to the cause of performing interpretation of national law in a manner most conforming to EU law.

Another source of implementing European standards, values and principles founded thereupon, including fundamental rights, upon which the value and legal system of the EU is built, albeit non-binding, but very influential in fact according to the first signs, is comprised of European private law projects, leading towards unification of individual areas of private law of Member States with the prospects of a future unified European civil code. In light of their exceptional meaning for national legal systems, including their constitutionalization, separate attention will be paid to the most important of them – the Draft Common Frame of Reference ("DCFR") [1-6].

Application of fundamental rights in European private law projects

The process of constitutionalization of fundamental rights is, as stated above, fed from multiple sources, which are the texts of international acts on human rights and activity of European judicial institutions. The course of constitutionalization of private law took on a new dimension in discussions during preparation and elaboration and in the work results of the Study Group for a European Civil Code. The Draft Common Frame of Reference became a training ground in which, on a (quasi) legislative level, rules and values of "classic" private law, limited to the area of contractual law, clashed with constitutional fundamental rights and beckoned attention in terms of their mutual coherency or rather compatibility. At the same time, the DCFR provided a practical example of the difficulty with which the process of constitutionalization of private law encounters in reality. One may certainly agree in general with the concept of constitutionalization of private law as a prerequisite for reflecting fundamental constitutional principles and fundamental rights in all branches of law, including private law. It is harder however to agree with the concept, in which the primacy of private law over public law or fundamental rights, is based on the concept of private law as detailed articulation of constitutional rights. This approach has both a genetic and methodological deficit. Fundamental rights are projected into private law *ex post*, with a delay; this creates substantially complicated possibilities for truly systemic and coherent solutions of this symbiosis. An example is the first wave of "socialization" of private law, which took place in European legal systems in the latter half of the 19th century and turn of the 20th century and left consequences on the form of legal systems that are conceptually and systemically comparable to implementation of the praetorian finding of law with its key instrument in the form of equity in Roman law of the classical period.

The DCFR, though explicitly, indeed primarily inherent in its name, designated as a group of principles, lists fundamental principles or values in its introduction and not in the text itself. However, the introduction neither introduces nor states fundamental-constitutional laws, but rather a foursome of values typical for private law and its values and in formulation in a likeness corresponding to the methodology of private law (freedom, security, justice and efficiency). At the same time, it justifies it is not including amongst these principles/values solidarity and social responsibility, in that working with them (thus the method) is a matter not for private but for public law. There is special meaning in the approach of the DCFR creators towards systematic classification of human rights amongst those values of which DCFR is comprised. Human rights are not classified amongst principles and values underlying model rules, because they do not belong amongst underlying principles, but rather amongst overriding principles.

In the text of the DCFR, fundamental rights are not explicitly named, but are referred to methodically in Article I-1:102.

With regard to the aforementioned specification of the functional status of values and fundamental rights towards model rules contained in the DCFR, it is appropriate to interpret the mentioned article differently: According to the interpretive rule in Para. (1), it is necessary to interpret and develop them separately and in accordance with their purpose and principles underlying them. Relating Para. (2) stipulates reading the model rules of DCFR in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws.

The apparent discrepancy of both paragraphs of the mentioned provision can be removed, if we:

a. start from the autonomy of model rules;

b. which is broken by the second part of the text of the first paragraph, i.e., in accordance with the aims of model rules and with principles underlying them (thus with inherent principles towards private law);

c. read the rules of DCFR in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws.

The creators of DCFR thus started out by respecting the differences in private law principles and fundamental constitutional rights, they distinguish their private and public nature and subject them to a differing method of application and interpretation. But what the creators of DCFR did not take into account is the difference in the notion of fundamental subjective rights, which by their nature are primarily public and the notion of freedom, which is the foundation and starting point mainly of private regulation. Both categories meanwhile differ not only in external features, but also in the content and relation to private law, which are immediate and primary for freedom, which does not apply to the majority of fundamental subjective rights. This paper starts from this partial conclusion in further considerations on the possibilities of resolving the barriers of permeation of both categories.

From an overview of the aforementioned opinions, H Collins makes a partial summary of the conclusions on the systematic and functional context: (a) Upon thorough respect for traditional differentiation of private and public law, sources arising from both fundamental branches of law are difficult to interconnect systematically and private law is not sufficiently prepared to accept fundamental constitutional rights and principles into its system. (b) On the contrary, acceptance of the concept of a single structure of sources of law leads to inclusion of basic constitutional rights and principles into a single internally unified system of law, including both public and private law.

The mentioned approaches have significant meaning for permeability of the constitutionalization process:

It seems that amongst lawyers, preferences are shown for a somewhat simplified and less sophisticated approach founded upon

a unified structure of sources of law and overcoming the boundaries between private and public law.

It is the author's opinion however; the boundary between private and public law cannot be overcome simply by sheer will power without deeper argumentation. More thorough and broader argumentation enables us to find ways for further implementation of fundamental (constitutional) rights into private law while respecting the basic structure of the legal system. Upon standard, or perhaps traditional respect for the differences in the subject and method of private and public regulation and differentiation of private law principles from fundamental constitutional rights and principles, we see that the fundamental private law principles act in the intentions of the method of private regulation, expressed by an algorithm of fundamental values of freedom – equality – balance (equity, justice). As opposed to this, fundamental constitutional rights preserve their genetically public nature. This difference however is less axiological and more methodological and functional. This creates room for bringing both groups closer, because their common value basis facilitates concentration on methodological approaches (see proposals for resolution in points IV-V of this paper).

Legislative approach/activism of Czech lawmakers

Czech lawmakers – using opportunities of ongoing complex re-codification of private law in the Czech Republic – projected into the actual text of the new Civil Code its link to constitutional sources, by which they were implicitly and indirectly incorporated into the text of the Civil Code. This then opened a chapter of distinctly conceived questions for resolving contact and possible mutual merging of yet internal values, upon which private law is built, with effect of fundamental/human rights derived from constitutional sources.

In the text of the new Civil Code, Czech lawmakers attempted to respect – of course not at all identical legislatively and technically with the text of DCFR – the differences of constitutional-public and "private" sources.

The specific likeness and simultaneously specifics of the Czech approach to Constitutionalization of private law can be summarized as follows:

(a) Especially in their introductory provisions of Sec 1 (1), Czech lawmakers - in terms of current approaches - incorporated the largely disputable sentence: "The application of private law is independent of the application of public law." By this provision, in its purpose enshrined in the first half of the 19th century, the lawmakers reinvigorated the complex discussion amongst Czech lawyers, upon which, under its influence, will be difficult to overcome boundaries of private and public law and not only that which could be a barrier to implementing the influence of constitutional principles in the branch of private law.

(b) Expressed in one of the introductory provisions of the Civil Code is a requirement for a constitutionally conforming interpretation of the provisions of the Civil Code. Fundamental (constitutional) rights are not explicitly mentioned in the text, but are considered a part of constitutional order of the CR, including contracts on human rights, by which the CR is bound.

(c) In one breath, in the same provision, the requirement is included for interpretation of the provisions of private law "with the principles by which this act is comprised, also with permanent regard to values protected thereby." Thus, the Civil Code exercised - as opposed to the DCFR – the same methodical procedure upon interpreting fundamental (constitutional) rights and principles contained in private law, by which it established systematically and methodically the contradictory handling of public and private sources.

(d) In the relating provisions of Sec 3, the Civil Code now enshrines as a source of private law a group "of underlying principles" (Civil Code – J.H.); it thus performs a work explicitly, a demonstrative enumeration, a work by declaring that "Private law flows also from further generally recognized principles of justice and law."

(e) The Civil Code recognizes a different role for fundamental (constitutional) rights and private law principles when applying the law: The Civil Code requires explicitly, if the legal case cannot be decided upon even while using an explicit rule or by *analogie legis*, it's judging "according to the principles of justice and principles underlying this Act."

In the new Civil Code, Czech lawmakers neither capitalized on the opportunity nor addressed the appeals in the area of applying fundamental (constitutional) rights in private law, formulated by both the academic discussion, running in parallel with preparation of the Civil Code and by its outcomes, as expressed legislatively *inter alias* in DCFR. This updated the requirement in the Czech Republic to search for - legislative, but mainly interpretive - solutions to problems affiliated with further constitutionalization of private law and simultaneously, by its legislative solution, hindered opportunities to achieve a viable solution.

Possible approaches to a solution in wider, particularly process-related genetic correlations

The situation arising by the "meeting" of fundamental (human, constitutional) rights in process constitutionalization of private law with principles contained in private law, thus with starting points forming the value-related functioning of private law, indicate differing starting points upon which private law values and fundamental (human, constitutional) rights are built. While on one hand, the basis of private law in the period of modernity is freedom of the individual, preceding the law and the aim of regulation is in part to protect this value preceding the law and in part to limit it in the interest of another value of private law, which is equality of entities and achieving balance of participating interests of persons, on the other hand, fundamental rights are built upon active recognition to a person of subjective rights, originally leading towards public power.

These differing starting points point out the paradigmatic and functional/systemic incompatibility of the group of fundamental rights with the paradigm of private law. Léon Duguit has already pointed out this somewhat latent discrepancy, as did Jaromír Sedláček in older Czech juridical literature. They questioned the position of subjective rights in the system of private law regulation as fundamental modality of law and stressed the importance of subjective responsibility. As opposed to this, by their nature, fundamental rights may in private relations only either support fundamental, primary and simultaneously value preceding the law, which law itself does not create, but rather protects it, or limits in the interest of other persons or in the common interest, human freedom, or may support equality of participants, or their balanced position of entities with each other. Their effect in horizontal – private

relations is thus: (a) partial – sketchy, because from the algorithm of finding the balance of participants in a system regulated by private law, they only focus on the partial aspect of fundamental private value as a whole, thereby less on the algorithm of fundamental private law values (freedom-equality-justice); (b) inconsistent with the methodology of private law regulation in a modern society; (c) institutionally incoherent, because their key institution is subjective right as, to a certain extent, a foreign element in fundamental institutional construction of private law; (d) systemically dysfunctional, because it contributes to the questioning of the boundaries between private and public law.

This status has its own logic lying in its historic origin: A group of fundamental rights (typically Bill of Rights), arising first in the womb of the feudal system, founded upon the legal status of the individual created actively, by recognition or acquisition of privileges by specific persons within a specific scope. The resulting concept of modernity partially retained the original concept of subjective rights, in fundamental measure and was paradigmatically replaced by a trio of values contained in modern society: freedom-equality-fraternity. The new axiological starting points were thus not accompanied by an adequate institutional change.

The dilemma of the historical determinate aspect of fundamental rights was not therefore resolved by establishment of a society founded upon freedom, equality and solidarity and was transferred into a system of modernity as a paradigmatic solution. In the altered conditions however, they can be considered at the most a complementary, supporting system.

An example of discrepancy, which had to be resolved upon transition to a new bourgeois society, is the teaching of John Locke, whose work Theory of Value and Property (1690) became the bible of bourgeois society, Locke started from two key values that he considered being (a) man himself and (b) the work he himself creates. From this basis, a dilemma was derived, resting in the double concept of man and property in relation to the conceptual basis of a dissolving society and a new society: (a) on one hand, as a pair of entirely elementary fundamental rights, i.e., man towards himself and towards the work he creates, thus his property; (b) on the other hand, as a fundamental form of freedom of a person (personal freedom and property freedom). Impacts of this dichotomous concept of a person and a person's property are present still today in the fundamental conceptual starting points of (private) regulation.

Conclusions

Constitutionalization of private law is linked to a series of accompanying phenomena, of which some are parametric, but others are paradigmatic, in nature. Regarding the latter of the two, it applies that the process of the entrance of fundamental rights into private law is one of the factors blurring the differences between private and public law of course, this also means overcoming the methodology of private and public regulation, which forms the basis for difference between both basic branches of law and the thus influenced likeness of values rising in the form of fundamental rights and values traditionally belonging to private law. One of the directions of constitutionalization of private law thus concerns the path towards removing barriers between private and public law; the second direction (supported also by this paper's author) is in this aspect significantly more reserved, and seeks to promote inroads towards constitutionalization of private law through alternative solutions. Upon respecting the tendency to preserve the dichotomy of private and public law, the differing form of values, upon which they are built and their differing methodology, it would be worthwhile to consider whether or not values, whose bearers are fundamental/constitutional law, upon their entrance into private relations in their horizontal form (i.e., between the bearer of a free position, existing prior the law and other private values) change their legal nature in accordance with the private methodology and private expression of values.

The last-mentioned solution holds systemic value: on one hand, it enables implementation of the process of constitutionalization of private law in its forms found in reality and functionality of private law and systemic categorization of values, principles, methodology and institutional instruments of private law and on the other hand, it preserves the fundamental structure of law and the structural and functional coherency of its fundamental branches. In this sense, it may represent a possible solution to the problem of integrity and cohesiveness of the doctrinal system of law, as pointed out by Collins [7-13].

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