

THE INFLUENCE OF THE HUMAN RIGHTS ON PRIVATE LAW IN THE CZECH REPUBLIC

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Abstract: *This article is aimed at describing the role of the human rights in the Czech legal order and especially the manner in which human rights reflect in the system of the Czech private law. Firstly, the authors provide brief description of the bases of the constitutional order in the Czech Republic so that they could explain the manner in which the constitutional human and basic rights are reflected in private law. For better understanding, the authors presented numerous decisions of the Czech Constitutional Court regarding the role of human and basic rights in the area of civil law. Last but not least, the authors outline the concept of compensation for immaterial loss and protection of consumers in the Czech law.*

Keywords: *human rights, immaterial loss, civil law, private law, consumer protection*

THE HISTORICAL CONTEXT OF HUMAN RIGHTS IN THE CZECH REPUBLIC

In the years after the so-called “velvet revolution”, the Czech Republic, as a post-communist country, returned to the democratic system and started searching for a fundamental determination of human rights. A special attention was paid to implementing the human rights into the system of law and finding proper way to ensure that they would be properly protected. However the concept of human rights was not new to the Czech law. The communist regime, which collapsed in November 1989, also included the protection of human rights into its system of law. Nonetheless it was typical for the communist totalitarian system that although it had formally acceded to international treaties on protection of human rights (Helsinki Final Act 1975) and recognized human rights (the Constitution of 1960), it failed to observe these rights or it applied these rights only selectively and pragmatically in accord with its own totalitarian doctrine.

Thus protection of human rights became the central theme of the Czech dissidents in the years between 1970 and 1989. Then it became the principal topic of the revolution of 1989. In the years following the collapse of communism, during which a democratic society was being built, human rights were given a lot of focus by both domestic politics and foreign relations policy. This approach was supported by the former dissident Václav Havel, who was president of the Czech Republic in the years between 1989 and 2003.

Although the protection of human rights is merely included in the constitutional documents, it is clear that human rights appear throughout the entire system of law. Therefore protection of human rights is also reflected in private law. After providing reader with a brief introduction to general protection of human rights in the Czech Republic, we outline the reflection of human rights in private law, and aside from that, we explain some of the changes which were brought about by the recent reform of civil law.

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THREE LEVELS OF PROTECTION OF HUMAN RIGHTS IN THE CZECH REPUBLIC

The existing system of protection of human rights in the Czech Republic provides three levels of protection, i.e. protection by the national law, international treaties and the EU law.

As for national law, human rights are guaranteed by the Constitution, i.e. the Constitutional Act No 1/1993 Coll. (the “Constitution”), the Charter of Fundamental Rights and Freedoms (the “Charter”) and also by a number of international treaties such as the Convention against Torture, the Convention on the Rights of the Child and especially by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Constitution and the Charter, which have been part of the so-called constitutional order of the Czech Republic since January 1, 1993, are definitely a great step towards effective protection of human rights.

The Constitution has been gradually evolving. It has been amended six times since it was adopted. Aside from the constitutional laws and international treaties, the findings and rulings of the Czech Constitutional Court are another important source of protection of human rights. These court decisions have a great impact on interpretation of the Constitution and the Charter.

The Constitution is introduced by a preamble, which sets forth the core values and principles. It indicates that the Czech Republic is a state that respects and protects fundamental human rights and freedoms. The Constitution also includes several provisions on Constitutional court and based on these provisions the first Czech Constitutional court officially began to operate on the July 15, 1993. Since the Constitutional Court was established, it has issued numerous important findings whose purpose is to protect fundamental human rights and freedoms.

The international treaties on protection of human rights and freedoms represent the second source of protection. There are dozens of various universal and regional treaties regulating not only the general standards but also certain special areas. For instance, there are treaties against torture and inhuman treatment, emancipation of women, combating racial discrimination, protection of rights of a child, and so on. It is sometimes argued that the “fragmentation” of the international system of protection of human rights and the existence of both legally binding and non-binding international documents may be a challenge for future development on this field.

The third source of protection of human rights is represented by the EU law. The Czech Republic is a member state of the European Union and thus it is also bound by the EU legislation, in particular by the Charter of Fundamental Rights of the European Union (the “EU Charter”), which did not have full legal effect until the entry into force of the Lisbon Treaty. However during the ratification of the Lisbon Treaty by the Czech Republic, the then president Václav Klaus refused to finalize the ratification unless the Czech Republic was excluded from application of the EU Charter. The reason was that some politicians argued that the Charter of Fundamental Rights of the European Union would dismantle the so-called “Beneš decrees”, based on which Germans from Sudetenland had to leave the territory of today’s Czech Republic after the World War II. According to these politicians, it would allow for legal challenges before the Court of Justice of the European Union

by families of the Germans who had to leave. The Czech Republic's ratification was finalized under the condition that there would be an opt-out from the EU Charter excluding application of the EU Charter to the Czech Republic. The Council of the EU therefore concluded on the basis and taking into account the position taken by the Czech Republic, the Heads of State or Government agreed that will, at the time of the conclusion of the next Accession Treaty, attach a protocol, based on which, the application of the EU Charter to the Czech Republic would be excluded.¹ The Czech Republic's request for an opt-out was however withdrawn in February 2014.

The three abovementioned sources of protection of human rights are inextricably intertwined. Their interconnection may be shown on the following provisions of the Constitution regarding international law:

ARTICLE 1

(2) The Czech Republic shall observe its obligations resulting from international law.

ARTICLE 10

Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than what is provided by a statute, the treaty shall apply.

ARTICLE 10a

(1) Certain powers of the authorities of the Czech Republic may be transferred by a treaty to an international organization or institution.

(2) The ratification of a treaty under the paragraph 1 requires the consent of Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum.

ARTICLE 10b

(1) The government shall inform the Parliament, regularly and in advance, on issues connected to obligations resulting from the Czech Republic's membership in an international organization or institution referred to in Article 10a paragraph 1.

(2) The chambers of Parliament shall give their views on prepared decisions of such international organization or institution in the manner laid down in their rules of order.

Aside from the Constitution, there are numerous decisions of the Constitutional Court supporting the authority of the obligations arising from international treaties.²

¹ Council of the EU. CONCL 3 dated December 1, 2009. Available here: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/110889.pdf.

² The decisions of the Constitutional Court No Pl. U.S. 19/93, Pl. U.S. 25/97, Pl. U.S. 7/2000, Pl. U.S. 353/2000, Pl. U.S. 5/01, Pl. U.S. 752/02, Pl. U.S. 31/03, Pl. U.S. 2/02, and so on. Available from: <http://nalus.usoud.cz/Search/Search.aspx>.

THE ROLE OF THE CONSTITUTIONAL COURT AND ITS APPROACH TO HUMAN RIGHTS

The Constitutional court is not part of the general system courts of the Czech Republic. One of its main functions is to review complaints raised by individuals claiming that their fundamental human rights or freedoms guaranteed by the constitutional documents or international treaties on protection of human rights were breached by final and binding decisions issued by public authorities. Aside from that, the Constitutional Court has several other powers,³ e.g. the power to abolish acts (statutes) or provisions of such acts if they are in conflict with the constitutional order, which is the reason why the Constitutional Court is sometimes called “negative legislator”. According to the Article 83 of the Constitution, the Constitutional court is a judicial authority protecting constitutionality. Procedural rules are set forth in Act on Constitutional Court No 182/1993 Coll.

The Charter is grounded on the natural law approach to human rights, which means that human rights are natural rights and thus universal and inalienable. The approach is based on a belief that each human being is a specific being having natural rights that extend from his or her humanity. According to the Charter, human rights emerge from the universally-shared values of humanity and from the nations’ traditions of democracy and self-government. The Charter does not “create” the fundamental human rights and freedoms; it rather declares and guarantees them. Therefore they exist independently from the Charter and cannot be repealed.

As in many other legal orders, there are certain legal limits on human rights. Some of these limits may be found in Article 4 of the Charter. Individuals are not only given certain rights, but they also have obligations. In the Charter, there are many rules which may be understood as potential obligations. Imposing obligations on individuals is however limited by law.

The Constitutional Court’s approach regarding imposition of obligations on individuals is laid down for example in the decision No I.ÚS 557/05:

“The core attribute of the rule of law is protection of the fundamental rights of an individual, which may be interfered only in extraordinary cases, especially if an individual by means of his or her manifestations infringes the rights of third parties or if such an infringement may be justified by certain public interest, which however may only lead to a proportionate limitation of the particular fundamental right. In other words, respect to the individual’s sphere of autonomy is a requirement for proper functioning of a state following the principle of rule of law. The individual’s sphere of autonomy is protected by the state; on the one hand the state provides protection against any interference made by third parties and the state itself carries out only such acts that do not interfere with that individual’s sphere, i.e. the state may only infringe if there are circumstances supported by the public interest and if such an infringement is proportionate (adequate) with respect to the goals to be achieved.”

³ The powers of the Constitutional Court are set forth in the Act on the Constitutional Court No 182/1993 Coll. A list of powers of the Constitutional Court available here: <http://www.usoud.cz/en/competences/>.

The individual's right to autonomy of will, i.e. the individual's freedom, is one of the core human rights protected by the Constitution. The requirement set forth by the Constitutional Court that any infringement by a public authority into the natural rights and freedoms of individuals shall not exceed certain proportion has great effects on private law issues as it is described in the following chapter.

REFLECTION OF HUMAN RIGHTS IN PRIVATE LAW

In *Civil law systems*, which are sometimes called “*continental law systems*”,⁴ civil law (in the strict sense) is a subgroup of private law whereas constitutional law is a subgroup of public law. Although there is no explicit limit or link in the existing civil law regarding protection or the fundamental human rights, a connection between the two is obvious. Constitutionally guaranteed human rights are reflected in private law. Such reflections are manifested in several ways: the fundamental human rights bring about certain exceptions from the application of the general principles of private law. As contract law is an important part of civil law, we will present several examples regarding contracts.

The crucial principle of private law is the principle of “freedom of contract”. As the Constitutional Court ruled “*protection of freedom of contract derives from the constitutional protection of property rights under the Article 11, paragraph 1 of the Charter*.”⁵ This principle however is often limited by other principles of private law, in particular by the “principle agreements must be kept (*pacta sunt servanda*)”. Moreover one cannot exercise rights, which are immoral (*contra bonos mores*) (the Section 3 of the Czech Civil Code No 40/1964 Coll. – the “old Civil Code”). Such exceptions from the general private law principles are usually explicitly defined in laws. Nonetheless, the decision practice of courts in the Czech Republic steadily adhere to the approach that certain principles of private law do not have to be expressly stated in a legal norm since they may be concluded from the “natural essence and historical context of a democratic society.” Therefore the limits to freedom of contract may be deduced even without an explicit limitation set forth in the laws.

There are certain principles which may be considered as the fundamental principles of private law, e.g. the principle of equality of the parties in commercial obligations, the principle of freedom of contract, the principle of no required form of negotiation, principle that agreements must be kept, to name a few.

On January 1, 2014 the new Civil Code No 89/2012 Coll. (the “new Civil Code”) entered into force. It seems that the new Civil Code, which has replaced the old Civil Code and several other laws, has strengthened the principle of freedom of contract. The new Civil Code is based on a neoliberal approach, i.e. it prefers the autonomy of will. The principle of autonomy of will is however subject to certain limits:⁶ “*Respect and protection of auton-*

⁴ See, e.g.: FLEINER, T. *Common Law and Continental Law: Two Legal Systems*. Universitas Friburgensis, 2005. Available here: http://www.thomasfleiner.ch/files/documents/legalsystems_fulltext_final.pdf. or HELMHOLZ, R. H. Continental Law and Common Law: Historical Strangers or Companions? *Duke Law Journal*. 1990, No. 6. Available here: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3131&context=dlj>.

⁵ The Constitutional Court decision No Pl. ÚS 40/02.

⁶ The Constitutional Court decision No II. ÚS 3/06.

omy is presented by the Constitutional Court in its previous judicial decisions as an essential condition for the proper functioning of the substantive law. However, the protection of autonomy cannot be absolute there, where there is another individual's fundamental right or constitutional principle or other constitutionally approved public interest which are eligible to limit the autonomy proportionally. ... The suggested specification of the principles of states following the rule of law is the actual principle that limits the complainant's principle of autonomy of will, which is claimed by the general courts." The Constitutional Court further ruled that the task for the general courts is to find practical concordance between the contradictory principles so that maximum of both of such principles would remain and the result would be consistent with the general notion of justice. When dealing with two colliding principles, the Constitutional Court employs so-called "proportionality test". The test is a complex a method for weighing the principles in question.

The decision No Pl. ÚS 42/03 shows the Constitutional Court's approach to collision of two human rights within private law: "*Tenancy is a legitimate objective limitation of property rights. If the legitimate aim of protecting the lease is motivated by social reasons, i.e. by a requirement to ensure an adequate standard of living to a tenant, this includes adequate housing as well as the satisfaction of the basic need to have a safe place where one can lay your head, then it is clear that further restrictions of the landlord beyond the requirement on satisfying the basic housing needs of tenants would not succeed in the test of proportionality.*" The Constitutional Court further explained in this ruling that if the law limited the landlord's right to take care of his property in such a way that it would not allow him to terminate the lease not even when the basic housing needs of tenants are not completely saturated, for example, that itself has a number of housing options at the appropriate level, such a limit would have to be considered as disproportionate to the objective.

The new Civil Code explicitly sets forth a request that each provision of private law shall be interpreted in accord with the Charter and other constitutional laws and with permanent respect to the values protected by them. In case of collision, such interpretation that conforms to the fundamental rights and freedoms shall take precedence over any others (the Section 2 al.). The new Civil Code contains a list of the principles which are generally accepted in the EU member states. Nonetheless, it lacks the principle of prohibition of discrimination, which is often a standard in the legal orders of the other EU member states. We however believe that despite the lack, prohibition of discrimination may be concluded from the essence of a democratic society and from the Charter or the Constitution.

The lower courts do not often refer to the judicial decisions of the Court of Justice of the European Union ("CJEU") or sometimes they even make decisions which conflict the CJEU decisions. Nonetheless the higher courts usually rectify the wrong process and interpretation of the lower courts so that compliance with the EU law is restored. In this regard we refer to the Constitutional Court decision No Pl. US 1/10: "*The Constitutional court believes that the petitioner was supposed to make a decision mainly on the grounds of the requirements stated by the decision Simmenthal II that certain provisions shall not apply due to their disagreement with the community law. If a general court focuses on analyzing the agreement in accordance with the law of the European communities and if it asserts – as it is being in this case – that the challenged statutory provision is not in agreement with the EC law,⁷ the general court has to draw consequences assumed by the judicial*

decisions of the ECJ,⁸ i.e. not to apply the challenged provision...” The Constitutional court is however not entitled to consider the reasonability of findings of the general courts and their belief whether or not the challenged provision is in accord with the EU law. The general courts have to give reasons that led them to their decision so that the decisions could be reviewed by higher courts or eventually by the Constitutional court.

The decisions of the Czech Constitutional court and subsequently the practice of the civil courts are influenced by the decisions of the European Court of Human Rights. Consequently the decisions of the Constitutional Court affect the general contract law. Therefore also the decisions of the European Court of Human Rights have indirect effect on Czech private law. Practicing lawyers have to react very fast to the new judicial decisions protecting, for instance, the weaker party (terms and conditions are adjusted to the approaches held by the Constitutional court or the Supreme court, etc). In regard to the issue of “weaker party”, it should be mentioned that there is a general rule that the private law relationships shall be balanced, i.e. the rights and obligations of one party shall not be excessively disproportionate to the ones of the other party, especially disfavoring the weaker party, which is often the consumer. Contracts entered into in a manner which contradict good morals (*contra bonos mores*) are absolutely invalid under the old Civil Code. Although the new Civil Code has strengthened the neoliberal approach, the consumers remain protected since consumer protection comes mainly from the EU law. Consumer policy is part of the strategic objective of the EU.⁹ According to the Constitutional Court, the “*contractual terms of the consumer contracts cannot derogate from the law to the detriment of the consumer. Consumers cannot waive the rights granted to them by law, or in any other way deteriorate their position. It means that the standing of consumer shall not be deteriorated even with consumer’s consent. On the other hand, changes disfavoring the supplier are possible.*”¹⁰

Consumer protection is based on a postulate that consumer is in a weaker position to professional suppliers. The unequal position results from the greater professional experience of the supplier and the supplier’s a better knowledge of law and easier access to legal services and “*finally with regard to the seller’s power to unilaterally impose contractual terms via standard form contracts.*”¹¹

The Another example of reflection of human rights in private law regards contractual provisions which breach the right to have a fair trial: “*The Constitutional court rules that the way the arbitration clauses were concluded is not admissible; if an arbitrator, who was not chosen in a transparent matter, deliver a decision on the grounds of the principles of fairness and if the consumer is deprived of his or her right to file an action at his or her civil court, such arbitration clauses breach the right to have a fair trial within the meaning of the Section 36 of the Charter.*”¹² It should be mentioned here that in the continental law system the “right to fair trial” applies to all types of judicial proceedings, whether civil, administrative or criminal.

⁷ This now it applies to EU law.

⁸ This now it applies to CJEU.

⁹ See, e.g. Special Eurobarometr 298, *Consumer protection in the internal market*. European Commission, 2008. Available here: http://ec.europa.eu/consumers/strategy/facts_eurobar_en.htm.

¹⁰ The Constitutional Court decision No I. ÚS 1845/11.

¹¹ The Constitutional Court decision No I. ÚS 342/09.

¹² The Constitutional Court decision No II. ÚS 2164/10.

CONCLUSION

Human rights have a great influence on private law. Although human rights are guaranteed mainly by the Constitution, the Charter, the EU Charter and numerous international treaties in the Czech Republic, their reflection may be found throughout the entire legal order. In continental law system is civil law one of the branches of private law. As this branch of law regulates mainly relationships between individuals, it is closely connect with the issue of protection of human rights. The fundamental human rights and freedoms emerge in all kinds relationships. In this paper, we focused mainly on outlining how the protection of human rights affects certain issues of contract law. A lot of focus was put on the decisions of the Constitutional Court since they provide a great source of examples. Protection of human rights is an important objective of the modern democracies and thus in our opinion there is a strong trend towards creating strong bonds between civil law and human rights.