HUMAN RIGHTS AND PRIVATE LAW[1]

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As we are looking for the answers to the question whether and how Human Rights should find their application in private law relationships we are considering the real nature of human and constitutional rights, the concept and source of law, the moral foundations of law, the way how social requirements are to be implied in legal relationships, the limited and relative character of these requirements, the necessary revision of private law and public law division and the function and aims of law in social engineering. Thus, we have to face a great bulk of basic problems of law and legal philosophy.

Application of Human Rights in the private sphere is one of the most challenging problems of private law today. Denying that Human Rights shall be applied in private law relationships would lead to consequences that are hardly acceptable. We cannot argue persuasively that natural and legal persons shall not respect others' human dignity and property, that persons and social groups may legally be excluded, oppressed and pushed to the periphery of society or that slavery shall be held lawful unless there are special provisions in domestic law, which forbid it. It seems, on the other hand, obvious that Human Rights cannot overwrite the private law without adverse consequences.

Based on the new tendencies of legislation and legal practise and the changes of the philosophical methods, it seems to be unsatisfactory to think only about the horizontal and vertical effect of constitutional and human rights, or their direct application. Much more of this: either we manage to find the way and build up a method of thinking that is able to incorporate the principles of constitutional and human rights into the private law legal relations while preserving the structure of private law or we completely have to re-create the framework of our thinking and we also have to create new methods, as well as a new approach. In my opinion, this is still one of the completely open and most urging questions of the theory and practise of nowadays' civil law.

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Thus, in conflicting human and constitutional rights with private law a new chapter of private law development may be started. This confrontation is shown with different gravity in various areas of civil law, and raises different problems accordingly. On the same basis to the applicability of those constitutional and human rights principles, this can be examined in the framework of human and constitutional rights within civil law relations. In tort law, less structural problems are caused by the application of human and constitutional rights, because of the flexible nature of tort law, which has a tendency to be opened and to pay special attention to risk allocation and prevention. On the other hand, a conflict seems to emerge within contract law, where the principle and paradigm of freedom of contract is hard or nearly impossible to conform to constitutional and human rights.

Considering their aims, magnitude, exactness of their content, protected interests and social expectations transmitted by them, human rights show a great level of homogeneity and are very different, but still present themselves as a single homogenous system. Their diversity leads to different problems of their application and it is further strengthened by the fact that their universality must be interpreted in the framework of very different systems of social values and legal norms. Problems of application of human rights in the framework of private law and partly the contradictions of the nature of human rights are clearly seen when examining questions related to the obligations of non-state actors, prohibition of negative discrimination, or human rights-based or constitutional protection of property.

There are strong arguments for that Human Rights impose obligations on states only as their sources are international treaties. This argument may be supported by other considerations as well such as that opening the direct way for Human Rights in the private sphere would trivialize Human Rights and inflate them. Moreover, direct application may make them as tools of political games and speculations helping the states to find a possibility of shifting liability for violation of Human Rights to non-state actors. The phenomena that provide the main arguments for direct application of Human Rights norms in the private sphere are globalization, privatization, fragmentation and Human Rights of women.

One of the main features of globalization is the increasing power of multinational companies in shaping social and economical relationships and human environment. Social responsibility of multinational enterprises is a problem often discussed in other contexts as well. The case against Royal Dutch Shell Company and one of its former directors launched in the United States under the Alien Tort Claims Act by the relatives of Ken Saro-Wiwa and John Kpuinen sheds a sharp light on the problem of liability of companies for viola-

tion of Human Rights. According to the Alien Tort Statute (or Alien Tort Claims Act), which is a federal law of the United States "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Privatization of prisons, health care, education, security forces, energy and water supply sectors is an overall tendency which makes it necessary to revise the problem of Human Rights in private law. The fact that these sectors are passed to the private sphere cannot result in excluding the private suppliers and service providers from Human Rights requirements while the state shall remain obliged by them under the same circumstances – simply because we think that it is an internal logic of law to limit Human Rights obligations to state actors. As Catherine MacKinnon put it: „The role of international law has been largely, in Isaiah Berlin's sense, negative. It could be more, but it fosters human rights less through mandating governmental interference than through enforcing governmental abstinence. In other words, if your human rights are going to be violated, pray it is someone who looks like a government, and that he already acted, and acted wrong."

The demand for having the members of armed rebel groups emerging with fragmentation of states indirectly under the Human Rights regime is more and more obvious. The development in women's human rights has led to a complete reappraisal of the way in which the public/private divide has been constructed to delimit human rights law. Human rights of women are typically not to be enforced against state or state actors but are to be held general requirements vis-á-vis the members of society.

Trying to define the direct addressees of Human Rights we should not take out of consideration the fact that international criminal liability of natural persons is already accepted and civil liability is generally parallel to the criminal one. There are legal systems, which provide the possibility of enforcing civil law liability with the criminal one together. That is why the international criminal liability raised the problems of distinguishing state acts from the act of certain persons as the question had to be answered whether dictators should be protected by state immunity relying on that it was not they who acted but the state.

As far as the anti-discrimination principle is concerned, I argue that discrimination is a social problem and private law built on market paradigm can only be adequate in a limited way to pursue such aims. Prohibition of discrimination should be limited to cases of monopoly and narrowly interpreted public offers if contracting is at stake. A further reference point in the course of application of the anti-discrimination principle could be the prevention of social exclusion. Private law cannot allocate the social costs of anti-discrimination. As a result, costs are to be borne by certain market players or – as an adverse effect –

members of the protected group. In a great bulk of anti-discrimination cases courts try to solve social problems with inadequate means and as a result even if decisions and aims are morally correct, consequences going beyond the relationship of the parties remain unmanageable.

The protection of and the right to property – in spite that it declares one of the basic values of our society and our economical order – is the less elaborated on the level of the norm and perhaps it is the most vague and most often discussed Human Right. Constitutional protection of the right to property does not consist of a necessary element of legal order; laws without written constitution are also able to provide the proper level of protection of property. It is remarkable that in the course of preparation of the South African Constitution the problem whether it is a good idea to have a constitutional protection of property was seriously addressed. There were strong arguments against constitutionalizing the right to property (first of all that it strengthens the public private divide), which make us consider whether it is really proper and useful protecting property on constitutional level. It has been clearly formulated that we do not really know whose property to protect and against whom in the constitution.

This implies perhaps the greatest paradox being inherent to the nature and aim of Human Rights. If we accept that Human Rights are natural rights in their real nature and they shall be construed as the modern form of natural rights inherent to all natural and legal persons by their existence – as it is argued for universality of Human Rights – we cannot explain why North American Indians or South-African natives cannot re-vindicate their lands that has been taken away. If we would contradict the argument that Human Rights are getting their binding force from the positive law and the legal instruments codifying them which did not exist that time we can hardly insist on that Human Rights are universal that they are to be enforced in absence of a specific regulation as well. And if this paradox would let us accept that Human Rights are to secure the position of certain groups having the power in society again, we have to give up our universality argument.

The morally staggering and deep paradox of the human right to property is perfectly reflected in the poetic dialogue of *Carl Sandburg*, according to the followings.

„Get off this estate.
What for?
Because it’s mine.
Where did you get it?
From my father.
Where did he get it?
From his father.

And where did he get it?
He fought for it.
Well, I'll fight with you for it."

I think that today we cannot give a consequent, general and abstract answer to the question how Human Rights should be enforced in the private sphere, which would cover private law as a whole. Human Rights themselves do not constitute a coherent and homogenous system. The system of Human Rights consists of requirements (or norms), which are different according to their origin, their aims and they have different social functions. They are not free from internal paradoxes either. Nevertheless they reflect general values, which are to come across in all of the world's legal systems. We cannot confront private law with this system of values concerning neither the content, nor the nature of private law regulation and practice. We cannot argue that private law should not follow these values. The greatest task does not seem to be to answer the question whether Human Rights should make their way in the private sphere; I think the only acceptable answer is 'yes.' The real problem is that the heterogeneous and paradoxical nature of Human Rights, the uncertainty of their content, the obscurity of their social purpose fully contradicts the basic and most important demand that private law (first of all property law and contract law) should be predictable.

There are arguments for that from a certain point of view predictability and certainty are more important than the content of private law rules in a sense. It is similar to the traffic rules: it does not matter whether one should keep left or right. Knowing the rules is the crucial point. The real problem is when information and interpretations of the rules are different and some keep left while some keep right.

The values that Human Rights transmit are not strange to private law at all; it is the uncertainty in content and the vague contours of Human Rights which are to be deemed as really strange to private law. If paradoxes of Human Rights and uncertainties of their content are imported to private law through their enforcement, this would make private law unpredictable and unable to perform its social function.

Enforcement of Human Rights in the private sphere would erode the traditional inner logic of private law thinking which touches upon all fields of private law. One could speak of the crisis of private law thinking but this would not be correct because it implies evaluation. This process – at least in great part – cannot be held positive or negative: it is beyond doubt that private law must be ready and open enough to receive it. In spite of this, it is very important to consequently stick – as far as possible – to traditional logical private law thinking. On the one hand, this helps to make this process slower, on the other hand this

would prevent erosion where it would be unnecessary, untenable on the long run or would result in risk of certainty of law. None of these impacts should be underestimated. In order to make private law ready to receive the real challenges of Human Rights we need time, thinking, looking for solutions, experiments and a lot of discussions. The greatest challenge may be that private law thinking must be able to transmit the social evaluation and social requirements effectively, consequently and persuasively to private law theory and practice. One of the greatest barriers to our flexible thinking in this respect is the public-private division that has to be revised.