

THE NATURAL LAW IN THE CZECH CIVIL CODE

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Abstract: The article is about the anchoring of the natural law and natural rights in the new Civil Code, Law no. 89/2012 Coll., Civil Code and presents a general overview of the importance and existence of natural rights today. Czech legislature's intention stated very briefly, what is the role of the new mooring natural rights of man, a broader context, it must be interpreted in accordance with current legal theories.

Keywords: natural rights, the system of private law, civil law, moral rights, sources of law, legal principles

1. Introduction

Processing of the new Civil Code represents a big challenge every time, it was the case of the Czech legislature as well. Fundamental dissatisfaction with the Civil Code of 1964 (Act no. 40/1964 Coll., Civil Code) was based on, according to experts, the stigma of communism.¹ So long was the air floated by the idea of a recodification effort to get closer to the modern trend of continental codification of the new generation. In generally a system of private law of the Civil Code starts a position of the fulcrum, which brings the basic concept and value system for all conceivable private relationships (relationships).² Therefore it was necessary to bring new conceptual changes.³

From 1st of January 2014 (the adoption of the new Civil Code) the Czech Republic became the first European country which brought to the text of the modern Civil Code the reference of the natural rights theory. This somewhat surprising feat evoked (and still produces) a lot of questions. Correct interpretation of the reference of the natural rights theory and its implementation in the context of the new Civil Code represents a challenge for discussion and the need to deal with the intention of the legislature, which was vaguely submitted. In the right case explanatory report should provide clear guidance, why was explicitly accepted the concept of the natural rights in the new Civil Code. Within uncertain answers we can with certainty say that the terms of positive anchoring of natural rights did not cause a revolution in the perception of positive and steady ties of natural law. Only few topics mean in a legal discourse so controversy discussion as just a question of natural rights. Among proponents of natural rights and positivists is a continuous controversy, not only in terms of normative. The dispute about the distinction of law and morality must be perceived as a

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¹ KÜHN, Z.: *Aplikace práva soudcem v éře středoevropského komunismu a transformace. Analýza příčin postkomunistické právní krize*, 2005, 1. vydání, Praha, C. H. Beck, 146-147.

² SCHWAB, D. – LÖHNIG, M., *Einführung in das Zivilrecht*, 2010, 18. Auflage. C. F. Müller, 1.

³ HURDÍK, J. – LAVICKÝ, P. a kol.: *Změny soukromého práva v České republice a dalších evropských zemích*, 2014, 1. vyd. Brno, Masarykova univerzita, Právnická fakulta, 122. Spisy Právnické fakulty Masarykovy univerzity, řada teoretická, Edice Scientia, sv. č. 500.



line of historical debate, which in several waves and forms returned and and we just repeat inaccurate claims.

Since the adoption of the new Civil Code is the area of private law accompanied by the fundamental changes which are detectable by simply comparing the text of the old and the new legislation. Depending on the required discontinuity were adopted institutes that represent a direct departure from the old law, but also institutes (old) new, which returns the terminology of private law back in time. Background and initial questions of the Czech Civil rights are due to "technology" and new approaches to processing a code difficult to detect, and in addition to individual autonomy (will), and of the principles proclaimed in the Preamble, requiring deeper reflection on the meaning of reform.

2. The Myth of Natural Rights

„Dead or Alive?“

I will start this chapter with a doubt with the significance and existence of natural rights that support the statement of the American philosopher Henry Veatch, who in his work years ago so urgently wrote: “Of course, the ancient and honorable doctrine of natural law is dead, isn’t it?”⁴ If one asks, whether the theory of natural rights was dead, or at least fundamentally obsolete, we must answer that it is not. Or at least not entirely.

Current jurisprudence (*juris prudentia*), which divides the actors traditionally right to legal positivists and naturalists, refers to a number of major proponents of the idea of natural law and in German-speaking countries has nonpositivismus even superiority.⁵ Live is also called modern natural law theory, which recently formulated J. Finnis and his followers. Despite the fact that there are proponents of natural law theory, we must recognize numerous superiority of those who are subjected to this theory, criticism, through which, paradoxically, we know about aspects of natural rights by far the most.

The topic of natural rights is perceived differently, with some exaggeration, we can say that for practicing lawyers is just a sort of revelation fabled unicorn. It is an alien terminology, because we well known and basic human rights, immanent action of legal principles and rules across private law, knowing the doctrine of personal and individual rights, but to define the rights to the natural stand up to these "unicorns" correct form in practice a big problem.

Natural law comes from the nature of man and the world, as well as a law of physics is derived from the nature of space, time and matter. Philosophers usually try to reason by reason itself, as in mathematics, although it has long since shown that this

⁴ VEATCH, H.: *Natural Law: „Dead or Alive?“* [online] Literature of Liberty: A Review of Contemporary Liberál Thought I, no. 4 (1978).
http://oll.libertyfund.org/option=com_content&task=view&id=168&Itemid=259#anchor23192

⁵ SOBEK, T.: *Právní myšlení, kritika moralismu*, 2011, Praha-Brno, Vydavatelství a nakladatelství Aleš Čeněk, 61.

can not be done, with the exception of mathematics, and perhaps not even there. Like the chicken and the egg, observation requires theory and observation led to the theory, the theory requires observation and theory leads to the observation. This is the core of the scientific method, if the scientific method can be expressed in words.

There are more possible definitions of natural law at this moment, we consider only those that are common to most theories, and capture the essence of natural rights.

In summary, as valid the characteristics of natural law to identify such analytical statements:

- ❖ natural law stems from the nature of man, as a species, which is,
- ❖ valid natural law is composed of arbitrary power of the state,
- ❖ natural law is objective, existing in nature,
- ❖ natural law can be only discovered, not to construct or create,
- ❖ natural law is a method, not a code,
- ❖ we do not recognize the natural right of the words or text, but only through individual cases.

These statements are the nature of the application test whether or not a natural right of man and constitute a default view in the case of a positive interpretation of the legal definition of natural rights.

3. Historical background

The first role of the natural rights theory, namely: *natural law as a sin jurisprudence*, was described above, but we can see also another, especially the historical role of natural rights: *the natural right of man serves as a tool (the revolutionary, repair and preventive)*.

To better understand the essence of natural rights, we have to remind the evolution and the context to this theory. The historical evidence suggests that the natural rights (there may arise an apparent contradiction with one of the starting premise, namely, that "natural rights exist from the beginning of time, always and in all circumstances"), the man pleads especially at moments when needs ideals that they could shield some of his major decisions. Such ideals that have become „war“ or „revolutionary“ passwords, or allow to deal with the wrongs of the past regime, if the instruments of traditional jurisprudence are insufficient.

W. Friedmann, describes the theory of natural law as *"a story about humanity's search for absolute justice (mostly unsuccessfully), the search for higher ideals than the positive law itself. These ideals are then at certain intervals rediscovered."*⁶

M. B. Crowe⁷ said that natural law is a set of unwritten laws that are qualitatively superior to positive law and also constitute its scale. Another view brought John Finnis, who reframed learning the basics of T. Aquinas and currently is considered the modern (authoritarian) interpreter of natural law theory today, we find that natural rights are defined on the basis of a goods of that person for their life really needs. Natural rights

⁶ FRIEDMANN, W. G.: *Legal Theory*, (3rd Indian reprint 2003), Columbia UP: 1967, 95.

⁷ CROWE, M., B.: *The Changing Profile of the Natural Law*, 1977, Hague, 12.

do indeed constitute what is good for man, these are the principles permitting to live human life in society under conditions of practical reasonableness needs of everyone.

According to McCormick, has a list of values, formulated by J. Finnis, "extremely unconvincing"⁸ character. It is not possible to create lists of values, referring to the "self-evident character," because in this case you cannot avoid subjectivism. Every similarly formulated a list of "important objective" core values is only a projection of moral, political or social views of its author. Cannot be considered valid value judgments, which are the expression of one's feelings or desires.

Numerous political and social reform movements relied upon the natural law, because it was always considered as a powerful reason stands above the applicable law. Once the company against the valid legislation reported with the new requirement, arguing primarily natural law. In this spirit he acted France during the great revolution and his action also struck happening in the rest of Europe.⁹

Natural law theory was in XIX. century under the influence of the historical school of law and jurisprudence positivist orientation (except for the few exceptions) abandoned. They didn't believe that there could be other law that didn't come from the will of the state. Beyond the text of the law, the legal ordinance was considered valid right, they were shaped by "spirit of the nation". Natural law theory was a dualistic conception. While legal positivism (monistic conception) constituted the only valid law.¹⁰

In XX. century have the category changed and the natural law concept has become a unitary concept, since this was based on the thesis inseparability of law and morality. Many contemporary authors consider the concept of splitting obsolete, since the conceptual separation of law and morality is Essentials only for legal positivism. T. G. Masaryk contributed to the revival of natural law in the XX. century to the czech territory. Natural law theory is repeatedly mentioned in connection with the so-called. czech issues and also in relation to the need to further significant reversal of the natural law takes place in Germany after World War II, it is a negative reaction to Nazi law¹¹ which was in retrospect falsely they identified as positive law.¹²

At present, we can follow the development of a new generation of legal naturalistics. Gary Chartier speaks about neo-classical theory of natural law, sometimes about a new theory of natural rights (new classical natural law - nCnL theory), which was initiated in the 70s by Germain Grisez. We can therefore recognize some kind of mix elements of classical and neo-classical natural law theory.

⁸ MCCORMICK, P.: Review of Nature as Reason: A Thomistic Theory of the Natural Law by Jean Porter, in *Journal of the Society of Christian Ethics*, 29, no. 1 (2009).

⁹ STIEBER, M. *Dějiny soukromého práva v střední Evropě*, 1930, Nástin, Praha, Knihotiskárna Typus, 3.

¹⁰ TOMSA, B. *Masarykův zápas o právo přirozené. Současné příspěvek k ideologii českých politických stran*, 1928, Bratislava, Nákladem Právnické fakulty University Komenského v Bratislavě, 22.

¹¹ SOBEK, T. *Viktor Knapp a nacistický moralismus*, 2013, Právník, AV ČR, Ústav státu a práva, roč. 152, č. 12, 1206-1218.

¹² TOMSA, B. *Masarykův zápas o právo přirozené. Současné příspěvek k ideologii českých politických stran*, 1928, Bratislava, Nákladem Právnické fakulty University Komenského v Bratislavě, 22.

4. The Intention of the Legislature and the Statutory Regulation of Natural Rights

The explanatory report¹³ of the Civil Code contains various references to natural rights that can be performed after selecting formulated as follows:

- ❖ man has inherently inalienable natural rights,
- ❖ a person or legal entity principally not and cannot be generally in equal legal status,
- ❖ Act doesn't limit the fundamental rights of man, but rather the fundamental human rights constitute a limit to the law,
- ❖ it is required to respect the inviolability of the natural rights of man,
- ❖ it must still take into account the democratic traditions of the Czech legal thinking on standards of civil rights of European democratic states,
- ❖ natural human freedom takes precedence over the state (the state is not the creator of human freedom, but her protector)
- ❖ natural rights belong to a certain value system expressed in accordance with czech constitutional order.

The idea of natural rights in the Civil Code can be perceived also by two factors, one of them is a legacy of ius naturalist concept of modification ABGB. Another enumeration of the text of the explanatory report, where they highlighted the democratic traditions of Czech legal thinking, the standards upon which the civil law of European countries and the basic directives for mental concept of the new Civil Code, which found its prototype in the Charter of Fundamental Rights and Freedoms and the Constitution of the Czech Republic. Humans are the main ideological base of private law, which must take into account his anthropological nature, otherwise you can not find the right natural law foundations of private individual rights of man.

Furthermore, we must ask ourselves "What is the objective of the rule of law?" O. Weinberger¹⁴ appointed three basic objectives that may very well be based on: a) the fairness of the legal decisions, b) legal certainty and c) the idea of the system. With this, it is highly advisable to avoid laws that can not be consistently and with full effects of the conduct, because this is a reliable way to demoralize society (*lex inanis*).

To assess the role of the natural rights of man in the Czech private law after 1. 1. 2014 is a key relationship, which can be between the theory and the Civil Code to consider.

In this context Damiano Canale¹⁵ distinguishes three models of the relationship of natural law and codification:

¹³ Explanatory report from 18. 5. 2011 [online]. 2011 From: http://obcanskyzakonik.justice.cz/tinymce-storage/files/OZ_Duvodova-zprava-11042011.pdf.

¹⁴ WEINBERGER, O.: *Norma a instituce (Úvod do teorie práva)*, 1995, Brno, Masarykova univerzita, 24 – 25.

¹⁵ CANALE, D.: The Many Faces of the Codification of Law in Modern Continental Europe, in CANALE, D. – GROSSI, P. – HOFFMANN, H. (eds.): *A treatise of legal philosophy and general jurisprudence*. 9., Lawrence Meir Friedman.

- ❖ methodological model, the normative content of the Code is a natural right, standards of the Code are eternal, universal and necessary,
- ❖ revolutionary model means that the Code is a political instrument to implement the ideas of natural law, whose purpose is to create a better society,
- ❖ exculpatory model where natural law justifies the legislature to determine their will as the exclusive source of law, so the content of positive law may ultimately differ from natural law.

With reference to the wording of the law and the wording of the explanatory memorandum can be concluded that none of the options above the current relationship between them and the natural rights of private Code does not apply. On these three models, therefore we will continue and expand on the idea of natural law and the relationship of the new Czech Civil Code.

New Czech Civil Code includes explicit mention of natural rights in several places. On the bases of natural law also refers to the explanatory memorandum to new Czech Civil Code. What do such references mean? It would be easier to answer what you mean. Natural rights are not defined anywhere demonstratively, mentioned in the text of the law can signify their positive-legal base, but also a reference to the value system that exists outside the law. In connection with the new Civil Code can the issue of natural rights approach in the following manner:

- ❖ natural rights have the nature of a conceptual basis – worldview,
- ❖ express the core values as principles, and as a principle also become immanent part of the interpretative process,
- ❖ anchoring the natural rights in the text of the statute is a legal link to this theory in its pure form.

New Czech Civil Code puts his preference for autonomy and the natural rights of individuals. The above already mentioned the numerous nature that are related to new Czech Civil Code offers. Orthodox positivists opinions irreconcilable with the concept of natural law, the natural law as an ideology, not taken. Acknowledged would be that only occurred "capture in legal text" this theory. In the scenario where we understand the natural law concept as a philosophical stance, which affects the whole of private law, is required another procedure. It is essential that the new Czech Civil Code contains only normative references to the doctrine of natural rights.

5. Summary

The essence of natural rights (probably) lies precisely in the fact that only by the emotion and reason do we know what is right and how it should be. If so, it is very difficult to produce a description of the individual components of the system, which in their content varies depending on the circumstances of the examined case.

We can make a conclusion that a specific historical context of the theory of natural rights and the conclusions of contemporary jurisprudence enable us to identify only distinguishing features of natural rights, but without embedding in the text of the law will remain only value the proclamation. We can also say that the practice is not legal under current conditions argue pure theory of natural rights.

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