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HIERARCHY OF APPLICATION OF SOURCES OF LAW IN PRIVATE LAW CODES – CONSIDERATIONS OF THE USE OF ANALOGY DE LEGE FERENDA

Abstract. *Commercial law is an important part of jurisprudence, since it controls commercial or trading activities. It represents a complex of norms of private law, controls relations between enterprises, and contributes to the implementation of their business activities. Therefore, the main purpose of the work is to learn the hierarchy of the application of law sources in the private law code, as well as aspects of the use of the de legeferenda analogy. The questions of vertical structure, conceptual definition and subsequent application of sources of law are considering in the paper. It was analyzed the Commercial Code on the example of the Republic of Slovakia and the Czech Republic. It has been established that the legal system as a whole is reasonably considered to be a rational and moral method of regulating public life. It is found that the development of legal discipline requires the participation of research officers. Since this can be a major incentive for the legislation development in a broader perspective for the benefit of the national economy.*

Keywords: Slovak Commercial Code, political influence, obligation, judicial decision, legislator.

INTRODUCTION

With regard to the scope of this publication, the present article discusses and examines the issues of vertical structure, conceptual definition and subsequent application of the sources of law [1], which create an integral part of private code, such as the Civil Code [2] and the Commercial Code [3]. With particular regard to the ongoing recodification of private law in the Slovak Republic and the already completed recodification process in the Czech Republic, we are attempting, with the help of spatial legal comparison and other scientific methods, in a wider context to reveal a platform for the hierarchical use of these specific sources of law. From the point of their legal nature, they serve subsidiarily, in order to regulate those legal relations that are not (expressly) regulated by the law.

Due to the complexity of social relationships and the generality of the issued law, there may be a situation where this law is inapplicable (inappropriate) for all the cases that may occur in practice. As the legislator (despite the endeavor) cannot abstractly predict the plurality of social relations in their real form, the so-called

vacancy may appear. When this *vacancy* (deficiency) occurs in the law and it is not objectively possible to supplement or change the legal norm, it is accepted (especially) in the private law sector to decide on the respective social relationship, not explicitly regulated by the law, by using the analogy (*legis* or *iuris*) [4]. The origins of the supportive application of the sources of law can best be observed in commercial law, in particular in the Slovak Commercial Code. The Code regulates the position of entrepreneurs, business engagement relationships, as well as some other business-related relationships. In the first place, in the provisions of § 1 sec. 2 of the Slovak Commercial Code the vertical structure of the use of the sources of law is defined, which served as a substitution function and thus should fill a certain vacancy (gap) in the law. Secondly, provided some issues cannot be solved in accordance with these special provisions, then it should be solved under the civil law provisions. Thirdly, if it cannot be solved under these general regulations, it shall be solved according to usual business practices.

If there is no usual business practice, then the principles, on which the Commercial Code is constituted, shall be applied. This order (hierarchy) of use of these law sources in Slovak private law is in fact quite unusual. The origin thereof dates back to the early 1990s. At that time, the business environment was just beginning to emerge. In the first place, it was the necessity to ensure a higher (stronger) legal certainty during the economic transformation, which led to the priority positions of civil law instead of business practices. They were not yet (and could not) been properly installed in the application practice. Apparently, it could only be created with the (gradual) development of the business relations in the terms of free market.

In the current situation of market economy and patterning and shaping of commercial practices connected thereto, it is possible to agree with the opinion (mostly presented by the commercialists), that the usual business practice in the hierarchy of commercial law sources were (considered) temporal for the limited period of time only until the creation of the standard business relationships. In the current (complex) period it is the right time to reconsider the use of *analogy legis* before the subsidiarity of business practices. As far as the applicability of the *analogy legis* is concerned, it must also be considered that it is (still) the application of written law. Efforts to change this arrangement can be seen in the context of recodification movements in private law in the Central European area. The Slovak Civil Code in its (several) provisions permits, or directly refers to the use of the *analogy legis*. For example, pursuant the provision of § 491 sec. 2 of the Civil Code, obligations arising out of the contracts (that are not regulated by the law) shall be governed by the provisions of the law which govern the obligations of the same (closest) nature, unless otherwise stipulated by the contract itself. When applying private law institutes in practice, it is desirable to point out that parties may exclude the use of dispositive provisions of the law provided they do not violate its mandatory provisions [5].

At the same time, under the provision of § 853 sec. 1 of the Slovak Civil Code, there is the general provisions clearly declaring the requirement of the application of *analogy legis*. It stipulates that the civil relationships, unless specifically regulated by the Civil Code, are governed by the provisions of this Code, which govern the relations with the content and purpose closest to them.

Although they are (seemingly) renowned legal institutes in domestic and comparative legal theory, opinions on some issues ambiguous. We could point to them in terms of conceptual definition, internal composition and determination of a legal nature [6]. Suggestions from the academic environment as well as from the application practice clearly indicate the need to address the use of sources of law in private-law codes that have been significantly influenced (modified) since the creation (setting up) of the free market environment in the early 1990s. This was at the time of transition from the administrative economy system to the market economy [7] and also the adaptation of the national legislation (primary and secondary) to the legal acts of the European Union with a view to harmonizing the legal environment. The outcome of this noble process is to move towards (gradual) targeted unification of European private law. Also, on the basis of the above mentioned facts, the active effort (need) of the recodification of (whole) private law can be clearly observed. For the purposes of this article, we want to focus the attention on the hierarchy of the use of new specific sources of private law that already embody or could directly incorporate the *doctrinal interpretation* platform into the legal acts (codes). Its legal commitment thus (for the first time) finds its place in the recodified private law system in the Czech Republic and in the future, perhaps, it also shall be the part of the legal system of the Slovak Republic.

1. GENESIS OF THE LEGISLATIVE INTENTION FOR THE CREATION OF LEGAL INSTITUTES

In this part of the article, we will try to clarify the genesis of the legislative intention for the creation of legal institutes directly related to the analyzed issues in the context of the ongoing recodification of private (including commercial) law in the Slovak Republic, as well as successfully completed projects in the Czech Republic by adopting a new (modern) The Civil Code [8] and related legislation. In the Slovak Republic, the intended legislative project on private law recodification basically focuses on two essential conceptual solutions. The first is the monistic concept that the (new) Slovak Civil Code shall include all fundamental private-law relationships; including family law and the unification of (fragmented) various obligations. On the other hand, there are (other) legal opinions that point to the need to keep business law and civil law in two separate (different) codes. However, the monistic concept is the leading idea, emphasizing, that it is not intended to commercialize the civil law, but to inevitably and usefully integrate the private law sector. Thus, it is in accordance with European-wide trend of codification, especially those taking place in

many Central and Eastern European countries [9]. The outcome of the Slovak project of private law recodification could point at the adoption of the Civil Code.

It is the civil law that due to its nature and place in the system of private law in the legal order of the continental legal system creates the prerequisites for covering the general private law through the "all-comprising" code, such as the Civil Code. The truth is, that the civil law essentially applies to all personal and property rights of a private law nature, irrespective of the subject matter of the relationships governed by the law; and the persons between whom the private relations are created. On the other hand, the specific legal regulation contained in the Commercial Code (which is at present in force in the Slovak Republic only) is governed by general private law on the basis of the principle of subsidiarity. We refer to the rule *lex specialis derogat legi generali*, under which the commercial law regulates (only) certain features of a specific (sophisticated) area of private law relations, which is generally not governed by the legislation applicable to all private law. It has to be noted that the legal order of the Slovak Republic is based on a continental legal system [10] using the written law (*lex scripta*) only, and is based on the foundations of Roman law. In its essence, it does not accept the judiciary (court) decisions to be the source of the law; and the court's decision-making power is not limited to judging cases based on the law of precedents (*Case Law*); i.e. only following the previous enforceable judgments. Each case is dealt with and decided upon individually; under the *ius dicat inter partes* principle [11].

2. COMPARATIVE ANALYSIS OF THE CIVIL CODES OF THE CZECH AND SLOVAK REPUBLICS

In the new (progressive) Civil Code in the Czech Republic, the monistic concept is applied. The completed recodification of Czech private law has unified private law into one code, which excludes legal institutes regulating commercial companies and private international law. Here we consider it appropriate to emphasize, that the basis for the preparation of this law (the Czech codification) was the professional legal work with the support of the respective state authorities. However, in the drafting and adoption of the law, there was a particular relevance to political influences, overlapping with the influence of various interest entities, whether institutionalized or informally formed *ad hoc*, often influenced by media action [12]. Putting legal standards in line with changing social relations can not always be just filling the vacancies; i.e. law-making through the interpretation of laws, not reflecting current trends in the law development. If there is a fundamental change in social relations, the creation (issue) of new legal regulations should be a consequence. We would like to emphasize that the legislator has, while reflecting of social changes in the context of private relations, according to our (modest) opinion, properly incorporated into the provision of § 10 sec. 2 in the new Czech Civil Code the direct reference (taking into account the need) *to the status of legal science (education)* [13]. The *doctrinal*

interpretation of the law in the Czech recodified regulation became legally binding and it has the status of a full-qualified source of law in private law relations. Similarly, the drafting of the paragraph of the forthcoming issue of the Slovak Civil Code also provides for the use of analogy, which includes application of *predominant status of the legal science* within the regulation of private rights and obligations [14].

Doctrinal (scientific) interpretation is an examination of the law in force (but also reflects the *de legeferenda* considerations), since interpretation is fundamentally important to correctly explain the content of the legal norms. It could be a suitable way to positively affects private-law relationships in application practice. Hereby we refer in particular to respected and accepted legal opinions of renowned scientific capacities, which, in particular, by their scientific erudition and argumentation, enjoy a deep degree of seriousness on the part of the legal public and, above all, in the sphere of application practice. Their renowned knowledge comes mainly from the publication of legal scientific monographs in their home country and also abroad, comments on (essential) generally binding legal regulations, their remarkable attitudes in scientific and professional legal periodicals, etc. At this point, we would take a pleasure to present the well-respected and renowned experts, representatives of *legal science*, whose long-established scientific scholarship is well known both in the Slovak Republic and in the European Union. With regard to the scope and the focus of this article, we want to present representatively the legal scientists, such as: prof. Dr. JUDr. Karel Eliáš [15; 16], prof. JUDr. Marek Števíček, PhD. [17], prof. JUDr. Pavel Holländer, DrSc. [18], prof. Bénédicte Fauvarque-Cosson, PhD. [19], prof. Hugh Beale, QC, FBA [20] and other precious professors worth (not only) of our attention.

We also want to make a few comments in this context on the judicial (court) decisions, which has an essential meaning in using analogy. The new Czech Civil Code involves the idea, that in the legal completion of the law and the filling of the vacancies in the law, respecting the principle of prohibition of *denegatio iustitiae*, it is not possible to allow the arbitrariness to take place. Therefore, in the provisions of § 10 sec. 2 it stipulates that the legal case shall be decided upon in accordance with the principles of justice and legal regulation; taking into consideration also the state of legal science and actual decision-making practice. The result thereof shall be a good arrangement of rights and obligations, respecting the habits of private life, and therefore reasonable judgments according to the rules of equity [21]. The proposed wording of the second paragraph does not stipulate that the judiciary's opinion should reflect the existing judicial practice or doctrine. However, it must be based on its knowledge and it must be substantiated. Although the Czech Civil Code expects and accepts the judiciary law-making, it also determines certain limits within the lines of the continental legal system [21].

At this point, however, we want to give an interesting view by prof. Pavel Holländer, on the question of the reasoning of judicial decisions. Knowing that the law

can be interpreted in a number of various ways, it also has the impression that many solutions simply cannot be the part of the normative space. On the one hand, he is the advocate of a creative, judicious approach to the law (judicial law-making) he claims to be necessary. On the other hand, however, he considers that it is also necessary to develop a methodology that prevents judiciary arbitrariness that is conceptually outside the system set up by the legislator [22]. The court has the status of issuing judgments (judicial decisions) that adequately remedy the vacancies of law, while specifying the legal framework by defining the interpretation of specific private law standards. A contrario, however, there may be an undesirable (unusual) situation in the application practice, when the law permits (only) a clear interpretation of the rule of law, and the interpretation in a lawful judgment of the court might misinterpret it.

Therefore, we must note that in the Slovak Republic, the Supreme Court of the Slovak Republic provides a regular, annual publication of the Collection of the Supreme Court's Opinions and Decisions of the Courts of the Slovak Republic. We have to add, that in terms of form of publication, this set of relevant judicial decisions does not include normative acts, since the interpretation contained therein is not legally binding [23–29]. However, its content may be considered inspirational in the respective specific case.

CONCLUSIONS

The hierarchy of the use of sources, applicable in the private law, is reconsidered in new contexts within the current recoding motions. The research is still actual; we could say that it is a timeless and interdisciplinary topic that raises the attention of law theorists and recodifiers not only in the field of private law. An important issue of (private) law-making is the effective publication of legislation, allowing proper orientation in the postmodern multilingual legal order; or even the guidance in interoperable legal systems. The challenge for access to law is the postmodern complex structure of law, characterized by multicentrism of law-making, *hypertrophy of legal regulation*, exceptionally high rate of change of legal norms and complicated interconnection of legal norms, and their considerable refinement by the juridical decision making.

In conclusion, we want to emphasize that the legal system as a whole is reasonably expected to be a rational and moral method of regulating public life. Therefore, in the framework of ongoing discussions (which are always open), emphasis should be placed on incentives from academics active at universities (law faculties) and academic science institutions, from representatives of professional organizations, as well as from public institutions (institutional arbitration courts and chambers of commerce), to the thorny application and legal theoretical questions of the legal system. In the area of legal discipline, this can be a major stimulus for the development of legislation, in a wider perspective for the benefit of the national economy also. Some

suggestions presented in this article are to be understood only in terms of academic opinions and *de legeferenda* proposals.

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