

The System of Principles of Private Law

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Introduction

The phenomenon of principles of law – both principles in general and principles of private law – tends to enjoy irregular scholarly attention that occurs in sinusoidal forms.

At times of (positivist) emphasis on written or even codified law, principles tend to be overlooked. What rules the law – as regards theory, legislation, and practice – is a verbalised formal system of written legal rules. Such periods of belief in the omnipotence of written law tend to be regularly followed by periods of doubt and the acknowledgement that even ideal legislators are unable to take into account all conceivable situations. This finding often has an empirical nature and follows from the mistaken belief that the more detailed, thorough, and extensive the text of a law is, the more effectively it will work in practice.¹

Maxims, principles, values, etc., are undoubtedly concepts that have been undergoing such a dramatic development over the past few decades that they can hardly be compared with other legal concepts. While

a few decades ago, these concepts were quite marginal in Czech and Slovak contexts (and not only there), recent years have been characterised by a *hypertrophy of principles*, formulated on the most diverse levels of the system of law, as well as on various stages of production and the application of legal regulation. Principles have become an almost ever-present phenomenon affecting *intra legem* and *secundum legem* situations, dealing with gaps in law, conflicts of rules, and legislators' silences on various issues. However, they have also been used to describe the value insufficiency of the system of legal rules, supplementing real life with what the unavoidably partial system of legal norms leaves out.

From a historical perspective, these principles mostly came into existence spontaneously² and *ex post* as an expression of the feeling of injustice when assessing certain situations only under the rules of written law (*summum ius-summa iniuria*). To a significant degree, this trend still persists; consequently, new principles are being constantly created, producing both derivative (partial) and generalising principles. This development

results in a relative complexity of principles, which are listed quite haphazardly or according to custom. Quite disparate principles are, thus, presented alongside each other, differing in nature, degree of applicability, and importance for private law. This cannot be described as a systematic approach.

The present article, given this context, does not aim to analyse individual principles of private law; instead, it tries to *arrange the existing private law principles into a functional system*. Using a procedurally genetic paradigm, it aims to formulate a system based on fundamental values resting in the actual roots of private law regulation.

Variability of the set of principles

As mentioned above, principles mainly seek a solution to the discrepancy between written law and justice – or what we describe in these terms – and what the goal of law should be, regardless of the way in which it may be described. This discrepancy is a reflection of the conflict between the counter forces of a given epoch in the development of society. The different ratio between social and liberal forces in particular stages of the social development contains the answer to *the question of whether a set of legal principles that is forever valid can be found*. It seems that the answer will not be positive, also with view to the acute tension between liberal and socially oriented types of economic, sociological, political, and legal thinking and practice. We are witnessing permanent progress in the areas of pure values and legal techniques. Even such a stable principle as the principle of democracy – which is only rarely subject to any doubt about its belonging to the universal principles – has been changing its content ever since the times of Socrates (whose trial has become one of the first witnesses of the crisis of democracy), regardless of whether it comes in the form of changes in institutional or mental infrastructure of these principles.³

Last but not least: as P. Holländer summarises it,⁴ the development of the conception and function of legal principles is determined by the constant conflict between natural law and legal positivism, as the key historical branches of legal (theoretical and practical) thinking.

The catalogue of legal principles is, thus, not determined a priori; by contrast, it changes in the course of history. What is changeable is not only the actual enumeration of principles but also their content. This means that it is *impossible* to set up *a stable system of principles of private law*; what can be formulated is only a system corresponding to the values on which a given society is based.

The application of the genetic process paradigm

The temporal variability of the set, content, and system of principles corresponds to changes that occurred in the past decades in the field of methodology in science. In the second half of the 20th century, modern science formulated the so-called *procedurally genetic paradigm*, which views the universe as a process occurring in irreversible temporal dimensions and as a base for order arising from chaos. It is this *finding of the irreversibility of time*, as a genetic feature of understanding reality, that allowed the application of this paradigm in science as a whole, including the humanities. It appears that the partial theories of individual fields of science can be unified into a functional whole and may be validated beyond the substantive paradigm – which limited science for centuries – by having applicability even for “non-natural sciences”. Scientific knowledge is applied on the basis of the new paradigm to biological, social, and cultural developments without any methodological limitations.⁵

If the above-mentioned paradigm is valid generally for all fields, then it must hold also for law, as a scientifically grounded reflection of the reality of social relations in models of reality.⁶ *Within the sense of the procedurally genetic paradigm, law constitutes a vector with its own points of departure and its temporal and spatial orientations.*⁷

Individual and social dimensions of humans

Within the disciplines of philosophy, Christian doctrine, and human sciences, humans – or, to be more precise, their schematized and reduced form referred to by means of the concept of “*person*” – were studied, in the following two dimensions:

- *individual* (Descartes, Locke, Kant, and others), and
- *social and relational* (Hegel, Durkheim, but also entire fields of science, such as sociology and personalism⁸).

Both dimensions form a base for an elementary characterisation of humans – this already seemed clear to Saint Augustine: “*Homo sum et inter homines vivo*”.⁹

If *the goal of law is considered to be the finding and regulating of the dimensions of humans and the dimensions of their positions within society*, then the dialectic base is constituted by precisely these dimensions, whose dynamic interaction contains both the decisive conflict of law and the substance and goal of (private) law: the maintenance or restitution of a dynamic balance in the relations between the participating persons. This is also where the source of human principles is located.

For more than two hundred years (most notably in the form of the French Revolution), this base was used to formulate a pair of basic values – raised into the status of fundamental rights – with each dimension of humans having one of the values:

- *freedom* as a modern expression of the individuality of humans entering society,
- *equality* as a modern expression of the conditions of the integration of humans.¹⁰

While the accentuation of the principle of freedom is an expression of the individual dimension of law from the points of view of both its aim and the process of its assertion, the implementation of the principle of equality introduces the relational dimension into law, which is further raised onto a qualitatively higher level thanks to the principle of “brotherhood” (*fraternité, Brüderlichkeit*), currently termed as the principle of solidarity.

Since freedom and equality are the basic values of private law, the private law regulation builds on these principles by minimising any limitations of the freedom of humans and citizens.¹¹ This means that there is not a horizontal relation between freedom – or other principles that support the principle of freedoms – on the one hand, and principles representing values leading to a (legal) limitation of freedom, on the other. Instead, the principle of freedom and its group has an a priori position with respect to the principles limiting freedom. No matter how blurred this dimension may become in the dimensions of private law regulation, it is still – potentially or actually – present. A substantial part of private law principles follows this schema by *belonging to one of the two groups*: either supporting or limiting the freedom of humans, although this is often mediated many times through legal techniques. This schema is also followed by *methods* of private law regulation (“everything is allowed that is not expressly forbidden”, dispositivity, etc.). After all, these *genetic relations are respected* even by those *principles that do not, at first sight, belong to any of these groups* and seek their place among them (e.g., proportionality, democracy, good manners, good faith). The genetic relations are commonly encoded in the mechanisms through which these principles assert themselves (i.e., in trying to find the minimum of limitations of the freedom of individuals).

The above-described hierarchical construction of private law principles is manifested not only on the level of private law as a relatively unified systemic whole but also on *its lower levels*: thus, property law is based on the freedom of ownership and followed by its limitations, to which the relevant principles correspond (e.g., the prohibition on the misuse of ownership); contract law is based on the freedom to contract and supplemented by limiting principles and rules (e.g.,

pacta sunt servanda); and, after all, even liability is based on the freedom of an individual to act, which is limited by liability limitations based on certain principles of this sub-field (e.g., *neminem ledere* and *casum sentit dominus*).

The partial conclusion may, thus, be drawn that freedom and equality constitute the two fundamental values of private law regulation. At the same time, there are very close links between the two values, since equality limits freedom on the one hand but also allows its real assertion on the other (cf., the saying under which “the law of the stronger is the worst injustice”). For this reason, freedom and equality must be seen as points of departure for the system of private law principles.

Freedom and equality as points of departure for private law principles

These considerations allow the identification of two basic groups of private law principles:

1. The first group is based on human *freedom*, supported, maintained and developed by a whole group of other principles, paremies, normative sentences, etc.

2. The second group *is* and simultaneously *is not* based on *equality* in the actual sense: this is a dilemma rocking the whole system. Equality is an approximative value, asserting itself in combination with *equity* in the broadest (linguistic) sense of the word, i.e., also as equality but also as a concept impossible to define.¹² Equity, thus, becomes a wider category that subsumes equality. Should continental law satisfy the expectations of the reform process leading it out of the crisis identified more than fifty years ago,¹³ then one of the solutions consists in the removal of the rigidity of continental legal regulation by transferring the focus of its development into the area of legal practice (application) which must be equipped with suitable instruments and methods to start and deepen this process. This also means the necessity of creating space for *equitable decision-making*. All this also justifies the implementation of principles into the system of private law.¹⁴

However, should private law enjoy a well-constructed system of values and institutes, then *its value base* – statistically speaking – *rests on three pillars*:

1. freedom;
2. equality (with a tendency towards solidarity), where these two pillars represent antipodes that are moderated;
3. reasonableness as a tool for the balancing out of the extent of interventions into personal freedom and the extent of the assertion of the principle of equality (of opportunities, weapons, or goals).

Arrangement of the system of private law principles

The organisation of the system of private law principles may take various forms depending on the criteria chosen for the arrangement.¹⁵

What matters most for the text that follows is the distinction of *axiological principles* into internal and external depending on what values they represent. While *external principles* are the carriers of non-legal values (freedom, equality, equity), *internal principles* rest on values dependent on the nature of the regulation (this mainly concerns legal certainty). External principles aim towards attaining the goal of private law regulation, i.e., on the most general level, the balance of the interests involved. This aim tends to be identified with the attainment of justice from the value perspective. However, any practical realisation of an aim

guided by external principles (i.e., the attainment of justice) is conditioned by the use of a certain technique of legal regulation. The values on which it is based express the internal principles.

From a different perspective, internal and external principles may be characterised as *fundamental principles*, with some further *additional principles* that may be added to them. The latter represent the manifestation of the former in the area of private law regulation. An example of a fundamental external principle is freedom; its additional principles are the principle of “everything is allowed that is not forbidden” and the principle of the autonomy of the will.

Combinations of the above-stated criteria may be used to formulate the system of external and internal principles, as well as fundamental principles and additional principles, in the following way:

External principles	
Fundamental principle	Additional principles
<u>Freedom</u>	Individual autonomy (autonomy of the will) Everything is allowed that is not forbidden Dispositivity <i>Vigilantibus iura</i>
<u>Equality</u>	Equal opportunities Ban on discrimination Protection of the weaker party (consumer, tenant, etc.)
<u>Balancing – equity</u>	Reasonableness (proportionality) Good manners (<i>Good Faith and Fair dealing</i>) Ban on abuse of law Democracy Rationality

Internal principles	
Fundamental principle	Additional principles
<u>Legal Certainty</u>	Protection of good faith (in the psychological sense of the word) Ban on (true) retroactivity Protection of rights acquired Legitimate expectations Transparency Protection of rights of thirds persons Prevention <i>Pacta sunt servanda</i>
<u>Efficiency</u>	

The overall system of private law principles may be expressed as follows:

I. external principles

- a) freedom
 - the principle of individual autonomy (autonomy of the will)
 - the principle of “everything is allowed that is not forbidden”
 - the principle of dispositivity of private law regulation
 - the principle of *vigilantibus iura scripta sunt*
- b) equality
 - the principle of equal opportunities
 - the principle of a ban on discrimination
 - the principle of the protection of the weaker party
- c) equity
 - the principle of reasonableness (proportionality)
 - good manners (good faith in the objective sense, fair dealing)
 - the principle of a ban on the abuse of law
 - the principle of democracy
 - the principle of rationality

II. Internal principles

- a) Legal certainty
 - the principle of protection of good faith (in the subjective – psychological sense of the word)
 - the principle of a ban on retroactivity
 - the principle of the protection of rights acquired
 - the principle of legitimate expectations
 - the principle of transparency
 - the principle of the protection of the rights of third persons
 - the principle of prevention
 - the principle of *pacta sunt servanda*
- b) efficiency

adech. K úloze právních principů v judikatuře [Application of Law in Complex Cases: On the Role of Legal Principles in Judicial Decisions] Praha: Karolinum, 2002, s. 247.

² With certain exceptions typical of some important epochs which managed to formulate their political and legal programmes, such as the period of the legal and political declarations at the beginning of modernity.

³ Schultz, U. (ed.): *Velké procesy. Právo a spravedlnost v dějinách [Major Trials: Law and Justice in History]*. Vydání první. Praha: BRÁNA, spol. s r.o., 1997, pp. 21-25.

⁴ Holländer, P.: *Filosofie práva [Philosophy of Law]*. První vydání. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2006, pp. 17-63, 139-176.

⁵ Král, M.: *Změna paradigmatu vědy [Change of the Paradigm of Science]*. Filosofie Praha, 1994, p. 60.

⁶ Hurdík, J.: *Institucionální pilíře soukromého práva v dynamice vývoje společnosti [Institutional Pillars of Private Law in the Dynamism of a Changing Society]*. Praha: C. H. Beck, 2007, s. 12n.

⁷ For more details, cf. Král, M.: *Změna paradigmatu vědy [Change of the Paradigm of Science]*. Praha: Filosofie, 1994, p. 15.

⁸ Cf. Durkheim, E.: *Les formes élémentaires de la vie religieuse*. 5. vydání, Paříž: PUF, 1968, p. 386n. Mounier, E.: *Œuvres*, sv. I, Paříž, 1934.

⁹ [“I am human and I live among humans”] Cited after d’Ippona, A.: *Gaetano Lettieri*, Milano: Edizioni San Paolo, Cinisello Baldami, 1999.

¹⁰ The third value the French Revolution – *fraternité* – (substantially similar to equality) failed to stand the test of time when confronted with the liberal development of European society in the 19th century, and disappeared, only to be rediscovered in the 20th century, as the principle of solidarity.

¹¹ Knapp, V.: *Co je dovoleno a co zakázáno [What Is Permitted and What Is Forbidden]*. Právník 1, 1990, p. 27.

¹² Mazière, P.: *Le principe d’égalité en droit privé*. Aix-en-Provence: Presses universitaires d’Aix-Marseille, 2003, mostly p. 49 and subsequent pages.

¹³ Cf. Oppetit, B.: *Droit et modernité*, Paris: PUF, 1998, p. 99 and subsequent pages and the sources cited therein.

¹⁴ Cf. the notion of principles “shining through” the legal order – Holländer, P.: *Filosofie práva [Philosophy of Law]*. 1. vydání, Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2007, p. 154.

¹⁵ E.g., according to *methods* leading to the formulation of principles, one may distinguish between principles formulated through *deductive* methods (i.e., a principle is specified from general points) and *inductive* methods (i.e., a principle is a generalisation of a set of rules of conclusions from experience). Some authors also list a combination of both methods. See Trimidis, T., op. cit., pp. 1-2.

According to the *material or formal sources of law*, one may distinguish, among others, historical principles (with the special role of Roman law), custom-law principles, comparative principles, principles formulated by means of constitutional regulations, principles formulated by means of acts (exceptionally also by means of subordinate legislation), principles formulated by means of the judiciary (Czech, foreign, European), and principles formulated by means of scholarly literature.

According to the *mechanism of operation* in the process of realisation and application of law, one may distinguish between principles forming points of departure (operating as points of departure or prerequisites of a set of legal rules –

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¹ Z. Kühn suitably points out the practically unusable Prussian Landrecht, which contains more than 17,000 highly casuistic paragraphs (including the rule that what was said about a fence from wooden sticks applies to a fence from metal grilles). Kühn, Z.: *Aplikace práva ve složitých příp-*

e.g., good faith in the psychological conception or legitimate expectations), and target principles (the values they bear are applied in the actual process of realisation or application of law – e.g., the principle of democracy).

According to the extent of operation in the field of law, one may distinguish between general legal principles, private law principles, principles of individual fields of private law, sub-field principles, cross-section principles (and, within them,

also cross-section principles between disciplines, fields, or sub-fields of law).

According to the *centrifugal or centripetal orientation*, one may distinguish between extensive principles (within the Czech system, these are understood to be those that are derived from and support the freedom of the individual) and restrictive principles (limiting the freedom of the individual).