Backgrounds of today's convergence of the Czech laws with the EU laws

historical view of laws integration within the European area

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The objective of this research is to show the development of the Czech law after accession of the Czech Republic to the European Union in the historical context. It means to show that the current process of convergence of particular national laws of the Member States is only one stage (although the crucial one for the present development) of the development of the European systems of law. The impacts of the accession of the Czech Republic on the European Union were not only political, economic and social, but also legal. The legal impacts consist first of all in the fact that what has been essentially changing since the accession of the Czech Republic to the EU are not only the sources of law, but also the construction of the Czech legal norms having their origin in the Communitarian laws.

In individual stages of our research we are going to show that the current Czech system of law is a result of a series of impacts having influenced it in the course of its development. These were, at the same time, the impacts having influenced also the systems of law of other nations. The Czech system of laws has, therefore, the same backgrounds as the whole continental system of law. This is supposed to facilitate the present integration system.

The primary common sources for the European legal culture were the Roman law and natural law – *ius naturale*, so we have to begin our lecture with the oldest times.

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"The Roman law is no Stone of Wisdom that only remains to be discovered. It is not possible to understand the European legal thinking only by reading ancient texts and admiring the juristic erudition of Roman lawyers. It is necessary to read also what followed and without which the Roman law would not have been what it is today." [1]

To get to the roots of the European culture of law, it is necessary to start with the historically documented sources. The very term "private law" (ius privatum) is a term appeared in one of the most significant ancient monuments of law, in the Digests. One of the leading Roman lawyers Domitius Ulpianus defined in them the difference between the private and public law by saying that the private law concerns the protection of interests of an individual, whereas the public law is directed at the Roman State and its operation. (D, 1, 1, 1, 2)[2]. The mentioned Ulpian's definition is often cited today as often as it is, on the contrary, especi-

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[1] Urfus,V.: Historické základy novodobého práva soukromého (Historical Fundaments of Modern Private Law), Praha 1994.

[2] *"...Publicum ius est, quod ad statum rei Romanae spectat, privatum quod singulorum utilitatem; sunt autem enim quaedam*

ally by theorists of law, denied. Mostly it is accused of schematising the issue, concentrating on external characters of both terms rather than on the contents thereof. The basic objection against Ulpian is usually the fact that he failed to define the fundamental difference between the private and public law, namely the principle of equality of the parties.

Anyway, the actual contents of the terms "private law" and "public law" was seriously dealt with only much later, at the outset of the modern civil society, i.e. in a period typical of the formation of modern systems of laws. The Middle Ages and the system of laws of that time were based on totally different principles than on the differentiation of the private law from the public law. The thesis of differentiation of the private law from the public law was unambiguously accepted by so–called continental system of laws (and it was classically elaborated by the European legal science in the nineteenth century), whereas the Anglo–Saxon law did not reflect such differentiation.

Examining the roots of the European private law, or the European legal culture, we will always put emphasize on the history of the continental culture of law and continental legal science. Its beginnings can be found already in the Middle Ages, at the outset of the legal science in general sense, although very soon it shifted its interest predominantly to property–right relations, i.e. to the sphere typical for the private law. The fundaments of the modern legal science in Europe can be actually regarded as the fundaments of the legal science of the modern private law. In other words: This science had really European features, being supranational and in this sense in became also a somewhat general theory of law, especially of the private law. That's why the history of the private law in Europe is – as can be said again – far more a history of this legal science and much less a history of individual legal regulations. This supranational European legal science, which was, at the same time, a legal science in general sense as well as a science of the private law, was really a force unifying the intellectual world of the past and still constituting the ideological basis of the modern legal culture of the civilised society.[3]

The development of the modern legal science on the European continent, based on the medieval fundaments and directed afterwards predominantly at private–law issues, was of course not straightforward. Although in particular historical periods it went through many peripetia, dire straits and culminations, the legal science with respect to the above mentioned agrees on one single basic idea. The fundaments of the modern legal science and, as a result, of the modern European continental system of laws must be unambiguously seen in renewed interest in the Roman law, which can be traced back to the eleventh century and the immediately following centuries at Italian medieval Roman–law schools. The next, although a rather different direction of the European legal science is represented by the legal humanism, a direction typical for the development of the legal culture in France, but also in the Netherlands. Very soon, it is supplemented with another very significant impact in the form of the rationalistic natural law, where it is possible to find, according to general opinion of legal historians, some liaisons with French legal humanism. Although the legally theoretical postulates from the rationalistically designed natural law influenced to large extent especially the European legal science of the private law, they have never broken its connection with the Roman–law sources. The rationalistically passed down and used natural law is thus a crucial factor influencing the formation of the new legislation, a concrete output of which are the systematically designed legal branches. Such codifications, first of which were created already in the eighteenth century, represent a fundament of the so–called modern, in many cases still valid law of the states of the present Europe. This paradoxically triggered the final divergence of the ways of the European legal science, which until the eighteenth century or the turn of the eighteenth century still had maintained a relative unity. Once more, however, that time in German relations, like if the unifying force of the common legal science revived. Its task is to overcome not only the political but also the legal diversity of Germany. It was just there that the crucial role was played by the legally theoretical direction referred to as the German pandect. It became, said in plain English, a kind of a general theory of law, foreshadowing the next development in an additional respect – it can be regarded as a predecessor of the legal positivism, which is a determining legally theoretical direction of the European legal culture of the nineteenth century.

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The crucial sources included a.o., as stressed above, the natural–law theories, i.e. the theory of an ideal justice independent of the State, based on the reason and human substance. The ideas of natural law went through a difficult development. For the first time they appeared at ancient times (Socrates, Plato). In the Middle Ages, the natural law was regarded as a sort of divine law (St. Thomas Aquinas). It was however in the period of the seventeenth to eighteenth centuries that the natural–law ideas went through the most massive development, having a decisive impact on codification processes in Europe. The old philosophy took on a new shape as a result of its rational concept.

publicae utilia, quedam privatim. Publicum ius in sacris, in sacerdotibus, in magistratibus consistit privatum ius tripertitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus..."

[3] URFUS, V.: Historické základy novodobého práva soukromého (Historical Fundaments of Modern Private Law), Praha 1994, s. 2.

The natural–law concept of the principles as rules that precede the applicable law and are unchangeable and eternal and result from the reason itself, is represented mainly by Thomas Hobbes. More than 300 years before Dworkin and Alexy formulated their theories, he contemplated about natural fundaments of the law in his treatises *The Citizen* and *The Leviathan*. The notions of the natural law and natural rights are the basis of the Hobbes' famous concept of the social contract. The natural right of every man is the liberty each man has to use his own power as he will himself for the preservation of his own nature; that is to say his own life. The right to self–preservation includes also the right to the means of the self–preservation, as a result of which everybody has the right to everything and the rights of people are necessarily in conflict. It is however obvious that the resulting war of every one against every one will ensure the self–preservation to nobody. Then comes the law of nature *"that it is not against reason that a man does all he can to preserve his own body and limbs, both from death and pain."* Approximately twenty particular laws of nature are deduced by Hobbes using rational argumentation, by derivation from other laws or by reduction ad absurdum. All laws of nature can be summarised according to Hobbes in the following rule: *"Whatever you don't want other people to do to you, don't do to other people either"*. The laws of nature are binding in terms of conscience; the conduct of those abiding them is fair. In outside world, they are binding only if a man can abide them safely, otherwise they would contradict the natural right to self–preservation; it would not be reasonable to abide the law making himself a prey to unjust individuals. The laws of nature as rules of the reason are unchangeable and eternal, because war will never preserve life and peace will never destroy it.

The reason why we are talking about Thomas Hobbes now is however his concrete formulation of the laws of nature, the ideas of which can influence even readers of today. Logically the first law of nature is *"seek peace and follow it"*. The path to peace Hobbes afterwards used for construction of the social contract is shown in the second law of nature: *"that a man be willing, when others are so too, as far–forth as for peace and defense of himself he shall think it necessary, to lay down this right to all things, and be contended with so much liberty against other men he regards necessary for his peace and safety as he would allow other men against himself"*. A form of this waiver of rights is a contract. This is a subject matter of the third law of nature *"that people should keep agreements"*, which is a source and origin of justice. As it is only a breach of a contract that can be regarded as injustice; if there is no contract, then everybody has a natural right to everything and cannot behave in contradiction with justice. These three laws of nature are crucial.

Hobbes' law of nature can be understood as principles constituting a basis for every system of positive law. This nature–law concept of legal principles is however obsolete today.

A personality whose work meant an essential inclination to the rationalistic natural–law school was Hugo Grotius. According to him, the law and the State are of earthly nature. The State is created on the basis of a social contract among people.

The natural–law school was directed, in terms of its programme, at overcome of the old law and formation of a new one. But the natural–law codifications were actually no brand–new codes. What was really new was their system and general terms supporting them. Particular institutes were however derived from the Roman–law heritage.

The natural–law principles, concretely for example in ABGB, were reflected in the famous § 7 reading as follows: *"If the case still remains in doubt, it shall with careful consideration of the surrounding circumstances, be decided according to the principles of natural law"*. In the past, a lot of high–profile legal theorists attempted to construe this provision.[4] A judge not having legal norms on hand shall decide according to natural–law norms then. So natural–law principles must have a status of norms as well.

This question was replied quite succinctly by the authors of the ABGB notes, stating, on the basis of Zeiller and Martini's treatises, that the natural–law principles are nothing else than systematic legal terms. These systematic legal terms were created by Romanistics studies in the course of centuries, so they were regarded as something natural, directly given to human intellect. At the same time, they asked themselves a question whether a judge should follow these systematic terms, using them as subsidiary legal regulations. Modern times views these systematic terms critically, analysing them and depriving them from both the status of norms and the generally binding feature. *"Dogmatism of 18 century was exchanged with relativism of 19 century and now we are entering a critical period, capable of analysing and correctly placing in mind both dogmatic apodictism and relativistic scepticism."*

Two principles were deduced from this:

a) cues as to how to reconstruct a norm from insufficient sources,

b) judge's right to judge also beyond the limits given to him by particular legal regulations or,

[4] KALLAB, J.: Poznámky o základech nových teorií přirozenoprávních (Notes about fundaments of new natural–law theories, Sborník věd právních a státních, 1913; KUBEŠ, V.: "Přirozené zásady právní" a "dobré mravy" v obec. zákoníku občanském. ("Natural principles of law" and "good morals" in general civil code) In: Randův jubilejní sborník; SEDLÁČEK, J.: Přirozené zásady práva (Natural principles of law), Časopis pro právní a státní vědu, I, page 153 et seq.; WEYR, F.: K problému systematických výkladů positivního práva (On the issue of systematic constructions of positive law), Časopis pro právní a státní vědu, IX., page 240 et seq.

if he follows a governing opinion, to decide the particular case at his own discretion, provided that he has no ill will.

Authors of modern codes regard as the fundamental natural right the human liberty. Still the code of Western Galicia contained in §§ 28–33 a list of innate rights. This list was however for political reasons deleted, as the absolutism of that time found such a list quite dangerous, even though it did not concern political rights, limiting itself only to ius connubii and ius commercii. In compliance with absolutistic interests, also the code authors believed that such list was useless, as an educated judge must know natural rights and *"ordinary people might be confused by the general formulation of such natural rights"*. Paragraph 17 contained a burden of proof in a dispute about innate rights. It declared that *"what is typical of innate natural rights, it shall be deemed existing, unless it is proven that such rights are limited by law"*. According to the authors' belief the natural rights are given already by human reason and it is no need for them to be declared by any special law. So the legal presumption of such rights was provided for in § 17.

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As a result of modern reception of Roman law, applying natural law, another period in the process of European integration of laws is started. It is generally acknowledged that internal arrangement of classical civil codes of continental law system formed early in the 19 century (Code Civil and ABGB) differs from that of the codes arisen from a later period (Swiss ZGB, which, moreover, lacks a general part, and the German BGB). But it is obvious that all mentioned codes are more or less based on various law schools, applying methods of receiving the Roman law. As if the today's usual internal system of the civil law directly reflected from traditional Gaius' arrangement of the law, called sometimes as *"Gaius' system" of personae – res – actiones*. Romanists' opinions of this issue are of course different[5], but the basic framework of the private law arrangement was given to the modern European codifications by the already mentioned German pandect of the early 19. century. It also helped a.o. to the today's usual system of civil codes divided into a general part and individual sections dealing with law of things, law of obligations, family law (marital law) and law of inheritance. We know even the author of such arrangement and the publication in which it appeared for the first time. The author was the German pandectist G. A. Heise, who published them in 1807 in the book *"Grundriss eines Systeme des gemeinen Civilrechts zum Behufe von Pandektenvorlessungen"*. This arrangement, abstracted by Heise from pandect law became generally acknowledged.

At the time of preparation of the Code Civil edition, the Heise's arrangement did not exist yet. It was published only three years after the code was published. In Austria, with respect to the date of publication thereof, it could have been known. But either it was not known or at the time that the ABGB codification work culminated (it was announced on June 1, 1811) it could not be taken into consideration, and or Zieller did not accepted this concept.[6]

This theory of doubtless influence of the Roman law (even though in a received form) on civil law was not rebutted either by renown scientists having dealt with it for a long time. For example Professor Krčmář wrote: "The Civil Code is undoubtedly based on the Roman law, though it was developed by reception of the Roman law to the north of the Alps and another one by transformation thereof, based on the so–called Usus Modernus Pandectarum. As far as some sections are concerned (comp. e.g. marital law), the code is based on the canonic law and some other elements, comp. Lehnhooff Aufflosung page 82. Some institutions use domestic sources, especially Czech and Austrian law. In this regard, the institute of public books should be mentioned. Also the codifications of that time are taken into consideration; it was especially the Prussian Landrecht that served as a master for some provisions. In addition, the Civil Code includes some elements that are contained in none of older systems of laws and this is actually a case of creative work of editors ..... Such phenomena and the whole shape of the code as such can be attributed to its editors, the leaders of which, at first Martini and after him Zieller, are true children and high–profile, highly educated representatives of the enlightenment era, filled with the postulates and tendencies of that period. The ideas governing the natural–law theory of that time, namely the belief that all the law is based on fixed and unchangeable fundaments, then the efforts towards justice of law, i.e. everyone should be judged equally, that the law should meet the requirements of equity, that it should be adequate to the country for which it is adopted, that it should be clear and comprehensible and comprehensive, while the comprehensiveness should be achieved by reduction to general and distinctive terms rather than by casuistry; all such ideas are reflected in the Civil Code."[7]

On the other hand, neither the dogmatic inclina-

[5] E.g. GAIUS: Učebnice práva ve čtyřech knihách. (Textbook in four volumes) Edited and translated from Latin original and editorial written by Jaromír Kincl. Brno, reprint of the first edition 1981, page 19.

[6] KNAPP, V.: Velké právní systémy (Major law systems), Praha 1996, pages 127–128.

[7] KRČMÁŘ, J.: Právo občanské I. Výklady úvodní a část všeobecná. (Civil law I. Introductory construction and general part) Praha 1929, pages 22–23.

tion to the purely Roman–law concept of the system of law would be fully acceptable. We can undoubtedly recognize perfection and thousand–year tradition the roots of European legal culture have, but, at the same time, rather than omit we should respect the next historical development existing here like in all spheres of social life. By the way, it is nothing new to doubt and seek new possibilities of society arrangement including the legal framework of its function. The continental system of laws, which was undoubtedly influenced by a Roman heritage, has never been a dogma, has never been regarded as a panacea for imperfectness of the law as such. This is also confirmed by the words of the already cited Professor Krčmář: "As already indicated, neither the Romanist system, generally applied when construing the civil law, can be regarded as flawless. A flawless system can hardly be built. The problem can be explained by stating that the system adequacy can be assessed from various viewpoints and that the treatment of the chosen matter from one viewpoint has flaws when assessed from another viewpoint. But if a majority adheres to that Romanist system, then the system can be justified only by the fact that the system complies with the aspects obviously more important than the aspects that are neglected. It must be admitted that the new legal institutes, which arise from time to time, make the flaws of such system more distinctive, as the system has no suitable room for them".[8]

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By establishment of modern legal codifications, the crucial stage of creation of common fundaments of modern systems of laws was completed. Further development of the European legal culture went already the way of development of particular systems of law and the efforts towards European integration in the field of law depended on success of integration processes in the economic and political field. Such integration was successfully started only after the Second World War and actually culminated on November 1, 1993 by ratification of the Treaty on European Union, known as the Maastricht Treaty. Immediately before that date, there were three European Communities – the European Economic Community (EEC), the European Coal and Steel Community and the European Atomic Energy Community. By effectiveness of the Maastricht Treaty, the EEC of that time was extended with an economic and monetary union and was renamed to the "European Communities". So the history of the EU, as a successor organisation to previous communities, is relatively long. The outset of the efforts towards establishment of close cooperation among Western European states date back to the period immediately after the Second World War, when the European countries facing the aftermath of the war had to solve their problems of restoration of their destructed economies, when Europe was split into two hostile blocks, when the topical issue of further development of Germany had to be solved in order to eliminate a potential danger that Germany may become engaged, for the third time in 20. century, in starting a world war. So gradually, beginning with the so–called Paris Treaty in 1951, treaties leading to more and more close cooperation of member states and extension of such cooperation to other Western European states and territories were concluded. The Maastricht Treaty guaranteed to all citizens the EU citizenship, the Acts on Tariffs and Trades and Movement of Persons and Capital were adjusted on its basis towards gradual achievement of the targets of free movement of goods, persons, services and capital inside the Union.

In the EEC and EC, the law was perceived mainly as an instrument, not as a target of the integration. After foundation of the EU by the Maastricht Treaty, however, a significant change in this field occurred. The Maastricht Treaty incorporates some principle, objectives and tasks, concerning the cooperation in the field of justice and internal affairs, which can be regarded as a basis of a law policy of the EU. At the moment, the autonomous law of the EU, contained in its treaties and acts of their bodies, is an independent system of law, which can be compared neither with international nor national laws. The member states' law contradicting the EU law is inapplicable and the member states have to adjust it to the superior law of the Union or to abrogate it. Such superiority of the EU law is not explicitly stipulated in their treaties, but is based on the legal belief of the member states.

The EU law discerns so–called primary and secondary laws and customary law. The EU primary law, incorporating the basic treaties as amended, is a result of international negotiations of member states convened for the purpose of essential changes in function or structure of the community. The EU secondary law consists of the acts based on the primary law and adopted by the competent authorities of the Union.

And here we are at the outset of the last stage of the integration or convergence of the laws in Europe.

As it results from the depicted backgrounds of the current convergence of the Czech laws with the laws of the European Union, the subject matter of the research is the idea of European integration leading to the EU reality with an emphasis on the role of the Czech element within this framework. At the same time, it is just the integration in the field of laws that will be stressed. The analysed topic is solved applying the historical comparative method.

[8] Krčmář, J.: Právo občanské I. Výklady úvodní a část všeobecná. (Civil law I. Introductory construction and general part) Praha 1929, page 38.