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Fundamental Rights: Abstract Values in Concrete Cases?

1. Fundamental rights and freedoms are human rights as they are laid down in national constitutions and international and regional human rights conventions (in Europe especially in the European Convention on Human Rights). However, fundamental rights cannot be considered as real legal rights having *normative* force unless their enforcement is guaranteed by courts in concrete cases as well. In other words, the source and the justification of fundamental rights are beyond the positive law, however, as the essence of enshrining them in constitutions and conventions, they become legally enforceable. In this approach, one of the indispensable components of the definition of fundamental rights is the fact that citizens are entitled and also able to enforce these rights in their everyday life – especially in their individual cases before courts.

The standard of the codification and of the abstract interpretation of fundamental rights and the quality of their enforcement in concrete cases are two interdependent, but separate questions. The high standard of the protection of fundamental rights in the constitution of a state and human rights conventions binding upon a given state, or even in documents interpreting fundamental rights rules (e.g. abstract constitutional review decisions of constitutional courts) does not go automatically hand in hand with the existence of human rights attitude in the adjudication of individual cases. Concrete cases can be *par excellence* human rights cases, however in other cases the human right aspect may be less obvious. Furthermore, even when the human right aspect is evident or noticed, there is a certain distance between, on one hand, the *abstract* formulation of provisions on fundamental rights in constitutions and human rights conventions (sometimes also in laws) as well as the abstract interpretations and, on the other hand, the facts and also the legal question of a given *concrete* case.

The paper analyzes some of the theoretical and institutional factors which exercise influence on the way in which the gap between abstract fundamental rights rules and principles and concrete problems having a human right aspect could be bridged. It tries to identify some of the elements of the national and the European system protecting fundamental rights which can advance the presence of fundamental rights attitude in various fields of the law. Raising the problem in the paper is strongly inspired by the Hungarian experiences about the enforcement of fundamental rights in concrete cases (especially before ordinary courts). Accordingly, the analysis pays particular attention to post-communist CEE countries including Hungary.

2. *Who is entitled to interpret the broadly phrased human rights norms primarily enshrined in constitutions?* Regarding different institutions playing role in human rights protection, such as constitutional and ordinary courts, ombudsmen and other national human rights institutions, the question can be raised in a wider sense. However, in a narrow sense the question concerns only the courts being the essential and indispensable institutions for the enforcement of fundamental rights. Consequently, in institutional terms the problem is relevant in those countries that adopted the centralized model of constitutional review, conducted by a separate constitutional court being outside of the regular judicial system – as it is typical in CEE countries and generally in Europe. The debate about the power of interpreting the constitution as well as the tension between the constitutional court and ordinary courts (the supreme courts) are considerable also in Hungary as a post-communist CEE country.

On one hand, constitutional courts require a monopoly over constitutional adjudication which also brings about the monopoly over the interpretation of constitutional norms including fundamental rights. On the other hand, ordinary courts do not take a significant role

in the interpretation of fundamental rights rules of the constitutions. In CEE countries this attitude of judges can be explained by the legacy of the communist regime. Before the transition to democracy the constitutions were considered as much more political than legal documents, without normative force. This understanding proved to be difficult to change. Besides, the judges were strictly attached to the text of the laws (legal formalism). This approach to the interpretation of legal rules does not give much room for applying rules and principles not explicitly formulated in the text of statutes. The less room there is for using such rules and principles in the practice of courts, the less possibility there is of deciding a case on the grounds of human rights rules and principles. This attitude was and – due to the socialization of judiciary – remained rather characteristic also after the transition, but it is generally insufficient to interpret and apply broadly formulated provisions on fundamental rights which are very general in character.

3. It follows from the foregoing that in CEE countries it is a common critique that ordinary courts are reluctant to interpret and apply abstract fundamental rights principles and rules, and the adjudication is limitedly pervaded by human rights attitude. This critique often raises the question *whether it is justified to the same extent to require the presence of fundamental rights in the different fields of the adjudication of ordinary courts*. This question is in essential overlap with the problem of the horizontal or third party effect of human rights: fundamental rights protection binds only states in their relationships with citizens, or human rights also apply horizontally, between private individuals and bodies.

From a comparative approach, we can find a number of methods as well as theoretical establishments of the application of human rights protection in private relationships. The main categories of the relevant theories are the so-called ‘state action’ doctrine (typical of the United States), indirect third party effect (worked out in the practice of the German Federal Constitutional Court and on this basis generally accepted also in Hungary), and finally direct horizontal effect. Studying this problem from the viewpoint of the presence of human rights attitude in the practice of ordinary courts, one can state that even accepting the most limited theory about minimalist horizontal effect, ordinary courts can be expected to consider fundamental rights provisions (laid down in constitutions as well as in international human rights conventions) as legal rules that are interpretable and applicable. The courts cannot totally remain aloof from the use of constitutional and fundamental rights rules in their practice – at least in cases where ‘state’ is present. Taking a step forward and accepting the doctrine of indirect horizontal effect, ordinary courts have to take into consideration in all types of cases that human rights principles and rules may be relevant, since all elements of the legal system have to be interpreted in the light of and in harmony with fundamental rights.

4. In CEE countries, similarly to most European states in general, the dominant model is centralised constitutional review: a separate constitutional court exercising abstract review of the constitutionality of laws as the focus of its operation. According to this model, a constitutional court is a separate special body in which human rights knowledge and sensitivity can be concentrated. However, this type of constitutional courts basically provides the abstract interpretation of legal texts with no reference to the facts of concrete cases. The outcome of concrete review initiated by ordinary courts or individuals affected by a specific case is also abstract when the subject of the scrutiny is the legal rule and not its application in a concrete case. Consequently, the interpretation of fundamental rights as well as related human rights doctrines (e.g. the criteria and test of the restriction of rights) are developed in an abstract way and are formulated with general terms similarly to the text of laws. On the other hand, concrete cases having a human rights aspect are decided by ordinary courts. Therefore, one can state that the relationship between constitutional courts and ordinary courts is the institutional aspect of the distance between, on one hand, fundamental rights declarations phrased and interpreted very generally and, on the other hand, specific cases.

How can the results of the operation of constitutional courts be transmitted to the practice of ordinary courts? As for the institutional and procedural background, the German-type constitutional complaint is considered as an important and effective transmitter. The possibility of constitutional complaint against the application of the laws is not general in CEE countries, at present it does not exist in Hungary either. The new Hungarian Basic Law of 2011 (entering into force in 2012), however, introduces this mechanism for fundamental rights protection which yields the possibility of analysing the influence of constitutional complaint procedures on the practice of ordinary courts.

5. The system of institutions protecting fundamental rights is far more complex also at the domestic level than that of constitutional and ordinary courts. There are further institutions playing an important role such as ombudsmen and other national human rights institutions, or in wider sense even human rights NGOs can be mentioned. The latter institutions do not generally serve the legal enforcement of fundamental rights, which is basically the constitutional duty of courts. However, they can promote and protect human rights effectively with a wide range of activities (see e.g. the so-called Paris Principles).

How can the operation of NHRIs and especially ombudsman institutions influence the enforcement of fundamental rights in concrete cases before ordinary courts? The mere existence and operation of this kind of institutions can draw the attention of citizens as well as of state organs including courts to fundamental rights. They can raise the awareness about and the sensitivity towards human rights. That is the most general but the least direct way of advancing human rights attitude also in the practice of ordinary courts. A more direct and professional manner of influencing the adjudication can be the interpretations of fundamental rights rules and principles. The interpretations offered by ombudsmen have the same concrete character as it would be needed in cases having a human rights aspect before ordinary courts. In this respect the relationship between the practice of an ombudsman or an NHRI and its use by ordinary courts can be more obvious when an NHRI is involved in a case before the court as a party or a representative.