TEST Engineering & Management

May-June 2020
ISSN: 0193-4120 Page No. 520 - 528

Principles of Private Law: From Roman Law To DCFR

Evgen Kharytonov, Doctor of Legal Science, Professor, Head of Civil Law Department of National University «Odesa Law Academy», Odesa, Ukraine.

Olena Kharytonova, Doctor of Legal Science, Professor, Head of Intellectual Property and Corporate Law Department of National University «Odesa Law Academy», Odesa, Ukraine.

Tetiana Kharytonova, Doctor of Legal Science, Professor, Head of Agrarian, Land and Enviromental Law Department of National University «Odesa Law Academy», Odesa, Ukraine.

Denis Kolodin, Ph. D., Associate Professor of Criminal law Department, Head of Civil law and Economic Justice Faculty of National University «Odesa Law Academy», Odesa, Ukraine.

Piotr Mysiak, PhD, Assistant Professor of Institute of Legal Studies of University of Zielona Góra, Poland.

Article Info
Volume 83
Page Number: 520 - 528
Publication Issue:
May - June 2020

Article History
Article Received*: 11 August 2019*
Revised*: 18 November 2019*
Accepted*: 23 January 2020*
Publication*: 09 May 2020*

Abstract:
The issues of definition of the term "EU law" are considered. The principles of Roman private law and their importance for the formation of the principles of modern EU private law in the context of the creation of a draft Common Frame of Reference (DCFR) are being explored, with the help of which a number of important methodological issues of creating a new concept of European private law are planned. The subject of the study was public relations on human rights in the European area. International legal acts were the subject of a research article (DCFR). The deduction, analysis, synthesis, historical method, logical method, comparison method were used in the study. As a result of the study, the following conclusions were made. The task of DCFR is to provide a basis for improving the concept of private law under the basic values of European civilization. So, this imperative should be guided by each state and determining the directions and nature of the development of national civil legislation.

Keywords: *aquitas, DCFR, European law, Human Rights, Justitia, principles of law, Roman law.*

I. INTRODUCTION

An analysis of the tradition of private law in European countries shows the diversity of concepts, terms, categories used in this field, different views of their nature, conditions, and grounds for use. This makes it expedient to research the basic principles of private law, which can serve as the basis for its development in the current context.

At the same time, we proceed from the fact that it is expedient to use the methodological basis of the research to understand the law as a concept – expressed verbally imagined, rational and emotional perception by the person of the law as a part of the world in which it exists, feeling part of this world.

We also mean that the concept of "European law" can be seen in a broad and narrow sense. In the

TEST Engineering & Management
May-June 2020
ISSN: 0193-4120 Page No. 520 - 528

broad sense, European law means the legal regulation of the whole set of economic, social, political, scientific, and cultural relations concerning the organization and activities of European international organizations. It is sometimes regarded as "regional international law" (Malanchuk, 2000). In a narrow sense, European law is understood as the law of the European Communities, supplemented by the legal regulation of the entire European Community. In the countries of the European Union, European law is an instrument of daily practical application, almost as necessary as national law. Besides, European law is also actively applied in the area of relations between the European Union and other countries. Thus, in such an understanding of European law, in a narrow sense, it is identified with the law of the European Communities, supplemented to some extent by the rules and principles governing the activity of the entire European Union (Opryshko, Omelchenko, &Fastovets, 2002). It has largely departed from international law and is a particular legal phenomenon.

EU law, when considered as a sui generis phenomenon, is distinctive in nature, although it is closely linked to both international and Member State law (Tatam, 1998). It is a special, third system of law that operates alongside international and domestic law (Muraviov, 2011).

II. PRESENTATION OF KEY RESEARCH FINDINGS

2.1 Human rights and European law

European law is a system of legal rules that have arisen in connection with the formation and functioning of the European Communities and the European Union, which are applied within their jurisdiction on the basis of, and in accordance with, the founding treaties and the general principles of law. We draw attention to the final part of this definition, which refers to the "general principles of law" (Entin,Naku,&Vodolagin, 2001). under which the rules of European law apply. Article F of the 1992 Treaty provides that "the Union shall respect the fundamental rights of the individual as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they derive from the general constitutional traditions of the Member States as general principles of Community law". We should, therefore, bear in mind that the general principles of EU law are based on the priority of individual rights enshrined in the European Convention and derive from the constitutional traditions of European states. These traditions (principles) determine the further development of the national law of the Member States of the European Communities.

In view of the above, one can agree with the understanding of European law in a special (normative) sense as a system of principles, legal rules that are formed in connection with the formation and functioning of the European Communities and the European Union on the basis of and in accordance with the founding treaties and general principles of law.

The basis for defining European law is the understanding of its essence as a single European concept, which is predetermined by the very idea of European unity. This also applies to the concept of private law, which underpins European civilizational values and stands for their embodiment in European justice.

Understanding European law as a concept means that it should not be seen as a set of legal norms created in connection with the formation of the European Communities and the European Union but as a system of defining humanitarian values based on the fairness of participants in the private sphere.

2.2 The emergence of the concept of human rights in ancient Rome

It should be noted that such a vision of the essence and purpose of private law was formed during the formation of the Roman law of Antiquity. At that

May-June 2020
ISSN: 0193-4120 Page No. 520 - 528

time, the philosophical basis was the stoic and epicurean doctrine.

Taking into account the philosophical foundations of Roman law, it is suggested to critically evaluate the widespread version of the translation of Celsus's statement, cited by Ulpian and preserved in the Digest of Justinian, as "Jus estarsboni et aequi" (Saveliev, 2008) – as "the right is the science of good and just". Rather, it should sound like this: Right is the art of goodness and conformity (adequacy, equality).

The interpretation of the ideas of Stoicism by the Roman rulers regarding the private status of the individual (following from the provisions of natural law) is connected with their understanding, interpretation of the categories "justitia" and "aquitas".

It is worth defining the attitude according to which "aequitas" (which was the specification and expression of natural justice "justitia") served as a scale for the adjustment and assessment of the law. Aequitas was a landmark in law-making; it was the maximum when interpreting and applying the law (in Principalities of the Holy Roman Empire). "Aequitas" etymologically denotes even. "Aequitas" has acquired the meaning of "justice" in the special meaning-specification of the concept of "justitia" when applied to legal phenomena in Roman jurisprudence.

This is how this concept appears in the statements of many eminent jurists of ancient Rome. Paul said: "In cases, especially legal matters, we must remember justice," (Golik, 2014) "this is desirable for reasons of justice, although it does not prescribe it."(Justinian Digest, n.d.). Marcellus states the following position of Emperor Antonin: "Although difficult to change the established order, but where explicit justice requires it, assistance must be given."(Justinian Digest, n.d.).

Nevertheless, it should also be noted that these concepts are related to such ethical categories as "bona" and "bona fides" (in the development of Roman law by the period of formation of private law).

Only the second of the named concepts has its independent meaning. As for the first of these terms, being initially synonymous with the word "patremonium", which meant "all property", "property of an individual". This term eventually referred to an integral part of those concepts where it was required to emphasize ethical validity, the fairness of a decision that lacked sufficient support in civil law, or filled a gap in it, or corrected obsolete rules. Such as, for example, "bonorumemptor", "bonorumpossessio", etc. The genetic connection of this term to the categories of Stoic ethics is visible in the specific Roman law concept of "bonus vir" - an abstract example of decent behavior and mode of action.

Instead, the category "bon fides", where the word "good" originally came from as an adjective. Later, in the process of the formation of private law, the category "bona fides" gained independence. The category "bon fides" existed as a concept, approximately equal to Ukrainian "honesty, conscientiousness". Its importance especially increased at the end of the Roman Republic, when under the influence of Greek culture, philosophy, etc., the expansion of the outlook of Roman lawyers began to lose the leading role of the formal moment of law. There is a fall in the cult of words, in which they see not the thought itself, but only a means of its expression outside.

Such an approach meant abandoning the requirements of strict formalities (which were inherent in civil law), opposing "astiostricti juris" and "actio bona fide", determining the validity of informal agreements, the emergence of real, consensual and nameless contracts, and eventually contracting rights and civil rights protection system, which is still unsurpassed.

As mentioned earlier, these ethical categories, based on ancient Rome, had mainly eclectic views that were based on Stoicism.

May-June 2020
ISSN: 0193-4120 Page No. 520 - 528

However, the formation of a number of views of Roman lawyers was influenced by epicureanism. First of all, it concerns the views on the sovereignty of a free person, the formation of the principle of equality of rights of subjects of private legal relations.

The influence of epicureanism on legal opinion is clearly manifested in the process of the formation of private property rights.

It should be borne in mind that the existence in the Roman jurisprudence of ideas adequate to modern property rights is sometimes called into question in the literature (Sukhanov, 1991; Saveliev, 1995; 1984).

To clarify this issue, it is worth addressing Cicero's statements about property transformations in things: "... the first task of justice is to do no harm to anyone unless you have been wronged; the next is to use the public (property) as public and private as their own.

The private property does not come from nature. It occurs either based on past occupation, for example, if people once came to vacant land, or as a result of the victory, for example, if they took possession of the land after the war, or based on law, an agreement.

Thus, the Arpin region is called the Arpinates, and the Tusculan region is called the Tusculans, something similar happens in the distribution of private possessions. As a result, since the private property of each of us is formed from what was common in nature, let each possess what he has; if anyone else encroaches on any of this, it will violate the rights of human society"(Cicero. About duties. I.VII. 20-21, n.d.).

This statement focuses on almost all conceptual issues of understanding private property rights and their significance in Rome: delineating public and private property, citing the primacy of the first in Roman society, identifying sources of private property origin, and justifying its fairness and existence, and a higher degree than public property.

As a result, the principles of Roman private law are as follows:

1. The sovereignty of the person, recognition, and consolidation of the formal equality of the citizens of Rome before the law. The consolidation of the principle: "PerLiberampersonamnihilnobisadquiripotest" and, at the same time, the promotion of humanitarian, altruistic actions for the benefit of another person.

2. Recognition of legal personality not only by individual citizens of Rome (individuals), but also by communities, communities of citizens – corporations that have become the prototype of the institution of legal entities.

3. Formation of the institute of the right of private property, recognition of the private owner of "higher" power over things, limited at the same time, where necessary, by the prescriptions of the law in the interests of the community, the rights to other things, etc.

4. Freedom of contract, which is initially understood as the freedom to enter into or not conclude contracts under civil law, and later – as an opportunity to conclude virtually any agreement that is not contrary to law and good conscience.

5. The combination of formality and free discretion of the parties when concluding agreements. Contracts (claims) race between stricti juris and bonaefidei ended in favor of bonaefidei. Preference for the meaning of the agreement over the external form.

6. Establishment of a contractual obligation security system that was based on combining preventive measures to secure the interests of the creditor with the punishment of the debtor and compensation for the interest of the creditor in breach of default or improper performance of the contract.

7. Creating an effective system for the protection of the rights of the individual by providing a variety of institutions that complement and balance

TEST Engineering & Management

May-June 2020
ISSN: 0193-4120 Page No. 520 - 528

each other. It was possible to obtain the protection of their rights both in court and by appealing to magistrates who had civil, administrative, etc. jurisdiction in urgent cases.

8. Formation (under the influence of Christianity) of the principle of property liability for committing a tort-based on the guilt of the person causing the harm.

The foundations of Roman private law now belong to the core values, institutions, and concepts that underpin the EU's livelihood in private law. Thus, recognition of these principles is a prerequisite for the adaptation of national legal systems to "EU law" ("European law") (Contemporary Problems of Adaptation of Civil Law to the Standards of the European Union, 2006; Belousov, 2009; Drobiazko, Mindroul, Tverezenko, Rabotyagova,& Stefan, 2010).

The beginning of the article mentioned the expediency of understanding and exploring "European law" as a concept. Therefore, speaking of "European law", we proceed from the need to distinguish between the general concept of "European law", which is an element of European civilization as a whole, and the concept of "European law" in the special sense, which relates to the regulation of relations arising from the creation and the activities of European international organizations (EU law). As the former has a common civilizational, "cultural" meaning, it is broader than "EU law", which is understood to mean the system of legal rules governing European integration processes and the activities of the EU (European Union law, 2011). EU law is limited only by the scope of EU activity and EU policy.

So, if by "European law" we mean the verbal representation, the rational and emotional perception of the right of man as a part of the world (European civilization) in which this person exists, feeling himself a part of it, then by the term "EU law" we mean the set of legal norms, rules and other legal remedies (discussions in the European Parliament on Community law, etc.) which, in accordance with the general principles of EU law, regulate the processes of European integration and the activities of the European Union.

It should be added that the basis for such a definition of European law must be to take into account the essence of law as a single European concept, which is predetermined by the very idea of European unity. This also applies to the concept of private law, which underpins European civilizational values and stands for their embodiment in European justice.

From the understanding of European law as a concept, it follows that it should not be seen as a set of legal rules created in connection with the formation of the European Communities and the European Union. It should be seen as a system of determinative humanitarian values, based on and provided with, first and foremost, by the fairness of participants in the private sphere. This approach, in our view, is also reflected in the modern vision of the essence of law; in the concept of private law in European civilization, where the emphasis is on the comprehensive protection of human rights, the strengthening of humanitarian principles of private law, along with the regulation of economic relations between the participants of the European integration process.

2.3 Draft Common Frame of Reference (DCFR) as the quintessence of a private legal tradition

Developments in this area are reflected in the Draft Common Frame of Reference (DCFR) (2009), which is intended to address several important methodological issues. The project also has an "expanded" title: "Principles, Definitions and Model Rules of European Private Law", which places "Principles" first, and the rest of the text defines concepts and models of legal decisions regarding the regulation of private law relations.

With this concept of DCFR, in the triad "Principles, definitions, model rules of EU private

TEST Engineering & Management
May-June 2020
ISSN: 0193-4120 Page No. 520 - 528

law", the "principles of EU private law" take the leading place.

It is worth noting that DCFR authors do not focus on defining the concept of principles of law, setting their terms, etc., but start with a caveat about the possible use of the term "principles". It is used as a synonym for the expression "rules that have no legal force". From this point of view, it can be said that DCFR consists of principles and definitions. DCFR is very similar in nature to other documents that use the term "principles". At the same time, the term "principles" can be used to describe those norms that have a more general legal nature, such as freedom of contract or good faith. From this point of view, DCFR model rules include principles (Bar, Cleve, &Varul,2013).

Attention should also be drawn to the distinction between basic and priority principles in the DCFR since it is through such separation that the emphasis is placed on the main directions of the formation of the concept of private law.

According to the text of the DCFR and the comments made by its authors, the basic principles are those which are intended to achieve the most general goals of the DCFR. The principles of freedom, security, justice, and efficiency are offered as such (with the assumption that they also cover the principles of contractual loyalty, cooperation, etc.).

The definition of "priority principles" DCFR does not contain. Perhaps because it is a term-notion that is already a definition, and characteristic of it is a list of such principles. (Favorite method of Roman law scholars: instead of abstract definitions, offer a specific list of objects, properties, relationships).

The most important political priorities include the protection of human rights, the promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and improvement of well-being, and the development of the internal market (Bar, Cleve, &Varul,2013).

It should be noted that, in line with the DCFR authors' position, expressed below, freedom, security, justice, and efficiency, while playing a dual role, also serve as priority principles. Then it turns out that the principles are divided not into basic and priority, but into "priority basic" and "priority not basic (ordinary)". This approach seems too complicated and is explained, in our view, by the fact that the "basic" principles relate to the contractual sphere" and here they are the priority) and the" priority ordinary" principles are general, relating to various aspects of being a European civil society.

It should be noted that the "priority of priority" is the principle of protection of human rights in Art. I.-1: 102 (2) DCFR. According to this principle, model rules should be interpreted in the context of any applicable means that guarantee human rights and fundamental freedoms (DCFR, 2009). This priority principle is also reflected in the content of individual model rules, especially in the anti-discrimination, non-contractual liability and other rules.

It is also interesting that the principle of support for solidarity and social responsibility is a priority. As the authors of the Project rightly point out, this principle is usually regarded as a function of public law (Bar, Cleve, &Varul,2013). Such a position is explained by the broad interpretation of the principles of loyalty and security of the contract, which allows involving in the sphere of contractual regulation a wider range of relations. Concerning the principle of solidarity in legal relations arising from the conduct of alien affairs without a power of attorney, this idea has been known in civilistics since ancient Rome (with some changes regarding the inadmissibility of interfering with another person's affairs against the will of that person). from the last century, and later received was supported in totalitarian societies, such as the USSR (Novitskyi, 1951).

The principle of preserving cultural and linguistic diversity is of practical importance. Here,

TEST Engineering & Management
May-June 2020
ISSN: 0193-4120 Page No. 520 - 528

the approach of DCFR authors is more promising than those of opponents of European integration, who fear the loss of national cultural identity, etc., and of authors who consider European integration from the standpoint of global competition in the EU-US system (Bratimov, Gorsky, Delyagin,&Kovalenko, 2000).

But with the inclusion of the principles of cultural and linguistic diversity in the rules, there is some concern about the potential for adverse effects on the internal market (and, as a consequence, on the well-being of European citizens and entrepreneurs) of the diversity of contract law systems. In this sense, the purpose of the DCFR is to guide the legislator, through which the meaning of European law can be understood by people who have received a law degree under different law and order (Bar, Cleve, &Varul,2013).

The principle of protecting and improving the well-being of citizens and entrepreneurs (and complementary to the principle of the smooth development of the internal market) is seen as covering all or almost all other principles. Because, as the authors of the Project emphasize, it derives the ultimate purpose and meaning of the existence of DCFR. If DCFR does not help improve the well-being of citizens and entrepreneurs in Europe – the project will not be completely successful (Bar, Cleve, &Varul,2013).

Considering, as a whole, the value of the DCFR principles, we can conclude that their task is to provide a basis for improving the concept of private law under the basic values of European civilization. In our view, given the task of harmonizing national legislation with EU law, it is precisely this imperative that should guide our country, determining the directions and nature of the development of Ukrainian civil law.

CONCLUSIONS

The results of the study provide the basis for the conclusion that it is advisable to understand European law in a dual sense: as a set of rules and as a concept. In a normative sense, European law can be seen as a system of principles and legal rules that are formed in connection with the formation and functioning of the European Communities and the European Union on the basis of and in accordance with the founding treaties and general principles of law. Instead, understanding European law as a concept means that it is not viewed as a set of legal norms created in connection with the formation of the European Communities and the European Union, but as a system of defining humanitarian values based on the fairness of participants in the private sphere and they are provided first and foremost.

At the same time, the general principles of law in the EU are based on the priority of individual rights enshrined in the European Convention, which takes into account the constitutional traditions of the European states. The same traditions determine the further development of the national law of the Member States of the European Communities.

This view of the essence of private law was even more ancient, when in Roman private law on the basis of the stoic and epicurean pupils formed such defining principles as the sovereignty of the individual; recognizing the formal equality of free people before the law; recognition of legal personality not only by individuals, but also by communities and corporations; recognition as a private owner of "higher" authority over things; freedom of contract; the combination of formality and free discretion of the parties in concluding agreements; the existence of a system of contractual obligations; an effective system for the protection of the rights of individuals, consisting of various institutions that complement and balance each other and others.

These and other principles of Roman private law are now at the core of the values, institutions, and concepts that underpin the European Union's

TEST Engineering & Management

May-June 2020
ISSN: 0193-4120 Page No. 520 - 528

livelihood in private law. On this basis, European Law is understood as the expression of a verbally imagined, rational and emotional perception by a person of the right as part of the European civilization in which this person exists, feeling like a part of him.

This approach, in our opinion, takes place in the modern vision of the concept of private law in European civilization, where the emphasis is on the comprehensive protection of human rights, strengthening the humanitarian foundations of private law, along with the regulation of economic relations between the participants of the European integration process.

Developments in this area are reflected in the DCFR. This document also has an expanded title - Principles, Definitions and Model Rules of European Private Law, which places "Principles" in the first place, and the rest of the text define concepts and models of legal decisions regarding the regulation of private law relations. With this concept of DCFR, in the triad "Principles, definitions, model rules of EU private law", the "principles of EU private law" naturally take the leading position.

Considering the value of the DCFR principles, it should be concluded that their task is to provide a basis for improving the concept of private law under the basic values of European civilization. In our view, given the task of harmonizing national legislation with EU law, this imperative should be guided by each state and determining the directions and nature of the development of national civil legislation.

REFERENCES

1. Malanchuk, P. (2000). Introduction to Eikhurst International Law. Kharkiv: Consum.
2. Opryshko, F., Omelchenko, A.V.,&Fastovets,A.S. (2002).European Union law: General part. Kyiv: KNEU.
3. Tatam, A. (1998). Law of the European Union. Kyiv: Abris.
4. Muraviov, V.I. (Ed). (2011). European Union law. Kyiv: Yurincom Inter.
5. Entin, L.M.,Naku, A.A., &Vodolagin, S.V. (2001). European law. Moscow: NORMA-INFRA.
6. Saveliev, V. A. (2008). The Legal Technique of Roman Law of the Classical Period. Journal of Russian Law, 108-112.
7. Priti Diliprao Pohekar, " Constitutional and Legal Provisions for Women in India ", BEST: International Journal of Humanities, Arts, Medicine and Sciences (BEST: IJHAMS), Vol. 3, Issue 10, pp. 81-86
8. Golik, Yu.V. (2014). Events in Ukraine and Criminal Justice.Criminology: Yesterday, Today, Tomorrow, 49-51.
9. Justinian Digest. (n.d.). Library. Retrieved from https://www.gumer.info/bibliotek_Buks/Pravo/digest/50.php. 2019.
10. Sukhanov, E. A. (1991).Lectures on ownership. Moscow.
11. Poonam Rajharia & Bhawana Sharma, " Legal Aspects of Corporate Governance for IT Companies in India ", IMPACT: International Journal of Research in Business Management (IMPACT: IJRBM), Vol. 2, Issue 11, pp. 35-42
12. Saveliev, V.A. (1995). Roman private law. Moscow.
13. Saveliev, V.A. (1984). Some questions of correlation of law and morality: Historicalaspect.Moscow: Soviet state and law.
14. Cicero. About duties. I.VII. 20-21. (n.d.). Ancient literature.Retrieved from http://ancientrome.ru/antlitr/t.htm?a=1423775001 . 2019.
15. O.W Igwe, " Terrorism, the Rule of Law and the Nigerian Nation ", International Journal of Humanities and Social Sciences (IJHSS), Vol. 4, Issue 1, pp. 7-16
16. Contemporary Problems of Adaptation of Civil Law to the Standards of the European Union: Proceedings of the 1st International Scientific and Methodological Conference. (2006). Lviv.
17. Belousov, Yu.V. (Ed). (2009).Problems of systematization of private law of Ukraine and Europe. Kyiv: Private Law and Entrepreneurship

May-June 2020
ISSN: 0193-4120 Page No. 520 - 528

Research Institute National Academy of Law of Ukraine.
18. Claribel Diebo Longjohn, " Gender Neutral Legislative Drafting in Nigeria ", International Journal of Humanities and Social Sciences (IJHSS), Vol. 4, Issue 3, pp. 67-84
19. Drobiazko, V.S.,Mindroul, A.V.,Tverezenko, O.O.,Rabotyagova, L.I.,& Stefan, O.O. (2010). Legal Support for Intellectual Property in Ukraine in the Context of European Integration: Legal Framework. Kyiv: Lazurite-Polygraph.
20. European Union law. (2011). Kyiv: Yurincom Inter.
21. Arbab Mohammed Abdul Rub, " Carltona Doctrine in Administrative Law ", International Journal of Political Science, Law and International Relations (IJPSLIR), Vol. 7, Issue 6, pp. 1-8
22. Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of reference (DCFR). (2009). Munich.
23. Bar, K. f.,Cleve, E., &Varul, P. (2013). Preface to the Russian edition. Model rules of European private law. Moscow: Statute.
24. Sophronia Sosa-Malabanan, “Privileges and Benefits Granted by Philippine Laws to the Senior Citizens in Calabarzon”, International Journal of Environment, Ecology, Family and Urban Studies (IJEEFUS), Vol. 6, Issue 3, pp. 75- 80
25. Novitskyi, I.B. (1951). Solidarity of interests in Soviet civil law. Moscow: Gosyurizdat.
26. Bratimov, O.V.,Gorsky, Yu.M.,Delyagin, M.G.,&Kovalenko, A.A. (2000). The practice of globalization: games and rules of a new era. Moscow: INFRA-M.