

Ondřej Frinta

Fundamental Principles of Private Law



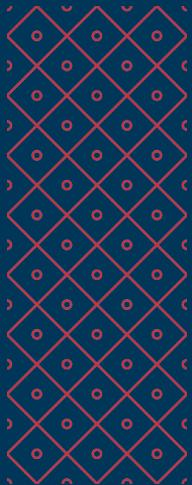
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Chapter 1

General Maxims



General Maxims

*“Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitia appellatum: nam, ut eleganter celsus definit, **ius est ars boni et aequi.**”*

*“Those who apply themselves to the study of law should know, in the first place, from whence the science is derived. The law obtains its name from justice; for (as Celsus elegantly says), **law is the art of knowing what is good and just.**”*

D 1.1.1 pr. (Ulpianus 1 inst.)



General Maxims

*“Cuius merito quis nos sacerdotes appelle: **iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, [...].”***

*“Anyone may properly call us the priests of this art, **for we cultivate justice and profess to know what is good and equitable, dividing right from wrong, and distinguishing what is lawful from what is unlawful; desiring to make men good through fear of punishment, but also by the encouragement of reward;** , [...].”*

D 1.1.1.1 (Ulpianus 1 inst.)



General Maxims

*“Scire leges non hoc est verba earum tenere, **sed vim ac potestatem.**”*

*“To know the laws is not to be familiar with their phraseology, **but with their force and effect.**”*

D 1.3.17 (Celsus 26 Dig.)



General Maxims

“For the significations of almost all words, are either in themselves, or in the metaphoricall use of them, ambiguous; and may be drawn in argument, to make many senses; but there is onely one sense of the Law. But if by the Letter, be meant the literall sense, then the Letter, and the Sentence or intention of the Law, is all one. For the literall sense is that, which the Legislator intended, should by the letter of the Law be signified. Now the Intention of the Legislator is alwayes supposed to be Equity: [...].”

*Thomas Hobbes, Leviathan (Chapter 26)
Hobbes, T. Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall
and Civil. London: Andrew Crooke, 1651, p. 172.*



General Maxims

“It is therefore distinguished between the letter of the law and its spirit in the sense that the letter of the law is only the overall meaning of the bare words.“

Cf. explanatory memorandum to Sect. 2 Civil Code

- ▶ at the same time, it applies that the **legislator always strives to achieve justice** (Hobbes)
- ▶ ▶ law is not an end in itself; law is not value-neutral
- ▶ ▶ ▶ law is based on certain values



General Maxims

- ▶ law is based on certain values

These values can nowadays be expressed through the conceptual framework of **the natural law doctrine**:

= natural rights of man **are a limit for the legislator** (and the statute created by him), not vice versa



General Maxims

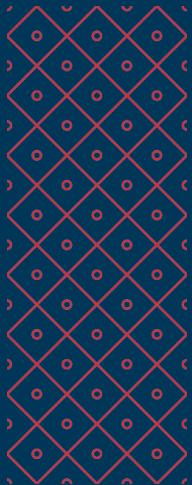
The Federal Assembly, on the basis of the proposals of the Czech National Council and the Slovak National Council, **Recognizing the inviolability of the natural rights of man**, the rights of citizens, and **the sovereignty of the law**, Proceeding from the **universally-shared values of humanity and from our nations' traditions of democracy and self-government**, **Mindful of the bitter experience of periods when human rights and fundamental freedoms were suppressed in our homeland**, [...].

Preamble
(Czech) Charter of Fundamental Rights and Freedoms (No 2/1993 Coll.)



General Maxims

- Sect. 3: (1) Private law **protects the dignity and freedom of an individual and his natural right to pursue his own happiness and the happiness of his family or people close to him in a way that does not unreasonably harm others.**
(2) **Private law primarily relies on the following principles:** [...].
(3) Private law also stems **from other generally recognised principles of justice and law.**
- Sect. 19: Every individual has **innate natural rights knowable by the very reason and feelings**, and therefore is considered to be a person. **A statute only provides for the limits** of application and the manner of protection of the natural rights of an individual.



Chapter 2

Concept



Concept

Basic rules governing private law as a systemic whole and permeating the entire regulation (i.e., regulation of personal, family, and property rights)

- ▶ rules of a relatively high degree of generality

Compare e.g.:

"a promise is binding and contracts are to be executed"

X

Sect. 661: If fiancés keep their existing surnames, they shall also declare at the wedding ceremony which of their surnames is to become the surname of their common children.



Concept

- ▶ inherent to law
- ▶ common to the laws of various countries
(at least within a certain type of legal culture)
- ▶ retain their validity even during changes of specifically formulated partial rules
(element of stability, protection against political influences)
- ▶ apolitical character of private law
(regulation of interpersonal relations)



Concept

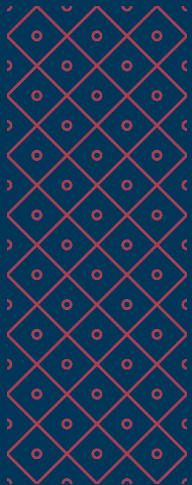
- ▶ protect values relevant to private law
(e. g. freedom, dignity, privacy, property)
- ▶ help achieve justice
- ▶ help achieve the general legal good and their application and enforcement in society
- ▶ where they help maintain order and balance (homeostasis)



Concept

Basic rules governing private law as a systemic whole and permeating the entire regulation (i.e., regulation of personal, family, and property rights)

- ▶ may or may not be expressly stated in the text of the statute
- ▶ the Czech Civil Code contains a demonstrative list (Sect. 3)
- ▶ ▶ as a reminder of the period of totalitarianism, which did not recognise the importance of principles and emphasised a formalistic approach to interpretation and application of law



Chapter 3

Legal Principle vs Legal Rule



Legal Principle vs Legal Rule

Legal Principle:

- = **command to optimise** (with regard to factual and legal possibilities) to apply to the greatest extent possible, striving to achieve the general legal good in a specific case
- = **several principles** may apply to a given case, they may operate with varying intensity (e.g., priority of protection of life over causing property damage), **they may even conflict** (e.g., contractual autonomy vs protection of the weaker party)

X

Legal Rule:

- = command, prohibition, permission (only one option applies)
individual modalities are mutually exclusive



Legal Principle vs Legal Rule

Legal Principle:

open nature, does not directly give rise to rights and obligations of addressees

R. Alexy: the solution is balancing and weighing ► legal principle

X

Legal Rule:

if the conditions in the hypothesis are met ► the disposition must apply ► if the disposition does not apply, the sanction must apply

R. Alexy: clear formulation of subsumption ► legal rule



Legal Principle vs Legal Rule

Legal Principle:

often stems from meta-legal foundations, meta-legal value systems (morality, ethics, religion, logic, conviction of general benefit, general good, justice etc.)
universally proven, recognised, need not be demonstrated (axioms)

X

Legal Rule:

formulated by the legislator based on political consensus, agreement, etc.



Legal Principle vs Legal Rule

Legal Principle:

if multiple principles apply = principles must be weighed

- method of proportionality

X

Legal Rule:

subsumption of a specific factual situation under a legal rule

- method of subsumption

lex generalis/superior/posterior derogat legi speciali/inferiori/priori



Chapter 4

Principle of Proportionality



Principle of Proportionality

Even in Czech law, **a number of general legal principles apply and are commonly used**, although they are not expressly contained in legal regulations. Examples include the principle that ignorance of the law excuses no one, or the principle of inadmissibility of retroactivity, not only in criminal law. Other examples are interpretative rules *a contrario*, *a minore ad maius*, *a maiore ad minus*, *reductio ad absurdum*, etc. **Another modern constitutional unwritten rule is resolving conflicts of fundamental rights and freedoms by the principle of proportionality.**



Principle of Proportionality

Article 52 Scope and interpretation of rights and principles

Para1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. **Subject to the principle of proportionality**, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Charter of Fundamental Rights of the European Union



Principle of Proportionality

16. [...] Legal norms must also meet substantive requirements, because in a material rule of law based on the idea of justice, fundamental rights represent a corrective both to the content of legal norms and to their interpretation and application. Therefore, it is the judge's task in the conditions of a material rule of law to **find a solution that ensures the maximum realisation of the fundamental rights of the parties (note: = optimisation)** and, if that is not possible, to decide in accordance with the general idea of justice, or according to the general natural law principle [...].

Constitutional Court case No I. ÚS 2166/10



Principle of Proportionality

20. [...]. **In the event of a conflict between two fundamental rights, [...], the general courts must first**

(1) identify which fundamental rights of the individual parties to the dispute are at stake [...] and then,

(2) taking into account all relevant circumstances of the case [...], the courts must decide so that, if possible, **as much as possible of both fundamental rights is preserved**, and if that is not possible,

(3) then give priority to the fundamental right in favour of which the general idea of justice or the general principle speaks [...].

Constitutional Court case No I. ÚS 2166/10



Principle of Proportionality

Assessment of interference with a fundamental right consists, according to established case law of the Constitutional Court, of three steps [...]. **In the first step, the suitability of the specific measure to achieve its purpose is assessed** (i.e., its appropriateness), meaning whether it is capable at all of achieving the legitimate aim pursued, which is the protection of another fundamental right or a public good. **Next, its necessity is examined** from the perspective of whether the least intrusive means was used. **Finally**, in the third and last step, **its proportionality in the narrower sense is assessed**, i.e., whether the harm to the fundamental right is not disproportionate in relation to the intended aim. This means that measures restricting fundamental human rights and freedoms must not, in the case of a collision between a fundamental right or freedom and a public interest, outweigh the positives represented by the public interest in such measures [...].

Constitutional Court case No II. ÚS 1774/14



Principle of Proportionality

Conflict of two or more rights (values) with each other

Assessment:

1) Suitability

Is the measure capable/appropriate to achieve the desired aim?

2) Necessity (test of minimisation of interference)

Can the aim not be achieved by another – more considerate (less invasive) – means?

3) Proportionality

Comparison of the seriousness of both conflicting fundamental rights (proportionality *stricto sensu*)



Principle of Proportionality

To identify which fundamental rights of the parties are affected:

Not all fundamental rights are always directly enforceable and operate immediately against individuals. In some cases, they operate only indirectly through individual norms of ordinary law, so that they “shine through” ordinary law. This is the case in horizontal relationships, i.e., relationships that are not based on superiority and subordination, where the parties are equal. Therefore, when interpreting or applying ordinary law to such relationships, **courts are obliged to carefully weigh this “shining through” and take it into account so as to fulfil their duty to protect both rights under ordinary law and fundamental rights.**

Constitutional Court case No I. ÚS 185/04



Chapter 5

Significance of Principles



Significance of Principles

1) Interpretation of Law:

Sect. 2 para 1:

Each provision of private law may be interpreted **only in accordance with**

- ▶ **the Charter of Fundamental Rights and Freedoms** and
- ▶ **the constitutional order in general**,
- ▶ **the principles underlying this Act**, and
- ▶ considering at all times **the values that it protects**.

Should the interpretation of a provision diverge from this imperative solely on the basis of its wording, the imperative prevails.



Significance of Principles

2) Application of Law:

Their existence cannot be ignored

Applied by courts and other public authorities

Sect. 2 para 3: **The interpretation and application** of a legal regulation must not be contrary to good morals and must not lead to cruelty or inconsiderate behaviour offensive to ordinary human feelings



Significance of Principles

3) Law-making:

Principles are inherent to law (or its branch, or even a specific legal institute)

► **the legislator must respect them**

Otherwise, coherence, unity, consistency, and hierarchy of the legal order will be disrupted

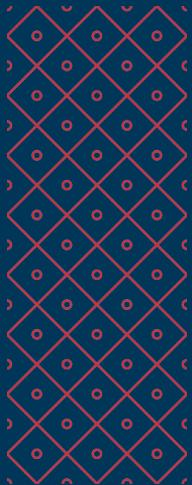


Significance of Principles

4) Knowledge of Law:

Understanding the actual content of legal norms

Understanding **the values on which the legal order stands**



Chapter 6

Classification of Principles



Classification of Principles

Various possibilities of classification:

1) According to branches of law (private law and public law principles)

e.g., pacta sunt servanda **X** nullum crimen sine lege

2) Substantive law **X procedural law**

e.g., pacta sunt servanda **X** nemo iudex in re sua

3) Traditional **X modern**

e.g., pacta sunt servanda **X** equality before the law



Classification of Principles

Various possibilities of classification:

4) According to expression in the text of legal regulations (expressly stated **X inferred)**

e.g., pacta sunt servanda X vigilantibus iura

5) According to scope

General (e.g., lex in retro non agit)

Specific branches (e.g., civil procedure: ne bis in idem)

Specific legal institutes (e.g., principle of monogamous marriage)



Chapter 7

Principle of Autonomy of Will



Principle of Autonomy of Will

Key principle of private law

Reflection of the requirement of human freedom and the possibility of free decision-making and action

Legally protected broad possibility for private law subjects to shape private law relations according to their free will

Constitutional basis:

Art. 2 para 3: Everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon her by law.

(Czech) Charter of Fundamental Rights and Freedoms (No 2/1993 Coll.)



Principle of Autonomy of Will

Four basic manifestations in private law:

- 1) Proprietary autonomy**
- 2) Testamentary autonomy**
- 3) Contractual autonomy**
- 4) Autonomy of creative intellectual activity**



Principle of Autonomy of Will

Sect. 1 para 2: Unless expressly prohibited by a statute, persons can stipulate rights and duties by way of exclusion from a statute; stipulations contrary to good morals, public order or the law concerning the status of persons, including the right to protection of personality rights, are prohibited.

Limits of autonomy of will:

- 1) Express statutory prohibition
- 2) Good morals
- 3) Public order
- 4) The law concerning the status of persons
- 5) The right to protection of personality rights



Principle of Autonomy of Will

Good morals:

To assess this question, one can generally start from the premise that “good morals” are a set of ethical principles, generally observed and recognised, whose observance is often ensured by legal norms so that every action is in harmony with the general moral principles of a democratic society. This general horizon, which develops its moral content over time and space with the evolution of society, must also be assessed in the context of the specific case, at the given time, in the given place, and in the mutual conduct of the parties to the legal relationship.



Principle of Autonomy of Will

Good morals:

Good morals are understood as a set of social, cultural, and moral norms which, in historical development, demonstrate a certain permanence, reflect essential historical tendencies, are shared by the decisive part of society, and have the nature of fundamental norms.

SC Case No 3 Cdon 69/96

Q.: *Which part of the judicial definition could be disputed?*



Principle of Autonomy of Will

The law concerning the status of persons

Status law in the objective sense = a set of legal provisions that regulate

- 1) the **creation and extinction of a person** in the sense of law
- 2) the **legal relations** of this person towards other persons, i.e., rights and obligations between these persons, **insofar as they affect their legal status (i.e., rights and obligations especially other than property-related)**, including determining the conditions under which these persons interact with each other

Zuklínová, M. Status – rodinné právo – nový občanský zákoník. In Správní právo č. 2003/5-6, p. 295 et seq.



Principle of Autonomy of Will

The law concerning the status of persons includes provisions on:

- ▶ Legal personality (creation and extinction of a person in the sense of law), “passive component”, Sect. 15 para 1
- ▶ Legal capacity, “active component”, Sect. 15 para 2

- ▶ Sex
- ▶ Determination and denial of parenthood (maternity and paternity)
- ▶ Family Relationship
- ▶ Marriage, (registered) partnership (especially creation, extinction)
- ▶ In-law Relationship
- ▶ Adoption
- ▶ Guardianship, ...



Principle of Autonomy of Will

Contractual autonomy = freedom of contract, i.e., freedom to conclude a contract at all

Individual aspects within this framework:

- 1) Freedom to choose the other contracting party
- 2) Freedom to choose the content (subject matter, time, place of performance, conditions, etc.)
- 3) Choice of type (nominate or innominate)
- 4) Choice of form of contract (unless prescribed by law)

X Act No. 198/2009 Coll., on Equal Treatment and on Legal Means of Protection Against Discrimination and on Amendments to Certain Acts (Anti-Discrimination Act)



Principle of Autonomy of Will

Contractual autonomy

X contractual compulsion = obligation to conclude a contract

i.e., duty to conclude a contract

Arises:

a) by operation of law

= statutory obligation to conclude a contract

b) from contract

= contractual obligation to conclude a contract



Principle of Autonomy of Will

Contractual compulsion – statutory contractual compulsion:

Examples:

Public transport of persons and goods

Compare e.g., § 35 Act No. 266/1994 Coll., on Railways

So-called “compulsory surety”, i.e., insurance of liability for damage caused by operation of a vehicle

Compare Act No. 30/2024 Coll., on Insurance of Liability from Operation of a Vehicle

Professional liability insurance

Compare e.g., § 24a Act No. 85/1996 Coll., on Advocacy



Principle of Autonomy of Will

Contractual compulsion – contractual obligation to conclude a contract:

= **preliminary contract** = contract to conclude a future contract
(pactum praeparatorium, pactum de contrahendo)

Compare Sects. 1785 to 1788

Sect. 1785: By a contract to conclude a future contract, at least one party undertakes to conclude, upon request within the agreed period, otherwise within one year, a future contract whose content is agreed at least in general terms



Chapter 8

Principle of Equality



Principle of Equality

The Civil Code does not expressly state it

Horizontal nature of private law relations = parties have equal (legal) status

Applies both to natural and legal persons

It concerns (substantive) legal equality, not factual equality in a specific situation

= no one can impose a civil law obligation (or right) on another without his consent

► Reflection in civil procedure: *nemo iudex in re sua*



Chapter 9

Principle of Protection of the Weaker Party



Principle of Protection of the Weaker Party

Represents a limit to the principle of equality

There is often a conflict between the principle of equality and the principle of protection of the weaker party

Need to balance factual inequality (imbalance) between parties

Main cases of factual inequality:

- ▶ Intellectual (protection of minors, persons with disabilities)
- ▶ Informational (e.g., entrepreneur vs consumer)
- ▶ Economic (e.g., employer vs employee)



Principle of Protection of the Weaker Party

Convention on the Rights of Persons with Disabilities (2006)

CZ: No. 10/2010 Coll. international treaty

Art. 1 para 2: **Persons with disabilities include** those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.



Chapter 10

Principle *neminem laedere*



Principle *neminem laedere*

*Iuris praecepta sunt haec: honeste vivere, **alterum non laedere**, suum cuique tribuere.*

*The precepts of the law are the following: to live honorably, **to injure no one**, to give to every one his due.*

Dig. 1.1.10.1 (Ulpianus 1 reg.)



Principle *neminem laedere*

Everyone may exercise his rights
neminem laedit, qui iure suo utitur

However, he must not interfere with legally protected interests of another (life, health, liberty, dignity, property, ...)

If interference occurs, **the tortfeasor is obliged to:**

- **compensate damage** (*damnum emergens, lucrum cessans*)
- **remedy non-pecuniary harm** (e.g., invasion of privacy, pain and suffering)



Chapter 11

Principle of Prevention



Principle of Prevention

Related to the principle *neminem laedere*

It is always better to prevent harm (pecuniary and non-pecuniary) than to remedy it later (however well and completely)

Sect. 2900: If required by the circumstances of the case or the usages of private life, (note: during his actions/conduct) everyone has the duty to act so as to prevent unreasonable harm to freedom, harm to life, bodily harm or harm to the property of another.

= applies only when someone is active, during his own conduct

✗ does not apply in case of passivity (e.g., merely seeing a car with a broken window = no duty to notify the owner)



Chapter 12

*Principle *pacta sunt servanda**



Principle *pacta sunt servanda*

Sect. 3 para 2: Private law primarily relies on the following principles: [...]

d) **a promise is binding and contracts are to be executed**

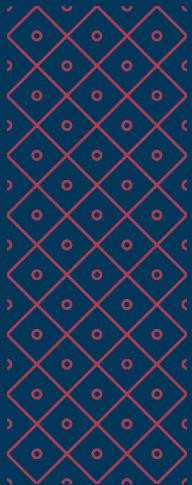
Freedom of contract **X** once a contract is concluded, **it becomes *lex contractus***

= duties under the contract are enforceable by state power just like duties arising by the operation of law

Provisions against excessive hardship:

Sect. 1765 (*clausula rebus sic stantibus*)

Sect. 2056 (a promisor of a gift is not obliged to donate, ...)



Chapter 13

Protection of Good Faith



Protection of Good Faith

Doctrine distinguishes good faith:

Objective = a certain standard of conduct, in the Civil Code usually expressed by the term **fairness** (fair, fairly)

X

Subjective = internal mental state consisting in the belief that:

- ▶ sb. acts in accordance with the law (that I do not violate the law by my conduct)
- ▶ the right belongs particular person (that I may exercise it as my own)
- ▶ a certain subjective right, legal relationship or legal status exists

However, the person is mistaken, but under the excusable (reasonable, justifiable) circumstances



Protection of Good Faith

Objective = *Treu und Glauben* (BGB); *gutte Sitten* (ABGB); *bonne foi* (CC); *good faith and fair dealing* (USA: *fair use*)

X

Subjective = *guter Glauben*; ***bona fide***

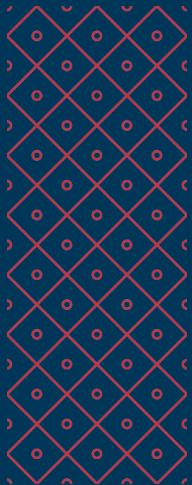
Presumed (Sect. 7)

Importance for acquisitive prescription of ownership (or other) rights (Sect. 1089 et seq.)

Importance for acquisition from a non-entitled person (Sect. 1109 et seq.)

X

Who acted in bad faith (***mala fide***) is not protected (Sect. 8)



Chapter 14

Other Principles



Other Principles

► ***neminem laedit, qui iure suo utitur***

= no one is harmed who exercises his right

► ***nemo turpitudinem suam allegare potest***

= no one may invoke his own dishonesty/unlawful act

► **iura quaesita**

= protection of acquired rights

► ***lex in retro non agit***

= statute does not operate retroactively



Other Principles

- ▶ ***iura vigilantibus, non dormientibus prosunt***
- ▶ ***vigilantibus iura scripta sunt***
 - = principle of vigilance
 - = rights belong to the vigilant, not the sleeping
 - = Importance especially in statute of limitations, prescription, acquisitive prescription
- ▶ ***ignorantia legis non excusat (neminem excusat)***
 - = ignorance of the law excuses no one
- ▶ ***prior tempore, potior iure***
 - = first in time, stronger in right



List of Sources – Civil Code, Case Law

Relevant provisions of Czech Civil Code:

Sects. 2, 3, 7, 8, 15, 19, 661, 1089 et seq., 1109 et seq., 1765, 1785 et seq., 2056

Case law:

CZ: CC Case No Pl. ÚS 33/97

CZ: CC Case No I. ÚS 2166/10

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