Free Movement of Goods and Persons Across the Polish – Czech – Slovak Borders

Legal Differences and Similarities

Edited by Barbara Mikołajczyk

Abstracts
INTRODUCTORY ESSAY

Peter Mosný

Historical Insight into Evolution of Relationships within Czech-Slovak-Polish Border

The paper focuses on the evolution of relationships of Czechs, Slovaks and Poles regarding common borders from the establishment of the first state in the territory of Bohemia and Slovakia – Great Moravia until ratification of a specific form of those relationships and borders after the Second World War. The study has the character of an outline and it aims to sketch the evolution of relationships between the Czech, Slovak and Polish nations from the Middle ages to the middle of the 20th century.

PART I: INTERPRETATIVE DILEMMAS AND CONFLICT OF LAWS

Ewa Rott – Pietrzyk

Interpretation of Juridical Acts in Polish Private Law (Are We Still Missing the Whole Point of the Only Right Interpretation Method in Private Law?),

When interpretation methods are concerned, rather heating argument is to be observed between academics involved in private law and academics involved in theory and philosophy of law, last time. This is a vital question if an interpretation means that the only and real task of the interpreter is to reveal and read the author’s intent, or the common intentions of the contracting parties (subjective interpretation method)? This leads on naturally to the next question: whether it is possible to still talk about interpretation when the interpreter uses objective criteria as ‘reasonableness’, ‘good faith’, ‘reasonable person’ (no longer speaking about intentions) to read the content of the text (unilateral juridical act or contract). In other words is it still possible to deal with objective or combined interpretation methods or this kind of dealing is totally pointless?

With objective criteria in mind and their significance, it is nowadays hard to believe in resistance to the recognition of a combined method of interpretation in private law where interpretations of contracts are concerned. A combined method certainly means that both subjective and objective criteria play a role in interpretation (but not as being a kind of alternative). And this is the delicate and moot point of mentioned heating argument.
Academics involved in theory and philosophy of law argue that the idea of the subjective-objective interpretation method (which comes down to a combined method) is conceptually flawed, updated and false. In this article I’m far from saying that this position is conceptually unacceptable from the point of view of academic involved in private law. What I am about to present in my article is that the mentioned heating argument is based on misunderstanding and, at the same time, the combined method of contract interpretation is not to be cut by the Ockham’s razor for some reasons.

David Schnálek

Interpretation in conformity with Union Law in Czech court rulings

The aim of the text is to examine the main duties which the Court of Justice has imposed on national courts regarding to the interpretation and prepare field for further research on this topic. Thus, in the first part of this text, the principle of indirect effect will be described. The second part of this text is dealing with limits of indirect effect in both European Union and national law. The last part examines the response of Czech highest courts to this doctrine. Selected rulings of the Constitutional Court, Supreme Court and Supreme Administrative Court are examined in order to find out how often and to what extent these courts follow the principles of the interpretation of the European Union law. The key finding is that the major problem is the reasoning of decisions of Czech courts. This reasoning is very important because the indirect effect may be applied only if it is possible under national law. However, Czech courts do not seem to deal with this problem and do not try to define the term used by the Court of Justice “as far as possible”. Thus, the answer will have to be found in the Czech theory of law.
Agnieszka Bielska-Brodziak, Lidia Rodak

Conforming Interpretation. A Case Study of Polish Jurisprudence

The main aim of this paper is to furnish an outline of how Polish courts deal with the problem of conforming interpretation. Generally, the paper is an introductory attempt at comparative studies between Eastern European legal systems such as Poland, the Czech Republic and Slovakia. That is why the paper consists of two parts, the first one introduces theoretical aspects and problems of conforming interpretation with a necessary background helping to understand its main controversies. Through analyzing cases from Polish court rulings, the second part will show problems with the limits of conforming interpretation. What this paper attempts to show is that conforming interpretation is one among many arguments used in the process of applying law.

It is so, because using it in legal discourse demands judicial creativity, which is not a commonly recognized feature of conforming interpretation. It is especially interesting to observe how judicial activism functions in the legal discourse though in the still very positivistic and stiff paradigm of Polish courts. As a key, we examine the way courts define conforming interpretation, shaping it by the context of given legal system.

That is why it is worth to examine how national legal orders in the context of community law “pave its way in national courtrooms”, because as it seems conforming interpretation as other instruments given by the EU is an universal tool which is a means to individualizing legal solution in every national legal system.

Naděžda Rozehnalová, Jiří Valdhans

Overriding mandatory rules, rules of safety, protective mandatory rules and other limits on application of law determined by conflict-of-law rules under the Rome I Regulation

Determination of applicable (governing) law is the main substantive issue addressed by conflict-of-law rules. However, the effects of instruments of private international law do not end there. In connection with the determination of the governing law, it is also necessary to take account of the boundaries of its application, i.e. application limits. This is by no means a negligible aspect. Rather the opposite, there are a number of limits, whose origins and objectives vary. These limits protect either the public interest or public policy. In addition, there are also limits represented by protective provisions for the benefit of one of the parties to a legal relationship. Likewise, applicable law may be limited by the fact that the
relationship in question is connected to only one system of law. Some issues related to the legal relationship are subject to specific connecting to foreign law, which also limits the impact of the obligation status. Last but not least, we need to bear in mind the differences in the procedural treatment of foreign law and conflict-of-law rules as such. In this text, the authors focus particularly on analysis of the first group of limitations, i.e. the current approach to overriding mandatory rules, rules of safety and public policy rules.

Maria-Anna Zachariasiewicz:


The issue subject to analysis is the concept of overriding mandatory provisions as an instrument of public order protection. Comparative study deals with the application requirements of third countries provisions and those of the forum, taking as an example the Polish Private International Law Act of February 4th, 2011, and EU Regulations: Rome I, Rome II, as well as draft regulations on matters of succession and matrimonial property regimes.
PART II: SOCIAL AND HUMAN RIGHTS SPHERE

Lucia Berdisová, Miriam Laclavíková:
Antidiscrimination Clause – Constitutional, Historical and Legal Metamorphoses

The paper provides an outline of antidiscrimination clauses in constitutions on the territory of the Czech Republic and the Slovak Republic from 1920 to the present time. It focuses on discrimination based on sex and gender from the point of view of law in books and law in action. The study also elaborates the fact, that Slovak and Czech word that stands for gender is “rod”, but the word “rod” stands also for English words “descent”, “lineage” and “birth”. The paper comes to the conclusion that metamorphoses of meaning of the word “rod” are also metamorphosis of antidiscrimination clause and that even though (or because) “rod” connotes something that is socially constructed, it is open to further interpretation and so it “opens” antidiscrimination clause. The paper does not omit EU antidiscrimination clauses and it articulates challenges that are brought before EU member states by the specific meaning of the word “rod”.

One might not get what one expects. What could be legitimately expected of a paper titled “Antidiscrimination Clause” in the context of free movement of goods and persons in the European Union, is mainly the way accession to the EU influenced national antidiscrimination law, more specifically e.g. elaboration of transposition of EC/EU directives in EU member states or the way the case-law of national courts of member states adheres to Union law through the principle of interpretation in conformity with EU law. Such an approach to the topic would be undoubtedly fruitful even if, still, oft-trodden.

This is a main reason why this part of the monograph focuses on the history of antidiscrimination clauses in common past of Czechs and Slovaks from 1920 and through this it opens the discussion about the present state of antidiscrimination clauses in the Slovak Republic and the Czech Republic. Our aim is to describe the life of constitutional order not to discriminate regardless of sex, gender, race, religion, etc. and to summarise challenges for the EU and member states of the EU which stem from it. The Ariadne's thread that will help us to pass the labyrinth of constitutional history is discrimination based on sex and discrimination based on gender.
Barbara Mikołajczyk

International Human Rights Obligations of Poland, Slovakia and the Czech Republic towards Persons with Disabilities

The paper analyses the Poland’s, Slovakia’s and the Czech Republic’s approach to the international obligations towards disabled persons. First, the UN Convention on the Rights of Persons with Disabilities of 2006 and its nature is considered by the Author. Then the European instruments directly or indirectly referring to disabled persons are considered. It turns out that Poland’s obligations in this field are limited in comparison with Slovakia and the Czech Republic.

The Author indicates that advocates of the Poland’s conservative approach to human rights obligations may argue that it results from responsibility for the assumed obligations. On the other hand, we should face new challenges in this sphere as human rights “do not stay still”, they are of a dynamic character and are constantly changing.

Peter Varga

Religious Discrimination in the Workplace

The article deals with a religious discrimination in the workplace. The author outlines the legal regulation applicable to religious discrimination in the Slovak Republic and potential issues the employers may deal with. The article also expresses the author's views and opinions on selected practical problems of religious discrimination that may occur in the process of work performance of employees and describes the legal instruments the employees dispose with when enforcing their rights.
The Impact of European Community Social Law on Polish Labour Law

European Community social law played an important role in the process of reconstruction of the Polish labour law system after the political and economic transformation in 1989. The inspiration by the EC social regulations supported the radical modernization of labour relations to adjust it to the new economic demands. The necessity to comply with the Community social standards, preceding Poland’s accession into the European Union, forced important and irreversible changes to the Polish labour law. The process of the its “Europeanization” brought new institutions or collective procedures and forced the development of the social dialogue. It considerably reinforced the anti-discriminatory regulations in employment relations and significantly remodeled the working time regulation. In general, EC social law enriched and strengthened the Polish regulations expressing the protective function of labour law covering the employees, inducing in the same time its evolution from the social security of employees toward their personal security. However, the pace and the scope of the necessary changes, apart from introducing a new vocabulary and a new syntax into existing legislation, caused diffusion of social law and difficulty in applying it. Nevertheless, the influence of EC social law has been perceived as positive. The aim of this paper is to characterize the impact of EC social law on Polish labour law.

Some Observations in the Discussion on the Model of Coordination of Social Security Systems

A reform of coordination of social security systems was implemented on 1st May 2010, the purpose of which was establishing priority principles of some overlapping norms in order to avoid accumulation of rights to social benefits set by the legislation systems in different countries.

The Administration Commission for the Coordination of Social Security Systems presented its opinion on implementing regulations concerning overlapping of social benefits or their accumulation. However, the legal proceedings implemented by provincial administrative courts lead to a contrary point of view.
There is a special requirement of protection for women – mothers - not only before, during and after childbirth, but also during all period of taking care of the child and family. It can be said that the value of maternity is not so important today, as in the past (but within different social and economic circumstances), so it is interesting to deal with the development of maternity protection.

The need for maternity protection led to adoption Labour law legislation which was protective to all female employees, and later only to pregnant women, mothers until ninth months after giving birth and breastfeeding women. The special labour law protection for female employees, especially for mother is in these areas which will be object of our research in historical context:

- Health protection which is mainly related to night work, overtime work, dangerous or unhealthy work (forbidden work) and breastfeeding,
- Protection from discriminatory dismissal (protection during maternity leave),
- Guaranteed right to work or equivalent position after maternity leave and
- Antidiscrimination law.

Finally, it can be concluded that maternity plays an important role for whole society so it is necessary to create the favourable Labour law protection and adequate state aid beneficial to women and families.
PART III: ECONOMY, CIVIL AND COMMERCIAL LAW ISSUES

Andrzej Bisztyga, Stanisława Kalus

The Constitutional Principle of Social Market Economy and its Protection

The article aims at presenting the content of the constitutional principle of social market economy including the standards established by the doctrine and constitutional case law. The constituents of the principle are: freedom of economic activity, private property, and solidarity, dialogue and cooperation of social partners. The authors attempt at reconstructing the practical protection of this principle. This issue is profound as the said principle constitutes the basis of the social and economic system of the Republic of Poland.

Monika Jagielska

Consumer Protection in Cross-border Transactions. Comparative Approach

The article is devoted to the problems of cross-border consumer transactions. On one level the material law issues like unfair contract terms, consumer sales, distant and out-door selling are dealt with. On the other level the matters of private international law in consumer protection (mainly Rome I and Brussels I Regulation) are deliberated in details. The author tries to show the problems arising for cross-border contracts concluded by consumers on a n example of a particular case. On the basis of an example of a sales contract concluded between Polish/Slovak/Czech consumer and entrepreneur the author analyses the difficulties arising from divergences in national laws and ways of its overcoming.

Zuzana Malacká

Consumer Protection in the Cross-border Transactions (the Slovak Model)

The article provides readers with basic but crucial information on consumer protection in cross-border transactions, considering the European Union legal acts as regulations and directives to be of the major importance in this field. Secondly, the article gives a view on the Slovak national law of consumer protection. By stating the main terms as “consumer”, “cross-border transaction means”, the article gives a survey through the aim of protection provided by directives and national law. Subsequently it leads straight towards the protection on the
ground of law applicable in the consumer protection in cross-border transactions and jurisdiction of courts. The article also reflects the practical view, on the day-to-day basis matters for consumer protection in the cross-border transactions.

Josef Šilhán

The Antitrust Challenge – from Market Shares to Barriers to Entry

This text addresses the issue of relevance of the criteria of market share on one hand, and contestability of the market on the other hand, in the context of law against abusive practices. The author argues for a more dynamic comprehension of competition and gives priority to the assessment of barriers to entry as a decisive factor justifying competition regulation and intervention.

Piotr Pinior

The Structure of the European Company with the Seat in Poland
(in Comparison to Czech Law)

Societas Europaea is a unique kind of a company regulated by the European Council Regulation of 2001. According to this Regulation, national legislators can create own acts adjusting the European Regulation into the national law, which may fulfill it or add new institution in the frames given by the Council Regulation, realizing simultaneously aim of the Regulation. As a result the SE may differ in some aspects among the EU Member States. The article would present the Czech and Polish rules concerning the organ’s structure in the SE.

Michał Kania

The Public-Private Partnership in Poland. Legal Aspects of New Possibilities for Foreign Entrepreneurs

The paper deals with the problem of the prescriptive regulations of the possibility to carry out undertakings - essential from the point of view of the quality of services offered by providing administration - by foreign entrepreneurs on the basis of public – private partnership projects.
First, general remarks about the public – private partnership institution will be presented. Next, the issues connected with the advantages which are linked with the public – private partnership with regard to the participation of foreign entrepreneurs in PPP projects will be discussed. Finally, the legal regulations in force concerning the possibilities of the participation of foreign entrepreneurs will be analyzed.

Katarzyna Pokryszka

Legal Aspects of Undertaking and Conducting Business Activity by Foreign Entrepreneurs in Poland after the Implementation of the “Services Directive”

The fundamental aim of the Directive 2006/123/EC on services in the internal market is to remove legal and administrative obstacles to exercising freedom of establishment and free movement of services between Member States of the European Union.

The most important purpose of this article is to present the influence of the implementation of the “Services Directive” on the provisions of Polish economic and administrative law concerning undertaking and conducting business activity. The article focuses on presenting the impact of EU law on Polish legal requirements which must be fulfilled by entrepreneurs in order to undertake and pursue business activity, registration and administrative proceedings as well as the changes in the system of concessions and authorizations which restrict the access to the specific areas of business activity. The article is also devoted to analysis of legal provisions adopted in order to simplify the procedures which relate to undertaking business activity and providing services by foreign entrepreneurs in Poland.

Ján Grman

Mobility of Companies in the European Union and the Impact of the Court of Justice Decisions in this Area on Slovak Relationships

The goal of this article is to describe the mobility of companies in the area of EU. The article describes factually and briefly the freedom of establishment and possibility of companies to set up establishments and pursue economic activity within the Member States of the European Union (article 49 and 54 in the Treaty on the Functioning of the European Union). The article characterized the possibility of companies to transfer of register seat and real seat from one member state to another. In the first part, the problem of corporate mobility
arised from conflict between national laws, are characterized. Subsequently jurisdiction Court of Justice in this area, are discussed in the second part. The Court of Justice has in many cases explained how the freedom of establishment and mobility of companies are being interpreted. The Court of Justice’s decisions on the freedom of establishment have had a great impact in the area of corporate law, or more precisely the choice of corporate statute in member state. Finally, regulation of corporate mobility and personal status of companies according to Slovak Commercial Code and impact of article 49 and 54 in the Treaty on the Functioning of the European Union and impact of jurisdiction Court of Justice on Slovak relationships, are introduced in the last third part.

Katarína Mikulová


The main purpose of this article is to present changes introduced by the amendments to the mediation legislature in Slovak republic made within transposing the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. These changes were mostly criticised by the mediators associations and theirs objections were not accepted. The critique was aimed on building more obstacles for the parties to choose mediation instead of the judicial process as the rising of the initial costs of the mediation, formalisation of the process of informal resolution of disputes and lowering the legal certainty as to the effective interruption the limitation and prescription periods. Therefore there is an expert commission working on new amendments to the mediation legislation in Slovak republic.
PART IV: ADMINISTRATIVE ISSUES IN TRANSBORDERS RELATIONS

Stanislav Kadečka

European Law Basis of Legal Regulation of Local Self-government

The paper gives a new approach to the local self – government in the EU. According to the Author the European aspects of local self-government represent one of the features that may and should contribute to the real free movement of persons within the European Union. Democratic Europe is not and should not be merely a union of sovereign national states but it is and must remain (maybe primarily) a Europe of citizens, and thus a union of free people whose matters are solved (directly by these citizens or by their free elected representatives) as openly and as closely as possible to these people, on principle regardless of which European country the person is situated in. To realisation of this may help the institutions and instruments which were mentioned in this contribution (even if the author realizes that the previous text is only an introduction to the theme and this issue might be elaborated in a more detailed way).

Jana Komendová

Free Movement of Persons within the EU and its Implementation in the Czech Republic

The free movement of persons is generally considered to be one of the most important rights of EU citizens and their family members guaranteed by EU law. This fundamental freedom which forms part of the internal market has been regulated since the establishment of the original European Communities. In the beginning, the free movement applied only to persons performing an economic activity. Later it was enlarged to other categories and currently covers all citizens of EU Member States and their family members who are not nationals of any Member State. This paper focuses on the EU legislation in force concerning free movement of persons, especially free movement of workers, and its implementation into the Czech national law. First, the sources of EU law governing this issue are mentioned, then the personal and material scope of application of the free movement of persons including their limitations are analysed, finally, legislation of the Czech Republic implementing EU law relating to the free movement of persons including free movement of workers, is dealt with.
The article deals with European regulations related to transfers of personal data abroad, and in particular with EC Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. It is divided into two parts. The first part presents standards provided for passing data within the Union (Member to Member transfers). It discusses both general principles and practice in particular states. The second part deals with rules concerning transfers outside the Union (transfers to third parties). It shows methods of transfer authorisation provided by Directive 95/46 – adequate protection methods and adequate safeguard methods, and presents the exceptions (derogations) serving as a supplementary type of authorisation in situations when the two methods mentioned above cannot be used. The article discusses the reasons, ways and effects of using each method.

The paper is dedicating to problems of foreign documents as one of type evidence, which is used by an administrative organ establishing circumstances essential for the case. Evidence from the document is the most often evidence enabling establishing the object truth in general administrative proceedings. The administrative organ use certificate of strange country and foreign documents with clausule apostille or exacting authentication. The attention exact also the danger from forgery of documents, resulting in defectiveness of procedure and constituting the basis for reopening of administrative proceedings.
Marcin Janik

Epidemiological Surveillance at a Trans-border Co-operation Level

Currently, one of the leitmotivs of the epidemic supervision constitutes the fact that most of the threats connected with contagious diseases ceased to occur only on a local area. Therefore, diseases inhibition, particularly large scale epidemics, is the priority operation which requires compound approach. Considerable part of the epidemic supervision is establishment of transborder network in order to work out diseases’ definitions that are subject to notify, collecting, up-grading, analyzing and spreading data concerning these diseases, as well as merit co-operation with domestic and foreign agencies.

Due to different levels of existing epidemic supervision and their needs referring to contagious diseases also the models of sanitary supervision will be analysed as well as their features.

Kateřina Ronovská, Anna Gronkiewicz

The Cross-border Philanthropy in Europe: Breaking through the Barriers

A foundation is a legal form of non-governmental organization, the capital of which capital is an important substrate for a particular purpose. There are a number of such entities in many countries around the world. The legal regime relating to their establishing and acting is partly convergent in the countries of the European Union. However, it is not uniform. As a result of increased activity of foundations relating to cross-border cooperation certain differences have been recognized in recent years. The significant number of foundations in the European Union operate with a view of public benefit. Furthermore, their activities are crucial for building the European civil society. Unfortunately, the existing differences are quite substantial and definitely obstruct the foundation's operation on an international scale.
The Principle of Mutual Recognition in Criminal Matters from the Perspective of the European Union

This paper deals with the principle of mutual recognition, which is considered to be the cornerstone of judicial cooperation in the European Union. The principle of mutual recognition is currently at the basis of many legal instruments governing judicial cooperation in criminal matters including final decisions, as well as decisions made during the pre-trial stage. And we should now consider whether the principle of mutual recognition has met expectations in areas of judicial cooperation or not and if we need to harmonise the legislation of criminal law of all European countries.

The principle of mutual recognition is suitably applied to the European arrest warrant, so the Framework decision on European Arrest Warrant is briefly described. A harmonised form of European arrest warrant has been introduced which not only speeds up, but also simplifies the administrative and translation element where all official language versions of the form are available to courts also in electronic form. A mutual recognition principle is not a completely new concept, but the basic prerequisite for this is a mutual trust.

The European arrest warrant is a very recent institution in the legislation of the Czech Republic and Poland, but it has been successfully integrated in the practice of judicial authorities and can be considered favourable. Mutual recognition is not a concept generally applicable to all acts, decisions and judgments of authorities of the Member States and is not yet completely adapted to the needs of criminal law. But if the Member States use a mutual recognition principle, we will not need as much harmonisation and approximation of criminal law.

The Role of Customs Administration in the Globalized World

The EU idea of free movement of persons and goods would not be possible without the customs union and customs law itself. Traditionally, the customs authorities are responsible for several main tasks, such as collecting customs duties, protecting the domestic market and ensuring that goods being imported do not endanger the lives of persons. What is
more, customs administration bodies also play a significant role in criminal proceedings. This topic is described in the first part of this paper.

Anyway, collecting customs duties is an important task not only for member states, but also for the EU budget, which has to be seen as one of the traditional own resource of the EU. That is why the international cooperation within the framework of the European Anti-Fraud Office (OLAF) should be pointed out, as well as the role of the World Customs Organisation (WCO) in the second part of the submitted paper.

Leszek Wilk

The Current Approach of Polish Legislature towards the Gambling Business in the Light of the Principle of Freedom of Services

In the light of the judicature of The European Court of Justice, running a gambling business is considered as providing the services. It means applying in gambling a basic European Community freedom - the commercial freedom. The limitation of this freedom is acceptable only when it is justified by an overriding aim of public good (particularly protection against socially negative results of gambling). The applied restrictive means should be proportional to this aim. The current Polish law is very restrictive as regards gambling. Its comparison with Czech law would be interesting (whether social and cultural conditions justify the difference between the intensity and the range of the protection against the negative results of gambling).