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Doctoral dissertation summary

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The theme of the constitutional fundaments of the civil law is not the object of a doctrinary research outlined in the Romanian or French juridical doctrine, the only study dedicated to it being the one of professor Luchaire in 1982, published under the impulse of the evolution that the constitutional jurisprudence regarding individual's rights was starting to have in that period. As a matter of fact, the appearance of the terms of constitutional fundaments or basis takes place in the context of the analysis oriented towards this kind of jurisprudence, more exactly in the modality in which the constitutional court reports in its decisions the institutions and principles of each branch of law to the contents of the Constitution, from the perspective of warranting the supremacy of the latter.

Although the constitutional jurisprudence represents in the two juridical systems the main way of attribution of constitutional fundaments to the civil law, the analysis of this notion supposes, in a first phase, the identification of a

theoretical support which sustains its existence and specificity. From this perspective, the present paper analyzes in a first chapter the notion of constitutional fundament from the perspective of its construction in the frame of the positivist theories and its historical elaboration.

We can observe in this way that the definition of the law as an auto-productive system by the positivist theories corresponds to a political and juridical reality represented by the state as being the only source of normativity, in the sense of making its Constitution the only point of departure in establishing a mechanism for the elaboration of juridical norms. Based on this monism of the sources of law and as long as "the fundament" corresponds in juridical vocabulary to the attempts to answer to " the reason why we should conform ourselves to the juridical prescripts and to the reason why these are mandatory" , the notion of constitutional fundament shapes itself as a notion in which the perception over the juridical, imposed by the state in considering its sovereignty, is reflected.

The approach towards law as a system shifts the problem of establishing the juridical criteria from the norm to the system, the problem of the legality of the norms being related to the state juridical system, each norm being necessarily tied to the juridical order, creating in this way its validity . In the case of auto productive systems validity is the specific modality of existence of the norms and it expresses the relation between two of them, based on which one of them constitutes the base of validity for the other. In other words, validity expresses a relation of the norm being part of the juridical system and based on that it gains the status of juridical norm.

The definition of law as a normative system structured by a combination of static and dynamic principles, which holds the unity and coherence of its elements as a main characteristic, imposes the existence of a

complex report of validity between the norms of the system where validity, condition of the juridical act, not only regards the respect of the adoption procedure of the norm, but also the background match between norms as a result of the transformation of all the requests regarding the inferior norms in validity conditions.

Transforming a natural right from the fundamental rights for which the vector is the Constitution , into a positive one, also transforms the bases of the fundamental rights of every human community. This quality gives them the opportunity to contribute to the definition of the perception over the juridical that we can notice in the systems which admit them as supreme values.

The constitutional fundament of the civil law is built within the frame of the positive theories as a notion that defines the formal and material criteria incorporated in the Constitution of the state, in relation to which one appreciates the juridical character of the particular norms for this specific branch of law.

As long as the constitutional fundament is tied to the existence of a constitution and represents the conception over the juridical act which it imposes to the juridical order, being a specific notion for every form of political organisation, the analysis of the revolutionary political and juridical context becomes essential for the better understanding of this notion. The revolution in 1789 and the adoption of the civil code in 1804 and 1865 are juridical moments which define the principles of the modern state.

In the context in which the political modernisation occurred in 1789 can be described in a direct way through the emancipation from the religious authorities, the autonomy becoming the essence of the human nature and being expressed through the belief that “man has got the nature to establish his own fate or that at least he should be treated as if he had”, the analysis of the

principles imposed by the revolutionary constitutionalism underlines the existence of a juridical order built on the model of an hierarchical structure of the juridical order. Within it, the liberty of the individual abides any normative act, meaning that that the political power does not have the task to organize society according to a certain truth and imposing it, it's only ration being the protection of the human rights as means of fulfilling the autonomy that allows the free search of a personal truth .

The adoption of the two codes does not take place in a political regime structured on these principles, neither the Constitution of year VIII nor the developing Status of the Paris Convention being constitutional texts when reported to the nature of constitutionalism. On the other hand we can see that human rights represent the principles on which the civil code is adopted, in the sense in which the French revolution and the Declaration of Rights which made them possible, represent the bases of a new political and juridical order.

Connecting the civil code to the human rights from the perspective of the analysis of the degree in which the latter are reflected in the civil code, puts in evidence the contextual nature of these principles, the content of which evolves in connection with the predominant social moral and juridical beliefs of those called upon to apply them. In this way, in 1804, there were considered juridical norms, those dispositions in the civil code regulating the conditions in which a father could lock his minor child in a private prison or those which were giving the right to women to file for divorce on the accusation of infidelity only if the husband had brought his mistress in the shared house.

The analysis of the historical elaboration of the constitutional fundaments underlines on one hand the central position that the individual rights have amongst the criteria that define the juridical act, and consequently

within the notion of constitutional fundament itself, and on the other hand it underlines the connection of this notion to the political and juridical space in which it is observed.

In the first chapter of the second Title the phenomenon of constitutionalism as a transformation of the branches of law as described by professor Louis Favoreau, is discussed. There is also a discussion on the echoes that this trend has had in the Romanian doctrine though the works of professors: Filipescu, Zlatescu and Simina Tanasescu. Observing the studies dedicated by professor Favoreu to the description of the phenomenon of constitutionalism we can see that it is, in the author's view, a phenomenon specific to any juridical order built on the respect of the fundamental rights and a constitutional justice system. On the other hand, as Favoreu underlines, the main support for the development of the process of constitutionalism of the branches of law in the French doctrine, is provided by observing the German juridical order, more exactly observing the action that the fundamental rights perceived as supreme values or objective norms have on the entire juridical system through The German Federal Constitutional Court.

Constitutionalism as a process of transformation is determined by the over passing of the defensive dimension of the individual rights, by attaching some positive effects to them. This is realised in a more visible way through the transformation of the transformation of the principles that it represents into rules to which the action of the authorities that apply, interpret or create juridical norms is applied.

The present paper puts in evidence three techniques of constitutionalism: the perception of fundamental rights as rules of interpreting the civil law; the horizontal effect of the former; the authority of the decisions of the constitutional courts.

The second chapter of this Title talks about the consequences of a systemic vision over the fundamental rights, determined by perceiving them as supreme values.

The constitutionalism of the civil law as a consequence of the attribution of a constitutional value to the specific norms of this branch of law is sustain partly by the French doctrine based on the constitutional jurisprudence in which the constitutional court protects some fundamental rights with t he help of other rights or principles that are common to the civil law.

Presenting the fundamental rights as a juridical collection is an achievement of the modern systems and expanding this collection through juridical means must be seen through the perspective of the constitutional protection of the fundamental rights. Perceiving the fundamental rights as a system of values also takes into account the evolution of the society, allowing this way “the interpretation of the rigid character of the written text, moreover as the text in discussion is a constitutional one for the revising of which a special procedure is needed” .

We can note the existence of a system of fundamental rights the bases of which are represented by dignity, freedom and equality; all the fundamental rights are based on the freedom and equality principles, which at their turn are a continuation of the principle of human dignity, all incorporated in a system that guides the constitutional protection of the fundamental rights.

The second part of the paper discusses about the effects of the constitutional fundaments on the civil law from the perspective of the constitutionalism techniques. The choice of the first theme approached was determined on one hand by the importance that the respect of the right to private life enjoys in the occidental juridical orders and on the other hand by

the fact the proclamation of this right both in the constitutional and legislative form permits and analysis of the influence and of the connections of the two spaces of the normative hierarchy in the sense imposed by the theme of the paper. At the same time defining the human being and the existence of a constitutional protection for this being represent a central point of interest for a paper that has got as main focus the observation of those fields where the civil and constitutional law can over pass the classic dichotomy public law – private law.

The unchained development of human personality determines the understanding of the right to a private life as a right comprising aspects connected both to the protection of privacy and secrecy and to the acknowledgement and protection of the personal choices as a manifestation of the power of self determination of the person. The analysis of the influence of this principle on the civil law does not support the constitutionalism theory as a transformation of the civil law. This is happening because the respect of the right to a private life is taking effect though the application of principles specific to the civil law and the development of this right by the civil judge, after it became part of legislation, cannot be tied to the decisions of the constitutional courts or to the principles of constitutional value. The individual's right to a private life is protect by the civil judge against the unauthorized investigations and divulgations, making the persona information an object of protection of this right but in the decisions there is no reference to the constitutional jurisprudence or to the constitutional fundaments represented by the human dignity or by the free development of the human personality.

The second Title of this second part is centred on the analysis of the effects of the human dignity in its quality of constitutional fundament on the

civil law. This analysis is imposed, as we've mentioned before, by the fact that it represents the core of the evolution of the fundamental rights as supreme values. From this perspective, the acknowledgement of the right to an identity to the transsexual together with the right of the child to know his origins constitutes a central aspect of the analysis dedicated to the influence of the constitutional fundaments over the civil law.

Concerning the sexual identity of the transsexual, the free development of the human personality inserts into the civil law a complimentary distinction between identity and identification, where the civil identity as a base of the notion of person "is made of objective elements and chosen or constructed dimensions as an effect of the personal freedom" .

The right of acknowledgement of their sexual identity for the transsexual in Romania is guaranteed by law no. 119 from 1998.

Concerning the right of knowing their origins for the children resulted from medical assisted insemination, the French system guarantees the right to privacy of the donor while in the Romanian legislation the absence of any reference to this matter is the subject of various debates between the acknowledgement of the right to know the origins or adopting the French system.

The implications of the free development of the personality on the civil law are better marked in the French system through the acknowledgement of the homosexual relations in the form of the civil pact for solidarity, this way putting these relations into a legal frame. In Romanian law the same effect is obtain by declaring the homosexual relations not prosecutable by the Constitutional Court in July 15, 1994. It can be noted at the same time that the constitutional protection of the freedom of getting married, does not give the

persons of same sex the right to marry, the difference between sexes being a condition for the marriage in both of the juridical systems.

The acceptance of the homosexual relations raises the problem of the existence of family relations in these couples, of central interest in this case being the debate over their right to have children.

If one of the specific features of the family, which justifies its existence, is represented by the appearance of children and the process of education, concerning the protection of a normal family life of the homosexual couples, a distinction between the private and family life is made. The private life is generally oriented towards the individual and to the environment where he can make the choices considered necessary for his free development, bearing from this point of view a strong individual accent. The family on the other hand is an institution, a subject of interest for the state, as a thing situated at the limit between public and private. The child in a family is the owner of certain rights while in the space of private life he will be the object of a right given to a person that claims the respect of his private life .

It is very important to note that the elimination of any distinctions between the civil pact of solidarity and marriage is without any doubt done only under the influence of the social beliefs and to the extent to which it determines the majority to adopt such a vision, the juridical order of the democratic systems being namely defined by this particular capacity to follow the tendencies of the majority. At the same time we need to take into account the supra national system to which the nations belong today and the constraints which the need of unity and integration imposes on the national juridical orders.

The free development of the human personality in connection to the dignity applies at the same time to the creation of a juridical status in the civil

law for the body and human embryo diversifying the system of attribution of juridical personalities by the rules of the common law.

We can also note that the rule of infans conceptus has got the role to protect the child and not the embryo and from the juridical point of fie the only one that can be the subject of rights is the person capable of autonomous physical existence. The juridical personality or existence of the embryo is acknowledged only if this is born, becoming this way a person.

The protection of the human person through the juridical personality does not correspond to the necessity of protecting it in the civil field but to that of protecting a juridical interest. This practical finality of the juridical personality justifies in a certain way its non attribution to the embryo: “What would an embryo need a bank account for, or access to justice or to sign a contract if it is not born yet? (…) The attribution of juridical personality to the embryo might seem even more shocking that denying it as long as it does not correspond to a practical utility” .

The main interest of the theory of juridical personality applied to the embryo is the possibility for it to be the owner of rights. It is clear that the rights of the embryo do not concern economical aspects as those mentioned before nut the right to life and human dignity. If only persons can have rights, as a consequence embryos not being persons cannot have the right to life nor to dignity. The wish to see the embryos as owners of rights supposes the reverse of the reports generated by the civil theory of juridical personality and the acceptance of the fact that there can be owners of rights without juridical personality.

A different type of explanation can be given to the problems presented. This explanation though does not mach the classical frame imposed by the civil law. In this respect we must underline that the right to life and dignity are

fundamental rights of the state's juridical order. According to article 1 paragraph 3 from the Romanian Constitution these are supreme values and they are to be respected by the public authorities. The obligation to guard the application of the fundamental rights given by the Constitution concerning the public authorities supposes the adoption of measures which can allow in a direct way and in all juridical aspects their protection as direct expression of the supremacy of the Constitution and of the acceptance of the principle of the state of law as principle of social and juridical organisation of the society.

From this perspective, guarantying the fundamental rights, perceived as juridical values does not necessarily suppose the existence of a classical connection of the type: fundamentals right – influence upon an individualised human being, owner of rights. The Constitutional guarantee of the fundamental rights permits the rejection of the conclusion that the absence of juridical personality of the embryo determines the absence of its any juridical protection. The positive law must recognize "the humanity beyond the strict notion of the person in juridical sense, satisfying only when we discuss parental issues and not when the respect of the existence and dignity of the human being is in discussion".

Dignity does not restrict to the human being in its individuality but concerns man's humanity in such a way that " if the man subject of the human rights from the juridical point of view represents the universal individual in its universal freedom and brings a process of identification into the scene, humanity does not allow this type of representation. It appears as the symbolic reunion of the human kind through the features they posses in common, through their quality of human beings. In other words it allows its belonging to the human kind as to a common kind" . Dignity represents therefore the quality of this membership of which the human embryo cannot be deprived .

In other words, the acknowledgement of a connection between dignity and embryo is essential when determining the juridical status of the both as long as the direct finality of dignity always was the distinction between human beings and animals or things. Therefore, no matter the evolution of the positive law, the human embryo cannot stay without a certain connection to the human species as this will make impossible “the acknowledgement of its humanity” .