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DEPARTAMENTO DE DERECHO CONSTITUCIONAL

Constitutionalization of Private Law: A comparative analysis of Spanish and Colombian systems

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Universidad Externado de Colombia

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Presentación

Los *Documentos de Trabajo* son un espacio para la reflexión y el debate. A diferencia de otros formatos, esta serie ofrece un palco para los trabajos inacabados, para la discusión de las ideas en formación y el perfeccionamiento de los procesos de investigación. Se trata pues, de textos que salen a la luz para ser enriquecidos con la crítica y el debate antes de pasar por el tamiz editorial.

En esta colección se sumarán cinco grandes áreas del conocimiento: el derecho constitucional, el derecho internacional, la sociológica jurídica, la teoría y filosofía del derecho. Además, de poner a prueba nuestras ideas, el cometido principal de esta publicación es aportar a los debates actuales, tanto aquellos que se viven en la academia como los que resultan de la cada vez más compleja realidad nacional e internacional.

Esta publicación está abierta a todos los miembros de nuestra Casa de Estudios, profesores y estudiantes, así como a quienes nos visitan. Esperamos contar con el aporte de todos aquellos interesados en la construcción de academia.

Magdalena Correa Henao
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Constitutionalization of Private Law: A comparative analysis of Spanish and Colombian systems

INTRODUCTION

Most early studies of law in the world are made based on a model that accepts the summa divisio established by the jurist Ulpian according to which the rules belong to public or private law. The first, understood as the set of rules governing the relations of vertical character between rulers and the ruled, the State and its partners, government and citizens. The second, meanwhile, handles horizontal and egalitarian relationships between individuals, their businesses and their forms of interaction in different political and economic models.

The previous division has lost most of its usefulness and the few applications as initial learning teaching method of the basic institutions of law does not resist the influence of phenomena such as specialization, constitutionalization private law and privatization of public law. The first is the emergence of new areas of knowledge in the science of law, involving the interaction and interrelationship of the right approaches from both public and private law: the law of the environment, mining, energy and telecommunications are, among others, new specializations in the institutions that combine the two systems from general division between public and private[1].

Also the privatization of public law is an important phenomenon of transformation product of the State role in the economy, new procurement schemes, allocation of functions of monitoring and control to individuals and private systems of conflict resolution by chambers of commerce and national and international arbitral tribunals. Since the end of last century, the traditional State stripped of many of its functions in parallel to increase the proportion of corporate influence in the economy and society, the neoliberal system imposed the need for a change in regulation and the result is a set of rules governing private law, solely or jointly with public standards, the traditional areas of the State sector.

But not only private law has had a kind of view towards expanding the boundaries of the public, but the reverse has also been named in the consti-

1. Rose-Ackerman, Susan. The regulatory State. The Oxford handbook of comparative constitutional law. Oxford University Press, 2012. pp. 671 to 678.

tutionalization of private law, which involved taking the constitutional and supreme within the legal system, a crisis of autonomy in favor of constitutional values, the integration of fundamental right to contracts as natural elements thereof and the emergence of new forms of contractual interpretation.

The idea that these three phenomena are widespread, allows and requires that consideration be way have been produced and developed in different legal systems. The purpose of this paper is to make a case study in which a structure has been modified classical private law of contracts, under the influence of a protection based on a constitutional provision of organic or protection of a constitutional right.

Comparative law analysis will be built based on the decisions of the Colombia and Spain Constitutional Court, which account for the existence of an effect of irradiation on the constitutional law of contracts. The methodology is descriptive, without prejudice to make some critical remarks and the conclusions reached by the study of Colombian and Spanish systems.

The work is divided into three parts, the first figures are systematized serving public law instrument to realize its effects on the law of contracts, in the second outlines the decisions of the Constitutional Court of Colombia showing some cases of application of the tools of the first part, and in the third, including some cases in the same sense, the Constitutional Court of Spain.

1. TOOLS IRRADIATION OF CONSTITUTIONAL LAW IN THE LAW OF CONTRACTS

As a framework for comparative analysis and better understanding of judicial decisions that will outline, for the Spanish and Colombian orders, which are cases of legal phenomenon of constitutionalization of private law, in this section we will refer to some of the mechanisms that central part of this new way of understanding the limits to private actors and their relationships in society.

First, there is the effect of irradiation of the constitution. It can be argued that other mechanisms are a realization of this general effect involving immediate force and effect of constitutional norms in any act or transaction occurred within the legal system. It is a consequence of the postulate of coherence of the rules and regulations that establish branch securing content below acts superior material.

In the case of legal transactions, irradiation involves integrating natural elements thereof, of the constitutional provisions that may be involved and their effectiveness, including preferentially to the terms set by the parties. However, this is not the only mechanism of the constitutionalization of private law and, in particular, of the contracts.

In those cases in which the constitutional rules do not replace or complement to contract terms, the effectiveness of those is signaled by the principle of consistent interpretation, which mandates that each private agreements

be interpreted as a development or realization of constitutional law and, of course, that in case of doubt between an interpretation that contradicts the Constitution and that it favors, the latter is chosen.

It is an approach that changed the traditional parameters of interpretation of contracts seeking better identification of the will of the parties, according to their intentions, actions and goals. Now, in addition to finding the business object and its terms, applies a scale of constitutional legitimacy of the business, according to the framework of possibilities that leaves private autonomy the Constitution.

Additionally, the so-called effectiveness of fundamental rights between individuals of German origin in the Drittwirkung is undoubtedly one of the most important mechanisms for the constitutionalization of private law. It involves a change in the concept of fundamental rights and relations within the State because it is recognized that, in so-called horizontal interactions between citizens, there are also situations where an exercise of autonomy or the subsequent requirement enforcement of a contractual provision may cause the violation of a fundamental right.

Besides the substantial effect of the efficiency of private rights, there is one of a procedural nature as embodied in the power granted to individuals to start legal proceedings against others to demand the satisfaction of a fundamental right by an act or mandate omission. It also affects the State's role as guarantor of citizens' rights because their abstention function versus private autonomy acquires a dimension of intervention, which involves the duty of issuing legal rules imposing limits on freedom of contract, the institution-building intervention to be responsible for the monitoring and control processes formalize the weak protection of contracts as in the case of consumers and the responsibility for its failure to perform these duties[2].

However, most legal transactions are made based on legal provisions governing them, this means that in many cases one party argues that his right has support in an ordinary, while the other seeks the effectiveness of a constitutional provision inconsistent with the standard that supports the claim of the counterparty. In some jurisdictions the judge may overcome this contradiction with the exception of unconstitutionality, entitling it to set aside a law that is inconsistent with the Constitution.

In these cases of antinomy, the judge does his duty to decide according to the law by applying the criterion of hierarchy, but do not do it by overriding general effects of the law, may decide it is not applicable to a particular case concrete. The exception of constitutionality has the potential to eliminate the

2. Julio Estrada, Alexei. La eficacia de los derechos fundamentales ente particulares. Universidad Externado de Colombia, Bogotá, 1999.

legal source of the business, so that not only can become invalid some of the obligations agreed to by the parties, but the totality of the act.

Besides substantial mechanisms, interpretative and procedural constitutionalization, operates an organic medium that transforms the role of government in society. This effect has two dimensions, on one hand, the State acts as a private in some of their relations and, secondly, it creates a set of institutions to intervene in the economy to regulate private competition, monitor abuse of dominant position, protecting consumers, providing services and compete with private companies.

Itself is a consequence of the rule of law, the requirements of the welfare State and a response to the growing power of business in the State and global economy. Public power that classical liberalism was noted for his abstention as a way to ensure individual freedoms, abandoned the paradigm and assumed omitting certain restrictions on the exercise of individual freedom come precisely from the accumulation of power by private actors society, to which the only effective response is State action by standards of protection and equalization shares material correct market failures and growing inequality.

None of these mechanisms operates autonomously, its implementation is not unique and in most cases is a combination of these that is generated around an unfair, unjust or a business contract system based on dominance one of the actors. But their existence and development is not in itself an attack on basic principle of private autonomy, by contrast, is a set of tools to ensure effective exercise of the same, by applying equality mechanisms the burdens of information, accuracy and objectivity to rationalize the classical idea of individualistic liberalism with the postulate of social justice and the proper functioning of the economic system.

2. COLOMBIA'S CONSTITUTIONAL COURT AND THE LIMITS OF FREEDOM OF CONTRACT

The operation of some of the mechanisms of constitutionalization of private law is illustrated by the review of judicial decisions that applied in the context of specific cases. Although Colombia's Constitutional Court has ruled on several areas in which the effect of irradiation of the Constitution is involved in contractual relationships, then identifies some of the most important decisions that embody the constitutionalization of private law.

In the Judgment C-747 of 1999, the Colombian court ruled on the constitutionality of the rules on capitalization of interest on housing loans offered by long-term financial system. For that corporation court, including such provisions in loan contracts were contrary to the Constitution, for violating the protected content on the right to adequate housing, which imposes a duty on the State to promote the access conditions of most part of the population to a residential network.

This decision is interesting in that it has a minimum level of deference to the general system of private contracting, to the extent that the decision of the Court order not totally outlawed Colombian pacte possibility of accumulation of interest, even in all cases of housing finance, but only in those long-term loans.

Moreover, in Judgment T-517 of 2006, the Constitutional Court examined the case of a citizen to an insurer denied the sale of a policy based on an agreement between the different companies, according to the which, when it comes to judicial policies in which the process is directed against one of these the other reserve the right to grant the bond required to start the process.

In the ruling, the Court ordered the insurance companies sell the policy to the public, so that it could initiate proceedings. According to the court, although the entities engaged in insurance activities may limit coverage and the amount of their services, when denied access to insurance based on subjective reasons, missing the duty of solidarity that involves the execution public interest activities.

In this judgment, the court limited the freedom of contract of the insurance denial because they can not refrain from selling insurance and, therefore, their autonomy is reduced to the internal conditions of coverage of the insured risk. The basis for the decision, and the public interest of the insurance business, focusing on the fundamental right of access to justice, the exercise of which would be prevented if none of the companies that provide a service allowing a citizen to access the same In order to meet the requirement for a prosecution.

Also in the Judgment C-319 of 2002, the Constitutional Court defined the scope of autonomy and contractual freedom of the utilities in the following aspects: i) affirmed the freedom of companies to set rates for their services, provided scenarios that are in free competition, there is no dominant position and within the limits set by the respective supervisory committee, ii) established that companies have the right to suspend the service if there is delay in payment of the invoice, but limited the ability to accumulate interest on arrears and iii) ordered the copper base charge only to a user when the service was suspended for late payment.

Here are three typical examples in which the court held that in the Colombian state of provision of public services allows competition from private companies and discourages competition, but there are also a set of constitutional limits are designed to ensure the rights of users and restrictions are erected in contractual terms, the interpretation of contracts and the degree of autonomy of private actors in the market.

Finally, there are two choices that are known as examples of constitutionalization of private law in Colombia. The first relates to the execution of a security to a blind citizen who refused to cover the debt because he had endorsed the creation of the security procedure was omitted the reading and

approval by a judge or notary. In the Judgment T-1072 of 2000, the Constitutional Court ordered the revocation of the sentence against the guarantor blind and established that there was a violation of his right to defense, equality and due process, in that the judge had given the prevalence private business in disregard of a standard of protection to people at invidencia.

The second decision relates to a fire in a mall for negligence of the owners, who tried to reconstruct the previous tenants vacate the premises or charge a higher fee. In Decision T-769 of 2005, the Colombian court limited the right of owners to set the monthly lease fee and protect the right to a living wage, work, life and dignity of the tenants of the premises.

These last two decisions are in addition to those outlined above, as examples of cases in which the classic elements of private autonomy, the legal transaction and interpreting contracts, are transformed as a result of the interplay of the rules of private the Constitution, in particular those relating to the protection of fundamental rights and powers of intervention of public bodies in the regulation of the economic system.

3. THE CONSTITUTIONAL COURT OF SPAIN AND THE CONSTITUTIONALIZATION OF PRIVATE LAW IN SPAIN

In the Spanish legal system has also raised the phenomenon of constitutionalization of private law. Some of the most important decisions listed below descriptively and unpretentious of completeness.

Decision 174/1995 of the Spain's Constitutional Court examined the compatibility of Article 38.2 of Law 16/1987 on the Management of Land Transport, which established mandatory arbitration as a mechanism to resolve disputes between the parties, the amount is less five hundred thousand pesetas, provided that there was no agreement or otherwise agreed. The court declared unconstitutional violation of this rule for equal rights, access to justice and effective remedy.

The main arguments of the Court to reach the conclusion reached in the final decision can be summarized in three points: i) unconstitutionality of arbitration as a rule, ii) the content of the right to effective judicial protection and iii) the right to equality and arbitration for minor amounts.

First, the court found that the provision established a binding arbitration for disputes of less than five hundred thousand pesetas in transport contracts, imposed as a means of resolving this dispute when the parties made an express statement to the contrary or When any of these disagreed with differences submit to the ordinary courts. In the opinion of the court, this rule reverses the rule of access to justice through the civil courts, to make alternative arrangements in the first option, in the absence of protest against.

Regarding the right to an effective remedy, the court held that the obligation to submit disputes to arbitration system violates the essence of the right protected because their exercise imposes a set of obstacles and impediments that are not constitutionally legitimate. Not that arbitration is not an appropriate measure to assist with the administration of justice, but can not given priority over ordinary mechanisms and, much less, with the requirement of an express agreement to the contrary to exercise a constitutional right.

Also the right to equality prohibits the establishment of such differences in the effects on access to justice of the causes of an amount. Although it is legitimate to promote arbitration as an alternative means of dispute resolution can not be made on the basis that ordinary judges know only major litigation according to its size or that in these cases you can choose between the ordinary courts and private, while in the case of minor disputes, they are always directed to the arbitration system.

For the court, these three arguments supporting the constitutionality of the rule, which implies a recognition that in the field of contractual relations and constitutional provisions, especially fundamental rights, is a limit to the power of disposal of the parties even when they omit any agreement with respect to, for example, the resolution of their disputes. The effectiveness of the Constitution imposes not only to act in favor of ordinary judges, but is made by declaring unconstitutional the rule that established the opposite effect to award the competition to the referees.

In addition to this decision, other pronouncements of the Constitutional Court of Spain to limit the scope of contractual freedom and autonomy in the workplace. In the Judgment 6/2011, the court ordered the protection of a group of workers who were excluded from the job boards of a company, have filed a lawsuit against it, on the termination of employment prior. In this decision, the constitutional view that the measures taken by the former employer had the effect of intimidating workers and thereby violated the guarantee is indemnity for the trial for the dismissal of the company.

In concluding that it was a punishment for having sued the company, the court rejected the company's arguments were based on the grounds for excluding workers from job boards and ordered to return them in their rights, in particular, indemnity assurance that protected content is part of the right to effective judicial protection.

Finally, in Case 76/2010, the Constitutional Court considered the case of a group of employees to whom it was canceled the contract to provide services in a company, with the argument that his multiple acts of request generated a better contractual terms decrease in the productivity of the company. The court found that the termination was an act violating the right of workers to strike and ordered the return of his rights.

The court reasoned that no contract can be understood as a waiver of a right to free enterprise and not a disproportionate power to impose restrictions on the rights and civil liberties. The termination of a contract is subject to the conditions agreed upon, within which can not be included with claim constitutional legitimacy, the exercise of a right guaranteed by law.

No doubt such decisions of the Constitutional Court of Spain far the degree of intervention of the Constitutional Court of Colombia in the field of contract. However, it is undeniable that in both jurisdictions there is a process in which the Constitution extends its normative force to the field of contractual relations between individuals, changes the traditional understanding of the linkages that occur as a result of a contract and conditions the legitimacy of the covenants of its compatibility with constitutional norms, especially those providing fundamental rights.

CONCLUSION

A comparative analysis of the influence of the Constitution in contractual relationships, to identify that this is a process that takes in most of the states in which there is a Constitution guaranteed by the existence of a constitutional court. However, there are differences in the extent to which constitutional norms are taken into account to evaluate or interpret a particular contractual term.

A proper process of constitutionalization of contract law is that which best reconciles the basic postulates of private autonomy and freedom of contract with the aspirations of equality, freedom and solidarity effective, which were established in the constitution after the Second World War.

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