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CYBERSPACE AS A PRECONDITION OF THE APPLICATION OF LAW IN A MULTICENTRIC EUROPEAN LEGAL AREA

by

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The Subject of Research: Cyberspace as a Precondition of Application of Law in Multicentric Legal System [1]

The emergence of unified European network sustaining the communication between courts might be perceived as a precondition for the existence and smooth evolution of the so called European legal area.

The concept of cyberspace as a vehicle for communication between different judicial actors operating within European legal environment will enable us to formulate two fundamental assumptions:

Firstly, the underlying premises of the European Court of Justice while adjudicating along with art 234 ECT require the existence of a network composed out of multi-level horizontal providers, such as ECJ, EChR, Constitutional Courts of Member States (1-st level), Courts of last instance according to art. 234 ECT point 3 (2-nd level), other Domestic Courts according to art. 234 ECT point 2 (3-rd level).

Secondly, the standard of states' liability for judicial error (both in EC law and in Strasbourg case law) will push member states toward participation of their courts within such a network in order to prevent and avoid potential liability for breach of EC law or the EChR. This will additionally strengthen the impact of some characteristic features of Cyberspace upon European legal Area.

The Outline of the Theory of Multicentric System of Law [2]

According to Ernst Wolfgang Böckenförde as far as political and legal development in European integration is concerned, we are in a state of transition, where traditional dogmatic categories and structures capture the changing realities only in part or not at all.¹ Those traditional dogmatic categories are very often (at least at the level of European law) associated with normativism, and traditional theory of law or jurisprudence.

Concepts such as “autonomous legal order” or ‘independent legal system’ will always lead back to equally unclear concepts such as ‘independent source of effectiveness’ of a legal order. Additionally the European legal area being a ‘fluid system’ may ‘hardly be described with rigid terms and notions. The contemporary legal theory begins gradually to accept non-unitarian character of law. In order to describe the system, new army of metaphors is marching.

The phenomena of the European legal area is being called multicentrism (at least in Polish literature on the subject) as proposed by E. Łętowska.² The term has also been adopted by the Polish Constitutional Tribunal, according to which it refers to “coexistence of different legal rules produced by different law-making bodies and applied by various courts’ structures” (Polish CT K18/04, 11.05.2005).

Contemporary dynamism of integration requires the acceptance of the fact that the authorities who are external to national authorities may in a binding or persuasive way make decisions concerning the application and interpretation of law. These decisions are effective on the territory of the state. Due to the process of European integration there exists one legal order of a particular Member State, still the system is of a multicentric character, where the division of competences *quoad usum* between national and Community authorities takes place. The multicentrism of legal system is discernible also within the perspective of the ratification of the European Convention on Human Rights and Fundamental Freedoms. In the sphere of human rights there is a co-existence and co-operation of norms originating

¹ E. W. Böckenförde (1999), *Staat, Nation, Europa*, Frankfurt am Main: Suhrkamp, p. 8.

² E. Łętowska (2005), *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, *Państwo i Prawo*, 4, 3 – 10.

from the national and conventional law. Accordingly, there is a division of competences between the Tribunal in Strasbourg, ECJ and national courts.

The advocates of multicentric, polycentric or multi-level model of law underline that the linear relations among legal rules have been replaced by circular or looped hierarchy of legal norms. A looped hierarchy is defined as an interaction among various levels or centers (which are discerned within the hierarchical order) in which the highest level directs back to the lowest level and influences it while at the same time the highest level is determined somehow by the lowest one.

Such system forms a total unity of legal norms among which exists specific interaction of a correlative character. The system is specified with a relative teleological unity while as one norm forms an autonomous aim, the other norms serve towards its realization.

Those phenomena in a particular way influence the process of application of law by courts. It seems that here the most serious problems are linked to the obligation of a national judge to apply legal norms of a national, Community and international origin, to use standards, rules and principles of supranational and international character. Hence, the judge should be able to identify a required standard, according to which it is necessary to decide a given case. Moreover, he or she should be able to solve a conflict among the conflicting rules or standards, which might be perceived as a form of discretionary "metaregulation". Undoubtedly the process is additionally being complicated by unclear, questionable and politically "sensitive" liaisons, entanglements and relations of dependence between national law and Community law, resulting with competence disputes among national and Community courts.

The relationship between multicentric judicial structure and state liability doctrine has been explained by the ECJ's 2003 decision in *Köbler v. Republic of Austria*, (Case C-224/01 E.C.R. I-10239). In this ruling ECJ proclaimed that a Member State may be liable in damages for a national court's serious misapplication of EC law. The assumption that the *Kobler* case clarified the relationship between ECJ and national courts, especially courts of last instance, is doubtful. On one hand decisions of national supreme courts can render the State liable for breach of Community law. On the other hand the

operation of this principle in practice will be elaborated upon by the ECJ on a case-by-case basis.

The approach presented in *Kobler* has been repeated and reinforced in the *Traghetti* case (June 2006), where any limitation of State liability on the part of the court has been found as contrary to Community law if such a limitation were to lead to exclusion of liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed.

Consequently, the multicentric system might be characterized by two paradoxes:

Firstly, it is devastating for the national legal order to ask a first instance court to sit in judgment on a court of last instance. Such an attitude of ECJ might lead to some unexpected results. In particular, there is a question about impartiality required by Article 6 of the ECHR. This problem may result with the potential conflict between Luxemburg and Strasbourg.

Secondly, traditional, hierarchical structure of national courts within member states is melting. From the Luxemburg's perspective, those structures are being transformed into some levels or layers composed out of: Constitutional Courts (first level), Highest courts (courts of last instance, ending the procedure, so the structure is fluid, because they vary from case to case)-second level, lower courts-the third level. Additionally one may observe that imposition of State liability for judicial acts would be likely to lead to the ECJ's decisions on whether a national supreme court had acted manifestly wrongly. Lower level national courts may be unwilling to find that superior national courts have acted in that way. They might therefore look to the ECJ to make the final judgment. This will lead to potential conflict within presumably cooperative institutional environment. As a result the ECJ might be placed in potential conflict with national supreme courts in unexpected way.

From this perspective we come to the conclusion that there emerges a new (horizontal) division of functions between ECJ and ECHR. ECJ is apt to promote integration and the development of Multicentrism as a gain in itself, whereas ECHR is going to concentrate on the protection of rights of individuals. Although the Court of Human Rights usually does not interfere with any finding of a national court on the ground of unfairness, there is

one precedent. It is the case of *Dulaurans v France*¹⁶ decided in March 2000, where a finding of the French Court of Cassation, which left undecided one of the claims of the applicant, was considered as manifestly wrong. This decision is certainly a step in the right direction. As one of judges of ECHR, Loukis Loucaides emphasizes, any manifestly wrong finding or judgement of a national court, even though not 'arbitrary', is at the same time an unfair finding which can, for that matter, be reviewed by the Strasbourg Court on the basis of a complaint in respect of a breach of the right to a fair trial. In our opinion it might be expected that ECJ's case law will tend sooner or later towards this direction.

The existence of those paradoxes may lead to the conclusion that the idea that it is possible for the "correct" answer to be reached in Community law cases, whilst intellectually attractive, raises serious practical doubts. Procedural efficiency and legal certainty are principles whose value should not be forgotten. Such an assumption may provoke two different responses.

Some commentators emphasize the fact that law within multicentric or multilevel system can not be recognize as such (Sir Neil MacCormick). They openly speak, as Alexander Somek does, about "inexplicable law in Europe": In the context of search for the new paradigm of supranationality in law it endorses weak or strong scepticism. Just to quote, Somek writes:

"There is a beautifully dark side to this. It should be born in mind that this situation is symbolism for it assumes that the law, at any rate of the level of elaboration by high judicial tribunals, is universally inexplicable. The authority on which the hierarchy is built has no medium to express itself. This is the hidden greatness of the strategy of privatization. It has no reasonable sphere of application. It is merely symbolic. It is a *symbol* for the hope that there is an excuse for the general fact that inexplicable law is purported to be known in decisions."³

If law is inexplicable, are we destined to await (with hope or anxiety) forthcoming judgments of ECJ and National Supreme Courts? Are we left with nothing "on the desert of the realm of multicentric chaos?"

The simple answer to this is, yes we are at least to some degree, though

³ Somek, A. (2006), *Inexplicable Law: Legality's Adventure in Europe*, Retrieved from October 10, 2006, from www.law.uiowa.edu/faculty/workingpapers.php.

we may try to apply different analytical tools in order to predict and optimize application of law within the multicentric legal system.

Traditional legal theory assumes that we are living in a world where legal rules are commonly known, at least by judges, who operate within costless, abundant environment.

In other words, it assumes that application of law, (adjudication) takes place within a world untouched by scarcity of resources. If we accepted the fact, that both, adjudication and potential judicial errors are expensive, where workable judicial system requires optimal allocation of judicial resources, than we may end up with the believe, that maybe economic analysis of law provides with an adequate set of instruments and explanatory tools and it may enable one to analyze adjudication within the multicentric legal environment from a quite new and fresh perspective.

Bound Rationality, Cyberspace and the Scope of Multicentrism [3]

Not deficiency but abundance and redundancy of legal resources may be regarded as a main source of potential problems with and within European Legal Area (ELA).

The necessary pre-condition for the existence and proper functioning of ELR may be identified with and referred to the flow of information. Otherwise co evolution would not become a feasible option. Moreover, it must be pointed out that a process of selection of the information is also crucial for the social development. The contemporary model of adjudication should include many sources of information as well as multicentric structure of the institutional framework of decision – making process. Therefore, in order to avoid liability for judicial error, the courts should improve the communication and flow of information concerning the content of given sentences, their reasons and different opinions on interpretation.⁴ It seems a demanding requirement as there is a large number of information and a limited access to it.⁵

In the above-presented context it is necessary to use some modern

⁴ Susskind, R, (1987), *Expert Systems in Law*, Oxford: Oxford University Press, p. 41-49.

instruments for indirect, mediated interaction within which the participants are not oriented towards communicating with particular persons, but within which the produced and received material is directed towards an audience, indefinite in its scope.⁶

Internet is a tool used for sending and receiving information. It is also an instrument for facilitating interpersonal communication and in result for an improvement of the social ability of an individual.⁷ Within the multicentric character of the system of law, net-organization of the Internet should facilitate the process of transmission of the important information – decisions and other actions made by the entities applying the law, courts in particular. Cyberspace seems to form a new medium – a global agora, scene or platform that is used not only for horizontal and vertical communication among particular courts but it is also a place for judicial discourse.⁸

Castells' theory deals with the network construction of society and network conception of reality. Internet is perceived not only as a new source of values and interests but also as a means for realization of one's claims and demands. In Castells' view the essence of contemporary society are social networks, with their important social structures and actions organized around electronically transformed data.⁹ This critical theory of society should be supplemented with a new understanding of the role of state and law in creating (shaping) legal relations and the protection of rights of individuals and whole society. The influence computer technology on social life is not of a shallow character but results in deep changes in many aspects of life, legal sphere including.

The functioning of information or network society makes it possible to broaden the existing discursive formation of public opinion. Therefore, it may be observed that the evolutions tends towards a deliberative model of

⁵ Wróblewski, J. (1982)., *Operative Models of Legal Systems*. In: C. Ciampi (ed.), *Artificial Intelligence and Legal Information Systems*, Amsterdam-New York-Oxford: North Holland Publ.; idem (1978)., *Axiological Problems of Legal Informatics*. In: F. Kaulbach, W. Krawietz (ed.), *Recht und Gesellschaft. Festschrift für Helmut Schelsky*, Berlin: Duncker&Humblot.

⁶ Thompson, J. B. (2001)., *Media i nowoczesność*, Wrocław: Astrum, p. 90–91.

⁷ Kreisler, H. (2006)., *Identity and Change in the Network Society: Conversation with Manuel Castells*. Retrieved November 5, 2006, from <http://globetrotter.berkeley.edu/people/Castells/castells-con0.html>.

⁸ Castells, M. (2001)., *The Internet Galaxy: Reflections on the Internet, Business, Society*, Oxford: Oxford University Press, p 11-40.

⁹ Ibidem p. 80-157.

politics or even contractual conceptions and Kantian liberalism. R. Alexy points out that within the contemporary states respecting the rule of law, communicational integration became a correlated of democratic institutions and rules governing democratic society.¹⁰ The communicational vision of the contemporary society may serve as a means for realizing such a situation when a community of ideas is not an artificial and mechanically forced community but rather a community based in an inner authentic reality comprising of understanding and acceptance of a given line of arguments.

A sphere where the exchange of opinions and thoughts is virtually unlimited – apart from the requirements of practical rationality and the ethics of discourse – is the very cyberspace. There, any arguments may be presented freely, sincerely and honestly – without any fear of a possible derision or danger. Therefore, these conditions are equal to the so-called requirements of importance, presented by Habermas. Unlike a *prima facie* statements, it seems that such a discourse may be close to the ideal situation of a speech. The medium of Internet plays a significant role within the multicentrism of a legal system where discoursed are becoming multicultural, looped and enriched with many motives. Therefore it is crucial to have an opportunity of passing the information on the content of the discourses, to have a possibility of participation and to have an open and quick presentation of one's arguments on a universal forum. The discourses may be characterized in a twofold way: firstly, they are heterogeneous when dealing with intimate, private, inner affairs, and secondly, they are homogeneous when dealing with, for instance, the European affairs.

As far as the flow of information among different decision centres is concerned, there is no limitation of time and space that resulted from the necessity to follow sometimes far distances in order to get the information on interpretative statement (for instance, from the European Courts of Justice) that must be taken into consideration within its argumentation process by domestic courts (for instance, in Riga). One may conclude that Internet is medium; medium is communication; communication is information;

¹⁰ Alexy, R. (1995)., *Recht Vernunft, Diskurs. Studien zur Rechtsphilosophie*, Frankfurt am Main: Suhrkamp, passim; Paroussis, M. (1995)., *Theorie des juristischen Diskurses: eine institutionelle Epistemologie des Rechts*, Berlin: Duncker&Humblot, passim.

information is in the net.¹¹

The computer technology facilitates a quicker understanding and consolidation of transmitted information in the memory of receivers; while the creation of data bases serves to find solutions to many social problems, including legal problems, in less time.¹² Using the metaphor of information highway of B. Gates,¹³ contemporary lawyer should be prepared for gathering large amount of information, such as data concerning particular judicial decisions that should be transformed and used within his/her own interpretation process, as quickly and effectively as possible. Otherwise, the lawyer is exposed to an ignorance of the latest directions of judicial decisions, or even an ignorance of law, and this in consequence may result in loosing of the given case, and as far as judicial decisions of domestic courts are concerned, the above result may lead to state liability.

Conclusion [4]

Multicentric legal system forms a total unity of legal norms among which specific interaction of a correlative character exists. The system is specified with a relative teleological unity while as one norm forms an autonomous aim; the other norms serve towards its realization. Those phenomena in a particular way influence the process of application of law by courts. It seems that within this sphere the gravest problems are linked to the obligation of a national judge to apply legal norms of a national, Community and international origin, to use standards, rules and principles of supranational and international character.

Within the context of multicentrism of legal system the notion formulated by Castells on the role of the computer networks may play within the process of organization of local, or rather local-global communities, seems insightful. According to Castells the old statement "think globally, act locally" should be replaced by its opposite.

¹¹ Goban-Klas, T. (2005), *Spółeczeństwo masowe, informacyjne, sieciowe czy medialne?*, *Ethos*, 1-2, p. 105; McLuhan, M. (2004), *Zrozumieć media. Przedłużenie człowieka*, Warszawa: Wydawnictwa Naukowo-Techniczne, p. 39-53.

¹² See Aakhus, M. (2002), *Modeling reconstruction in groupware technology*. In: F. H. van Eemeren (ed.), *Advances in Pragma-Dialectics*. Amsterdam – Newport, Sic Sat-Vale Press, p. 121 – 136.

¹³ See Gates, B. (1997), *Information and Our Interactive Future*. In: M. D. Ermann, M. B. Williams, M. S. Schauf (ed.), *Computers, Ethics and Society*, New York-Oxford, Oxford University Press, p. 114-122.