European Juridical Culture – in Varietate Concordia

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Abstract

The notion of juridical culture plays a decisive role in the process of European integration. This concept synthesizes the relations established between law and culture. The “juridical culture” is a system of both material and spiritual elements, that relates to law and is reflected in human consciousness. Such a complex notion is, without a doubt, very useful in the research of a phenomenon as complex as European legal integration, especially in areas such as human rights. A question that law and sociology must answer is which of the juridical cultures that now exist in Europe will prevail and how will this happen, as there are essential differences between the Eastern European and Western European legal culture (and even within this two broad areas). We must also find an answer on how can this differences be preserved, while creating, a new, unified European juridical culture.

Keywords: Legal Culture, Human Rights, Diversity, European Law

1. Introduction

    The concept of “juridical culture” [Sofia Popescu (2003), Revue “Studii de Drept Românesc”, Romanian Academy Publishing House, July-December, p. 247] synthesizes the relations established between law and culture. It is composed of both elements of juridical sociology, compared law and philosophy of law and it can prove very useful in the research of such a complex phenomenon as European juridical integration. A supranational structure, of such complexity and which raises so many issues, in all the areas of social life, as the European Union, cannot fulfil its destiny by merely signing treaties. The Union was created in order to evolve, process which not only that has not ended so far, but we can assert that it is just beginning. The idea of creating a united Europe is in fact an older idea. Giuseppe Manzzini claimed, in 1852, that Europe is in a situation of crisis, as it no longer has a unity in purpose, destiny and mission. Also, according to Manzzini, even if the European nations are able to solve their internal affairs, the notion of nationality must be understood as an alliance of people, of the nations and the organisation of Europe must be accomplished based on certain principles, so that that people can be free, to associate freely and to learn how to ask themselves certain questions. The building of the European system did not start from scratch.

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According to Constantin Noica, “only the European culture, at least from our perspective, after it tried various alternatives (Byzantine, Roman Catholic, Italian, French, Anglo-Saxon), has opened, through historical conciseness, towards all the known culture” [Constantin Noica (1993), Modelul cultural european, Humanitas Publishing House, Bucharest, p. 9]. At this moment EU does not have a unique juridical culture, meaning the member states continue to have national juridical cultures. Perhaps this is one of the main reasons for the failure of the project for a European Constitution. National constitutions are also a way to express what we could call the national specificity, values that are specific to a state or to a certain juridical culture, the preamble usually stating which are the values that are considered essential.

2. A persistent European legal culture

In spite of the important differences (especially between the states from Western and Eastern Europe), there are also numerous common cultural elements between the member states of the EU. We might say that there is a persistent European juridical culture, due largely to the systematization accomplished by Roman jurists that has been an important source of inspiration for all the latter European law codifications. Although the Roman law is no longer in effect, its concepts and principles were perpetuated over two millennia, until today, and there are still perfectly applicable. We consider that the most important contributions to the European law today are as follows [Ștefan Cocoș, Măgureanu F. Alexandru (2012), Drept român, Pshihomedia Publishing House, Sibiu, p.9]:

- Roman law built the law’s alphabet, through a juridical language able to express the juridical ideas, that the real life situation demanded;
- Roman law determined the development of the juridical thought, characterized by precision, clarity and logic. The consequence was that today’s juridical concepts appeared (or at least most of them) within Roman law framework;
- Roman law contributed to the forming of important juridical principles (most of the Latin adages are still in use today), even if some of the general principles of today’s law could not have been foreseen by the Roman law;
- Roman law helps the specialists and the students that are studying law, to acquire, even today, a juridical education, as it is still studied in most of the Europe’s and world’s law universities;
- Roman law helps developing a practical juridical sense, as it was formed based on jurisprudence. This gives us the possibility to follow and understand the way the juridical concepts are being built. The most eloquent example is the Digest of Justinian, a vast collection of jurisprudence, one of the most important proofs of the value of the Roman law.

3. European superstate, federation or a new, sui-generis structure?

The state appears, in many of the contemporary discussions, as an old structure, that can no longer efficiently manage the challenges of the modern world. The disappearance of the structure that now we call state, has been predicted since the beginning of the twentieth century, by authors such as Leon Duguit. Any discussion about globalization, or regionalization, raises serious questions about the faith of national states and implicitly, about national legal cultures. The national state has even reduced its attributions to a minimum level, by transferring more and more tasks to the private sector. On the other hand, the emergence of the supranational structures, such as E.U., seems to also threat the existence of the state. The appearance of such structures might be interpreted also as a form of resistance to the general process of globalization. The avowed purpose of the E.U. is “unity in diversity”. The European Union tries to maintain the sovereignty of the states and especially their national specific features. Nevertheless the national sovereignty, arguably maintained, must suffer some limitations in the Union’s larger framework, in order to ensure the direct application of the European judicial norms in the member states and the preference of the European law to the national law. Recent discussions have even firmly argued that the future of the EU, can only be its transformation into a federation of states. In that eventualty, the question that arises is, which legal cultures will survive? Also, will there still be a diversity of cultures, or a unified one, imposed by the strongest member states of the EU? Nicolae Titulescu was rejecting the idea of the “superstate”, asserting that an international organization is a voluntary association of free states, that have the obligation to respect the laws that they accepted, based on their own sovereignty. Today however, the advantages of such a structure become obvious, due to the
multitude of global challenges, such as pollution, the greenhouse effect, the diminish of the natural resources, the planet’s overpopulation and many others, that are not the problem of only one state, but global challenges and the traditional state, as well as the older international organizations and the international law seem helpless against them. In the future, the structure of the EU will probably influence the forming of an even more complex organism, perhaps a global one. The constantly evolving process to realize a new superstate-like structure as the EU raises a series of challenges. Firstly, “united in diversity”, seems an idealistic goal. In order to maintain diverse juridical cultures it is vital for the process that will create the “superstate”, not to be accomplished in the benefit of the most powerful states. However these states are in fact the “locomotive” that drives forward the process of Europeanization.

Another important challenge is to find solutions to the difficulties that arise from the process of legal integration. Placing the same legal norms in areas that are economically and socio-culturally different, having as recipients subjects that are so different, is at least inefficient and in some cases it can even be a serious violation of rights.

4. Legal norms and general principles

The elaboration of rules, that are meant to be applied in different areas, over very different subjects, must find its starting point in the general principles of law, norms with a high degree of generality that can be given different interpretations. We consider general principles of contemporary law [Măgureanu F. Alexandru (2012), Prințipii generale ale dreptului, Universul Juridic Publishing House, București]: the principle of legality, the principle of responsibility, the principle of equity and justice, the principle of protecting fundamental human rights. These principles can and must be found in any democratic regime. However elaborating legal norms with a high degree of generality presents some risks. Namely, it is possible to give such a norm a different meaning than the one the legislator wanted. When there is doubt regarding a rule of law of the EU, becomes necessary to interpret that law, according with the provisions of the EU treaties and the general principles of law. Interpretation is all the more necessary because EU law is still a new law system. Same rule is imposed when implementing community measures at a national level, especially in matters related to equality before law and the protection of fundamental rights.

Recourse to general principles of law and to general principles of EU law (we consider general principles of EU law: protection of fundamental human rights; the principle of proportionality; the principle of direct and prior applicability; the principle of equality; legal certainty; the right to defense; principle of res iudicata; the principle of loyalty and solidarity between member states; the principle of subsidiarity; the principle of environmental protection) as legal sources is required, particularly due to the novelty of the community law, which unlike national law of the member states has not “sedimented” yet [O. Manolache (2006), Tratat de drept comunitar, fifth edition, C. H. Beck Publishing House, București, p. 24]. Regulating through general principles helps maintaining cultural diversity and, at the same time, helps creating a European legal culture. However the principles must be applied to real life situations, role that can only be fulfilled by a court of justice. The more general the norm of law is, the more powerful the judge is. A very important element in the legal system of the EU is the European Court of Justice (ECJ), integral part of the judicial system of the member states. The ECJ plays a more important role than the national courts of justice, as the EU law has more gaps than national law systems. There is no national law system that can claim it has an overwhelming influence over EU law, although it seems that so far the German and the French law systems are amongst the most influent. On the other hand, EU already has its own law system, that gained its own specificity, a system which has been around long enough to influence, at its turn, the national juridical systems, so that it would be very hard to establish the exact quantum and the importance of the influences.

The European Court of Human Rights also plays an unifying role, in the EU law system. Starting from the particular cases presented in front of it, the Court supports its decisions on the EU law, in matters like: legal certainty, legitimate expectations, responsibility, non discrimination and proportionality. Judicial precedent plays an important part in the Court’s decisions, which are invoked during trials on an increasingly larger scale, even in the countries were jurisprudence is not a source of law.

We consider that there are however some aspects, where cultural diversity is not the most important value. For example we can speak, at this moment, of a universal law of the environment. There can be little or no debates, at least in the EU, in matters related to cultural diversity versus environmental protection. The “conflict” is easy to solve, in our opinion environmental protection prevails, as environmental protection is a global issue and so the
solution can only be a global one. Every system of law must prioritize its most important values. Certainly not protecting the environment, or in other words the extinction of human life, is more important than diversity.

We must also note that perhaps, diversity is more resilient than we think. For example the Law of twelve tables was in effect for almost millennia, as it was considered sacred and therefore unchangeable. Yet Roman jurisprudence found ways to avoid its obsolete provisions.

In conclusion, the EU juridical system can use the same principles of law, the same legal norms with a high degree of generality, but applying those norms will have to be different, according to the area of a juridical culture. The reason for this is obvious: at the basis of any law system there must be social realities and the legislator is forced to relate to a certain system of values, which exists in that specific society, to the social aspirations that the citizens have. At the same time, applying the legal provisions in a different manner would mean a preservation of the situation that exists in the EU at this moment, a delay of the Europeanization process and the delay or even the annihilation of the chances that EU holds of having, at some point, a juridical culture. On the other hand, maintaining, even at a minimum, the existing juridical cultures, in the EU, would mean maintaining the diversity. The law system that EU should aim at, must not be one of the existent systems, of one or more of the member states, but a new one, a synthesis of the main common elements of the European law systems. The fundamental principles of law and the common elements of the juridical cultures must be at the very basis of this system. At the same time, this system based on similarities will have the difficult task to preserve a large number of differences, a large part of what we can call European diversity.

5. Juridical cultures and human rights

The combinations of the elements that compose the cultural diversity seem to be of infinite. Nevertheless, the concept of human rights protection must appear as an unitary whole, especially in some regions of the world, such as the EU. Finding a solution to this dilemma is only possible by finding a common denominator, a general code. International and European treaties fulfil that very role, the one of ensuring a minimal guarantee for human rights. At the same time, accordingly with the principle of subsidiarity, it is recognized the sovereign prerogative of states in order to find, primarily inside their national borders, the most appropriate ways of reaching a common goal: the protection of the rights consecrated in the international treaties. When this goal cannot be achieved, the state will have to answer according to international law.

The author Joseph Raz has shown [Joseph Raz (2009), *Human Rights in the Emerging World Order*, Oxford Legal Studies Research Paper No. 47, pp. 31-47], that the problems related to cultural diversity, appear especially in the case of some rights such as the right to health and to an education. According to the mentioned author, even the idea of health is different from one culture to another. Health appears as being closely related with functionality and functionality is connected with the type of activities, which are important for a normal existence. The right to health is sufficiently broad to cover disabilities and other disadvantages, but it arguably covers other aspects, for example facial disfiguration or infertility, smoking ban or other activities that are considered dangerous. Also the cataloging of mental illnesses is evidently different in various cultures, and so is the right that every person has to enjoy the best physical and mental health that can be achieved [International Pact on Economic Social and Cultural rights, art. 12, paragraph (1)]. The right to health includes: access to clean drinking water, to occupations that are not hazardous to health, a healthy environment.

According to the European Charter of Fundamental Rights of the European Union, article 35, “Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities”. The right to health, as it is stipulated in the Charter makes more concessions to the idea of cultural diversity, but we must add that in EU (or at least in some member states) the health standards are generally high, especially in comparison with other parts of the world. Maintaining the cultural diversity, including the diversity of juridical cultures, is of utmost importance, especially in areas such as EU. Nevertheless, even complying with the principle of subsidiarity and the principle of national sovereignty, human rights often conflict with cultural diversity. In our opinion however, this is not a negative characteristic of human rights. Cultural diversity, although it is an important value, is not however an axiomatic value, that cannot be questioned or that cannot be balanced with other values. On the contrary, an objective weighing is necessary for
each situation separately. Cultural diversity or the specific of certain juridical cultures cannot be invoked, in order to justify flagrant violation of fundamental rights. It would be peculiar, for instance, for North Korea to invoke cultural diversity in order to justify the refuse to publish real statistics in matters related to human rights. A juridical system, even an international one, implies solving conflicts between different sides and finally, even between certain values. Protection of human rights must prevail in most of the situations. However there are human rights that are not absolute, and so their interpretation and implementation demand more attention towards cultural diversity and the validity of those purposes.

According to an author [Robert Alexy (2004), *Drepturi fundamentale și drepturi ale omului*, in Jörn Rüsen, Hans-Klaus Keul, Adrian Paul Iliescu (coord.), *Drepturile omului la întâlnirea dintre culturi*, Paralela 45 Publishing House, Pitești, pp. 48-49] there are many constitutions based on human rights, whose juridical principles are claiming universal validity. But at the same time, these principles historically belong to the cultural space of the Occident and outside this space is hard for them to “grow roots”. According to the mentioned author, the contradiction between universal validity and historic specificity can be solved through the conception that the principles of the constitution, that are based on human rights have developed in the frame of an historic process of universalization.

Human rights are acknowledged, as a principle, in most of the world. However, the way this principle is applied and adapted is very different from one juridical culture to another. It is impossible to apply this principle (or any other principle), in an identical manner, in different areas, in different cultures.

6. Conclusions

A question that the European researches must answer is which of the law cultures will prevail and how will this happen, as there are clear differences between the Western European law culture and the Eastern European one, and even inside each one of them. At the same time, the emergence of a strong Asian pole of power raises new questions regarding the evolution of the international law, at the final form that it can take.

We must also take into account the fact that applying a principle of law into a different law culture, without at least a minimal adaptation, can lead to disastrous effects. For example respect towards human rights must be realized in a different manner, keeping in mind the specific features of each area. Although a principle can be used in more than one legal systems, its contains will be different each time. There are for example certain traditions that, if researched could be considered, at least at a formal level, a discrimination. Traditionally only men are appointed priests. This might be interpreted as discrimination, but still, because of a powerful tradition, the limited access of women to be appointed as priests, is not perceived as a discriminatory measure, by the majority of the citizens, but as a natural, customary solution. At the foundation of every legal system, there must be a system if, which exists at a certain point, inside a society, system that is strongly influenced by cultural differences and by the social aspirations that the subjects of law have. The unification implies a certain hierarchy of values, at a European or international level.

References

International Pact on Economic Social and Cultural rights