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Realization of law[1] in the European Union (Vague thoughts on)

1. Introduction

Creating a genuine European Area of Justice – it has been one of the main goals of the European Union since the turn of the millennium. For achieving this goal, it is absolutely necessary to examine the assertion of national and community law within the Union. First, we have to answer some fore-questions.

a) Even choosing the proper term causes problems. Today, the concepts behind terms like "community law", "EU Law" and "European law" are not properly distinguished.[2] There is a chance that after the ratification of the Treaty of Lisbon signed on 13 December 2007 we can operate with more exact concepts. In the present study, in order to avoid dogmatic and terminological problems, I am basically looking at legislation that belongs to the first pillar of the acquis communautaire and I use the term "*community law*".

b) We must highlight it at the beginning, that in the European Union both community law and national law can originate rights for legal entities. Moreover, it often occures that the two systems of norms jointly create an interpretable and applicable set of regulations. Therefore, when examining realization of law in the European Union, we should not only concentrate on realization of community law. We must extend our observation – for theoretical and practical reasons – to realization of both community and national law.

c) In respect to realization of law, those legal norms are worth examining which ensure particular rights to certain legal entities.

d) The appearance of community law, as a unique phenomenon, as historical novum, raises fundamental theoretical and practical questions for lawyers, which affect either the concept of law, the structure of the legal system or realization of law.

1 Here the meaning of „realization of law" consist when the *reality* suites to the expectation of *law*.

2 About this problem, see, for example, Imre Vörös: Az európai jog rendszertani dilemmái. In: Jog és Állam 8. Budapest, 2006, p. 23., Tamás Kende – Tamás Szűcs – Petra Jeney (editor): Európai közjog és politika. Budapest, 2007, p. 1019.

2. The concept of law

My first, basic statement is that the appearance of "community law" might raise problems in connection with the views on the *concept of law.* Although, we should not forget, that we can approach the concept of law from different aspects and also that we still have not found a definition of the concept of law that is generally accepted. Whereas, most approaches connect it with the state and attribute such characteristics to it which are characteristics of law created by state (or local authority) organs. However, "community law" is only partially compatible with the earlier applied concepts (e.g. the secondary sources of law are not created by the state) and specialities of law (e.g. the circle of recipient of community law often differ from the circle of recipient of national law). In this respect, we either reconsider the concept of law or we must state that "community law" is not law.

3. The structure of the legal system

We can meet similar problems in connection with the *concept and structure of the legal system*. The legal system is usually defined as a set of laws of a given state that are in effect at a definite point in time.[3] It is difficult to handle the community law in this field. Most approaches regard community law a completely or relatively autonomous legal system, which differ from both national domestic law and international law.[4] However, many experts point out that community law "significantly pervades and partially overlap the domestic legal systems of the member countries (…) the law of the EC also forms a special framework with the legal systems of the member states".[5] These approaches look at this phenomenon from the point of view of the European Communities, the European Union and community law. As to myself I would rather approach the question from the side of the member state legal system, and from this viewpoint I would rather point out that due to the direct effect of community law, community regulations unambiguously build in the national legal systems. Therefore, the legal systems of the member states became two-level systems: in the legal system of each country we can distinguish a European and a national level.[6] Thus, presently the legal system of each member country is divided vertically into two great structural parts. This vertically divided legal system can also be divided horizontally. The national level aims at complete and flawless regulation and can be horizontally divided into branches of law. The European level contains partial, target oriented regulation, where the community aspect generates the creation of a norm, and therefore, regulations are not created in every field, but basically in connection with community targets.[7] The European level of the legal system can also be divided horizon-

3 See for example, Vanda Lamm – Vilmos Peschka (chief editor): Jogi Lexikon. Budapest, 1999, p. 312., Miklós Szabó (editor): Bevezetés a jog- és államtudományokba. Miskolc, 1998, p. 75., Mátyás KAPA (editor): Jogi alapismeretek. Budapest, 2007, p. 6.

4 See Vanda Lamm – Vilmos Peschka (chief editor): Jogi Lexikon. Budapest, 1999, p. 370., András Jakab: A jogszabálytan főbb kérdéseiről. Budapest, 2003, p. 170.

5 László Kecskés: EK-jog és jogharmonizáció. Budapest, 1999, p. 111.

6 It is worth mentioning that the rules of the European level are not necessarily the same in each member state. There are, for example, countries, which do not participate in certain forms of cooperation (see, eg. monetary union, home affairs in civil cases)

7 For the problem of the division of legislative spheres between the European Union and the member states, see Tamás Kende – Tamás Szűcs – Petra Jeney (editor): Európai közjog és politika. Budapest, 2007, pp. 744–795.

tally. However, dividing it into branches according to the traditional criteria would lead us to limited results.[8] When talking about horizontal division, we should, for practical reasons, distinguish between institutional-organisational regulations and norms ensuring economic and social integration. For further studies we have to stipulate that the problem of the realization of law can only be examined from the point of view of the latter.

Legal norms of the European Community naturally do not exist and function in themselves, but in functional interaction with other norms of the legal system. If we examine community regulations more closely we come to the conclusion that – especially in the case of norms realising economic and social integration – there is a strong connection with the national laws regulating the given area. Moreover, the community regulation often cannot be interpreted without the national law. It is partly because community regulation is partial regarding its subject.

4. Realization of law and assertion of rights

In the followings, we are looking for an answer, based on the above, for how the norms of the vertically divided two level legal system realize in the area of the genuine European Area of Justice. We are examining those legal norms in the field of justice that ensure specific rights to a certain legal entity. Furthermore, we emphasize, that we examine the assertion of norms of both national and community law, since either national or community law can ensure the above-mentioned right.

4.1. The mechanism of realization of law

Our starting point is that national or community law ensures certain right or claim to a legal entity. There are two ways of realization of law: *following the law* or *assertion of rights*. Following the law is voluntary, it can be spontaneous or conscious. *Rights are* usually *asserted* for the initiation of a legal entity stating his/her right, with the help of public authority, and in exceptional cases, by rightful own power. During assertion of right force may also be applied.

In case the legal entity intends to use state institutions and, as a last resort, force of public authority in order to assert its rights, then state institutions must recognize the existence of entitlement in the particular case, typically in a lawsuit. There, the facts of the case and the relevant statutory provisions are compared and if they coincide, then the related legal consequences follow. During a lawsuit the legal dispute of the parties is decided according to the existence of entitlement and they also decide about the acknowledgement of the existence of right according to the relationship between the two parties.[9]

The final stage of justice and within it of assertion of rights is – either with the use of force – the execution, the practical realization of right acknowledged by public authority. This stage of asserting rights is the enforcement proceeding.

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8 About this problem, see, for example, Imre Vörös: Az európai jog rendszertani dilemmái. In: Jog és Állam 8. Budapest, 2006, pp. 22–25.

9 We should note, that in certain circumstances, the probability of the existence of a right is so high that the state opens up the possibility for the entitled of using force in order to assert their right. An example for such a case is if a liability is recorded in an authentic instrument.

4.2. The problems of realization of law in the common European area of justice

The above-mentioned entitlements or demands can be prescribed by any norms of the legal system: the demand can be based on Community law or national law. No matter which element of the legal system the demand is based on, realization of law in the common European area of justice raises several special questions.

a) The first such question is *the institution system of asserting rights*. All the claims based on national laws, and most of the claims based on community law can be asserted in front of the court of the member country.[10] Therefore, if a legal entity in the European Union intends to assert its claim in a legal way, they can turn to the court of the given member state. However, it means 27 different countries, the same number of different procedural orders, legal culture, and jurisdictions functioning on different levels of efficiency, 23 different official languages and 60,000 judges. A related question is that in the different member countries there are significant differences between the sensible lengths of a trial. The European Court of Human Rights in Strasbourg between 1999 and 2005 condemned Austria in 91 cases and Italy in 1170 cases for violating the reasonable time for settle trials.[11] In such diversity, it is inevitable that there are some differences in legal interpretation and in the field of efficiency of assertion of rights. Enforcing claims based on Community law can be especially problematic. There are views according to which the parties should be offered the opportunity – mainly for the interest of the consistent and unified jurisdiction – to turn to a Community court independent of the courts of the member states with their action or for a final remedy.[12]

b) Linguistic diversity and the dissonance of the different legal culture also present a problem in the field of legal harmonisation and legal unification and in the application of the directly applicable Community law. In my opinion, with the presently applied methods, European legal unification cannot be properly achieved. Translating the certain legal terms into 23 languages cannot result in a unified legal order. Without legal comparative studies, establishing legal unification, we cannot expect any valuable results.

c) As we have already mentioned above, the Community regulations were added to the legal systems of the member countries, so these legal systems became two-level. In studying the realization of law we must take this fact into consideration. When exploring the content of each norm during the application of the traditional methods of legal interpretation, we must regard the European and national level in each legal system as a unit. Therefore, grammatical, logical and especially the systematical and historical legal interpretation we must interpret national and European norms in relation. However, if doing so, a certain norm might have different content in each legal system. Thus, using the different methods of legal interpretation we can find a different content for the same norm in several legal systems, because the theoretically unified community law should be compared by interpretation with practically different national laws.

d) The answer given to the question if law assertion procedures are *subject to petitions* or not, raises a special problem. Is the court of trial bound by the regulations the parties based

10 Miklós Király (editor): Az Európai Közösség kereskedelmi joga. Budapest, 2004, p. 31., András Osztovits: A jogérvényesítés nehézségei az Európai Unióban. In: Az igazságszolgáltatási kihívásai a XXI. században. Budapest, 2007 p. 288.

11 Imre Szabó: A hatékonyság: megvalósítható cél vagy eljárási elv? In: Az igazságszolgáltatási kihívásai a XXI. században. Budapest, 2007 p. 369.

12 András Osztovits: A jogérvényesítés nehézségei az Európai Unióban. In: Az igazságszolgáltatási kihívásai a XXI. században. Budapest, 2007 p. 289.

their claims on, or is it the task of the court to judge these legal grounds, or the court has to apply the legal norms that can be connected to the facts automatically without the reference of the parties. In some legal systems, according to the rules of legal procedures, the court is bound by the right that the parties are intending to assert (by the legal grounds), and its task is to judge this right. This is reflected in the regulations of Hungarian civil procedure. Some authors point out at the same time that in the Van Schijdeln case, the European Court following the question put forward by the Dutch state court came to the conclusion that the national courts should necessarily apply the norms of Community law even if the parties do not refer to them directly.[13]

e) Last but not least it is a question closely related to realization of law, that with the extension of integration it is inevitable that the number and significance of cross border legal disputes will increase, to which we must react the proper way. Therefore, in the field of realization of law and assertion of rights some problems must be addressed by procedural means. In this field the European Union has made great steps, moreover, it has created several supranational norms. However, are these regulations sufficient, are they created in the appropriate way and do they respond correctly to the challenges? I am convinced that we cannot give a positive answer to these questions with a clear conscience.

Zusammenfassung

Die Geltung des Rechts in der Europäischen Union

Sowohl das nationale Recht als auch das Gemeinschaftliche Recht können Rechte für die Rechtssubjekte in der EU entstehen lassen, sogar oft bilden die zwei verschiedenen Normsysteme gemeinsam ein verständliches und anwendbares Normmaterial. Das Zusammenleben des Nationalrechts und des Gemeinschaftlichen Rechts, bzw. die Schritte für die Verwirklichung eines einheitlichen europäischen Rechtsraumes werfen grundlegende theoretische und praktische Fragen für die Juristen auf, die den Rechtsbegriff, den Aufbau des Rechtsystems, und die Durchsetzung des Rechts in gleicher Weise berühren. Der Autor bestrebt in seinem Artikel diese grundlegende theoretische und praktische Fragen in Betracht zu ziehen.

13 András Osztovits: Az előzetes döntéshozatali eljárás legfontosabb elméleti és gyakorlati kérdései. Budapest, 2005, pp. 34–36., Tamás Gyekiczky: Töréspontok (Polgári eljárásjogunk néhány aktuális kérdése). In: Collectio Iuridica Universitatis Debreceninsis VI. Debrecen, 2006, p. 150.