Doctrinal aspects concerning of the philosophy of the european community law

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***Abstract**: An approach of the European Community Law from a philosophical point of view had a great following in the last half of the 20th century, with good results in the creation of some real strategies about the integration. That is why some general, traditional wise values were assumed as basic for the European Community Law. An important aspect in the foundation of a new practice of the science of law, based on the values of philosophy, emerges from the fact that the community law is different both from the science of general law and international law. The new directions of the community law were adopted by the sovereign states, which signed institutive Community treaties. The philosophical approach is that by signing the community treaties, those sovereign states accept to transfer a certain part of their national sovereignty to the newly created Community institutions. On the other hand the transfer of sovereignty must not be understood as a threat to the national integrity, but as a chance of integrating into larger and more efficient structures. From this point of view, the present work initiates a debate upon the main characteristics of the community law, the way in which the concepts of political and juridical philosophy contribute to the creation of the new mechanisms and procedures of the European community law. Having a clear image of these aspects means a great importance for the success of Romania's accession.*

***Keywords**: community law; foundation treaties; European Community.*

Introduction

Speaking in principle, in order to define the political and juridical concepts some logical requirements must be fulfilled, but also some doctrinal aspirations. The difficulties are even bigger when we speak about the concept of "community law" which designates a different reality from that of the national and international law. That is why, in order to clarify the precise definition which says that the law comprises all the juridical principles that regulate the legal community order, one must illustrate some aspects of the evolution of this kind of legislation.

In this direction one must notice, on one hand, that the juridical principles of community law have been adopted primarily by the sovereign countries, through international treaties. In other words, the basic community law principles are backed up by the sovereign power of the countries that have accepted to sign treaties, under the cover of supranational institutive treaties, having the ability to create, in their turn, juridical principles, respectively, derived community law principles.

On the other hand, this means that the respective sovereign countries, by signing institutive treaties, have accepted to transfer some of the duties of the national to the newly created Community institutions. The transfer of sovereignty must not be understood as a threat leading to national disintegration, but as a chance for the integration within larger and more efficient structures. In addition to this, one must not forget that by means of institutive treaties the sovereignty transfer of the member states has been made focusing upon well delimitated fields, and as a compensation they have achieved the right of the community law, as a common instrument, integrated to the national law systems of the Community countries.

We can see from this that from a strictly juridical point of view, the community law comprises the primary institutive legislation and the derived legislation. Further on, the primary community law also comprises the juridical principles emerged from the institutive treaties (European Coal and Steel Community, European Community for Atomic Energy and European Economic Community), including the conventions and the attached proceedings and also the subsequent Community Treaties, respectively the accession

documents of the newly received countries. The derived community law comprises the juridical documents adopted by the Community institutions in time.

In order to understand these defining elements, as characteristics of the community law, every explanation must be connected to a philosophical point of view, as a principle, in order to justify the logical doctrine of the European construction as a whole. Because only by getting closer to the theoretical and practical rationality of the working mechanisms, shall we be able to seize the essence of the European countries process getting near. Or, in the very midst of this great enterprise we find a very delicate problem, that of the conciliation between the principle of the national sovereignty of the countries and the aspiration to the supranational integration. The long debates developed around this problem have led to the appearance of two opposing concepts, which influence the content and the speed of realizing the Community projects.

1. Doctrinal perspectives concerning the construction of the European Community

On one hand this chapter deals with the "intergovernmental" doctrine, supported by the politicians who are preoccupied with maintaining the sovereignty of the countries, by proposing a kind of cooperation inside the community and between the national governments, under the control of some permanent institutions but not permitting them to have a decisional power upon the member states.

On the other hand it deals with the "supranational" doctrine, supported by those who want the existence of a supranational federal community, insisting upon the transfer of sovereignty from the member states towards a superior international authority having a decisional power.

Between these two doctrinal, opposite directions there was and there still is a battlefield of the strategic paradigms of the achievement of the European integration process. Thus, several theoretical projections have appeared in the second half of the 20th century, and among them, the most important seem to be: *functionalism, realism, neo-medievalism and federalism*.

1.1. ***The functionalism theory***, based upon a pragmatic logic has enjoyed a great popularity in the period of the creation of the European Coal and Steel Community. Those who adopted this theory were sceptical of the capacity of national countries to solve major internal and external problems and they supported the necessity to realize the European Union by giving value to the game of interdependencies, following an upwards v/ay beginning with concrete economical actions towards a political federation. The functionalist ideas of David Mitrany have been developed in new formulas by Ernst B. Naas, Leon Lindberg, Philippe C. Schmitter and Joseph Nye.

1.2. Opposed to political idealism, ***the realist theory***, inspired by Thomas Hobbes' concept concerning the natural state of the rivalry between people, sustains that the state should remain the main subject of the international scene. Considering that the sovereignty is not. divisible, the realists have pleaded in order to support the idea that the state keep its full authority up to the higher levels of political decision. Thinking of the Community institutions, these are accepted only if they play the role of instruments meant to reinforce the power of the member states. Thus, European integration can only represent the expression of the intergovernmental ratios and exchanges. The realists also consider that the activity of the Community institutions must also be the duty of governments. Among those supporting the realist theory, the most important are Stanley Hoffman, Robert Keohne, Keneth Waltz and Andrew Moravcsik.

1.3. ***The neo-medievalist theory***, called like this under the impression given by the comparison with the social medieval situation, characterized by the political and estate dissipation and the scene of the endeavour of the European integration where a network of actors is acting, says that the European Union means a new type of government, difficult to define, having instruments situated at different levels, insufficiently clarified from a juridical point of view. The particularity of the Neo-medievalist theory,

represented by Philippe Schmitter, comes from the fact of the presence on the political scene of some other actors, apart from the member states and the Community institutions, these being the non-governmental organizations, ethnic groups, cultural groups, euro-regions etc.

1.4. As a reaction to these radical nationalist opinions, **the theory of European federalism** has come first. Being convinced of the weaknesses of the nation states, states being made responsible for the two world wars, those who adopted federalism pleaded for a federal state, seen as a European political construction based upon a powerful institutional structure having at its very heart the European Parliament. As main representatives of the federalist theory we can mention Denis de Rougemont, Henri Brugmans, Altiero Spinelli, Susan Sidjanski and Joschka Fisher. The idea of these politicians has a large following and that is why the Romanian researcher Adrian Liviu Ivan from the city of Cluj supports the fact that "*the contemporary European federalism earns more and more supporters, the federal European state being strongly backed up both by the political and community groups of supporters*" [1].

One thing is very clear here, the fact that the entire actual European construction is the result of a struggle between the political forces acting under so many doctrines and theories. We see then that each of these theories brought its specific influence upon the community law system. This means without doubt that the principles of community law must be explained starting from this political, philosophical basis. This is the hypothesis which will be proved further on in the present work.

2. The principles of European Community law

The community law, by proposing new, juridical elements, is now situated in a stage of consolidation, a reason why it is permanently compared to the general principles of law. This is mainly, about the principles of the natural law emerging from tradition and from the European juridical way of thinking. Having all these in mind and depending upon the major community objectives the capacities of the European institutions may also be stated the juridical relationship between these institutions and those of the member states.

Concerning the activity of setting up the abilities of the European Community, and the delegation of these abilities between communities and the member states, there are three governing principles: *the principle of specialization, the principle of subsidiarity and the principle of proportionality*.

The action of these principles, like the axis of a mechanism, gives content and coherence to the whole process of European construction.

2.1. ***The principle of specialization***. The European communities, being thought of even from their initial stage as organisations meant to fulfill very clearly determined objectives, have been established by special treaties in respect of the demands expressed by the principle of specialization. This fact brings serious juridical consequences: "*The consequences of these regulations emerge, on one hand, from the fact that the states may ask for the annulment of those Community documents that have been adopted by overpassing the competences given to the Communities by means of treaties and, on the other hand, by the fact that the states can't over-pass their own competence resulting from the accession agreement, occasional actions in this regard being put under penalty*" [2].

2.2. ***The principle of subsidiarity***. The concept of subsidiarity has a long history and it might be found with great thinkers like Aristotle, Thomas Aquinas or John Locke. In addition, the significance of this concept is linked to the religious doctrine regarding the relationships between communities. The idea that is suggested, following this line, is that great communities must only interfere with small communities in a subsidiary way, thinking of problems that may be only solved at a superior level. In other words, the "centre" must not interfere except to help the inferior levels and only then when the efficiency of the intervention is superior to that of the basic group.

The principle of subsidiarity also proves to be very operational within the complicated process of the European Union. The positive implications of this principle have been first illustrated, in a report of the European Commission on the 26th of June, 1975, that said "*the European Union should not lead to the installation of a centralized super-state. Consequently and in strict accordance with the subsidiarity principle, only those duties that the member state would not be able to fulfill efficiently should be given to the Community*" [3]. Later, this principle has been mentioned in the community treaties too, beginning with the Single European Act (1986), up to the statement of the Maastricht Treaty (1992). In its recognized formula, preserved within the Treaty of Amsterdam (1997), the subsidiarity principle is stated as follows: "*The Community acts within the boundaries of its abilities and its objectives attributed to it by the Treaty. In the fields that do not belong to its strict ability, the Community does not interfere -according to the principle of subsidiarity - but only in case that the objectives of the intended action can not be realised in a sufficient manner by the member states, they being - due to the dimensions and effects they generate, better fulfilled by an action at the community level*" [4].

Within the framework of the European Union the principle of subsidiarity is perceived as an instrument of achieving decentralized political power. The member states, on one hand, have given up some prerogatives of the national sovereignty in favour of the community institutions, but on the other hand, they keep the government mechanisms in order to apply the national law. That is why, a clear distinction must be made between the national power and the supranational power. On this basis, democracy means that the states should enjoy a greater power in the sectors in which neither the European Community nor the member state has an exclusive competence. In other words, the researcher Viorel Marcu says: "*The national ability is the rule, and the community ability is the exception*" [2]. And still, Octavian Manolache notes that "The Principle of subsidiarity was and it continues to be a principle submitted to some opposing ideas, a fact that has determined the formulation of some directions from the part of the Community institutions" [5].

2.3. ***The principle of proportionality***. In order to achieve the objectives stated by the foundation treaties, the European Communities have been attributed some adequate capacities of action, according to the principle of proportionality. In conformity with this principle, "*the community institutions will have to act in such a way not to overpass the application of the abilities being necessary to realise the community objectives. The moment when the institution may choose between many solutions of solving, its competences, having as an only support this principle, it will be then necessary that the institution choose the less restrictive one for the executor, and in case that some duties must be imposed, they must not overpass the intended goals*" [2]. This means that the principle of proportionality, having roots in the neo-liberal doctrine, defines the very nature of the European Community. That is why the Court has been giving it a central place, since 1956, to the activity of administrative and legal punishment and in regulating the problems concerning consumer protection and the movement of persons. When applying this principle, in case that the community law principles are broken, reference should be made to the community measures, regarding both the nationa and member state measurements.

The Treaty of Amsterdam, which modifies some of the provisions of the Maastricht Treaty, contains in its annex an agreement specifying that every community institution should observe the correct application of the principles of subsidiarity and proportionality. The agreement re-states the idea that the European Community activity should let the national authority a large edge for decision, with the condition of respecting the demands of the institutive treaties.

3. The characteristics of the European community law

Being an original set of juridical rules leading the organizations and the functioning of the Community institutions, the community law is, in fact, special for each member state. In other words, the community law has a specific power in order to be considered a common law in all member states. The characteristics that

make it enter the internal juridical order of each member state are: *an immediate applicability, a direct applicability and a priority applicability*.

The presence of these characteristics put into evidence the essential fact that the Community law is not made up either as a collection of international agreements, or as addenda of national, juridical systems. In other words, between the Community and national law, there is a special relationship of separation, on one hand, and of a dialectical mixture, on the other hand.

3.1. ***The immediate applicability***. Different from the norms of the international law, and viewed as external ones, the norms of the Community law automatically receive, from their adoption, the status of a positive legislation inside the internal juridical system of the member state. The explanation is of a doctrinal nature, in the way that, while the ratio between the internal law and the international law requires a dual interpretation, the ratio between the internal law and the Community law requires a monist interpretation.

The dual concept states that between the internal law and the international law there is a relationship of independence, thus the two systems of law act in parallel. From this point of view it is considered that the international treaties, even those perfectly ratified, produce effects only inside the international juridical order. In other words, the international law "*does not regulate the conditions in which the norms stated inside the treaties are integrated in the juridical order of the states for which they must be applied by their institutions and their juridical principles. This matter is left to the free decision of each state, which regulates it, in accordance to the adopted concept regarding the relationships between the international law and the internal one*" [6]. And because the provisions of the international treaties should have applicability with the legal rules of a member state they must be nationalized, that is, to be settled in a juridical norm of the respective state. In this way "*the international norm suffers a change of its nature and it will be applied under its new quality of regulating the internal law and not under that of the international law*" [6].

The whole difference is the doctrinal perspective when speaking about the understanding of the ratios between the internal law and the Community law. The place of the dual concept is taken by the monist theory illustrated even by the philosophy of the Community law, a theory according to which the two systems of law serve a common end. Under the perspective of the understanding, the provisions of the Community treaties are totally integrated within the internal juridical order, keeping, however, their initial quality, that of community rules. The consequences of this approach are as follows:

- *the community law is automatically integrated within the juridical system of the member state*, without suffering an additional nationalization as a consequence of an another justifying document;

- although they are integrated inside the internal juridical order of the member state, *the community norms keep their distinct nature*. The proceeding by which the community law becomes applicable for a state by virtue of a document released by the Parliament does not mean that it comes from the Parliament;

- *the obligation of national judges is to apply the rules of the Community law* in the same manner as they apply domestic law;

3.2. ***The direct applicability***. The community law, besides the characteristic of an immediate integration inside the internal order of the member states, also has the general capacity to directly complete the juridical status of the particular persons.

This characteristic of the community law becomes evident by comparing it to the situation of the international law. The idea is that initially, inside the dominant concept of the international law, it was considered that the international treaties may directly create rights and obligations only as a task of the states, as classical subjects of international law, and not as a task of physical persons, too. Consequently, as an exception, the doctrine also accepted the possibility that the member state that signs a treaty should adopt special clauses concerning this matter being applicable by the national courts.

Being called to give opinion upon this matter, the European Court of Justice, taking into account of the clauses of the Foundation Treaties and of the European Community objectives, has concluded that the resorts

of the member states may benefit of the regulations of the community law, meaning that they may become entitled to having individual rights, even though they are not especially directed to satisfy this purpose. Acting in this way, the European Court of Justice has turned a legal international exception into a fundamental principle of community law. At the level of the community doctrine, the direct applicability means "the rights of each person to ask the national attorney to apply him/her the treaties, the regulations, the directions or the Community decisions. And it is also the attorney's obligation to make all these texts applicable, irrespective of the legislation of the country from which it comes".

The fact must be taken into consideration that not all the juridical norms of the Community have the same direct applicability. Depending on the category they belong to, some Community orders have a complete direct applicability, others have a limited one and others have no direct effect, because, by their content, they can't be applied to other addressees but to those strictly specified.

3.3. The priority applicability. Being immediate and direct, the community law also enjoys the characteristics of the priority applicability. Referring to this issue, Cornelia Lefter, in her work notes that: "*The priority or the superiority of the community law signifies the fact that it is, from the moment of its adoption, immediately and directly applicable inside the internal juridical orders of the member states and it can't be put apart by some posterior national norms*" [7]. In other words, from the fact that Community law is characterized by direct application ensue following problem: what happens if a Community rule get into conflicts with a rule of national law?

The only solution, in the case of such a conflict, is to give priority to one of these two categories of norms. Because the Foundation Treaties do not contain imperative references to this situation, the problem should be solved by the community juridical doctrine which developed around some real cases at the European Court of Justice.

Being called to give its opinion in such cases, the European Court of Justice pleaded for the priority of the Community law, adopting the "community" theses according to which the ratio between the national law and Community law solves itself following the Community law regulations. Giving their support to this thesis, the theorists formulated several logical-philosophical arguments.

First of all, the "communitary" thesis imposed itself as an essential condition for the existence of the Community law and even for the existence of European integration. We can't speak about European integration without having a Community law system and at the same time we can't speak about the existence of the Community law if it can't be equally applied in all the member states, as there are national law systems inside of these states that may oppose it. This means that the priority community law principle is not meant to produce an artificial hierarchy between the national authority and the communitary one that may contradict the basis of the integration process, but it is adopted and assumed to guarantee the existence and the rationality of the entire European construction.

Secondly, the "communitary" thesis emerged from the originality of the Community law, from the specific nature of the Community treaties and does not spring out from some concessions of the member states. That is why the juridical order of the Community has its priority against any national, juridical norms of the member states. Furthermore, the priority of the community law may be invoked not only in front of the European Court of Justice but also facing the national jurisdictions. Consequently, the answer to the question concerning the relationship between the national, juridical order and the national one, is as follows: "*From the point of view of the Court of Justice, the traditional liberty of a state in deciding for itself how to fulfill its obligations, resulted after signing the Community Treaties, has been concealed by the Community juridical order*" [7].

Conclusion

As a conclusion, the juridical nature of the European Union has, as its basis, many logical-philosophical elements sustaining specific objectives and desires for the Community construction process. It is true that the three Communities giving content to the European Union, have been founded by international treaties. This means that the European Communities, like any international organization, have their origin in the sovereign will of the states. This will perfectly matches the provisions of the international public law.

Starting from this true fact, and in relation to the supranational characteristics of the Community institutions, the traditional, juridical doctrine has put into discussion the status of the European Union, starting from the distinction made between federation, a structure based upon a constitution, and confederation, a structure based upon an international treaty.

Reality proves that, when explaining the status of the European Union, it is not enough to operate only with the above mentioned distinction. This is because although the Community Treaties are the result of agreements between states, in their case the provisions of the international law should also be applied. Taking thi.: matter into account, the place of the international law has been taken, referring to this matter, by the Community law. Thinking of these new circumstances, Jean Paul Jacque says: "*The community today is a specific set of rules based upon a distribution of sovereign competences between itself and its member states, the Community competences being applied together, within the framework offered by the Community institutional system. This is the sense in which we may talk about integration. Thus, the Treaty can't be analysed by using international law, as it comes closer to the form of a Constitution*" [8].

The growth of the credibility of the Community thesis also supposes, beyond the economical and pragmatic changes, a change of the mentality. In this sense, Andrei Marga has written: "*If through the term of paradigm we understand what the members of a community share together, a cluster of convictions and values, methods inside which they formulate questions and build up answers, then we have reasons to say that, even with different levels, we witness the flow of a paradigmatic change in Europe. Our life problems and our cultural interrogations pass without being seized from the national paradigm, that had a long way inside the European culture, into the European paradigm*" [9]. It results from here, without any doubt, that facing this change in paradigm, philosophy needs to have an essential role.

References

[1] A.L. Ivan, Theoretical perspectives of European construction, Eikon Publishing House, Cluj-Napoca, 2003, p. 50;

[2] V. Marcu, Institutional Law Community, Edition II, Lumina Lex Publishing House, Bucharest, 2001, p. 151, p. 152, p. 154;

[3] Jinga A. Popescu, Terms Dictionary Community, Lumina Lex Publishing House, Bucharest, 2000, p. 164;

[4] Treaty establishing the European Community, article 5, in The basic documents of the Community and the European Union, second edition, Polirom Publishing House, Iasi, 2002, p. 20;

[5] O. Manolache, Community law, second edition, All Beck Publishing House, Bucharest, 2001, p. 68;

[6] P. Filipescu, A. Fuerea, Institutional European Community law, Fifth Edition, Actami Publishing House, Bucharest, 2000, p. 53;

[7] C. Lefter, Community law Institutional, Economic Publishing House, Bucharest, 2001, p. 62, p. 64;

[8] J.-P. Jacqué, Droit institutionnel communautaire, 1998, după A. Popescu, I. Jinga, Euro-Atlantic organizations, Lumina Lex Publishing House, Bucharest, 2001, p. 88;

[9] Marga A., European unification Philosophy, 2nd Edition, Apostrof Publishing House, Cluj-Napoca, 1997;