Elements of continuity and discontinuity in the evolution of European Union law

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Abstract:
The phenomena of continuity and discontinuity have a great importance for any science and by default to the science of law in the sense that a legal system is proving effective or ineffective depending on how it handles issues of continuity and discontinuity at the level of legislation. Regarding continuity in matters of law, the Romans knew very well to create a very efficient legal system, on which a large part of modern law relies. A series of important legal institutions of today have their origins in the Roman law, jurists establishing ever since some rules which have acquired undeniable continuity even to the present. A thorough study of continuity-discontinuity relationship as a general rule for the evolution of law is justified by the actuality of the topic, both from the point of view of post-totalitarian evolution of the Central and Eastern European countries as well as from the perspective of their European integration. As for the second aspect, we should start from the premise that the European Union once extended does not cope for the first time with the difficulties of continuity - discontinuity alternation because of this expansion. Throughout history, Europe was confronted with such alternation in legal terms as well and the experience that it has acquired can be used in the continuous process of European Union's expansion.
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The evolution of the international and European law and the processes of continuity and discontinuity have also made their presence felt at the level of relations between states, thus the issue of enactment at this level being much more sensitive as compared to the legal transplant of international and European legal norms at the level of states' internal law.

The current international realities bring a series of problems of interpretation and modulation in terms of enactment, states' sovereignty being an example which in this context no longer appears in its classical form but involves a modulation meaning that states no longer have sovereignty over all their prerogatives as is the case of the member states of the European Union. This aspect supposes an element of discontinuity or better said a modification of one of the essential elements of continuity existing at international level.

Other elements of indubitable continuity result from the common history of the European countries, including their legal systems and legal cultures [1]. The elements mentioned above had and it is natural to still have an important role in the process of integration by facilitating it. In continental Europe, there is the common

tradition of the Roman law (*jus commune*), of humanism, enlightenment and modern codifications.

In the specialized literature [2] they insist on the idea that, despite the many cultural differences, Europe originates from Christianity, the tradition of the Roman law and the Greek perception of the beauty. This affirmation is valid for the Western and central Europe, and yet we may not deny the existence of some religious, cultural and political connections with the Eastern Roman Empire and the Byzantine version of the Roman law for Russia and South-Eastern Europe. The proof of law Christianity may be found in the Ecclesiastes [3]: "what has been will be again, what has been done will be done again; there is nothing new under the sun". Therefore, the continuity of law relied on the *moral and religious norm* people obeying from times immemorial to a divine superior authority which addressed their consciousness and symbolized their belief. As shown in doctrine, the origin of law is found in the ancient times of appearance and development of human communities when practices and rules are combined with tradition and habit, and the latter governed the relations of understanding or of fighting between tribes. [4] Thus, individuals' behaviour was guided by those moral precepts that were emphasized by the religious norms from times immemorial. These norms have not lost their applicability or validity over the years and after so many generations. The fact that the legal systems of the European Union member states have common congenial roots is confirmed by their history. [5] The European community area is essentially identical with the European part of the Roman Empire being governed by the Roan law. The entrance of the central and Eastern Europe countries into the sphere of Soviet domination after the Second World War did not mean their breaking with the European history.

The history of law [6] also shows elements of discontinuity such as the abandonment of the superior classical culture of the Roman law and the culture revived in the Eastern Roman Empire after the fall of the Western Roman Empire and this decay of the Roman law represented a regress of the European legal culture. However, the Roman inheritance has survived lying at the bottom at juridical legalism and positivism specific to the European legal culture. The notion of *jus commune* of Europe has been maintained throughout the evolution of European legal thinking and it proved capable of rebirth.

Another constant of the European legal culture consists in the conceptualization of the empirical legal material and the systematization of legal

phenomena starting from the formation of concepts owed to the Roman jurists and less prone to change and, thanks to the Roman jurists and their European successors, the ground for the great codifications of the modern time was broken. Examples of specialized papers are: *Codex Justinianus* (529) contained all imperial constitutions ever since the reign of Emperor Hadrian. It was rotted in both Codex Theodosianus and other law books such as Codex Gregorianus and Codex Hermogenianus. The first edition of the book could not be preserved. The second edition of the Code was issued in 534. *Digests* or *Pandects* (533) were a compilation of weighty comments of the great Roman jurists from the classical period, most of them from the 2nd and 3rd centuries A.D. Many of them held authority in justice. The reform of Justinian in this field aimed at the unification of the legal system and the elimination of contradictions from the Roman legal system by gathering the entire jurisprudence in a coherent legal system. *Institutiones* (533) (Institutions) were a law book for the law schools based on the model of the manual of the famous Roman jurist Gaius. It contained excerpts from the other two books with an updated legislation. *Novellae* were the imperial constitutions issued after 534 most of them in Greek. Though their issuance in one volume had been designed ever since the reign of Justinian, the new book was published after the death of Justinian. They were reunited by a Byzantine jurist, Athanasios of Emesa, in 572–577, in a collection for jurists, *Syntagma*.

The modern European law is the product of absolutism which needed a centralized organization, comprehensive regulations, and a law that may contain abstract formulations and fulfill both administrative and judicial bureaucratic functions, and be enforced in a uniform and predictable manner. In order to be valid the modern law has to be directly or indirectly authorized by the state. Thus, a formal and reasonable law has come out which Max Weber [7] referred to and whose main model was the codified law which spread in the 19th century in the whole Europe. Regarding the codification of international law, it is shown that this operation represents systematization of international customs in the international treaties, with a huge advantage and very adequate of modern international society has a great need for legal accuracy ... the main actors in the codification of international law are states as the main subjects of international law. [8] The totalitarian regimes from the 20th century marked another period of discontinuity in the European legal history affecting for a long or less long time the legal culture of the countries where such

regimes were instituted. The concept of the rule of law which formed and was affirmed in Europe based on the enlightenment, in the spirit of the American Declaration of Independence and the philosophy of the French Revolution became deformed, useless and inoperative in the context of totalitarian regimes of the past century.

The law has lost its relative autonomy and authority which resulted from its role of control exerted on the state. The state has acquired the control over the law, the latter becoming a simple instrument of state domination. The serious depreciation of the principles of the rule of law also resided in the total domination of the individual by the state, an individual who was subjected to surveillance and control exercised in all aspects of their life and lived in a situation of legal insecurity. An interruption of the evolution of the modern European law was caused by postmodernism which also inevitably influenced the law. At the same time, it must be noted that the application of legal norms in different areas as economic and socio-cultural development, with as recipients diverse subjects of law, may in some cases be a serious violation of the rights of subjects of law, that is it is therefore necessary to draw up rules to take as its starting point the general principles, rules with a high degree of generality, suitable to various interpretations. [9].

By comparison to the illuminist modernism which excludes the claims and values of other paradigms, postmodernism consists in a new concept about the human society considered to be a differentiated society where different communities and different domains such as economic, civic, cultural coexist, to which we add the public domain with the role of conciliation and mediation of the other domains, their balancing, and the interiorization and mitigation of conflicts among domains. [10] Each domain is made up of its own and distinct norms, goals, procedural rules, values, processes, transformations and balances. Consequently, in the society there is not only one justice but a multitude of justices and postmodernism considers that ways of adaptation of the pretensions of rival concepts on justice [11] must be found.

The 20th century marked the beginning of the transition from modernity to another social-cultural paradigm which might be called *postmodernity* [12] in default of a better name. Modernism was characterized by a formalist legal science culminating with the extreme variant of the legal pure theory elaborated by Hans Kelsen [13]. Starting from the 19th century, the law of the modern state has been a unique, automatic and maximal law.

Prior to end of the past century, the orientation towards a new understanding of the law came out manifested in studies dedicated to the juridical pluralism of complex societies. They started from the idea that in the same geopolitical space there is not only but several legal orders and sustained that state's pretention to hold the monopoly in the creation of law was absurd and that there were legal orders and legal communities that superposed. The law, in general, and the state law, in particular, is relativized and desacralized. [14] In the last decade of the past century, they noticed the aging of the state law, the undermining of its role of social modeling and innovation or future planning and ephemeral and renegotiable forms of law appeared such as the regulation of the relations between corporations and the European regulation. A series of social issues may not be settled by the modern law whose limits become more and more obvious. The alternative solutions impose more and more, state's monopoly over legality being put to an end and juridical minimalism starting to manifest which means that legal relations become more and more power relations.

One of the solutions that may seem adequate in these conditions is the postmodern fight for the law having as an objective the combination of the state law with law non-state forms. It starts from the idea that, since they identify with the normative regulation technique, the modern legal systems have become the instrument of a state, hierarchic and bureaucratic government form unable to organize a healthy and prosperous civil society. The modern legal system has become neutral from the cultural viewpoint which means that the reign of law as a juridical technique does not have a social or cultural impact but the design of modern law is more asocial than antisocial.

The European Union law represents a set of regulations approved through the treaties concluded by the Member States and through the documents approved by the European Union institutions governing the organization and functioning of the European Union.

The European Union set out *an autonomous law order* which is "the expression of a special perception of *values,* together with a European legal community*"*. [15]

Autonomy consists in the fact that the European Union law is the result *of its own legal sources* and comes off – with the materialization of its basic notions and

principles – the basic elements of international law as well as its historical assignation to the law principles of Member States.

Autonomy is the result of the structure and constitutive principles, a distinctive feature for the European Union, of the direct authority and of the primacy of the European Union law.

As any other legal order, the European Union legal order consists in an organized set of rules whose value is the result of the basic legal rules included in treaties. Therefore, we may distinguish the *primary law*, consisting in the rules included in the constituent treaties, from the *private law*, which further includes legal rules issued on the basis of constituent treaties and in compliance with the provisions particularly provided by these treaties. [16] The legislative basis in the European Union system consists of over 300.000 normative documents, available both as texts commented upon at various university lectures or as special papers as well as in digital forms. The legislative server of the European Union (EURLEX) provides the access to a multilingual data basis which structures a wide range of normative documents, starting with the European Union treaties to international agreements, preparing papers, jurisprudence and parliamentary interpellations. Certain documents from the above mentioned ones are available in the Romanian language, due to its quality as an official language of the European Union besides the languages of the other Member States. The translation process of such an extensive legislative set of documents is undoubtedly a long one and one cannot estimate the time when the Romanian citizens will be able to consult the European legislation completely in the Romanian language. For the time being, it is mandatory to translate all the new normative documents into Romanian, even before the date they are signed and come into force.

The brief analysis of the normative documents within the European Union involves the description of the main sources of primary law (treaties), derived law (regulations, decisions and directives) but also a brief description of the unwritten sources (tradition, jurisprudence and the general principles of the European Union law on the whole).

The European Union primary law consists in the three Treaties which laid the bases of the European Community, as well as in the Treaties and documents issued to amend, complete or adjust them. In other words, we refer to an impressive number

of conventional tools, appropriate to either of the Communities or even common to the three of them.

The legal order of the European Union is *a supranational legal order*[17]*,* relying on the approval of the transfer, by the Member States of the European Union, of certain decisional competences towards the European Union institutions. Within this legal order there are maintained certain competences, not at all unimportant, on the national level of the states belonging to the European Union.

The *unity* of the European law rises above the diversity of national contexts, requiring that the application of the European Union law in Member States be conditioned by both observing the particularities of every national legal system and, especially, by nationally applying the European Union rules “with an identic content and an equal effectiveness” [18].

Originality consists in the fact that jurisprudence establishes the unity of the European Union law as being compatible with a certain *social and cultural pluralism*; national legislations pursue a justified purpose regarding the European Union law, as the States shall be competent to choose the most adequate means and to observe the requirements resulting from European Union law, especially those related to the principle of proportionality. One can also notice the fact that the European Union law asserts firmly its own originality, being a compromise between the three systems of European law: continental, Anglo-Saxon and German.

The legal order of the European Union, *different from the national legal order,* is the result of creating a law system capable to ensure the achievement and observance of the basic objectives of the European Union. This law system does not prevent the development of the state activity, or the existence of the national law systems of Member States, but it integrates these systems into the European Union order, in compliance with its principles.

More exactly, the European Union *law* consists of a set of rules [19], called the *legal order* of the European Union. These are mainly the constitutive treaties of the Union, to which we can add the directives, regulations, general and individual decisions, recommendations, approvals, resolutions of the European Parliament. We must also add the jurisprudence of the European Union Court of Justice in Luxemburg. We shall not omit the general principles of law, in their quality as unwritten sources, otherwise integrated to the traditional law and the tradition itself.

The European Union law operates beside the domestic law of every Member State; yet we cannot say it integrates into the law of these states, as it is a specific, autonomous law, providing an equable application of the European Union rules; in all Member States it has a direct, progressive effect, having primacy over the national rule, especially due to the systematic jurisdictional control.

The European Union is established as a *new legal order of international law*, for the benefit of which the states have limited their sovereign laws, although in certain fields only, and whose subjects are not only the states but also their citizens, the European Union national or otherwise said the European citizens.

As a consequence, the most important challenge the law must face at a global and European level is the reintegration of the social and juridical spheres through a more pluralist approach because the historical separation of the law from the society was not inevitable and, appreciated *a posteriori,* it brought few benefits to the mankind.

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