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Comparative Law. Europe Union Law

Emilian Ciongaru[1]

Abstract: The analysis of the European law, jurisprudence created wants to have that purpose, the idea of justice unique at European Union level, based on the comparison of the two main systems that act as current EU members, namely: the Roman-Germanic legal system and common law system (common-law). Observing the link between the European legal order and its Member States to ascertain the relationship based on the principle of direct integration of European law into national law of Member States and the principle of primacy of European law over domestic law, principles which were stated by the Court of Justice. Increasingly we can see that, besides the current territorial globalization, and globalization of justice is based on general principles of law and would, establish common ground for all other existing legal systems, aiming to equilibrium coexistence of all citizens, in order to respect fundamental rights and freedoms.

Keywords: European legal order; jurisprudence; common law; globalization of justice

Since the oldest times, comparative law has an important object of research but also the practice. Through the adopting different the legal rules, the peoples had discounted most of the times the way they were regulated some problems in the countries which neighbored. For example we have the *Law of the XII tables*, which, according to Roman jurisconsults, was in a great measure made by the Athenian laws of Solon. So after comparing various foreign legal systems, the Romans, a people of lawyers as Plato said, have developed jus gentium (law of nations - was intended to regulate relations between citizens and pilgrims).

Later, in *Novel 89*[2], the Byzantine law regularize the situation of natural children, consecrating a softer regime in their favor, the result of comparing the existing laws in Syria and Phoenicia (Otetelisano, pp.17,140,141.).

Then, Victor Dan Zlatescu concludes that as a country or region is essentially a provincial phenomenon" (Călinoiu et al., 2007, p. 44 and next). This justified Pascal could say: *truth is an error on this side of the Pyrenees beyond themselves*. Indeed, "the legal rules - eventually the subjective phenomenon - is the result of some social needs, the political and psychological pressure, and finally a certain mentality. A border can be drawn arbitrarily certain mandatory rules on a territory and others, can opposite one neighboring. There is no criteria, sometimes there is no possibility of reconciliation. This creates conflicts of laws, with or without conflict of sovereignty and thus becomes necessary private international law (Zlătescu, 1997, p. 11).

Continued on this idea, Zlatescu notes that „The history of shows that law has all times yearned for the universal law, manifested in other words an aspiration to overcome the national condition, to become a universal phenomenon. What else but that right was Roman law, which applied to large numbers of people not just than *rationae imperii* but and *imperii rationis*, because its valence logic and fairness" (Zlătescu, 1997, p. 11).

[1] Associate Researcher, Institute of Legal Research Acad. "Andrei Radulescu" of the Romanian Academy, Bucharest, Romania, tel. +4.021.318.81.06, fax +4.021.318.24.53, Corresponding author: emil_ciongaru@yahoo.com

[2] Novel 89 - (novela = new law) system was part of the Byzantine law given by Emperor Leon VI (+912)

The modern era is characterized by the fact that despite the diversity of legal systems, it still managed some *uniformity* in some domains, or even a legislative unification through a series of international treaties. Of comparative law studies and research have had a healthy dynamic, one of the most important role in this regard back conferences specialty associations have promoted the need for more consistent comparison of systems law (Călinoiu et al., 2007, p. 44 and next).

In this way exemplify this the events of the last decades of the nineteenth century saw a revival of the legal comparison had as a top the first International Congress of comparative law which took place in 1900 in Paris. Used as a methodological perspective favorite to the social sciences, especially by schools the juridical ethnology (Constantinesco, 1997, p. 121 and next) and comparative history of law, comparative law has acquired gradually the institutional expression that has legitimized and strengthened its position in science of law (Zweigert & Kotz, 1998, pp. 57-58). Therefore in France was born in 1869, the *Society of Comparative Legislation* (*Societe de legislation comparee*) who edited the international journal *Revue internationale de droit compare* periodically occurring today. In Germany is similar to the French society also appear in 1984 bearing the name und *Internationale Vereinigung fur vergleichende Rechitswissenchaft und Volkswirtschaftehre*[1]. French model with the same appear in England in 1984, *The Society of Comparative Legislation* which, in turn, edit own periodical called today *International and Comparative Law Quarterly*. The consequence codification that encompassed all over the world, was reduction in comparison approach, and actually found of the names of various societies and journals, with a simple translated form or juxtaposition of codes and foreign law. (Constantinesco, 1997, pp. 93-94).

As regards concept Of comparative law, many authors specialty have enumerated numerous views and opinions (Constantinesco, 1997, pp. 93-94; Otetelisano, p. 200).

Thus, Raymond Salleiles (Salleiles, 1900, p. 167) consider, for example, comparative law as a „common law of civilized humanity” and each country to compete in the formation of this type of law. Edward Lambert considered that the comparative law (Lambert, 1921, p. 159) is a social science that establishes general laws, as well as a higher form of *juridical art* and the very idea of *civilized nation* would be sufficient to provide the basis for a *common law*. Leontin-Jean Constantinesco, stressed that „As in the natural sciences, and the comparative law is subordinated to any particular problem big problem, which is to comprehend the universe as a whole. In the science of compared the knowledge of comparative law the legal isolated institutions is not just a step to knowledge and understanding of the whole: legal order first, then the legal system concerned” (Constantinesco, 1997, p. 93-94). Also the purposes of a comparison as universal laws and have been pronounced and the Italians doctrinaires, Giorgio del Vecchio and Francesco Cosentini. (Călinoiu et al., 2007, p. 47)

Three trends of the comparative law in Germany (Călinoiu et al., 2007, p. 47) is distinguished by Bernhoeft: an *ethnological* tendency, related to race that explains why the peoples with the same level of civilization have similar institutions, a *historical* tendency that discloses as possible, even to the same level of civilization, as the evolutions of some peoples to be different and the *dogmatic* tendency that would consider juridical institutions reporting to the social environment in which every people lives.

So the comparative law has an object and its purpose, representing a scientific discipline which uses of course elements related to foreign law, but only insofar as they serve the purpose of comparative. With great force this idea is revealed by Professor Pierre Legrand at the University Panthéon-Sorbonne, which criticized (Legrand, 2001, p. 7) the practice of the present as simple comparative studies of foreign law synthesis attempts.

In the opinion of the famous scholar of philosophy of law, the Italian professor Giorgio del Vecchio, the comparative law should become a universal law compared to real science, by which would be identified legal elements of general value, applicable to all humanity. But even Giorgio del Vecchio admits that such a right would be a universal science of compared different from the actual philosophy

[1] International Association of Comparative Law and Economics.

of law, finding him in the latter only the fundamental principles on which would and should produce some findings.

So we can say that the comparative law (Constantinesco, 1971, p. 206 and next) (Schnitzler, 1961, p. 106 and next) is, first of all, a way to gain knowledge in the extent to which exposes this characteristic, it is capable to offer a variety of solutions for problems more and more diverse than those offered by a science juridical the national preoccupation. Purpose of comparative law is to enrich and expand the variety of solutions and provide the person who uses this critical opportunity to find a *better solution* to a specific problem. (Cappelletti et al., 1986, p.l and next, p5 and next.)

Furthermore, the comparative law also aims, the specific goals relevant to the practice. Thus, comparative studies are often useful to preparing the legislative process and this method of comparative law facilitates so as to create a new law but and the way and supranational rights of a union, finally, the comparative law can be a solution for judges in the interpretation of law and creative in their role of *creators* of law (Otetelesanu, 1936, p. 55 and next).

When it comes to drafting national law, legislators have used frequently in many domains and many countries from materials developed by lawyers who use the method of comparative law.

In the law of international organizations, the use of *comparative law* is on the basis the legal policy, a necessary precondition for any creation of law, so used, of the one part, to the creation of the organization itself (founding treaty formulation) and on the other hand, for the autonomous rules of internal field (a right secondary).

The reason is that, knowledge gathered from the various national laws of Member States in an international organization is not only a "reservoir" of ideas welcome for legislation formation of this organization. On the contrary, a more detailed analysis of the national legislation will demonstrate what values are suitable for an implementation of inside a positive community member and which the trials are most appropriate to ensure to a maximum realization of the common principles. With the other words, the *comparative law* can bring a decisive contribution to the development and effective functioning of an international organizations and to national legal the framework of its approval.

Such linked to aspects of regional unification and harmonization of law, must be being stressed the importance that it should have to study comparative law in Romania, in its quality as a member of the European Union. Unification of Europe, compared with as law instrument, required lawyers know all of member countries the legal systems belonging to the Member States.

Dual comparative law based on French civil codes and geman comparison, will take note of the features and common law juridical family otherness.

Considering the specific objectives of the construction of political, economic and juridical in the European Union, the comparative law has concentrated on the European continent, highlighting the similarity in law and, consequently, the building of a *unified European law*. In the the same context of European juridical construction, an evaluation of the right postmodernist postulation highlights the need to maintain diversity in law and *the juridical pluralism*.

Starting from the past, from the idea of unity of Europe[1] the comparatists could distinguish a European legal configuration which favored the rise of the two juridical structures cognitive or of two forms of knowledge in law, each having its own principles of storage, reproduction and of extension: of the one part, tradition roman law, the the invoice nomotetica, and on the other part, the common law tradition, the ideographic nature. Legrand also stated in his book *Comparative Law* as “As goes without saying as we ought to reserve the name of research priority chip” comparative „of confrontation the

[1] European idea, by using the phrase,, United States of Europe is quite old (1849). The idea of European unity was expressed in sec.al eighteenth century by JJ Rousseau, I. Kant, in sec.al nineteenth century by Saint-Simon, Proudon or Victor Hugo (1849), at 7. 09.1929. Aristide Briand proposed the League of Nations League of Nations General Assembly to create a federal link between European states which do not affect, but the sovereignty of these states. Over the years this idea was taken and used in different circumstances. Thus, on September 19, 1946, Winston Churchill in his speech at the University of Zurich, said the need for establishment of the United States of Europe, and as its first stage, a partnership France-Germany.

phenomena that occur on both sides of the demarcation lines that appear between the two embodiments of the language of reality that is the juridical tradition (legal tradition is altuf any) is not excessive and apply to Europe, of European Community has used a formula that Nietzsche, in his time, to figure out what will be *the age of comparison*. So for the first time, the two European juridical traditions - a roman-born and one English source - are required to interact effectively within the parameters defined by the *Treaty of Rome*".

A factor of comparison of of European law and the birth was considered to be the development level of a system of law or another. After Roscoe Pound, the comparison must take into consideration, therefore, only mature legal systems or those belonging to civilized nations. From there went and the idea as "like must be compared with these, concepts, rules and institutions under comparison must be linked *the same level of development of legal, political and economic*" (Gutteridge, 1938, p. 73.). Risk analysis of the this kind of things was that drove the comparatists for comparisons all occidental the legal systems, namely those belonging to civil law and common law, and to ignore others. „... Comparing the law of the old races of the East with European law would not be productive, maintains, therefore, Gutteridge" (Gutteridge, 1938, p. 73.).

The challenge of unification of European law by the appearance of EU law, having as a instrument comparative law, required lawyers of member countries know all the legal systems belonging to the Member States.

The two main systems of law apply to EU Member States had compared and found common points in the birth and development of a new law, European Union law, juridical traditions: roman and common law must be understood as two manifestations of European discourse on unification of the law.

Essential characteristics of Roman-Germanic law:

- The public law is separate from the the private law. Ulpian considers that the public law regulates the organization of the state and the private law refers to citizens, it is, therefore, consists of principles of civil law, the law of nations and the natural law.
- The unity of private law, is another feature of the Roman-Germanic law, meaning the existence of fundamental common principles underlying the civil law, the commercial law, the private international law, even though many states have separate codes that regulate their commercial relations, separate of civil codes.
- Not all rules of civil law, existing laws states are roman-born so in the civil or commercial codes there are rules which have their source in the local customs, for example, the union of family assets in French law is rooted in traditions French, many states have taken the canonical rules about marriage, affiliation and even succession, which the differs from Roman law. These differences do not affect the family features of law in countries that use the Roman-Germanic law, as is common conception of law, legal vocabulary and method followed is common to find a solution in the process also common.
- Although almost all modern legal systems have abandoned collective responsibility for violating legal obligations, specifically Roman-Germanic law is how to design material obligations.
- Common form of regulatory, the legislative technique is another common feature Roman-Germanic family in that almost all countries within this family have codes, which the establish rules for of civil relationships, of family and property.
- The Roman-Germanic law has preserved formalism few characters from Roman law. Thus, the human will create legal documents without ever actually be expressed in a form that is solemn or the magistrates participation. However, marriage is a solemn act, the real estate transfer is made with authentic, contracts with a certain amount must be made in writing, etc.
- The principle of regulation subjective rights is characteristic Roman-Germanic law. In English law, the judge creates the right applicant from the obligation of the defendant, to be proved. In the Roman-Germanic law, rights are the subjective the owner may claim restitution of property or subjective right on the basis of their son has the right to the legacy parent.

The principal feature of English law has developed along two lines: to live honorably, which has found expression in the rules of *Equity*, and not harm another and gives that which is, or the precepts that formed the *Common Law* rules.

- English law was formed as a judicial law, which has led to the priority of procedure, which means that we must first determine the outcome of established procedure.
- English Sovereign could not only use a particular law, which actually was a law of the case. He exercised the supreme jurisdiction, giving in each case an individual solution. From here, they developed two principles: English parliament, which is the sovereign power, can only give individual laws, establishing specific rights, so-called status, which refers to how to resolve disputes, on the other hand, courts decide on behalf of the sovereign, so only their decision, the concrete application of the will it can be a rule of law. Presently, English judge can refuse to apply a law emitted by Parliament, if it does not conform with the judiciary practice or violate *Equity*.
- English law was established as a customary law and judiciary. Unlike the continental European law, which is a set of rules that the judge examine them to choose the solution, English law do not the norm becomes obligatory only when an application acquires precedents. English law was created by judges, not by lawyers.
- Another a feature of English law is the absence of divide, known in continental European law, in public law and the private law, in turn, but the private law is not subdivided into commercial law, civil law,etc..
- Finally, another specific feature of English law is that it only applies in England and Wales.

Always there was very large differences between the traditions of a region than customs of another, even more so between existing customs of territories of different states. However, is the history of Europe law in reality a unity and is a creation old while histories of national laws is the late scientific creations and forced the idea of sovereignty of states. Roman law taken by most European states exercised with different intensities in different periods, in various forms, directly or indirectly, a profound influence on European legal systems. In parallel with upgrading and updating law of each state to develop a European legal science taken as a method and systematic corps of rules ordered and systematic organized, the Roman rule in their substance but European in scope. (Constantinesco, 1997, p. 31). With the advent of legal codes, these differences have widened, leading in the second half of the nineteenth century to a total ignorance of foreign law systems. The motivation of appearance codes resides in rationalism and in the principle of legal certainty, than claimed and exploited by political power. Assuming the diversity the states will strengthen laws autonomous individuality, distinct from each other, but limited in time and space in application. Each national legal systems will become the center of their interests, the national legislations develop in parallel, independent, so that the comparative law in this period was justified by the simple curiosity of jurists, on the fragmented and abstract fields.

As a result of comparing the two major systems of law but also with other systems of law the Court of Justice gave the definition of EU law, according to which this order is a legal entity, autonomous and integrated into the legal system of Member States which stem of the following characteristics its:

- European Union law represents a legal order, an „organized and structured set of legal rules with their own sources, equipped with organs and procedures able to issue them, to interpret them and to find and sanction if necessary, violations”[1].

In this sense, the Court of Justice stated that the treaties are not limited to creating the mutual obligations between the various topics which apply, but establishes a new legal order that regulates the

[1] ECJ established the principle of primacy of EU law in its judgment against Costa Enel dated July 15, 1964. In this decision, the Court finds that the legislation issued by the European institutions are integrated into the legal systems of Member States which are bound to respect. European law has supremacy over national law then. Thus, if a national rule is contrary to European provisions, Member States authorities to apply European mood. National law is neither canceled nor repealed, but its character is obligatory suspended.

powers, the rights and obligations of these topics, and the procedures necessary for a finding any the possible infringement.

- EU legal order is an order independent legal entity both in relation to international legal order, and the internal law of the Member States. EU law is distinguished from the public international law of the following points of view a) - while international law regulates the relations between states, so their the external relations, the European Union law regulating relations within the European Community is not a national law, no the external law, but also their right of each member, as their national law, EU law is placed in a position much closer to national law, not to identify with it yet, b) - subjects of EU law and can be natural or legal persons, while the area of international law is strictly limited to subjects to states (primary subjects) international organizations nation to fight for national liberation, insurgency and warring (subtopics), c) - while norms of international law originated in cooperation of States in their agreement will, and involves maintaining full sovereignty of States, European Union law is based on a skills transfer, on the transfer of sovereignty from Member States by EU institutions European elections, they the latter having the right to adopt legislation autonomously, within the limits set by European Union treaties, d) - while international law lacks sanctionatorie side, EU law establishes a mechanism of enforcement of its rules and sanctions and providing in case of non-compliance.

Autonomy of EU law is manifest in relation to the national law of Member States, but this autonomy is not complete, absolute, for European elections EU the legal rules constitutes an important component of of the national legal systems of Member States, which are applied in a obligatory of the national courts. Substitution the national law with EU law is not completely, European Union law regulating those intervening only the in social relations where occurred a transfer of power from the State Community and the European Court of Justice has no jurisdiction to verify the legality of legal norms of the Member States.

- The European Union law is a straight-in the national law of the Member States, this feature is the essence of The European Union law. The European Union law has a special power of penetration in the domestic legal order of Member States and it is expressed in the fact that the rule of national law automatically acquires status positive law in the internal order of the Member States (it is immediately applicable), creates by itself rights and obligations for private persons (it is directly applicable) and has priority over the national norm (is the priority application).

The dialogue between the legal traditions of Roman law and of common law - between the speech of commentary on the text sacred and the speech rhetoric - is undoubtedly to subscribe in the forefront of every project of European integration: „Mutual knowledge of the two different systems, knowledge to that must be inclined the investigator spirit of jurist of this century, is necessary and sufficient elements to form the comparatists modern mentality" (Sarfatti, 1938, p. 63 and next). Thus the tradition of Roman law, and especially his the civil rights, to avoid assuming the appearance of a civilizing mission in the imperialism and colonialism to the cultural and political, to name just the idea of civilization, they wanted to eliminate the peoples, ethnic groups and cultures for simply because they were different and replace world view born of lived history, with the world view imposed by a dominant culture. Rather it is for the Roman rights to operate in an environment characterized by civic attitude and civilian, as manifestations of civilians tends to recognize of individual differences of sensitivity, that is a generalized form of respect to the other, considered not as an opposite outside , but as constitutive of self.

Current remains famous formulation of Andre-Jean Arnaud, such as „Europe juridical will not exist unless will itself the pluralism and the complexity that even at origin, have been included in history."

Bibliography

Călinoiu, Constanta; Duculescu, Victor & Duculescu, Georgeta (2007). *Comparative Constitutional Law - treated - Volume I*, Fourth Edition, revised and added. Bucharest: Lumina Lex.

Cappelletti, M. et al. (1998). *Integration through law, European and American federal experience. A general introduction, Integration through law*. Vol. l. Berlin.

Constantinesco, L.J. (1971). *Rechstvergleichung/Law.* Vol. l, Berlin.

Constantinesco, J.-L. (1997). *Comparative Law Treaty/ Introduction to comparative law*. Vol.1. Bucharest: All.

Gutteridge, H.-C. (1938). La valeur du droit compare/The value of comparative law. *Recueil d'etudes Edouard Lambert, Introduction a l'etude du Droit compare/ Collection of studies Eduard Lambert, Introduction to the study of comparative law*. Vol I. Paris: Librairie generale de droit et de jurisprudence.

Lambert, Eduard (1921). *L'institut de droit compare. Son programme. Ses metodes d'enseignement/The Institute of Comparative Law. Its program. Its teaching methods*. Lyon.

Legrand, Pierre (2001). *Comparative law*. Bucharest: Lumina Lex.

Otetelesanu, Al. (1936). *Compared Civil Law Course*. Bucharest: Culture of the People.

Otetelisano, Alexandre (1940). *Esquisse d'une théorie générale de la science du droit comparé/Outline of a general theory of comparative law science*. Paris: Sirey.

Sarfatti, Mario (1938), *Le droit compare dans son essence et dans son application /The comparative law in his essence and in his application*, in Collection of studies Edouard Lambert, Introduction to the study of comparative law, Volume I, General Library of Law and Jurisprudence, Paris.

Salleiles, Raymond (1905). Conception et object de la science juridique du droit compare/ Design and object of legal science of comparative law. *Procès verbaux/Official Reports*, Vol. I, Congress in Paris.

Schnitzler, A.F. (1961). *Vergleichende Rechtslehre/Comparative jurisprudence*. 2nd edition. Basel.

Zlatescu, Victor Dan (1997). *Comparative private law*. Bucharest: Oscar Print.

Zweigert, K. & Kotz, H. (1998). *Introduction to Comparative Law.* Oxford: Clarendon Press.