DROIT POLONAIS CONTEMPORAIN
POLISH CONTEMPORARY LAW

2000 №1-4(125-128)
2001 № 1-4 (129-132)

PL ISSN 0070-7325

NATIONAL SYSTEMS OF LAW AND EUROPEAN INTEGRATION

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I.

1. A Roman jurist called Gaius, who lived in the times of Mark Aurelius' rule, in the introduction to his great work entitled *Institutiones,* put a maxim which is still worthwhile to remind now, more than eighteen centuries later. It is strikingly fresh and up-to-date in the times of a uniting Europe.

This great lawyer said that all peoples that are governed by laws and customs use partly their own statutes and partly the law that is common to all people *(pmnes populi qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur*[1]*).*

The idea contained in this brief sentence holds true in the present time in the case of the European Union. The creators of the Treaty establishing the European Community, referred to as the Treaty of Rome, had in mind the idea of laws that are partly common to the countries of our continent. The treaty owes its name to the Eternal City where it was concluded in 1957.

The signatories of the Treaty of Rome probably did not realise that the idea of laws uniting different nations had such an ancient origin. More likely, they followed an instinctive sense of unity of existential objectives pursued by all people despite the fact that they are separated by state frontiers, speak different languages and have different customs. Though respecting the laws of individual nations, the States Parties to the above-mentioned Treaty made an attempt to be governed also by common laws, which - according to Gaius - resulted from "natural reason" among all the people (ex *naturali ratione inter omnes homines).*

Never in the history of Europe has the idea of an international community enjoyed such strong support as in the second half of the last century. For three hundred years at least the belief that national interests had absolute primacy in the relations between sovereign States had been dominant in the opinions on the system of international rela-

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[1] G a i u s: *Institutiones. Commentarius primus* with Polish translation by C. K u n d e r c w i c z, Warszawa 1982, pp. 28-29.

tions. In his book entitled *Diplomacy*, Henry Kissinger wrote that this modem, in his view, approach to relations between States was introduced in the 17th century by France under the rule of Cardinal Richelieu.[2] A similar standpoint on the issue of European communities still prevailed in the 1960s. Then, General de Gaulle promoted a conception of Europe composed of national States, which he referred to as "Europe de patries." He rejected the idea of supranational Europe.[3]

The integration of European nations, guided by common values and aspirations to peaceful development of mutual economic relations, proved possible thanks to overcoming the dogma of a "balance of powers" understood as achieving uniformity of interests of the strongest States even to the detriment of the weaker nations.

2. The Treaty of Rome did not envisage unification of European law, as it is sometimes - erroneously - believed to have done. It only indicated general common objectives: laying down the foundations for closer links between European States, ensuring economic and social development by joint actions aimed at liquidating barriers dividing Europe and improvement of the conditions of life and work for its nations. Article 3 of this document envisages "the approximation of laws of Member States to the extent required for the functioning of the common market," while Article 100 provides that the method of such "approximation" of legal and administrative provisions will be effectuated through directives, issued by the European Council, in matters having direct influence on the establishment or the functioning of the common market. The above Articles are of considerable importance for determining the place of national laws in the legal order of the European Union. We will deal with this question in more detail later on.

A new stage in the process of European integration, which started with the establishment of European Communities, was opened in 1991 in Maastricht with the Treaty on the European Union (Maastricht Treaty). In this document, the heads of twelve European States confirmed "their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law." The Union adopted as its objectives, *inter alia*, preserving the full *acquis communautaire* and conducting a detailed analysis of legal regulations (so-called *screening)* in order to determine to what extent politics and forms of co-operation introduced by this treaty require changes to ensure efficiency of Community mechanisms and institutions.

The Treaty of Amsterdam, concluded in 1997, played a certain role in the development of the idea of legal integration of Europe. It confirmed the respect for basic social rights determined in the European Social Charter of the Council of Europe, signed in 1961 in Turin, and in the 1989 Community Charter of Basic Social Rights of Workers. The latter document, although it is just a "solemn declaration" and not a normative instrument, is of vital importance in the search for common directions in the social

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[2] Polish edition: Philip Wilson, Warszawa 1996, p. 16.

[3] Cf. S. S o ł t y s i ń s k i: "Dostosowanie prawa polskiego do wymagań Układu Europejskiego" [Approximation of Polish Law to the Requirements of the Europe Agreement], *Państwo i Prawo* 1996, no. 4-5, p. 3; the views of this author were accepted a. o. by M. M a t e y - T y r o w i c z: "Polskie prawo pracy wobec integracji europejskiej" [Polish Labour Law and European Integration], *Państwo i Prawo* 1996, no. 4-5, pp. 120-121.

protection of workers of the European community. And probably it will be the Charter of Fundamental Rights of the European Union adopted in Nice in December 2000 that will play a fundamental role in the process of establishing a close union between the nations of Europe.

II.

1. The expression "approximation of laws of the Member States" (Article 3 of the Treaty of Rome) became the object of various interpretations. The term "adjustment" of domestic law to the Community law is inaccurately used as a synonym of this expression. This term is close to the notion of unification (standardisation) of law. But the objective of the European Union is not to create uniform legal structures in the Member States. In other words, unification is something different from the "approximation" of domestic legislations of EU Member States.

The most commonly used word is "harmonisation." The meaning of this term is the closest to the concept of ''approximation" of domestic legislations according to Article 3 of the Treaty of Rome.

Harmonisation consists in "approximating" national legislations to EU law in the sense that a Member State should be governed by the directives issued by the Council of the Communities and by the objectives set in such directives. But the choice of forms and means to achieve such objectives is left at the discretion of each State (Article 181 of the Treaty).

Legal harmonisation in a yet broader understanding is "activity consisting in agreeing the contents and rhythm of introducing common legal standards (particularly substantive norms) within the framework of EC institutional structure..."[4] This definition lacks precision and is too narrow, since the above-mentioned "agreements" are not a sufficient condition for approximation of comparable cultures (national ones and the culture of the European Union). It is also important whether the administration and the judiciary of a Member State (or a State applying for such a status) are capable of enforcing and observing EU standards.[5]

It also seems erroneous to call the process in question "reception" of the European Community law by Member States.[6] In the encyclopaedic meaning, reception is absorbing foreign examples (customs, different law). In jurisprudence, reception of law

[4] C. M i k: "Problemy dostosowania polskiego systemu prawnego do europejskiego prawa wspólnotowego (w kontekście przyszłego członkostwa Polski w Unii Europejskiej)" [Problems of Adjusting the Polish Legal System to the European Community Law (in the context of Poland's future membership in the European Union)], Przegląd Legislacyjny 1998, no. 1—2, p. 70.

[5] Cf. M. K ę p i ń s k i: "Obowiązek zbliżania ustawodawstwa Polski do przepisów obowiązujących w Unii Europejskiej w świetle Układu Europejskiego" [The Duty of Approximating Poland's Legislation to the Provisions in Force in the European Union in the Light of the Europe Agreement], *Przegląd Legislacyjny* 1998, no. 1-2, p. 13; C. M i k, *op. cit.*, p. 69.

[6] M. J a ś k o w s k a: "Europeizacja prawa administracyjnego" [Europeanisation of Administrative Law], *Państwo i Prawo (PiP)* 1997, no. 11, p. 18.

is considered to be using the achievements of other nations in making the laws of a given country, using the examples of more developed legislations, even ones from very remote times.[7] The greatest reception of law in the history was the reception of Roman law initiated in the 12th and the 13th centuries by the University of Bologna. In the processes of establishing national legal orders, EU directives are not "received" on the ground of domestic legislations in the way institutions of Roman law were used to create modem systems of civil law. The directives set European standards, but do not provide ready examples of legal solutions which could be simply "received." In accordance with these directives, Member States create their own laws instead of absorbing external laws, laws of the Union. It does not mean that Community law as separate supranational law does not exist, but that it is a collection of domestic legislations of the Member States of the Community.[8] The sources of this law include EU regulations, which have the force of law *ipso vigore* and do not require any transposition in order to be binding in the countries of the Community.[9]

The notion of harmonisation of domestic laws with EU directives does not include the so-called "implementation of Community law," which is understood as a process of introducing EU standards into the legal order of a given country. It is not only a task for lawyers, but also for specialists in other disciplines.[10] By no means can this "implementation" be understood as some kind of transplantation, simple incorporation of Community norms into a Member State's domestic legislation. We should separately tackle the problem of direct effectiveness, in the relations between subjects of a Member State and other partners, of such provisions contained in the directives with which the domestic law has not been harmonised. The case law of the Court of Justice does not exclude such a possibility.

Against the background of the above arguments, some misunderstandings may result from using a very general term with many meanings, namely "Europeanisation of law."[11] None of the national laws arc transformed into European law as a result of approximating to common standards set by the Council of the Union. "Europeanisation" of law, in the most general and metaphorical meaning of the word, might mean subordination of national laws to the European system of values.[12]

Anyway, none of the terms discussed here justifies the thesis that national systems of law of the Member States become an integral part of some supranational European law. Each Member State has its own law consistent with the basic assumption of the Union, which is its economic and social coherence (Article 130a of the Treaty of Rome).

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[7] Cf. J. B a r d a c h: "Recepcja w historii państwa i prawa" [Reception in the History of the State and the Law], Czasopismo Prawno-Historyczne 1997, no. 1, vol. XXIX.

[8] Cf. L. B a r: "Kształtowanie ordynacji rynkowych (Rozważania w drodze do Wspólnoty Europejskiej)" [Formation of Market Ordinances (Reflections on the way to the European Community)], PiP 1992, no. 11, p. 36.

[9] Cf. D. L a s o k: "Porządek prawny Wspólnoty i Unii Europejskiej" [Legal order of the European Community and the European Union], PiP 1997, no. 3, p. 25.

[10] Cf. S. B i e r n a t: "Kilka uwag o harmonizacji polskiego prawa z prawem Wspólnoty Europejskiej" [Some Comments about the Harmonisation of Polish Law with EC Law], Przegląd Legislacyjny 1998, no. 1-2, pp. 23-24.

[11] Cf. M. J a ś k o w s k a, op. cit., p. 18 and the literature quoted by the author.

[12] Ibid.

It follows from the above remarks that progressive States of our continent by no means aim at "incapacitating" Member States in the adoption of their own laws. The founders of the European Community were guided, in their search for the idea of uniting laws, by the admonition that Ch. de Montesquieu gave the future generations 250 years ago in "The Spirit of Laws": "Laws should be so specific to each nation that it is a rare occurrence that the laws of one nation might be suitable for another. The political and civil rights of each nation should only be special cases through which human reason manifests itself' *(Des lois devraient être appropriées à chaque nation à point qu 'il soit rare qu 'elles puissent servir à une autre nation. Les droits politiques et civiles de chaque nation ne devraient être que cas particuliers à travers lesquels se manifeste l'esprit humaine).*[13]

The architects of common Europe were, however, more optimistic than the great Montesquieu in their assessment of the possibility of nations of the contemporary world using similar laws.

2. The victory of the idea of law based on common foundations means, in today's world, liberation of juridical minds of contemporary Europe from the influence of the historical school in jurisprudence. F. K. Savigny, the main representative of this doctrine in German jurisprudence of the early 19th century, would probably consider the conception of laws common to the nations of united Europe as deeply incoherent with the assumptions of the theory according to which law, just as language, is an unconscious product of the history of a given nation, of its "spirit."[14] Savigny claimed that laws could not be invented for any nation, even in the form of codes that should be binding in a single State. Lawyers only express the laws which are formed in the national conscience and fulfil this task limiting themselves to formulating legal norms in the same way grammarians determine the rules of a living language.[15] Imposing laws taken from foreign legal orders on a nation is, in the light of the assumptions of historicism, a serious assault on the development of the nation which has its own legal consciousness and culture rooted, above all, in the national customs.

In the times of globalism, historicism is extremely anachronistic. The irrationalism and nationalism accompanying this doctrine cannot be reconciled with today's view on the future of European nations, and in a further perspective even the nations of the whole world. Now Europe reverts to the ideas of rationalism, which started in the Renaissance. This great intellectual trend stressed the active attitude of a human being in shaping his life. The creation of partly common international cultures is nothing but a futuristic vision of united nations.

Of course, each period in the history is causally conditioned by earlier events. The achievements of the past must then be taken into account in the making of national laws. However, there are no dialectical rules in the history that would determine upfront the social course of historical events, as Marxist historicism saw it, propagating the

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[13] Ch. d e M o n t e s q u i e u: L *'Esprit des lois* [The Spirit of Laws], Paris 1748.

[14] F. K. S a v i g n y: *Vom Beruf unserer Zeit zur Gesetzgebung und Rechtswissenschaft* [On the Vocation of our Age for Legislation and Jurisprudence], 1814.

[15] Quoted after J. L a n d e: *Studia z filozofii prawa* [Studies in the Philosophy of Law], Warszawa 1959, p. 349.

philosophy of determinism in social development under the name of historical materialism. "The poverty of historicism" was presented by K. R. Popper in a book under the same title.[16] Referring to the arguments of the author of "The Open Society," we must say that history itself does not create the legal culture of any nation. It is us that have to create it using the experiences of other nations, not waiting until such culture is created by the force of tradition based on beliefs, customs, laws of nature, etc.

III.

1. Community patrimony was included, under the name of *acquis communautaire* in the so-called White Book adopted by the European Commission in 1995 in Cannes. Apart from normative regulations, this document contains also more general legal principles and case law of the European Court of Justice. Adjusting the internal legal system to these requirements is a precondition for Community capacity, that is, for enjoying the status of a Member of the European Union.

Additionally, what is of some importance for the countries of Central and Eastern Europe applying for membership of the European Union is the conclusions of the European Council adopted in Copenhagen in 1993 (so-called "Copenhagen criteria"), which lay down the conditions for extension of the Union eastwards. One of these criteria is the capacity of a given State to adopt *acquis communautaire.*

The conclusions of the European Council from Luxembourg, adopted in 1997, and the 1998 document entitled "Partnership for Membership" are also vital for fulfilling the conditions for adjustment of the countries of Central and Eastern Europe (including Poland) for future membership.

In any case, according to the above documents, the purpose of the integration process is not a simple incorporation of Community norms into a Member State's domestic legal order. "Adjustment" of national law to EU law consists in such transformations of the legal order of the given State which, while preserving its national autonomy, will ensure its compliance with the law of the European Communities from the point of view of aims and directions of development. The guiding principle of the process of harmonisation is "unity in diversity." It means mutual recognition of procedures and freedom of making decisions that are necessary to preserve developmental continuity and internal coherence of national laws.[17]

2. Integration of national structures with the order of the EU is not as easy a process as it may seem. European integration is based on the assumption of compatibility of cultural systems of the States of our continent. However, this assumption must be used with great caution. National cultures even within the same civilisation circle are not comparable in all respects.[18] In comparative studies, false conclusions may be drawn

[16] K. R. P o p p e r: *The Poverty of Historicism*, London 1956.

[17] Cf. P. D a r a n o w s k i [in:] *Komentarz do Układu Europejskiego* [Commentary to the Europe Agreement], Warszawa 1994, p. 198.

from discovering synchronic similarities and differences, that is, ones that coexist at the same time. The studies of "diachronic" diversity, showing differences in the development of individual nations in various time profiles are also quite important. On the basis of such studies one may determine that a given country is ready for entry into the European Communities or, quite the contrary, that it is backward, which is an obstacle in its aspirations to European membership. Thanks to such studies one may also understand the resistance of Eurosceptics against integration, driven by fear of breaking the tradition, losing the continuity and the coherence of national culture and State autonomy.

Spatial criteria are the most deceptive in comparative studies of civilisations. Membership of the same, seemingly uniform, geographical systems, such as Europe, does not equal unity of cultures of the States of the same region, even neighbouring ones. The apt comments by Ch. de Montesquieu on the links between laws and "the nature of climate and nature of soil"[19] are helpful in explaining the difficulties on the way to integration of Polish agriculture with the highly-developed agriculture of leading West-em-European States.

Harmonisation of internal laws with EU directives seems relatively straightforward. It is mainly a task for lawyers. Polish lawyers, so far, have not succeeded in completing this task.[20]

There is a more complex task of implementing Community norms, directives and case law on a broader scale, namely achieving a satisfactory level of observance and practical application of Community *acquis.*

However, the most difficult problem is preparing the general public for integration with Europe. It is not just about showing the citizens the benefits of membership of their State in the Union. A big change must be brought about in the thinking and behaviour of the whole society, many national habits must be overcome, xenophobia and intolerance must be eradicated from people's minds. To achieve this objective, we need many years of work on the formation of a new intellectual culture, more universal than the traditional one, wide open to the world. In this sense, the task of adjusting the mentality of citizens to the European dimensions is an enormous one and requires many measures, including studies of the economy and culture of States of the European Union, teaching European law in schools of higher education, training for public administration workers, linguistic preparation for moving freely within the European structures, etc.

IV.

The problem of determining the individual shape of Polish law after Poland's accession to European Union has not been, so far, dealt with in more detail in our litera-

[18] Cf. P. B a g b y: *Culture and History. Prolegomena to the Comparative Study of Civilizations,* London 1958.

[19] Ch. d c M o n t e s q u i e u: *L'Exprit des lois, op. cit.,* vol. 1, chapters XIV and XVIII.

[20] Cf. P. C z e c h o w s ki: "Stan i trudności w realizacji dostosowania prawa polskiego do prawa Wspólnot Europejskich" [The Status and Difficulties in Adjusting Polish Law to the Law of the European Communities], *Przegląd Legislacyjny* 1998, no. 1-2, p. 44 and following.

turę. Until now the main focus has been on finding the ways to achieving the objective we long for, while little attention has been devoted to the issue of autonomy that our law should preserve after adjusting the legal order to EU requirements. The aspiration to quick integration under the proud banner "Poland in Europe" does not really encourage critical reflection on the issue whether it is feasible for our country to adopt certain patterns within a short timeframe.

In such a brief paper devoted to such a broad range of problems it is naturally impossible to elaborate on this subject. It is worthwhile to think at least about the scope of necessary transformations of Polish law against the background of international sources already binding upon Poland.

The basic instrument that imposes the duty of approximating Polish law to Community law upon Poland is the Europe (Association) Agreement concluded in Brussels in 1991 (which entered into force on 1 February 1994).

The aims of the Agreement were specified in Article 1 thereof (to provide appropriate framework for political dialogue, to promote the expansion of trade and the harmonious economic relations between the parties, to provide a basis for the Community's financial and technical assistance to Poland, to provide an appropriate framework for Poland's gradual integration into the Community, to promote co-operation in cultural matters).

The association was established for a transitional period of a maximum duration of ten years, divided into two successive stages, each in principle lasting five years (Article 6). It seems a sufficiently long period, but it is not sufficient taking into account the possibilities of our society (see part III and end of this paper).

The source of Poland's obligation to "approximate" (harmonise) the provisions of law are the provisions of Articles 68 to 70 in Chapter III of the Agreement. The approximation includes, *inter alia,* intellectual property, protection of life and health, protection of workers at the workplace, consumer protection and the environment.

Article 68 envisages that Poland will use its "best endeavours" to ensure that its future legislation is compatible with Community legislation. This provision guarantees the Polish legislator freedom in setting the priorities and speed of approximating Polish legislation to that of the Communities. The way this process is organised and the time it will take to bring our legislation to EU standards are internal Polish matters.

The harmonisation in question should ensure, first of all, rationalisation of our regulations in compliance with European patterns. Culturally, Poland seems well adjusted to take up this challenge, because our country belongs to the circle of Mediterranean civilisation and the elements of collectivism are basically alien to our way of thinking. Individualism and rationalism are the features of the Western-European civilisation that we should assimilate in the process of integration with the European communities.

Poland must, above all, include in its legislation the concrete aims set by numerous EU directives, which are the basic instrument of integration in its broad sense. The European Commission has the power to bring an action to the Court of Justice against a Member State that did not incorporate the provisions of a directive into its legislation. Not being a member of the Union yet, Poland is not under a formal duty to adopt any

directives, but as part of its efforts to become a member of the European Community it should complete the approximation of its legislation to the provisions contained in all EU directives.

To facilitate the tasks set in Article 68 of the Association Agreement, Poland is granted assistance in accordance with Article 70 thereof. It is the so-called "technical assistance," which includes exchange of experts, provision of information, organisation of seminars, training activities and aid for the translation of Community documents.

As regards the obligation determined in Article 70 of the Association Agreement, Poland received financial assistance within the framework of PHARE programme, which was implemented and whose fruits included over 160 drafts of legal instruments and over a dozen thousand pages of expert opinions in the field of law. The above programme was supported by SIERRA programme, which was used, *inter alia*, to translate, publish and disseminate Community legal instruments.[21]

Our very weak command of foreign languages is a stumbling block on Poland's road to the European Union. Article 76, subparagraph 5 of the Association Agreement recognises as necessary "to promote the use of Community standards and terminology." If our translators are too eager to accept this encouragement, it may prove unfortunate for the purity of our language. The Polish language is already full of various linguistic horrors imitating EU terminology, especially the English words (such as *aproksymacja, kontroling, skrining, transparencja,* etc.).

V.

Poland's integration with the European Communities is, as it follows from our reflections, a difficult process, which requires deep systemic changes that must occur within the framework of the transformation of the State system, which has been going on for ten years already and has not been completed yet. Without continuing the transformation Poland has no chance for a real integration. There can be no integration without transformation. This statement reflects the magnitude of the task that all of us are facing, not only those who "govern the Republic and hold justice in their hands."

Membership in its nominal sense means the fulfilment of formal requirements by including *acquis communautaire* in our laws. But integration should be real in the sense of us being competitive in relation to other countries of the Community, not only on single European markets, but also in the field of science, education and culture.

The European Union must already be a structure of reference, the point of gravity in the current development of Poland.[22] The most difficult thing is to understand not

[21] Detailed information about the utilisation of this programme can be found in the article by P. C z e c h o w s k i quoted in the previous footnote.

[22] M. B e 1 k a, J. H a u s n e r, L. J. J a s i ń s k i, M. M a r o d y, M. Z i r k - S a d o w s k i: *Polska transformacja* w *perspektywie integracji europejskiej (streszczenie)* [Polish Transformation in the Perspective of European Integration (an outline)], Friedrich Ebert Stiftung, Warszawa 1994.

only the benefits of Poland's accession to the Union, but also getting to know the conditions that must be fulfilled in order to achieve this aim. Can the consciousness of our nation handle the problem within a period that is proudly considered to be sufficient for Poland's integration with Europe? Is transforming the traditional mentality not a task for many generations?