ETHICS IN THE EUROPEAN UNION

SAFWAN NASER[1]
Fakulta mezinárodních vztahů, Vysoká škola ekonomická v Praze

Abstrakt

Proces harmonizace v rámci Evropské unie je bezpochyby doprovázen mnoho komplexnostmi. Navzdory tomu, že proces integrace je složitý a musí nevyhnutelně zahrnovat sladění celé škály zákonů členských států a ačkoliv některé oblasti práva vyžadují úzkostlivě podrobné definice, zdá se, že etika hraje mnohem méně významnou roli v celém procesu než by bylo nutno.

Klíčová slova

Etika, Evropská unie, právo, harmonizace, ekonomie

Abstract

There are undoubtedly many complexities which accompany the process of harmonization in terms of the European Union. Although the process of integration is complicated and must inevitably include a reconciliation of a range of laws of member states, and although some areas of law require meticulously detailed definitions, it seems that ethics play a much less significant role in the whole process than necessary.

Key words

Ethics, European Union, law, harmonization, economics.

Introduction

There have indeed been many prolific thinkers throughout the history of mankind who have focused on the significance of ethics from various perspectives. The aim of this paper is to consider the extent to which ethics are taken into account in the process of legislation in the European Union.

[1] The Study was prepared in the framework of the Research Program No. MSM 6138439909 "Governance v kontextu globalizované ekonomiky a společnosti"

While it is irrevocably true that at least in terms of its historical origin, law as such stems from ethical concepts, it is highly questionable whether modern legislation has remained faithful to the ethical heritage. It is indisputable that the practical applicability of ethics is hampered by the ambiguity of the concept and the scope of definition that it is susceptible to. The difficulties related to defining ethics as a concept are still extant in spite of the numerous previous attempts to explain the premise of the term. It is sufficient for the purpose of argumentation in this paper to only very briefly mention the intellectual contribution of John Locke and Immanuel Kant pertaining to ethics as a philosophical point of departure.

To put it quite simply, John Locke asserted that the mind is born a tabula rasa, therefore repudiating the concept of innate ideas. Consequently, whatever definition of ethics we arrive at, it will only be a construct of the human mind. It is therefore rather difficult to define ethics in terms of conventional terms such as morality, honesty, integrity etc., and yet it is simultaneously and paradoxically intuitively obvious that precisely these terms are most apt, albeit they require definition themselves. Conversely, Immanuel Kant attempted to synthesize rationalism and empiricism and in his *Critique of Practical Reason* (1788) and put forward a system of ethics based on the notion of what he termed "categorical imperative". Although the principle of categorical imperative is very helpful, it does not truly provide a definition of ethics. Nevertheless, it is a concept which is heavily referred to and indeed proves very useful even if looked at solely from a legal perspective. Whether we wish to refer to it as Kant's categorical imperative or basic principles of Christianity, few would disagree that the notion of reciprocity is crucial for any viable definition of ethics. Nevertheless, it is clear that despite having used generally known philosophical concepts only in a very simplified manner, the definition of ethics is still very challenging and indeed perhaps unattainable.

The entire matter becomes even more complex when cultural differences are factored into the definition of ethics. It is obviously possible to identify perceptible differences in the approach to morality, honesty and integrity when we compare such different approaches as that of Japan and the Czech Republic for example. However, although it is relatively fairly straightforward to identify the differences between to countries in terms of the approach to ethics, it is difficult to define the span and nature of different cultures per se. Furthermore, even if we were to content ourselves with a simplified approach and ignore the intricate aspects of the historical development of individual countries and presume that there exists such a thing as "European culture", it would be merely a geographical approach and even then it would be an intrinsically flawed premise. Consider the consequences if Turkey were to

become a member state of the European Union. Would it still be viable to speak of a "European culture"? Consequently, it would be desirable to define ethics independently of cultural differences, which obviously greatly complicates the whole process. Nevertheless, for the purpose of this paper, it is not desirable to go into greater depth regarding the complexity of defining ethics. It is sufficient at this point to emphasize the existence of the problem of defining ethics in general terms as a concept and recourse to the simplified interpretation of Kant's categorical imperative as the premise for argumentation in this paper.

Having established the working definition of ethics and having addressed the problems related to the ambiguity of the term, let us now look into the links between ethics and law from the perspective of the European Union.

The Intricacies of Ethics

Before we elaborate on the specificities of the connection between laws and ethics in the framework of the European Union, it is useful to at least briefly consider the significance of economics in this matter, even if it were only for the purpose of contrast. Although it might not appear so at first glance, the origins of economics are not entirely free of considerations on the relevance of ethics. In fact, Adam Smith himself believed that economics and ethics were inseparable, although his terminology was perhaps a little different, the concepts remain unaltered. The mere fact that his famous work *An Inquiry into the Nature and Causes of the Wealth of Nations* was preceded by his unfortunately less know *The Theory of Moral Sentiments* shows that Smith was not oblivious to the concept of ethics and certainly did not consider economics independent of it. It is therefore clear that the explicit connection between ethics and economics was made at least as early as the latter half of the eighteenth century, but this by no means represents the most distant historical connection that can be traced. Nonetheless, the aim of this brief diversion was not to determine the roots of this connection but rather to point out what alteration this connection has undergone, because the general preoccupation of economics nowadays is not linked so closely to ethics as could be expected. One would certainly have to try very hard to find a mention of ethics in the vast majority of economic axioms. Ethics are at best only mentioned as something that must be taken into consideration, but one would hardly find any link to ethics in maximizing utility under conditions of scarcity and under the constraints of a specific budget line…

However, although the link between ethics and economics might not be obvious at all times, it is safe to assert that the connection is not a case of wishful thinking. The need for relentless

precision and the overwhelming role of numbers in economics perhaps only overshadow the link between ethics and economics, yet at least on a theoretical level, the link still exists.
It is important to bear this in mind because it is quite difficult to separate economics and law, if not on a theoretical level, then at least in terms of the recent history of mankind. Many laws are being devised with their economic purpose in mind (this is most obvious in the case of laws related to issues such as taxes and other financial matters). With respect to the aforementioned connection between ethics and economics, it can be said, with a certain degree of simplification obviously, that even though law and ethics are not entirely independent of economics, the aspect of ethics remains relevant and is not overridden by the role of economics.

Law and ethics on the other hand enjoy an intrinsically much closer connection. This connection between law and ethics is undoubtedly more apparent than that between economics and ethics, and yet even this relationship is not absolute and despite the inherent link between law and ethics, the two are certainly not interchangeable. While there is a tacit presupposition in many societies that illegal actions are usually unethical, this certainly does not imply that all unethical actions are necessarily illegal. Indeed, it is not out of the ordinary to be legally unassailable but ethically at fault and it is not infrequent that the capabilities of a lawyer are assessed in terms of his ability to find a way around legal constraints in order to achieve a particular end. It would be interesting to consider why it is not uncommon for precisely those lawyers who are most adept at finding a way around legal constraints to be financially rewarded the most. However, we will not delve deeper into this economic intermission as the complicated nature of the relationship between law, ethics and economics is already patent at this point. All of these aspects of the relationship between law and ethics, economics and ethics and the influence of economics on the connection between law and ethics must be taken into account when we assess the significance of ethics in terms of the European Union.

In spite of the fact that the connection between ethics and law is indisputable, it would seem that the importance of ethics in the legislative process is diminishing, if indeed ethics were ever a major and conscious concern beyond the level of the aforementioned intrinsic link which undoubtedly exists between law and ethics. While it is true that ethics as an abstract concept is not susceptible to a clear-cut and unequivocal definition free of terms which are

themselves beset by ambiguities, this certainly does not justify the subordinate position of ethics in the legislation process within the European Union.

Even if we were to consider laws as a manifestation of traditions and ethical concepts which have been evolving since the existence of mankind, it is simply not possible to rely on this theoretically perpetual link and take no notice of the potential of ethics as a unifying element in the process of legislation in the European Union. It is only a matter of time until the sheer bulk of laws intertwining the relationships between the member states of the European Union becomes perplexing beyond repair. There are obviously many areas of legislation that can be taken into consideration and not all of them are in the same condition, but it is the general approach which must be considered alarming. The problem consists mainly in the unnecessary and rather counterproductive depth and detail of legislation, especially in some areas of law. Opinions will certainly differ on the specific areas, but it is beyond any doubt that excessive regulation is not a desirable trend.

This situation is made worse by the nature of the legislative process itself. One would have to look very leniently at the laws of individual member states of the European Union to arrive at the conclusion that they are entirely free of inaccuracies. Whether we take into consideration the Anglo-Saxon tradition which in its essence relies heavily on judges, or the tradition akin to the Napoleonic Code which is based at large on the legislative prerogative of a political authority, we inexorably reach the conclusion that laws devised in individual member states of the European Union cannot possibly aspire after perfection and will inevitably be flawed, regardless of the particular law at hand. The differences between statutory law and common law (unwritten law) are not of major significance because the European Union has evidently decided not to rely on common law and work with statutory law instead, yet it is interesting to realize that regarding only the origin of a law from the perspective of ethics, the two traditions do not differ to a major extent, as laws are propounded by an authority of some type which certainly cannot be deemed an infallible source. Since the laws of individual member states of the European Union unquestionably display a certain degree of imperfection, it is rather improbable that the laws passed in the framework of the legislative process in the European Union will be free of imperfections.

It is precisely for this reason, if not for any other, that ethics merit a more decisive function in the legislative process, at least with respect to the European Union. Even if one were to pay no attention to the moral aspect and look at this issue purely form a point of view of practicality and reasonableness, the inevitable conclusion would be that ethics are an

indispensable factor if the European Union is to function effectively. It is clear that even a simple summation of the laws of individual member states of the European Union would be a complicated process and it would certainly not be a wise approach. While there undoubtedly exist many similarities connecting laws passed in individual member states of the European Union prior to the laws passed in the framework of the legislative process of the European Union, it would be difficult to achieve a summation which would not discriminate any of the member states, if any such summation would indeed be at all possible and desirable. It is therefore quite evident, even on an intuitive level, that the reconciling of the laws of individual member states in the framework of integration within the European Union requires a broader perspective.

Any process of integration of such magnitude is inevitably susceptible to imperfection, especially when there is a certain level of intrinsic deficiency in all the individual elements which are a part of the integration. It is therefore extremely important to constantly take the origins of the creation of the European Union into consideration. One of the debatable and less relevant motivations behind the creation of what today is known as the European Union was the desire to prevent another war in Europe reaching or even surpassing the scale of the Second World War. Although this is also an interesting issue from an ethical point of view, let us concentrate on the more pertinent reason – increasing market accessibility. Although one should not diminish the importance of cultural and political cooperation in terms of the European Union (especially in view of the consequences of a possible full ratification of the Treaty of Lisbon), it is more than obvious that the endeavor was in essence driven by economic factors. If we take this notion even further, we arrive at the conclusion that the motivation behind the European Union of today was primordially one of enabling a greater degree of freedom, of facilitating economic cooperation and overcoming the tediousness of having to reconcile individual laws of the parties wishing to engage in business together. However, it would seem that somewhere along the path of providing greater freedom in general and simplifying economic cooperation in particular, the process took a wrong turn and backfired in the sense that what is happening now is actually getting in the way of the original intention of increasing market efficacy.

Incidentally, this is precisely why to ensure a sound relationship between law and ethics, it is absolutely essential to constantly have in mind the economic basis of the origin of the European Union. It would appear that this has been forgotten to some extent, for the process of reconciling the laws of individual member states of the European Union has been wavering between the necessity to endow each member state with a certain level of autonomy while

simultaneously ensuring that individual member states do not digress disproportionately from the will of the majority in the framework of the European Union. This process of legal harmonization has become so engulfed by resolving the above-mentioned predicament of sovereignty that the original intention of providing greater freedom and facilitating economic cooperation has been almost forgotten.

Although the aim of the process of harmonization is to guarantee a certain level of equality in terms of the sound functioning of the market and just competition, it would appear that the concept of competition was misunderstood. To put it quite simply, allowing market access freely and without selective impediments is an entirely satisfactory precondition which ensures that all those involved have equal opportunities. However, the process of harmonization has unfortunately resulted in excessive regulation which resulted in an overwhelming of the market with legal constraints which in turn actually discourages competition. This is a direct economic consequence of the insufficient role of ethics in the process of legislation.

Although it might not seem so at first, it is not so important whether directives or regulations are used as a means of granting ethics a more decisive role in the legislative process. The obvious advantage of directives is that they usually leave a certain amount of leeway as to the particular rules to be adopted as long as the desired result is achieved. Regulations on the other hand require absolutely flawless wording because they are self-executing and cannot be altered by implementing measures, which significantly decreases the danger of misinterpretation. However, the legal basis for the enactment of directives and regulations is article 249 of the Treaty establishing the European Community, which means that they only apply within the European Community pillar of the European Union. Furthermore, in view of the possibility that the Treaty of Lisbon will be fully ratified, there might be a problem with the cancellation of the pillar system. This only supports the argument that ethics as an underlying principle in legal harmonization is more valuable than the approach of meticulously defining every thinkable aspect of a particular legal area. Take for instance the recent problems related to corporate governance in banking[2] and the United States housing bubble connected to foreclosures which underpinned the subprime mortgage crisis. The automatic reaction in both the United States and Europe was to emphasize the necessity to

[2] Société Générale in Europe most recently.

further tighten legal regulation of the market to ensure that similar problems do not repeat themselves. It is obvious that in such specific matters a sufficient degree of precision is unavoidable and indeed advisable. However, it is clear that all complications in such convoluted matters cannot be fully accounted for unless a more general approach is also applied. The ultimate aim should be to find the right balance between ethical prerequisites and detailed descriptions of how to achieve them. It is indeed much easier to define such aspects of business as marketing and advertisement in general terms, but ethics should be considered more closely even in such intricate matters as financial services. “Hyping” stocks is a good example of the synthesis of ethics and law. Not only is “hyping” unethical, but it is also illegal. The general ethical principle behind this is quite simply that “hyping” constitutes unfair behavior, but it requires a fairly detailed definition of what actually constitutes this unfair behavior.

Conclusion

The main aim of this paper was to point out the unsatisfactory role of ethics in the framework of the European Union. It is obvious that some areas of law require meticulous definition, but even in such cases, it is necessary to constantly have in mind that the ultimate aim of a law is to ensure reciprocal ethical behavior. The problem of the European Union seems to be that this concept has been forgotten in the process of excessively detailed legislation and redundant harmonization. The premise of ensuring equal opportunities and conditions on the market for all members of the European Union is undoubtedly correct. However, it is clear that the aim of law cannot be to fully describe and regulate every aspect of human interaction, but rather ensure a certain minimum of justice – to ensure a certain level of ethical standards if you will. To reconcile this notion across several sovereign states, harmonization is certainly a plausible approach. However, it is important to opt for the appropriate method of harmonization while taking into consideration the scale of integration and the underlying aim of a market free of unnecessary constraints.

Each market and the laws governing it would have to be analyzed in great detail in order to pinpoint the imperfections resulting from the insufficient role of ethics, but the ambition of this paper was simply to draw attention to the existence of the problem of the inadequate role of ethics in the legislative process of the European Union and the consequential excessive restrictions and counterproductive regulations.

Bibliography:

[1] Ondřej, J., Plchová, B., Abrhám, J., Pulgret, M.: *Ekonomické a právní aspekty podnikání v Evropské unii*, Praha: C.h. Beck, 2007, s. 366, 978-80-7179-558-2

[2] Benton, E. C. et al: *Corporate Governance in Banking (A Global Perspective)*, Massachusetts: Edward Elgar Publishing, 2007, s. 297, 978 1 84542 940 9

[3] Kant, I.: *Critique of Practical Reason,* Indianapolis: Hackett Publishing, 2002, s. 284, 0872206173

Kontaktní údaj na autora – email:

safwan.naser@cnb.cz