

RELATIONSHIP OF EUROPEAN IUS COMMUNE AND NATIONAL LEGAL SYSTEMS IN FORESEEABLE FUTURE

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Abstrakt

Príspevok sa venuje popisu a definícií termínu *ius commune* ako ho poznáme v histórii a v súčasnosti. Popisuje v akom rozsahu môžeme v súčasnosti hovoriť o jednotnom právnom systéme, a ktorá časť práva sa mu najviac približuje. Vzhľadom existujúci trend je v závere vyjadrený predpoklad, že teraz sa vývoj nezastaví, ale sa bude ďalej rozvíjať.

Kľúčové slová

ius commune, rímske právo, kánonické právo, miestne zvyky, medzinárodné právo, Európsky právny systém, jednotný právny systém, pluralizmus, národný, nadnárodná úroveň

Abstract

Contribution deals with description and defines the term „*ius commune*“ how we know it in history and nowadays. In the contribution the idea is developed to which extent we can speak about unified legal system, and which part of law is closest to this description. Considering the trend in conclusion the assumption is drawn that the development will not stop and how it will continue

Key words

ius commune, roman law, canon law, local customs, international law, European legal system, unified legal system, pluralism, national, supranational level

1. Introduction

Before discussing this topic, I would like to set up a kind of framework. To understand the future man need first to know the past. So it is here. Before telling how I expect the future

development of, I would like to tell you in a shortcut about the sources of my understanding on the *ius commune*.

Firstly we have to go back to the history, to see what *ius commune* is and how did it develop through the past until these days.

In the second part I would like to show you on the example of my country the recent situation and relationship between the legal system of Slovak Republic and the *ius commune* as we know it today.

And finally on ground stones I am going to think about the possible and at the same time inevitable development of this relationship in the foreseeable future.

2. „*Ius commune*“ in History

Maybe when talking about *Ius Commune* we can start with the Ancient Roman Empire. Which actually developed a large „common“ culture, religion and also „The legal system of centuries“. (in fact there is not very much left from the original Roman law) In regards to the process of establishing a common culture and legal system in the Roman Empire we can speak about combining the cultural aspects of all nations and peoples of the Roman Empire conquered by the Roman legions. This point of view might help us in discussing the future of *ius commune*.

It is true that within the Roman legal system itself we can differentiate between *ius civile* which was applied to the citizens of the city Rome, so to speak to the elite of the Roman Empire, and then it was the *ius gentium*, which dealt with causes of the non Roman nations which is now described as international law.

This was the part of Roman law which influenced the most of the population of the Roman Empire and may be it is the part which really could be defined as *ius commune* at those times. But in the theory of law *ius commune* is now often understood as the communitarian law of European Union.

So than might the question arise if the international law can be also described as *ius commune* or is it the European law which is the closest „successor“ of *ius commune*. But for the purpose of European legal history and for the purpose of this paper let us just presume that the *ius commune* we are talking about is or are the legal systems of Europe and common legal principles.

After the collapse of The Roman Empire, the development of legal culture goes further on. In different parts of Europe different process due to many circumstances went on. Those circumstances and historical background can play also an important role for the possible development of *ius commune* in foreseeable future.

As we know not the easiest but the best supposition for one consistent legal system was established in England. Because of the Norman invasion in England there has been set up only one legal system for the whole country. Of course that at the end of eleventh century there were still lots of local customs and customary law, but those disappeared and in the sixteenth century we can already talk about the *ius commune* or Common law which was the kings' law all over England. This was caused by establishing Kings Courts which started to make the law in stead using ancient habits. So by knowing this we can expect the influence of common law to the future *ius commune*.

A different situation has been in France. The King of France was one of the princes to whom the Title „King of France“ was given. But the King was able to make rules only for his own territory for long time. Only in the sixteenth century the unity of power was achieved by the

King for the whole territory of France. At that time the King ordered to put the oral local customs in writing and starting to compare it. In comparing local customs they were trying to find common principles. We can assume that may be this was the beginning of the comparative law, which is and will also in the future be a very part of *ius commune*. But as we already know from the history that not the French kings will succeed in unifying law. France had to wait for the great little general who gave her in 1804 The Code Civil.

Even more difficult it was the situation of *ius commune* in Germany. The empire was split in more than three hundred sovereign states. And Each state had own customs and also own legal system. Until nineteenth century the empire was not united. The emperor, who was one of princes' electors, had no real power, except his own territory.

Not only in Germany, but mostly there, were local customs surrounded by Roman law. In matters concerning contemporary life Universities were asked to give legal opinions. Those were based on Roman law. In this way the Roman law came to be used in action and it became the *gemeines Recht* - *common law*.

The Roman law at that time was very much influenced by Canon law. Usually the Canon law and Roman law were taught at universities. And because of the power of the Roman Catholic Church in some way we could say that church was developing both legal systems. Or at least influencing Roman law in a very strong sense. The Canon law for its own use and the Roman law for the use of non ecclesiastical matters.

From these different angels of view we may summarize that *ius commune* is the law which is the unified or commonly used law in one country, mostly formed and thought at universities, the written law. On the other hand in every place there has been of course also the particular law, customs or statutes, so called the *ius proprio* - *customary law*.

All over the history in every country there have been in some extent two systems of law. Many times there have been numerous conflicts between those two systems. And at each time there has been an ambition to solve these conflicts by using power, divers rules or agreements.

3. „*Ius commune*“ in Presence

As long as Romano-canonical law was applied within the ecclesiastic environment there was a certain degree of uniformity at a European level, albeit with some local variation.¹ In this context, Romano-canonical law was a genuine *Ius Commune* in the sense that it constituted a relatively uniform system of rules for all of western world.

Nowadays this role of *ius commune* is overtaken by International law and on the European scale by the European-communitarian law. Within the context of the European Union in the area of substantive law, where it may very well occur that foreign law would be applied to a given legal relationship.

Here is the global definition of "community law:" For those who don't take the link, Community acquis is: The Community acquis or Community patrimony is the body of common rights and obligations which bind all the Member States together within the European Union. It is constantly evolving and comprises not only principles and political objectives of the treaties; it is also Community legislation and the case law of the Court of Justice.

By the time a greater role are playing the declarations and resolutions adopted by the Union; measures relating to the common foreign and security policy, measures relating to justice and home affairs. This definition includes international agreements concluded by the Community and those concluded by the Member States between themselves in the field of the Union's

¹ As quoted in: C.H. van Rhee, 'Civil Procedure: A European *Ius Commune*?', *European Review of Private Law*, 2000, p. 589-611.

activities. When further countries join the European Union, full compliance with the Community *acquis* is one of the requisites for accession.²

3.1. Constitution of Slovak Republic on international law

Each state has made different changes in his own legal system in order to keep it closer to the European *ius commune*. The real situation differs from state to state. In present conditions of international law it is up to each sovereign state to decide on the relationship between the international law and the national one. Thus recently states are attached more to the monist theory. I would like to develop this idea on the example of relationship between the legal system of my country and European norms.

After separation of former Czechoslovakia on 1.1. 1993, when Slovak Republic became an autonomous subject of international law, it became also the successor of bilateral and multilateral treaties and through this step Slovak Republic took over her responsibility in international commitments.³ At the time before Slovak republic was a member of European Union the communitarian was regarded as part of international law.

Let us have a look on the Article 1 (2) of the Slovak Constitution:

“Slovak republic accepts and respects general rules of international law, international treaties by which is it is bound, and its other international commitments.”

The Article 1(2) is very important, because it is expressing the opinion that a legal state is respecting its commitments which are result of international agreements. This article is

² Communitarian Law, by Niki Raapana, updated 12/10/04, <http://nord.twu.net/acl/commlaw.html>

³ Jan Klučka, Miesto a postavenie medzinárodných zmlúv v právnom poriadku Slovenskej republiky.

saying that Slovak republic is accepting and respecting international commitments regardless of their character or creation using norms or decisions of international organizations.

In spite of these remarks the constitution is not solving the position of international norms in the way of defining them as a part of the national legal system. In this point it is different to other constitution of some countries of central and eastern Europe⁴. Through the recent amendment of Slovak Constitution by the constitutional law 90/2001 Z.z. Slovak Republic on the highest legal level manifested its approach to international law and inclined to the monist theory of the relationship between the national and international law. This is clearly shown in the article 7 (5):

“International treaties on human rights basic freedoms, international treaties that need not to be executed by law, and international treaties directly establishing rights and duties of citizens or legal entities, which have been declared in a form foreseen by law, have priority over national laws.”

This disposition enables directly exercise contractual commitments of Slovak Republic in its national legal system by using norms of international law.

The relationship to European law after entering European union changed seriously. According to the part of the Article 7 the item (2)

“Slovak Republic on the base of legitimate treaty accepted by the National parliament can transmit its rights to European Union. Also legal acts of European Union have precedence over national acts of Slovak republic.”

Priority application can although not be seen as autonomous decision based on the national legal system. It is actually respecting the European legal system or as we can also say European *ius commune*. This is also one way of pulling the national legal system into European law.⁵

⁴ Ibid.

⁵ Jiri Malenovsky, *Mezinárodní právo veřejné*, Praha, 1999

After looking at the constitution of Slovak Republic we can close up with some remarks. The constitution recognizes the international treaties as the main source of the international law and assures their direct application. With the article 7(2) the main premise is set in integrating the European law into the legal system of Slovak Republic. The constitution inclines to the monist theory but does not declare this principle in the text itself.

European norms in the legal system of Slovak Republic

Securing international commitments in the legal system is also a step closer to a common law. Especially when talking about European treaties and legislation.

Considering that the Constitution of Slovak Republic does not have “*expressis verbis*” specified that international treaties are part of the national law their position is clearly stated in the act “1/1993 Z.z. about the Collection of laws of Slovak Republic”. This statute is a complex rule about proclaiming laws. International treaties stated in the article 7(5) are holding the position under the constitution but above all other legal acts and they are printed in full text version also in the “Collection of laws”. This act is providing the form and process of executing the treaties.

As we have stated that all act of European Union and its institutions have a prevailing position over the national norms, we cannot forget the most important fact that the statute 1/1993 Z.z. is also assuring the execution of them.

Approximation is resulting from the European association treaty. European law left the manner of accepting European act on the countries self. Duty of the entering countries is to accept all arrangements of general and special character to fulfill commitments of the accession treaty.

Before the amendment 90/2001 Z.z. of Constitution was passed and effective most of the required documents were accepted by lower legislative acts. May be it seemed to be more effective but it could be doubted if the way of acceptance was appropriate enough in dealing with act of international importance. But after the change of constitution in is impossible for national central institutions to implement acts of European Union “*ex industria privata*”. Acknowledging the importance to the acts of European Union in the Constitution by giving them priority before national legal norms is a clear step towards creating common European *Ius commune*.

4. Foreseeable future of the *Ius commune*

On my opinion national law is coming closer to *Ius commune* by integrating international and European rules into national legal systems. Those are the rules which can be described as the rules of *Ius commune*, because nowadays they are creating a common legal system.

As Kelsen is saying the state is the model for the future development of the international legal order. That does not necessarily entail, as is usually understood and as some of Kelsen's writings may have given to believe,⁶ that we are moving towards the constitution of a ‘*world state*’. It means only that the international legal order tends to become centralized. It is not inevitable, however, that it should become centralized to the same extent as the nation-states.

Throughout the past we have seen how law in different times and places has been united and infied. At the beginning regional customs came into the law of the whole country. It happened as they have been used and brought to real life by courts also in different regions of that country. And later on became integrated to the national legal system.

⁶ Kelsen, *General Theory*, *supra* note 22, at 308. This whole question of centralization and decentralization of orders is covered at 303-327.

Nowadays we can see the integration of international treaties and European laws, or directives into different national systems. Especially this can be seen on the Law of European Union. The process is already so far, that there are already numerous European or international organizations with own decision-making institutions. The member states not only acknowledge these decisions, but are bound by them.

But still according to some authors say that there cannot be an European *ius commune* because there are no legal means of supervision of Communitarian legal acts by European Union and the the application rests in the hand of the member states, there is until now no separate system of courts in the member states. The only court is the Court of Justice in Luxembourg.⁷ According to the Lisbon treaty on the other hand the competence of the Court will considerably increase.

On my opinion the Development of an European system of law – an European *Ius commune* cannot be stopped any more. Regarding this obvious signals of the past and present development we can say that there is not only a strong tradition of one unified legal system. Now the international treaties, acts of European Union are integrated into national legal systems. But it is may be predictable at this time that the process will not stop at this point but will be developed further. The possible development can turn into other direction, and it might become the opposite already in the foreseeable future. It means that national systems themselves can become a part or branches of a common law.

If you take a closer look at specially the directives of European Union⁸, you will see that this process already started. Anywhere you can see the harmonization. And not only directives are harmonizing the law of European Union. Whether there occurs a conflict there is also the European Court of Justice that decides how this or that concrete case has to be solved. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the

⁷ As quoted in Tokar Adrian, Something Happened. Sovereignty and European Integration. In Extraordinary times, IWM Junior Visiting Fellows Conferences, Vol.11:Vienna 2001

⁸ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) *Official Journal L 294*, 10/11/2001 P. 0001 - 0021

Constitution the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.⁹

In few year using all the legal and political means more and more , step by step national legal systems will become closer and closer to each other and to European law itself.

In my conclusion I will use and support the idea of Peter Fitzpatrick in *New Europe and Old Stories*. Where he wrote: *Mythology and Legality in the European Union* explores the question of how the myth of European identity sustains the EU as an exemplary community and nationalism as the pivotal point of the European legal order. The configuration of the law, the myth and nation serves to construct Europe and its laws. Europe “joins” the nation-state to avoid particularization (particularistic interests) and to become a model of universalism. In this project, its (Europe’s) identity is formed as the negative formation – against excluded other states. This exclusion is shown in the establishment of the EU’s external borders and in the introducing of European citizenship for nationals of member-states only.

The rights of EU nationals create a distinct and privileged identity over and against non-nationals. But the similarities between the EU and the nation create a tension, since both occupy the same domain, whether in legal terms or in terms of the identification and loyalties of their citizens. Against the general belief, Fitzpatrick concludes that the tensions are more between competing nationalisms than between national and supranational levels. And here the law comes into play.

The Europeanness of the law subsisting at the EU and national levels, provides a singular place and universal orientation which can accommodate the duplicity and plural location of nationalism in the EU. Fitzpatrick sees all of this as a modernist project. He accepts the idea that legal pluralism infuses the EU legal order, and that it (legal pluralism) cannot alter the

⁹ **The Treaty Establishing a Constitution for Europe (CIG 87/2/04)**

modernist orientation of EU law within which pluralism is a way leading to unification¹⁰ hence to the only one legal system, the European Ius commune.

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¹⁰ Peter Fitzpatrick and James Henry Bergeron Aldershot, Brookfield USA, Singapore, Sydney: Ashgate Dartmouth, 1999