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THE LEGAL SCHENGEN AND THE UNITY OF THE EUROPEAN COMMUNITY

Liviu-Bogdan Ciucă (a)*
*Corresponding author

(a) Professor PhD, Faculty of Juridical, Social and Political Sciences, "Dunărea de Jos" University of Galați, Galati, Romania

Abstract

The attempt to achieve a European Civil Code, always doomed to fail or become a suspended step, challenges us to raise a number of questions that aims the value of national legal traditions from the perspective of the need for Community unity. The recent European event, called generic, Brexit is another example that underlines the vulnerability of the European project in terms of intra community connection bridges and once again confirms the rule that sharp differences of cultural, economic and especially of legal nature between EU states are unmanageable. In our analysis, based on the example of hypothetical European Civil Code, unrealized chiefly because of disguised pride under the motivation of preservation of the national legal culture, we try to design the possibility of managing national legislative policy in harmony with Community law proposing to achieve such phased harmonization starting from the fundamental law, respectively the Civil Code, the Civil Procedure Code, the Criminal Code and the Criminal Procedure Code. We believe that this approach will be staged from the perspective of EU countries that adhere to this project, thus realizing a genuine "European legal Schengen space" nucleus of Community harmonization.

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Keywords: European, Schengen, civil, challenges, code

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1. Introduction

1.1. Introductory notions

EC Treaty stipulates in art. TEC 249 the types of Community legislation. Thus "the European Parliament jointly with the Council and the Commission adopt regulations and directives, make decisions and formulate recommendations or opinions" (Art. 249 of the EC Treaty). A brief description of these legal instruments reveals that: Regulations are binding in their entirety for the EU member states and apply immediately; Directives are binding only in terms of the intended result and can only appeal to a EU member state or group of EU Member States; Decisions in accordance with art. 249 TEC are compulsory for those to whom they are addressed for, after their notification.

Recommendations and opinions: according to art. 249 TEC are not mandatory, cannot be challenged in court and are not directly applicable. Considering that the legislation could be, incontestably, a Community clotting factor and that the differences in regulatory approach on the same subject by the European States, we propose for reflection the following: Is the Community legislation, through the tools it currently has at its disposal, sufficient to ensure an uniform treatment for all European citizens in relation to their rights? Is the national legislation, different for each EU Member State, due to national legal tradition and culture specific to each state or it is generated on the one hand, by the specific interests and, on the other hand, by the inability of Member States concerned, to achieve a complete and uniform European legal reform? A uniform legislation at European level can become a Community clotting factor? Here are just some of the questions posed with the findings at European level of some events that reveal the vulnerability of the European project. Along with "the Brexit" that already became a certainty, more and more supporters of the European Community launched the challenge for the identification of new intra community "bridges". In this context returns on the front of debates the completion of the older project which envisages the realization of the Civil Code and of the European Penal Code. More and more significant voices in the legal doctrine of the Member States require a common underlying legislation at EU level. This precisely to ensure a non-discriminatory legislative treatment for all European citizens but also to ensure a unified, transparent and predictable legislation for the entire community space.

2. Problem Statement

2.1. European Civil Code

Serving to harmonize the private law legislation of all EU Member States to this date, the European Civil Code still proves to be a losing bet. Justifying the inability of this project by "the need to preserve the national legal traditions" or by "huge amount of research and systematization”[1] those who oppose the approach, we believe, that they actually want to cover the inability to legislative adaption, pride and group or even personal interests. We recall in this context the three distinct and concrete initiatives: Initiative under the influence of the German Civil Code of prof. Christian von Bar, initiative dominated by the influence of the Italian model of[2] professor Gandolfy, initiative targeting only the

[1] http://blog.popescu-legal.com/noul-cod-civil-european
[2] With French and German law influences.

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contracts of the Danish professor Ole Lando. We consider that such an approach should take into account not so much the paternity or the pride of "school of influence" but the citizens need to be treated evenly and balanced at the level of legislation throughout the European Community.

Lack of a European Civil Code did not prevent the adoption of different legal mechanisms which have as their object the relations of private law that we find in the civil legislation of each state. However, the draft of the European Civil Code becomes even more necessary because beyond the need to solve some concrete problems, the code can and should be a factor for European cohesion to generate comfort and guarantees needed for every EU citizen that has at its disposal the same procedure as any other citizen in the community space to reclaim or defend a right recognized throughout the European Union (Ciucă, 2016).

In this context it must be recalled the proposal for the Regulation on the Common European Legislation in matters of sales, initiative seeking to regulate the activities in matters on the European single market. Considering the differences between the legislation of each country at Community level it was found that apart from the unpredictability and non-transparency generated by different regulation, there are also additional costs due to the need to adapt of the operator to the national law of the State where he operates, costs on translations, but especially generated by the need for legal advice for understanding the national legislation in the area where the operator wants to operate. Going beyond the debate on compulsory or non-compulsory character of the European Law of Contracts, we believe that we need to overcome the facts in this endeavor because a delay in adopting a single legislation in matter would further alter the cross-border trade. Different legislation with regard to contracts, the existence inside the European area determines that only "8% of consumers buy online from another Member State"[3]. At the same time according to the source mentioned above "61% of cross-border sales are rejected because traders refuse to sell in the country where the consumer is. For the most part, this situation is caused by regulatory obstacles and legal uncertainty about the applicable rules. "

Therefore, in order to secure the market of cross-border contracts and to make permissive the exchange of services and goods, the Commission proposed a journey that since July 2010 included the adoption of the Green Card on policy options for progress towards a European Contract Law for consumers and businesses, which continued with its public consultations completed in January 2011, with a panel of experts in order to achieve the feasibility study on unique law of contracts. In June 2011 the European Parliament adopted the resolution on policy options in the perspective of a European contract law for consumers and businesses, and in October 2011 the proposal for a Regulation on the Common European Sales Law. This proposal has received the approval of the ECON Committee on October 11, 2012 and JURI Committee on March 6, 2013 performs the draft report. IMCO Committee has given its opinion on the draft report on July 11, 2013 and on September 25, 2013 it was published the report of JURI Committee. On February 26, 2014 in the European Parliament plenary session, in the agenda was the debate and final vote on the draft of this project, the final text summing 186 articles and its annexes.

A very specific reason in order to achieve this process of unification of European legislation with regard to contracts we can extract even from the preamble of the adopted text which states that "there are still major bottlenecks in cross-border business" and that legislative gap "creates disadvantages in the

[3] documents.tips/documents/dreptul-european-al-contractelor.html.

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detriment of consumers”. The same text states that "legal barriers resulting from differences in the various binding rules ... have a direct effect on the internal market" and that the "inconvenience of law in contractual matters ... prevents traders to fully exploit the potential of the internal market "[4].

We thus highlighted that, for economic reasons, the legislation on trade has found the fastest unifying solution at European level and also that the legislative differences in other areas represents a blocking factor of the market and one of the reasons for dissolution of the Community. We believe as in trade sector have been achieved concrete steps, it can be achieved also in other areas unit legislative regulations at European level.

The feeling of every European citizen that he is treated in the report that they have similar rights with any other citizen from the same European Union, remains a goal that can be achieved through a consistent and transparent legislation. The result of a “Eurobarometru”[5] poll (Eurobarometru poll, 2015) shows that on the question: “How well informed do you feel you are when it comes to your rights as an EU member?” 57% of respondents answered "no information" and only 42% said they were informed. We note that in the same sociological study, at the urging of indicating a right of the European citizen, 87% of the respondents indicated "the right to be treated like any other member of the European Union, citizens of other national states than the interviewee."

3. Research Questions

3.1. Statistical data

A recent survey by the Romanian Institute for Evaluation and Strategy - IRES within the period 27-28.04.2016 illustrates certain interesting data regarding the perception of some national values, as well as of some European values. This survey shows that the image of the European Union as rendered by the interviewee and consequently on the Romanians’ level, is a divided image; the distribution is an interesting research topic from both the perspective of promotion of some common values and from the perspective of communication. As follows, we will partially present the data of the survey mentioned above; we will only present the questions that we considered to be relevant from the perspective of the discussion topic, and the afferent answers.

1. How important is to you the fact that...? (Figure 1)

2. Do you agree with the following statements? (Figure 2)

3. Generally, the European Union recalls for a highly positive, positive enough, neutral, negative enough or highly negative image? (Figure 3)

4. What does the European Union mean to you personally? (Figure 4)

5. Generally, you believe that the fact that Romania is part of the European Union is... (Figure 5)

6. By taking everything into account, do you consider that Romania has more benefits or more obligations as a result of being a member of the European Union? (Figure 6)

7. Would you say about yourself that you are very optimist, rather optimist, rather pessimist or very pessimist regarding the future of the European Union? (Figure 7)

[4] www.europarl.europa.eu
[5] The poll entitled "Citizenship in the European Union conducted between 21-23.10.2015 where attended 26 555 Europeans citizens, of which 1.0002 Romanian citizens, Flash 430.

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4. Purpose of the Study

In our opinion, all the data presented in the figures 1-7 represents the perception of the Romanian population in relation to the European Union and the position adopted by Romania within the community, but we believe that it can be extended to the normative act and the reform of the legislative system, even if we only take into account the criticism and observations generated by the New civil code through the 2009 reform.

It is very clear that currently the legislative policy cannot be compiled independently from the legislative policy of Romania's partner states or with who is sharing common projects. "The preoccupation regarding the collaboration amid states aiming to elaborate certain normative acts that should be as efficient as possible, predictable, accessible and in key with the fundamental principles of human rights and freedom, has inspired both practitioners and professionals of the law, during each historical phase of the organization and the development of the state" (Ciucă, 2014).

5. Research Methods

The Research Method used by the Romanian Institute for Evaluation and Strategy – IRES was CATI (Computer Assisted Telephone Interviewing) on a total sample of 750 subjects aged 18 and over, representative of the adult population in Romania.

6. Findings

Please find below the answers from the chapter Research Questions:

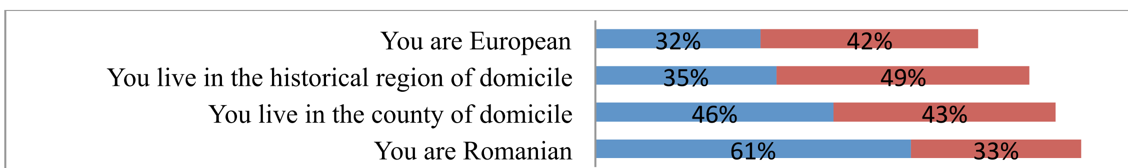

Figure 1.

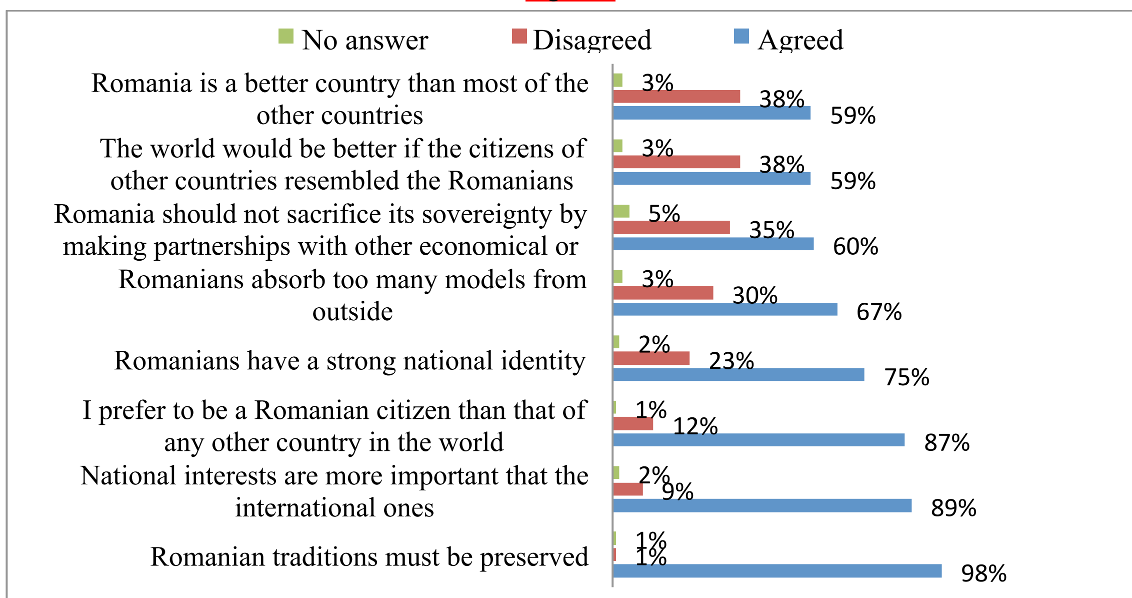

Figure 2.

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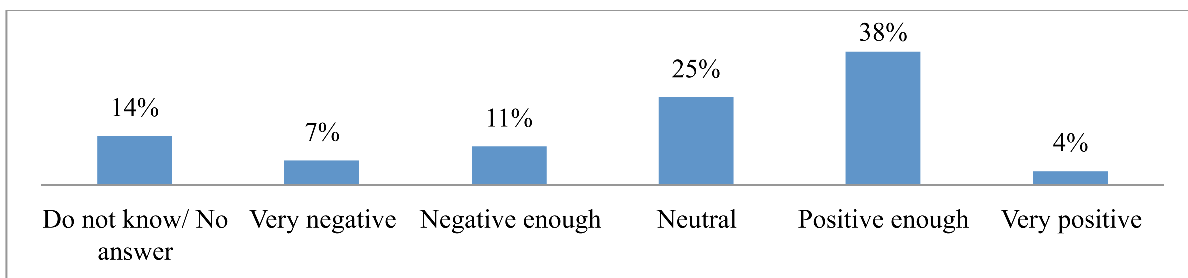
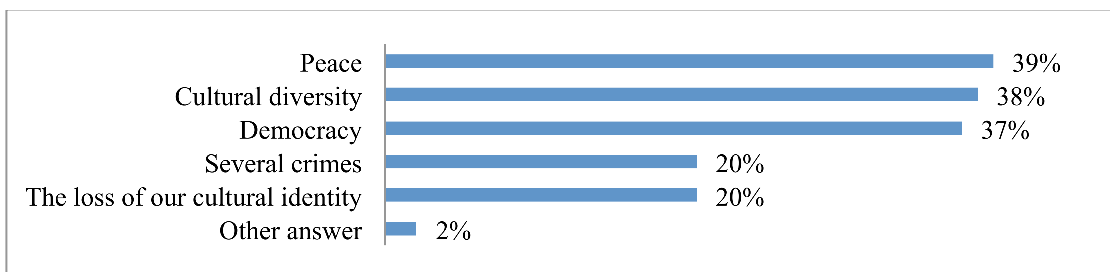


Figure 3.



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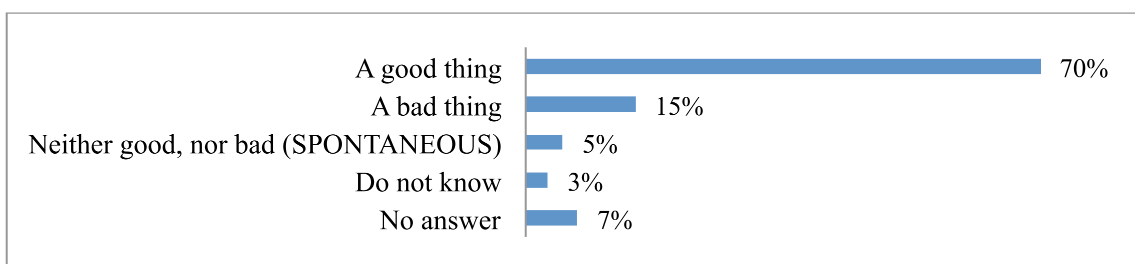

Figure 5.

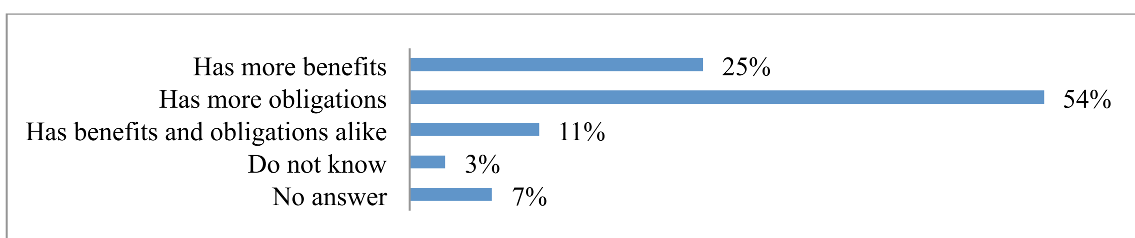

Figure 6.

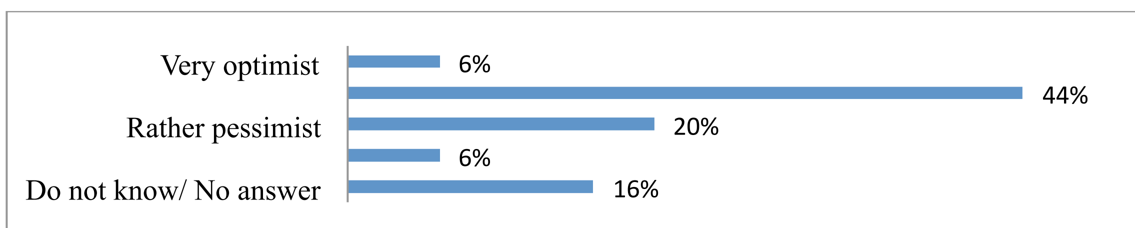

Figure 7.

On the other hand the European project is seen as a positive goal but there are reservations about its effectiveness, in part because there are different national legislations which addresses the same subject in relation to the same citizens of the same Union.

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6.1. National legal identity vs. European legal unity

If, as to the national identity, we can state that things are clear from the perspective of origins that generate this identity, when referring to the European identity it is ascertained that it "still is hard to materialize in relation to the national identity, a result of a prolonged historical evolution" (Heywood, 1997, p. 103). The doctrine shows that, at least on a declarative level, the European identity should not undermine the national identity but as a primary objective, it should generate a legal, economic, political and social community which should make the European challenge reachable. In art. 1-5, the European Constitutional Treaty evaluates the relation amid the European Union and its member states. Even since point (1) in art. 1 the European Union admits its obligation to equally and non-discriminatorily respect the rights of each member state as to the European Constitution. For that matter, the paper "European constitutional law", Victor Duculescu şi Constanţa Călinoiu (2008, p. 91) state that the "European Union respects the essential functions of the state, especially those the object of which is to ensure its territorial integrity, to maintain the public order and to keep the national security", the national identity is thus promoted as "a concept that is not transferred but, on the contrary, maintained and respected, being in fact a consequence of the national sovereignty which is by excellence non-transferrable and which finds its place within the sovereign power of that people" (Duculescu & Călinoiu, 2008). This context raises the question if national sovereignty does not represent by itself a factor negatively affecting the European identity. Starting from the concept of sovereignty, we can conclude that it is considered to be the fundamental attribute of a state, based on which the state decides independently regarding its external and internal interests. Winston Churchill said that "the tragedy of Europe resides in the contradiction between the unity of Europe and the sovereignty of states".

The author of the paper "The sovereignty of member states in the European Union" (Dragomir, 2005, pp. 181-182) presents an interesting valence of sovereignty, which, from the perspective of the former UNO Secretary General,[6] is extremely current and important "to reconsider the issue of sovereignty, to admit that it can take new shapes and perform more functions"[7]. From this perspective, is it possible to state that this "rethinking of sovereignty" represents a permanent transformation of the concept as depending on the actual interest of the Union? If the answer to this question is affirmative, then we can state that the sovereignty concept itself is affected because any transfer of any component of the sovereignty concept to a third state or a third organization represents in fact its own weakening. Obviously the questions are many and the different answers do not please the representatives of the pro-European current and the euro-skeptics equally. We believe that the European Union sovereignty is stronger the more the sovereignty of component states is consolidated and we also believe that the sovereignty of a European state within the European Union is consolidated and reinforced even by a non-discriminatory relationship of the European Union with each member state under predictable and equal conditions. From this perspective, a different approach to the rights of each citizen of the European Union, an approach generated by a different national legislation at the level of each state, can only generate a discriminatory treatment for the European citizens regarding the same right inside the borders of the same European Union, driven by the fact that the national legislation is different. By the use of the

[6] Boutros Boutros-Ghali, Secretary General of United Nations January 1st, 1992 and December 31st, 1996.
[7] Boutros Boutros-Ghali, Secretary General of United Nations January 1st, 1992 and December 31st, 1996.

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result of sociological studies and of the other presented elements, the present article aims to draw the attention upon the fact that the European project is major, complicated in its management but beneficial to all the states involved and that, within this project, there appears the need for a unitary national legislations or a unique European legislation that should balance each European member state and each European citizen in relation to the same cause and in relation to the same right. The sociological result illustrates positive perceptions regarding the European Union, but also question marks regarding the accomplishment of transparency, information dissemination and compliance with the rights, equally for all the citizens of the European Union. The achievement of a consolidated European identity and of a platform that should lead to the compliance with rights equally for all European citizens requires energy, time, will and to put pride asides. We appreciate that, for starters, the achievement of a European Civil Code could represent the beginning of a road to legislation unification in all fields and a road to the achievement of a European culture and a "European cultural space", as presented by Louis le Hardy de Beaulieu in „Du Déficit démocratique à l'Europe des citoyens" (1995, pp. 30-31).

7. Conclusion

7.1. "Legal Schengen"- Conclusions

The debates on the need for a common army and uniform legislation at Community level are more consistent and determined by a European reality that cannot be challenged. The evident gaps both economically and in terms of respect for human rights among countries in the first part of the league, such as the Netherlands, Finland, Germany, France and those at the end of this ranking as Italy, Spain, Greece, Portugal, Romania, cannot be covered only by the European success which consists in achieving free movement of European citizens. The need for an European civil law is essential to strengthening the community and to promote non-discriminatory basis of all measures of recovery or defense of fundamental human rights. This kind of European Civil Code would eliminate the problems caused by national legislation, differences unknown and difficult to interpret.

Being a developed and complex approach, the achievement of an European Civil Code raises many issues that will be solved. From this perspective the concept that we suggest namely "Schengen legal space" could be a possible, realistic and necessary solution. Establishing a working group in which to attend experts from countries that wish to join this space and has as aim to establish the principles of law and finally the text of the Civil Code of this "Schengen legal space", the space will remain open for accession by other States but also extend to other fundamental laws such as the Criminal Code. Gradually as joining other states to the legislation undertaken jointly by the member countries of this legal area it will ignore the national legislation covering the same field in parallel with the European norm.

Clearly, the law must respond to realities of everyday life, will be able to withstand the changes required by the society with the consent of all members of legal space to which we refer (Ciucă, 2016).

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