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LIST OF ABBREVIATIONS

ANI	–	National Integrity Agency
BVerwGE	–	Bundesverfassungsgericht
CEE	–	Central and Eastern Europe(an)
CSM	–	Superior Council of Magistracy
CVM	–	Cooperation and Verification Mechanism
EU	–	European Union
ECHR	–	European Convention on Human Rights
ECtHR	–	European Court of Human Rights
ECJ/CJEU	–	Court of Justice of the European Union
FRCh	–	Charter of Fundamental Rights of the European Union
HCCJ	–	High Court of Cassation and Justice
M.Of.	–	Monitorul Oficial al României (Official Journal of legislation)
NCC	–	New Civil Code
NCCP	–	New Code of Civil Procedure
OUG	–	Emergency Government Ordinance
RCC	–	Romanian Constitutional Court
TFUE	–	Treaty on the Functioning of the European Union
TGI	–	Tribunal de Grande Instance

Introduction:
Judicial Culture as Vector of Legal Europeanization

MANUEL GUȚAN

The sociological concept of 'culture' has definitely marked, in the last decades, the history of high academic legal research. Especially, it has found out a very fertile soil in post-modern comparative law, a research field more interested in overcoming the canonical boundaries of positivistic legal analyses and considerably better prepared to face the challenges of multi and interdisciplinarity. The concept of 'legal culture', despite its inherent vagueness, is appreciated for its capacity to widen and deepen the comparative law inquiry.

Understanding law in its cultural determinacies leads the comparatist beyond the legal texts and makes it sensitive to specific patterns of legal reasoning, beliefs, assumptions, behaviours and practices belonging to a particular human community. Thus, irrespective the cultural unit to be analysed, i.e. professional legal bodies, ethnic groups, nations, group of nations, the concept of 'legal culture' is emphasizing the intimate cultural links underlying a distinct epistemological legal community. As such, despite its vocation to mark cultural boundaries between particular communities, despite its capacity to emphasize legal distinctiveness and to postulate legal identity,[1] the concept of 'legal culture' has, above all, a cohesive role. Legal culture is primarily a proof of legal sameness and, only secondary, it is a mark of legal distinctiveness.

Consequently, to analyse and understand legal-cultural sameness is, at least, as scientifically entitled as it is to analyse and understand legal-cultural distinctiveness. One clear advantage to postulate legal-cultural sameness reside in its integrative and unifying functions: legal orders, sub-national, national or international, which apparently have distinct legal concepts, rules, institutions and texts, might be closely linked at the legal-cultural level. Deep cultural and wide abstract legal-cultural analyses could unify different cultural units at different levels and with different intensities. Thus, someone could speak about a modern legal culture,[2] about Occidental / Western or Oriental legal cultures,

[1] R. Cotterrell, 'Comparative Law and Legal Culture' in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2008), p. 711.
[2] L. M. Friedman, 'Is There a Modern Legal Culture?' in (1994) 7 *Ratio Juris*, pp. 117-131.

West-European and East-European legal cultures, a Common Law and Roman-Germanic legal cultures, European legal culture, European constitutional or private law cultures or about national legal cultures. Moving towards small cultural units, someone could speak about the (national) legal elites' culture, about doctrinal and legislator's cultures, about the legal practitioners' culture or about the judicial culture. Important is to carefully corner those cultural traits that provide and sustain the cultural unity of the envisaged cultural units.

Central to this volume is the idea that legal-cultural analyses is not only acknowledging the existence of different levels of legal-cultural unity but also it witnessing the particular legal-cultural dynamic existing inside and between different legal cultures. Law and society[3] and law and culture[4] studies have clearly emphasized the full capacity of a legal culture to change: a legal culture could be constructed, de-constructed and re-constructed, it can evolve to new identitarian latitudes. Despite some inertia inherent to every legal-cultural unit, the cultural boundaries are rather porous and open to change, even if this couldn't be a fast and easy to control process. Legal traditions themselves, central pillars of the very and long lasting national legal cultures are collapsing under the strong challenges of modernization, industrialization, globalization or universal constitutionalization.

The existence of deep and intense underlying cultural traits represents a clear etalon for every legal culture and an obligatory referential standard to assess its viability, integrity and unity. A vivid and strong legal-cultural linkage between the members of a particular legal community is giving full cultural meaning, cohesion and consistency to every legal order under surveillance. Conversely, a legal order which is underpinned only by the uniformity or harmony between its legal norms, institutions and concepts, with no underlying legal-cultural vividness, can hardly be labelled as integrated or unified.

This seems to be the perpetual problem of the European legal integration: in the European legal space we are in the presence of an artificially, top-to-bottom, harmonized or uniformed European legal order facing 28 national legal cultures and different other subsequent professional national legal cultures. Every single European legal norm, necessarily created to meet the national legal orders, have the chance to be de-contextualized and culturally re-constructed by the national legal / judicial cultures.[5] Following, instead of having one European legal order effectively and unitary applied in the member

[3] *Ibid.,* pp. 120-121.
[4] D. Nelken, 'Using the Concept of Legal Culture' in (2004) 29 *Australian Journal of Legal Philosophy*, p. 6.
[5] S. Boyron, 'General Principles of Law and National Courts: Applying a Jus Commune' in (1998) 23 *European Law Review*, pp. 171-178.

states, there are many national legal-cultural responses and the same number of different possible applications. For example, every national judge facing the burden to apply EU law inside her/his national legal order, will be naturally tempted to proceed following her/his national legal-cultural determinacies.[6] Of course, this anti-European attitude is everything but acceptable and solutions must be developed to counterbalance it.

Pure legislative solutions might be adopted (*e.g.* a European Civil Code or a European Constitution) but, in a wise philosophical, sociological and post-modern comparative perspective, the proper solution is rather a cultural one. For having a meaningful and really unified European legal order, it must be endorsed by a European legal culture.[7] Consequently, the legal Europeanization cannot be achieved only through full compliance with the principles of prior and direct application of the EU law in the member states' legal systems, through formal uniformization of the national law with the EU law provisions or through formal judicial harmonization of the national judicial case-law with ECJ judgments. In the same manner, Europeanization of human rights protection does not mean only to formally implement legal norms, principles and specific language[8] or to achieve a formal tuning between the national legislation or the national courts' judgements and ECtHR's case-law. Effective legal Europeanization means to acquire common values, principles, ideas, ideals, patterns of legal reasoning, concepts, attitudes, behaviours and praxis. This is why, despite the intellectual and scientific relevance of assessing the existing deep cultural linkage between the European national legal cultures,[9] the European legal culture must be substantial and operational. This approach is leading us to two distinct levels of (legal) Europeanization: on the one side Europeanization is understood in terms of policy-driven horizontal and hierarchical institutionalization underpinned by transplantation of legal normativity and legal procedures, on the other side Europeanization is understood in terms of horizontal and hierarchical building of common meanings, beliefs, attitudes and practices. In terms of effectivity, i.e. concrete functioning according to its established political-legal framework and producing envisaged goals, institutional Europeanization is closely linked to legal-cultural Europeanization.

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[6] I. Maher, 'National Courts as European Community Courts' in (1994) 14 *Legal Studies*, pp. 234 *et seq.*

[7] V. Gessner, 'Global Legal Interaction and Legal Cultures' in (1994) 7 *Ratio Juris*, pp. 135-136.

[8] M. Aziz, 'The Impact of National Rights on National Legal Cultures' (Oxford and Portland Oregon: Hart Publishing, 2004), pp. 167 *et seq.*

[9] See F. Wieacker, 'Foundations of European Legal Culture' in (1990) 38 *American Journal of Comparative Law*, pp. 4 *et seq.*

In this sense, if the effective and uniform application of the EU law (or of the ECHR) depends on the existence of a European judicial culture, this one must be created.[10] Its creation is theoretically possible but practically difficult to obtain. It has to theoretically fight all ideological reductionism, different academic idiosyncrasies and practically difficult to overcome legal-cultural inertia. This is why the European judicial culture is still a generous idea[11] and a project to be fulfilled. It remains anyway, as a delicate challenge, the burden to establish the target groups, content, extent of a possible and desired European judicial culture, the concrete method to acquire it and, last but not least, the authorities (European or national) entitled to develop it. Considering its necessity and urgency for the EU project, the European judicial culture seems to be, above all, an EU official endeavour, initiated and conducted by EU authorities. This is probably the reason behind the European Commission's 2011 initiative to start an ambition programme of training targeting all national judges of the member states, meant to create a European judicial culture.[12] Without framing the concrete content of the common judicial culture, this programme reveals a necessary top-to-bottom approach meant to create, through learning, judicial-cultural sameness. However, this official initiative does not entirely capture the complexity and challenges of judicial-cultural Europeanization: the Europeanization of national constitutional judiciaries is also important considering national constitutional courts' central role in balancing the European and national constitutional-cultural specificity in the context of constitutional adjudication; the firm implication of national political, administrative, judicial and academic elites and authorities is fully required for achieving a substantial judicial-cultural change; the change of national judicial methodology is as important as the formal education or the interest to secure particular standards of judicial independence and morality; the Europeanization of national judicial cultures should reach to a compromise between the European goals and the national interest to preserve its legal-cultural identity; finally, the vertical (usually official) judicial-cultural engineering could be coupled with a horizontal (usually informal) judicial-cultural engineering.

The problem of constructing a European legal judicial culture gets more complicated when the process of European enlargement is considered. When a new member state is joining the EU, it has to face a European legal order to a certain degree already integrated and a timid European judicial culture already

[10] See W. Heusel (ed.), 'The Future of Legal Europe: An Emerging European Judicial Culture?' in (2008) 9 *ERA Forum*, pp. 109-125.
[11] Cotterrell, *op. cit., supra,* note 1, p. 715.
[12] H. van Harten, 'Who's Afraid of a True European Judicial Culture?' (February 3, 2012). Available at SSRN: http://ssrn.com/abstract=2117842 or http://dx.doi.org/10.2139/ssrn.2117842.

under development.[13] It is hard to theoretically evaluate the ideal solution to be adopted: on the one hand, the first logical alternative is to expect a legal-cultural compliance of the new EU members with the existing European judicial culture. It is hard to accept a re-evaluation and re-construction of the existing European judicial culture by programmatically taking into consideration judicial-cultural features of the newcomers. On the other hand, someone could expect a step-by-step recalibration of the European judicial culture through open and sincere dialogue with the newcomers' national judicial cultures. Obviously the last one should be very strong and penetrating for achieving such performances. Anyway, each alternative implies a more or less fast and deep Europeanization of the new integrated national judicial cultures.

The problem becomes even more complicated considering that the new EU member states came, almost exclusively, from Central-Eastern Europe (CEE). All of them are transitional post-communist societies aiming to acquire Western standards of free-market, democracy, rule of law and constitutionalization. Their concrete political, economic and legal Europeanization meant a multi-layered institutional integration in different European structures, *i.e.* Council of Europe and European Union, channelled by strict pre and post-accession conditionality. This one becomes a perpetual challenge for the national political, legislative, administrative and judicial authorities. Political and constitutional Europeanization obliged the national authorities to meet the Copenhagen political criteria (1993), to assume EU constitutional common values, to implement ECHR and EU standards of human rights' protection and to continuously fight for judicial independence and eradication of corruption.[14] Pure legal Europeanization meant proceeding to massive legal transplantation of the *acquis communautaire* and to connect the national legal system to the legal and political command coming from Bruxelles or Strasbourg. Having

[13] T. M. J. Mollers, 'The Role of Law in European Integration' in (2000) 48 *American Journal of Comparative Law*, pp. 702 *et seq*. A European judicial methodology is increasingly developing, having as main pillars the teleological / purposive legal interpretation (M. Guțan, 'The European Legal System: Between Mixed Legal Traditions and Law as Culture' in B. Iancu (ed.) *The EU as a Paradigm of Future European Statehood* (Bucureşti: New Europe College, 2007), pp. 163-164), shift from 'rules' to substantive standards of legal adjudication, *i.e.* moral, economic, political, institutional or other social considerations (L. Niglia, 'Taking Comparative Law Seriously – Europe's Private Law and the Poverty of the Ortodoxy' in (2006) 54 *American Journal of Comparative Law*, pp. 410-411), widely appeal to comparative law and a European doctrine of precedents (K.P. Berger, 'Harmonization of European Contract Law. The Influence of Comparative Law' in (2001) 50 *International and Comparative Law Quarterly*, pp. 883 *et seq*.).

[14] See C. E. Parau, 'The Drive for Judicial Supremacy in Eastern Europe' in A. Seibert-Fohr, (ed.) *Judicial Independence in Transition*, (2012) 233 *Max Plank Institute's Series on Comparative and International Law*, pp. 619-665.

presumed their willingness to follow the European-centred path, the national political, administrative and judicial bodies have been expected to willingly display rapid and efficient political and legal change. In these conditions it is not puzzling that the process of 'socialization' (*i.e.* 'a process by which social interaction leads novices to endorse expected ways of thinking, feeling and acting') developed by the EU in the CEE member states appealed more to 'coercive persuasion' tools (*i.e.* involving besides reasoning, sanctions and positive incentives) than to argumentative tools (i.e. a process of communication, which aims at changing people's attitudes, beliefs or behaviour through structured debate rather than overt coercion).[15]

However, concrete steps towards Europeanization inevitably shed light on the huge cultural gap between Western and Eastern European legal and judicial cultures. Despite their strong political commitment to European integration, CEE candidates, especially their national judiciaries, proved to be poorly methodologically equipped to face the burden of European legal integration. Textual positivism, primitive positivism,[16] reluctance towards the binding legal precedent, 'the lack of knowledge and ability',[17] mechanical jurisprudence,[18] rudimentary descriptive approach towards the study and application of legal norms,[19] ignorance towards persuasive arguments and soft law, disregard of comparative law are but few cultural traits of the CEE judiciaries which endanger the European legal-cultural integration. Conspicuously, CEE judiciaries have not only a different judicial culture but also the wrong different judicial culture. This is not a reality to blame, as long as it can be culturally explained, but neither a reality to be accepted. As B. Iancu correctly put it, although this legal-cultural wrongness is not culpable, post-communist judiciary is not credible, *i.e.* 'they have no moral, professional and intellectual

[15] D. Tamvaki, 'The Copenhagen Criteria and the Evolution of Popular Consent to EU Norms: From Legality to Normative Justifiability in Poland and the Czech Republic' in W. Sadursky, A. Czarnota, M. Krygier (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht: Springer, 2006), pp. 148-156.

[16] M. Zirk-Sadowski, 'Transformation and Integration of Legal Cultures and Discourses – Poland' in Sadursky, Czarnota, Krygier (eds.), *op. cit. supra*, pp. 308-309.

[17] Z. Kühn, 'The Application of European Law in the New member States: Several (Early) Predictions' in (2005) 6 *German Law Journal*, http://germanlawjournal.com/print.php?id=577, p. 10.

[18] M. Bobek, 'Judicial Selection, Lay Participation, and Judicial Culture in the Czech Republic: A Study in a Central European (Non)Transformation', College of Europe, *Research Papers In Law* 3/2014, p. 2.

[19] B. Iancu, 'Post-Accession Constitutionalism With a Human Face: Judicial Reform and lustration in Romania' in (2010) 6 *European Constitutional Law Review*, p. 35.

fitness to serve a rule of law democracy'.[20] Taking into consideration the crucial role of constitutional judiciary in meeting the European political standards, their professional skills have been carefully under surveillance. Taking also into consideration the central role of the national ordinary judges in the application of EU law and ECHR, the Europeanization of the national judicial bodies and of their mentalities (*lato sensu*) become special mission both for the national and European authorities. Following, CEE countries' judicial cultures are suffering a process of Europeanization since the early stages of the pre-accession negotiations. Basically, considering their communist legal-cultural heritage, their democratic deficit, their political immaturity, their rather formal interest for human rights, the process of Europeanization becomes a process of vertical or horizontal legal-cultural engineering effectively developed through pre- and post-accession conditionality or via academic channels. For some scholars, this should happen even if this process entails double standards of Europeanization: while in the old founding member states the birth of a European legal/judicial culture is a matter of dialogue and bottom-to-top legal-cultural change,[21] for the CEE newcomers the legal/judicial cultural change should occur top-to-bottom.[22] Consequently, bridging these 'worlds apart'[23] is rather a matter of monolog and cultural exclusion. Thus, instead of judicial cross-fertilization, the CEE judiciary must be culturally fertilised and inseminated in order to produce European judicial-cultural unity.

In this context, the national judges are expected to suffer a considerable change of their pattern of legal reasoning and legal methodology, of their dependence to political command, of their attitude towards the national and foreign legal sources, of their current understanding of national sovereignty and their traditional perceptions about legal precedent. The constitutional judges are particularly expected to manifest 'constitutional tolerance', *i.e.* 'the allowance for and…the acceptance of the spirit of the acquis'[24] which aims to subordinate the national legal systems to EU goals. The same process of judicial-cultural change is envisaged as regards the adaptation of the national

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[20] *Ibid.*

[21] J. Smits, 'On Successful Legal Transplants in a Future Ius Commune Europaeum' in A. Harding, E. Örücü, *Comparative Law in the 21st Century* (London/Hague/New York: Kluwer Academic Publishers, 2002, pp. 146 *et seq.*

[22] S. van Erp, 'Comparative Private Law in practice: The Process of Law Reform' in E. Örücü and D. Nelken, *Comparative Law. A Handbook* (Oxford and Portland Oregon: Hart Publishing, 2007), pp. 400 *et seq.*

[23] Z. Kühn, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement' in (2004) 52 *American Journal of Comparative Law*, pp. 531 *et seq.*

[24] J.H.H. Weiler, *apud* M. Aziz, 'Constitutional Tolerance and EU Enlargement: the Politics of Dissent' in Sadursky, Czarnota, Krygier (eds.), *op. cit., supra,* note 15, p. 247.