CULTURAL RATIONALITY IN LEGISLATION

Hannele Isola-Miettinen*

Abstract: Legislative reasoning in Europe takes place in cultural pluralism, “in the unity of diversity”. The consequence of this pluralism is that cultural rationality is necessary demand, which has to be taken into the account in the method of legislative reasoning. This article focuses the culture in legal reasoning, an activity separated from legal reasoning. The article reflects three dimensions of cultural rationality, context, legal consciousness and language as a part of cultural aspects. There is not found one clear and undisputable concept of culture, but many. The method of legislative presupposes, for example, that it is organised to take into account the cultural aspects. Another alternative is to establish legislative reasoning methods which are based on the relevant knowledge, reporting regularly and efficiently on cultural aspects in society. This alternative favours taking better into account the legal consciousness of society which is the precondition of legitimate laws. The change of legal consciousness often takes place in an imperceptible way. The language rights are an essential factor in influencing the legislative agenda and understanding the law given by the legislator.

Keywords: cultural rationality; legal consciousness; reasoning.

1 Introduction

This article is interested in the cultural rationality in the legislative reasoning. By the forms of cultural rationality, it is referred to several societal phenomena like moral habits, religion, language and ethnic aspects in society, for example. It is the legitimacy demand of the legislation, which necessarily presupposes, that those cultural aspects are taken into the account in legislation.

* Lic. Adm. Sc, University of Eastern Finland, Law School; The Finnish Parliament, National Audit Office.

In the context of legislation, the legislative reasoning concept refers to that human activity by which the legislation is reasoned. This activity takes place in the activity, when the political preferences and values of society are formulated into the form of laws and legal norms. The term legislation (*legis latio* in Roman law) means the creation of laws (KELSEN, 1945).

More usual it is to reflect the legislation as a procedure. We are used to think that legislation is created in the democratic procedure. For example, when following Finnish Basic Law provisions on legislation, one concludes that the legislative process takes its form in the parliamentary plenary discussions and through the committee minutes and opinions. One always can ask if it is enough to ensure the demand of legitimacy of law creation.

I argue that just following the procedure does not necessary ensure that, for example, the cultural rationality criteria are taken into account. When considering the substance of legislation, one needs to reflect several echoes taking place in society, anyhow. There are found perceptions which give signals that important cultural aspects often hide outside the consciousness of procedures, plenary discussions or parliamentary committees.

Modern legislative reasoning takes its place in the complex environment. From the perspective of sovereign state model, one is able to see that there is a clear difference between the formal democracy and real democracy, for example. The latter, the real democracy, refers to how the citizens or the "society" are able to take part in the creation of norms and show up their opinions and attitudes keeping eye on the parliamentary discussions. Democracy and legislation are much more complicated story. For example, when defining the concept of democracy, there is always seen the dilemma between the principle of self-determination of individuals and the principle of majority in society (WAHLGREN, 2008). The terms of natural freedom and political liberty, the problem of political freedom is "How is it possible to be subject to a social order and still be free?" (KELSEN, 1945, p. 284-285). And further, democracy at the stage of legislation generally means that all the general norms are created by a parliament, elected by the people (KELSEN, 1945)[1]. More and more, it is manifested demands that those individuals who are governed by the law should be able to influence more to that content of law governing those individuals (PECZENIK, 2009). If not, the problem might be that individuals or groups in society do not necessarily consider legislation legitimate at all.

1.1 Structure of the article

The introduction chapter is shortly concentrating to define the concept of culture and legislative reasoning. I reflect the concept of culture as a general concept with purpose to make it more understandable and closer with the world of legislative rea-

[1] See the problems of legislation in global dimension (GARAPON, 2009).

soning. Another concept which I want to explain is the term legislative reasoning. I stress in using the concept the legislator's legislative activity is legislative reasoning in its nature.

After the introduction chapter, I organise this paper into the three parts. The second part is reflecting the problem of context, the third, the legal consciousness, and the fourth, the language as essential parts of cultural rationality.

1.2 The concept of culture

The term culture comes from Latin word '*cultus*' for worship or reverential homage. The concept of culture is much more expansive, referring to the term agriculture and cultivation of soil. From that, the linguistic step is short to cultivation of the spirit or mind. The development of cultivation of spirit and mind appears closely tied to what is known in Europe Enlightenment. The term culture then became an expression of ultimate values, an alternative secular source of them. It partially even compensated the religion as basic values. As a matter of fact, the concept of culture in European countries has different echoes. There are distinct national traditions in speaking of culture (GLENN, 2004; KUPER, 1999).

When trying to find out the modern use of the term culture, the English-French dictionary Le Robert & Collins defines the term culture as a noun *la culture* to mean the *connaissances* the culture, in other words, knowing the culture, *homme de culture*/ cultured man" or "*il mange the culture*/he is not very cultured". It is also mentioned "*culture générale*" meaning the general knowledge. One interesting definition found from the dictionary (Le Robert & Collins) is the concept of culture fair-test or cultural free test, referring to the exams which are not discriminating the cultural minorities, "*examen conçu pour ne pas défavoriser les minorités ethniques*". This kind of idea means some kind of culture neutral approach in exams. One could imagine if such cultural neutral approach could be possible in law creation? One may reflect and evaluate if it is possible to justify the international conventions on human rights to be culturally neutral or not in their nature?

Broad concept of culture is part of the history of the concept and its scientific development. It is part of the tradition of the culture that it seeks, to be all-inclusive, it is extending to the tradition (GLENN, 2004). Anyhow, as a concept, the tradition is more historically based concept than culture. Broad definition of culture remains open questions, anyhow. The fact is that there is no common agreement on the concept culture itself. Legal culture has been considered to be generic term for the attitudes and ideas held by some part of the public, and which are affected by events and situations in the society as a whole. That leads to actions that have an impact in legal system itself (CHURCH; SCHULZE; STRYDOM, 2007). For example, the background of human right declarations is in certain events and situations, like crimes against humanity or history (GARAPON, 2009).

We have a conception that every legal culture has its hard core, in other words, the common basic view on the concept of law, values and world view. Through the hard core of shared understandings, each culture achieves and adopts its identity that makes them to be that culture. Identity means that there are distinctive aspects from other cultures. Without some "others", there is no identity. At the same time, cultures are constantly influencing each others, integrating to some extent foreign elements into their own culture. In modernity, all legal cultures in the world have some, more or less, information on other cultures. It has been noticed that in areas like commercial law or human rights law, law tends to become a universal language with the local dialects rather than totally different languages (VAN HOECKE, 2007). Anyhow, I doubt that the general common principles as a perception of law, for example, in human rights area (GARAPON, 2009), are not taken seriously.

1.3 The concept of legislative reasoning

In legal studies, the expression legal reasoning is a more familiar concept than legislative reasoning. There is no clear answer to what legal reasoning is, but there are many ways to characterise legal reasoning (PECZENIK, 2009). In this paper, the interest is in the legislative reasoning. Legislative reasoning refers here to the activity and methods creating legal norms. In this respect, the main difference between the concepts legal reasoning and legislative reasoning is that the legal reasoning methods are interested in solving the single concrete cases on the basis of legal norms, and legislative reasoning methods are interested in the creation of general and abstract norms.

For example, in the Finnish Basic Law, there are three written law general criteria which the parliament representative has to take into account in legislative reasoning: the rightness, truth and basic law. There does not exist or even must not be required any other kind of demands. How to follow the demands of rightness, truth and basic law, is an interesting topic from the point of view of legislative reasoning as such.

There are limitedly, if not at all, studies concentrating purely on the legislative reasoning. I give to the topic of legislation a greater significance, because it is the main product of legislator. It is born through the legislative reasoning, and it has been considered to have the status of dominant legal source in legal system. The legal order traditionally legitimates itself by referring to the law which is assimilated to the legislation usually given by the parliament.

The modern environment of legislative reasoning is supranational. The legislative reasoning is obliged to take into account the demands of international treaties and regulations. To be legitimate and acceptable, the legislation should follow some legislative rationalities, one of them is cultural rationality (WAHLGREN, 2008). The problem of legislative reasoning in terms of cultural rationality and cultural aspects is that legislation is given in the European Union legislative environment. On European

Union level, there exists the supranational legislator; on national level of member states, there exist national legislators having the interest on common substantial questions. The legislation given at the level of European Member States is not purely a national question. The environment of legislative reasoning in European Union is merely pluralistic in its nature. One is able to say that in European Union all legislative reasoning takes place in the pluralistic legislative culture. As a matter of fact, the provisions of European Union Treaty have adopted the pluralism to be a common accepted value.

2 Cultural rationality and context

The legitimacy of law does not mean just formal validity of law; in other words, the demand that law is given as a political instrument in formal procedures, promulgated and published. Legitimacy of law means also that law fulfils the criteria of the cultural rationality. The reason behind the cultural rationality is to provide the demands of contextual acceptance. The law which rises up the mistrust in society has a tendency not to be obeyed. In long run, there will be the discussion on the duty to obey such laws. So, there is always the need to study the aspects of societal acceptance when preparing the legislation (WAHLGREN, 2008).

2.1 Author in law creation

How to cope and define the term context in the activity like legislative reasoning? In Europe, there are several legal traditions with their own cultures. In common law system, for example, “equity meaning fairness and right” has its origin in canonical law. Petitioners had a right on grounds of conscience to have secular causes brought before the church courts so as to ensure the upholding of natural law (MUSSON, 2001). In England, the law was by product of king and parliament – parliament emerged in 1215-1382 − and was an important political forum (MUSSON, 2001). Legal cultures are generally based on a long tradition and even aim at keeping it unchanged for as long as possible. Anyhow, in law there are also recent cultures which lack such a tradition. Such are, for example, the European Union law and European Human Rights law (VAN HOECKE, 2007). It has been argued that the context has a fundamental importance for understanding legal sources. For example, Roman law in Justinian’s Digest was not interested in practice and no interest was paid in those involved. Roman law was interested only in the interpretations which brought prestige among fellow jurists (WATSON, 2004). The modern system seeks its reliance form authority and earlier systems, the law which comes from the Justinian Digest or French Code Civil *et cetera*. The reliance on this former system – what ever the system was – provides the authority that is required (WATSON, 2004). The origin of authority of law – *auctor* or creator – also springs up from Roman law. Like a trustee, the emperor was considered *auctor* possessing *auctoritas* vis-á-vis

beneficiaries. Beneficiaries were said to possess duties to obey the trustee. The auctor imprinted his intent or thought plan into an ordinance or statute. The *auctor* produced cognitive objects that the ordinance represented. The *auctor* was believed to pre-exist the product in time. It was also a statute which empowered the juridical agent (CONKLIN, 2001).

The context of human and legal societies is problematic concept. The relation of legislation to society and its particular circumstances was the principal idea of theory of separation of powers by the French philosopher Montesquieu in 1700 century. As a matter of fact, Montesquieu received his inspirations from common-law culture which stressed contextual factors. Montesquieu, in his Spirit of Laws, insisted that laws must be adapted to a variety of different factors (MONTESQUIEU, 1751).

In spite of the cultural context, our attitudes, unconsciously or not, presume some author behind the law. When considering the origin of law, one has to reflect who is the *auctor* of law in our modern time and, particularly, in the globalised world where legislation is given by the supranational legislative organs. The picture is not clear, not at all.

The growing trend has also been that the legislator more and more often gives the job of law-making to judges and jurists, those who are not formally competent to legislate (WATSON, 2004). It is the judges who finally formulate the rules in single concrete cases, although the constitutions still are clearly stating that it is the legislator which legislates and establish legal norms (GARAPON, 2009). The essential question in this respect is how sensitively the judges take into account the cultural aspects. Another aspect is the role of legislator in the judge-made law.

2.2 Law is one specialised domain of society

Culture is the capacity for creating categories of our experience. It is categorising imperative. Culture, as a concept, traverses numerous domains of our lives binding them together. Law is one of those cultural domains, specialised one. Law does not exist in isolation. Although some have argued that law and morals should be kept apart, for example Kelsen (1945) very broadly, it is crucial to show and recognize that as part of the legal culture, moral precepts find their source in different legal systems (ROSEN, 2006).

Social institutions are contextually embedded. That consists of the accumulation of culturally differentiated patterns and rules, which give the general model of evolution, like the rule of law, its shape. In this way, it makes further specification of experience possible. This is the context the supranational intervention in the legal process focused on a unification of the legal system is a kind of attack on cultural identity promoting functional adjustment to an unification of technologies and markets (LADEUR, 2004). This process is not linear because of cultural differences. There are several considerations concerning the rigidity of embeddedness of national legal system (LADEUR, 2004). However, harmonisation as a kind of devaluation of do-

mestic practices of law has its effects. The infrastructure consisting conventions, knowledge is in a transformation process, the direction of whose development is determinated by the changes in economy, in technology and in forms of life in EU-Member States themselves (LADEUR, 2004). There is no doubt that ongoing tendency towards the fragmentation of statehood and an increasing heterogeneity of the legal system which come to the fore in all EU-Member States. “This is a precondition for the development of European legal methodology, which has to be dealt with and cannot be ignored (VAN HOECK, 2004)” This development does not take place manifestly, but it is heterogeneous and unevenly running process (LADEUR, 2004). The methodology of law-making does not have the shared common knowledge basis which could be referred to in EU-Member States. This is a problem, for example, in telecommunication law, where there does not exist either the national patterns or examples. European law can initiate a productive process of legal reform. In the areas where there already exist structural forms on national level, the legislation has to open up the paradigm of unity of law and cope with the diversity of plural normative systems. The network of cooperation is one methodology for the pluralised legal system (LADEUR, 2004).

The problem is how to recognize those cultural aspects, which are important in legal reasoning and in legitimating law? We agree that the concept of culture exists as a means of differentiation. In the functioning of human and legal societies, the concept of culture refuses to distinguish all aspects between fundamental elements of human activity, like genetic information, for example. Genetic information is the information constituted by the tradition, and in the form of present manifestations of the culture. Both the action and the informational reasons for that action are culture. But the past, with all information, simply becomes an undistinguishable feature of present manifestations of differences between groups. We are not able to trace genetic or non-genetic information, but we are constantly reminded of the existence of them both in determining the human action (GLENN, 2004). The dimensions of human life are constituted also by action or practice or social practice or praxis. They all occur in what we know as the present. The practice, which is recorded, becomes part of the mass of non-genetic information of the world and may become the part of the information of the traditions of the world. Actual practice, of the courts for example, might be captured and adds the store of the information of the legal tradition. Moreover, in order to understand the human life, on the societal level, we are able to find that they are different, each society having the distinctive culture. There are some consequences, the first relates to that there is local culture (country or nation), there is also culture other than one’s own (GLENN, 2004).

One method of legislative reasoning should be interested in how to take into account the local culture and the culture other than one’s own. There are theoretical aspects like informational reasons for certain action etc. in society, but also the cultural knowledge which is more easily achieved, for example through studies on

attitudes and values. One might ask: are there organisational alternatives favouring cultural rationality aspects, like specially elected chambers which could take into account the local culture? Or should there be other kinds of representative arrangements, such favouring the cultural aspects and pluralism in society?

3 The cultural rationality and legal consciousness

The term legal consciousness and legal decision-making has traditionally been linked to the psychology and behavioural science. Studies have shown the greatest potential for the social sciences in investigating how the law influences, and is influenced by, everyday behaviour of people in the environments, outside the courts, in which they live, work and play. Psychology can make its marks in the context in which law influences on the everyday behaviour, where people interact under the rule of law as they understand it. The idea has been the model of legal decision making that intertwines the law and behavioural sciences approach to legal analysis. The psychology researchers prefer the theory of rational choice as a best description of human decision making: how people really do make legal decisions, how the law would have them make those decisions. The baseline in this approach is rational choice and the dimensions of decision-making are actual versus normative decision-making (WIENER et al., 2007, p. 3-6). The rationality has been defined to be an ideal that can be realised more or less. That is why the human culture needs some measure how to identify what is legitimate law (PECZENIK, 2009).

3.1 Capturing the consciousness

Consciousness refers to the total contents of a mind, including images of the external world, images of the self, of emotions, goals and values, and the theories about the world and self. Kennedy (2006) uses the term in this vague and all-inclusive sense. It defines the universe within which are situated the more sharply-delineated concepts that are vehicles for analysis (PECZENIK, 2009). Legal consciousness refers to the particular form of consciousness that characterises the legal profession as a group, at a particular moment. The main peculiarity of this consciousness is that it contains a vast number of legal rules, arguments, and theories, a great deal of information about the institutional workings of the legal process, and the constellation of ideas and goals current in the profession at a given moment (PECZENIK, 2009). A subsystem integrates a system of some elements in legal consciousness. It includes them in a formal arrangement, and such arrangement has a horizontal and a vertical dimension (PECZENIK, 2009).

Legal consciousness is a product of legal culture and experiences at the level of both individual and groups in society. Legal consciousness can be seen both as an active element shaping people's values, beliefs and aspirations and also as a passive agent providing a reserve of knowledge, memory and reflective thought, in-

fluencing not simply the development of law and legal system, but also political attitudes (MUSSON, 2001).

3.2 Internal and external of legal domain

Legal consciousness is used in several contexts, narrower or broader sense. In narrower sense, the concept is used in the context of legal profession. In wider context, legal consciousness is describing the reserves of knowledge and thought of these who experienced the law and legal institutions in everyday life, who participated in the legal culture, or whom it created an impression and for whom it provided and integral part of social relations common together. These two forms of legal consciousness can be seen in the way that is confused and influenced both the institution of parliament and events occurring within the wider political arena (MUSSON, 2001).

Those who have been educated within some legal culture have been socialised into that culture and will, when forming the legal profession. And the legal profession largely follows it, this will partly happen unconsciously (VAN HOECKE, 2007). Legal consciousness in studies refers to the legal thoughts. Legal consciousness is a set of concepts. Legal consciousness means intellectual operations that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest. The autonomy of legal consciousness is a premise, yet that autonomy is no more than relative. Not only the particular concepts and operations characteristic of a period, but also the entity that they together constitute, are intelligible only in terms of the larger structures of social thought and actions. Legal consciousness, when it has its own structure, mediates their influence on particular legal results (KENNEDY, 2006).

The notion behind the legal consciousness is that people can have in common something more influential than a checklist of facts, techniques or opinions. They can share premises about the salient aspects of legal order that are so basic that actors rarely if ever bring them consciously to mind (KENNEDY, 2006). These underlying premises concern the historical background of the legal process, the institutions involved in it, and the nature of the intellectual constructs in which lawyers, judges, and commentators manipulate as they attempt to convince their audiences. Among these premises, there are often links creating subsystems with their own internal organization and rules of operation. These change. They expand and contract to cover or not cover a greater or lesser number of the aspects of legal reality that are within legal consciousness at a given time (KENNEDY, 2006).

3.3 Knowledge on cultural consciousness

It has been stated that to acquire a particular concept does not involve an increase in knowledge or mental faculties. Rather it indicates that information has

been re-categorised and generalised. In other words, the key element in the growth of legal consciousness is the ability to process, adjust and learn from past experiences and events. The shifting views in law and politics should be seen in terms of the mental readjustments being made over time by the individuals and groups (MUSSON, 2001). Legal consciousness should be regarded as a complex phenomenon enabling people to reformulate their ideas and general opinions on the basis of their existing experiences and in accordance with the new legal opportunities. The process itself could be intermittent, though, rather than constant, depending on the nature of internal reflection and the stimulus of external events (MUSSON, 2001). Popular legal consciousness has been defined so that it is part of legal culture. Usually the concept of culture has been defined through the term legal consciousness and understood in terms of consciousness as ideas, attitudes, values about law, the legal system and institution. Less has been paid attention to the behavioural patterns in the concept of culture. Anyhow, the definition of legal culture as ideas, attitudes, and values serves as an umbrella term to cover a range of measurable phenomena that in turn influence the development of law (CHURCH; SCHULZE; STRYDOM, 2004, p. 26-27).

4 Cultural rationality and language

European integration and globalization means that new ideas, conceptions, principles have been transferred into legal language, some of them fit the local culture, some are totally unrecognizable. Some words are known worldwide, some may be common to many languages, and other will be specific for one language or even local dialect. Languages are all the time incorporating new foreign words. This happens naturally and globalization enhances this process. This happens to the legal language too. England and Ireland have brought to the continental legal vocabulary the term “good faith”, on the other hand, England and Ireland has learned the expression “legal dogmatics” (VAN HOECKE, 2007, p. 95).

4.1 Language pluralism and language conventions

International development and European integration have increased and vitalized the discussion about the content of law and the minimum criteria the content must have. Anyhow, there is no agreement what the content of law or even minimum criteria should be. On global level, the cultural differences are enormous. Although Europe could be defined to be one cultural unity, there are found several cultural differences (WAHLGREN, 2008). However, the European Union does have a common legislation which should be implemented with the same principles in Member Countries.

Legislating and legislation are one form of communication. Communication is an important aspect in the legislative reasoning and in implementing the legislation.

Through the international conventions, it has been agreed that language rights as a part of human rights must be protected universally. For example, between Nordic countries, there has been agreed a Language Convention (1987) that guarantees all Nordic citizens the right to use their native language (Swedish, Danish, Norwegian, Iceland, Finnish languages) when they are dealing with the authorities of another Nordic country. Anyhow, there is one interesting detail: the telephone discussions with public authorities are outside the scope of the Convention.

There are written other provisions on linguistic rights on European law level. The European Convention on Human Rights (1950) includes provisions on linguistic rights in criminal matters (article 6) and on the non-discrimination, which prohibits the discrimination on grounds of language (article 14). There is no doubt that linguistic capacity is an essential precondition in using other human rights or taking in account the duties or obligations written into the Conventions, Treaties and European law level legislation. The Council of Europe, the European human right organization, formally separated from the European Union, has also agreed (into force as of 1998) the European Charter for Regional or Minority Languages. The provisions of the article 1 of the Charter state that “regional or minority languages” mean languages that are traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State’s population, and different from the official language(s) of that State. It does not include either dialects of the official language(s) of the State or the languages of migrants. An interesting aspect is that one criteria of the provision is “languages that are traditionally used within given territory”. The European Charter for Regional and Minority Languages does not guarantee for EU-citizens the right to use his/her own language in other European Union Member State, anyhow. The European Charter for Regional and Minority Languages does not guarantee individuals from third countries to use their own language in European Union Member State, unless there does not exist bilateral agreement.

Linguistic rights are confessed and guaranteed in the Universal Declaration of Human Rights given by United Nations and dated as of 1948 (art. 2, art. 4, art. 14, art. 24, art. 26, art. 27). On linguistic rights, there are provisions also in the Declaration on Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1993) given by Union Nations.

The European Charter of Fundamental Rights, as a part of European Union primary law provisions, does have articles on linguistic rights and cultural rights. The article 21 of the EU Charter does have provisions on the general non-discrimination principle; language is one ground towards which discrimination is prohibited. The article 22 of the EU Charter does have provisions on cultural, religious and linguistic diversity rights, which European Union respect. The article 41.4 of the EU Charter states that “every person may write to the institutions of the Union in one language of the Treaties and must have an answer in the same language”.

4.2 Realizing the language rights

Community's communication on A New Framework Strategy for Multilingualism in year of 2005 stated for first time the portfolio of a European Commission which explicitly included the responsibility for multilingualism. The document reaffirmed the Commissions commitment towards the multilingualism in EU and set out the Commission's strategy for promoting multilingualism in EU. It proposes several actions for this strategy, also. The European Union is founded on "unity in diversity": diversity of cultures, customs and beliefs and of languages. The Commissions multilingualism policy has three aims: to encourage language learning and promoting linguistic diversity in society, to promote a healthy multilingual economy and to give citizens access to European Union legislation, procedures and information in their own languages. The responsibility for this progress remains in Member States, but the Commission will improve the consistency of action taken at different level. In the Commissions Action Plan 2004-2005, national and regional authorities are encouraged to give special attention to measures to the European Charter on Regional and Minority languages, too.

It has been remarked that European Union does not have a policy on minority languages. This is an area left to the Member States to be dealt with as a matter of subsidiarity, the EU acknowledging only the dominant, official language of each Member State (WAKEFIELD, 2007). The protection of languages has been addressed to the Council of Europe, which is not the same organ than the European Union. The policy of minority languages is practically left to the Member States, to be dealt with as a matter of subsidiarity. So, it is primarily the Nation States who must realize the language rights and individuals ability to understand, for example, legislative agenda and the rights and duties written into the legislation.

Legal certainty as an essential part of the rule of law principle presupposes that the text of laws is understandable and accessible by the citizens (RULE OF LAW, 2011). Anyhow, the legal maxim like the legal certainty does not realize as such the language rights or individuals ability to understand the legislative agenda or rights and duties written into the legislation, written in foreign language or when legislation is using the unfamiliar concepts and expressions. Considering the importance of the agenda of legislation, one must not forget the manifestation that individuals should be able to influence to the content of law governing them. Legislative reasoning should take methodologically into account, the context, legal consciousness and linguistic diversity, in other words cultural rationality.

4.3 Language rights in single cases

In some cases, the language has formed the hinder and prevented the use of the European Union fundamental rights (former Community basic rights), prevented benefitting the right to free movement and working in European Union. In the Groener

case, a national of Netherlands had been precluded from taking up a post as a teacher of painting in an Irish State school. Such decision was made on the ground that she did not know Irish language which, alongside English, is an official language in Ireland. The European Court held that, under Article 3(1) of Council Regulation (EEC) Number 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, such a requirement of linguistic knowledge was justified having regard to the nature of the tasks to be performed by the person concerned provided that the linguistic requirement in question is imposed as part of a policy for the promotion of the national language which is, at the same time, the first official language, and provided that that requirement is applied in a proportionate and non-discriminatory manner'.[2]

There are also other important cases where the basic principles are established. In the case Haim, the European Court of Justice held that although language requirements constituted an obstacle to the exercise of freedoms guaranteed by the European Union Treaty, they could be justified by overriding reasons based on the general interest.[3] In Haim case, the European Court of Justice states that "according to the Court's case law, national measures which restrict the exercise of fundamental freedoms guaranteed by the Treaty can be justified only if they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective".[4]

In some cases, there has been stressed that the prior examination of the proficiency in the languages of the host country is against the provisions of European Union legislation. In the case *Commission of the European Communities versus The Grand Duchy of Luxemburg*, which questioned about the freedom of establishment, the Grand Chamber of European Court of Justice in year 2006 stated that by making the registration of an European lawyer with the competent national authority subject to prior language test, the Member States law was contrary to provisions of relevant applicable community directive[5]. In the case *Graham J. Wilson versus Ordre des advocates du barreau de Luxemburg*, it also has been stated that directive regulating the freedom of establishment practice of the profession of lawyers must be interpreted as meaning that the prior examination of the proficiency in the languages of the host Member State is not allowed.[6]

In year of 2007, concerning the case *Skoma-Lux sro versus Celni ředitelstvi Olomouc*, the European Court of Justice stated (Grand Chamber) that European Union legislation, because of conditions of accession, "precludes the obligations contained in Community legislation which has not been published in the Official Journal

[2] C-379/87 Groener, 1989 ECR 3967, § 24.

[3] C-242/97 Haim, ECR 2000, p. I-05123, §§ 52-62.

[4] C-242/97 Haim, ECR 2000, p. I-05123, § 57.

[5] C-193/05 Commission of the European Communities versus Grand Duchy of Luxemburg, ECR 2006 p. I-08673, § 47.

[6] C-506/04 Graham J. Wilson versus Ordre des advocates du barreau de Luxemburg, ECR 2006 p. I-08613, § 77.

of the European Union in the language of a new Member State, where that language is an official language of the Union, from being imposed on individuals in that State, even though those persons could have learned of that legislation by other means". The Court said that the only version of an European Union regulation which is authentic is that which is published in the Official Journal of the European Union. The electronic version predating that the publication, even if it is subsequently seen to be consistent with the published version, cannot be enforced against individuals.[7] In the *Skoma-Lux sro versus Celni ředitelstvi Olomouc*, the European Court of Justice was interpreting European Union language provisions, not saying anything about the validity of the legislative act or decision made in Member State.[8] In this case, because of the legal certainity, the Member States concerned are not, under the European Union law, obliged to call in question the administrative or judicial decisions taken on the basis of such rules, where those decisions have become definitive under the applicable national rules. Only in the case of exceptional circumstances where there have been administrative measures or judicial decisions, in particular of coercive nature, which would compromise fundamental rights, it is for the competent national authorities to ascertain this with those limits.[9] What the European Court of Justice actually said (in very complicated and uninformational way) in this case concerning the language rights: the definitive administrative decisions taken on the basis of the European Union normative act, that was not published in the European Union Official Journal, and not given by the official language of the Member State, are valid, unless they are not infringing the fundamental rights. That kind of discretionary powers belongs to the national authorities in European Union Member States.

The language conventions as such are not realising the rights of individuals. There is needed individual capacities, motivation and will to learn foreign languages, financial resources to establish language policy and education or multi-lingual services. There is no doubt that language is one important precondition of functioning democracy where legislative reasoning takes place.

5 Conclusions

The concept of culture as such is a very vague concept. It is possible to define culture as a broad concept, or more narrowly, analysing the concept in some special domain, like in the legal domain.

There are several considerations about the culture, one assumption is that culture begins in our genetic history. There exists such genetic information store which is the reason for our actions. On the other hand, the culture and tradition are combined. The culture is understood to be behaviour, attitudes and ideas of the individuals and

[7] C-161/06 Skoma-Lux sro versus Celni ředitelstvi Olomouc, ECR 2007 p. I-10841, § 50 and § 51.

[8] C-161/06 Skoma-Lux sro versus Celni ředitelstvi Olomouc, ECR 2007 p. I-10841, § 68.

[9] C-161/06 Skoma-Lux sro versus Celni ředitelstvi Olomouc, ECR 2007 p. I-10841, § 73 and § 73.

groups in its nature. There are several approaches to the culture. Capturing the one and clear concept culture is impossible.

When considering the concept of culture and cultural rationality in legislative reasoning, one must take into the account that legislation is the activity transforming the preferences and values from the society into the internal legal sphere. The legislative reasoning is a kind of cross-cutting activity between the internal legal sphere and the society outside that purely legal domain having its own concepts and methods. In continental European legal doctrine, the concept of law has been traditionally separated from other system of society, systems of morals and religion, for example. Modern legislative reasoning in European and globalised law necessarily takes place in the cultural pluralism. It is not possible to separate strictly the internal and external spheres of legal domain in society. Not even in the legal reasoning activity.

In the legislative reasoning, the concept of culture is possible to understand as a categorising imperative. Understood like this, the culture refers to the distinctions and differences between the individuals, groups and nations. On the other hand, the concept of culture has an integrative function. In the legislative reasoning, one has to balance several cultural demands through the method and criteria of the cultural rationality. In European Union, it has been accepted the principle of unity in diversity. It necessarily demands the legislator to balance several cultural aspects which change, but often in a very imperceptible way. Cultural rationality and cultural consciousness as a part of it is one important factor which is legitimating legislation and law in society.

RACIONALIDADE CULTURAL NA LEGISLAÇÃO

Resumo: A justificativa legislativa na Europa se encontra no pluralismo cultural, “na unidade da diversidade”. A consequência de tal pluralismo é que uma racionalidade cultural torna-se necessária, o que deve ser levado em conta no método de justificativa legislativa. Este artigo foca na cultura da justificativa jurídica, atividade separada da justificativa jurídica. O artigo refletirá sobre três dimensões da racionalidade cultural: contexto, consciência jurídica e linguagem, como partes de aspectos culturais. Não foi encontrado apenas um conceito claro e indiscutível de cultura, mas vários. O método dos pressupostos legislativos, por exemplo, é organizado para levar em consideração os aspectos culturais. Diversa alternativa seria estabelecer métodos de justificativas legislativas que sejam baseados em conhecimentos relevantes, relatando regular e eficientemente os aspectos culturais da sociedade. Essa opção favorece o fato de levar em conta a consciência jurídica da sociedade, que é uma pré-condição para leis legítimas. A mudança da consciência jurídica acontece de maneira imperceptível. A linguagem do direito é fator essencial para influenciar a agenda legislativa e entender a lei criada pelo legislador.

Palavras-chave: racionalidade cultural; consciência jurídica; justificativa.

References

CHURCH, J.; SCHULZE, C.; STRYDOM, H. *Human rights from a comparative and international law perspective*. Pretoria: Unisa Press, 2007.

CONKLIN, W. E. Invisible origin of legal positivism: a re-reading of the tradition. Netherlands: Kluwer Academic Publishers, 2001.

GARAPON, A. Judges at the crossroads between worldwide and universal dimension, 71-91, the World Order, 1-17, Global Harmony and Rule of Law, Papers, Plenary Session, IVR. In: 24th World Congress, 24., 2009, Beijing, China. *Proceedings…* Beijing, China: University of Beijing, 2009, p. 15-20.

GLENN, P. H. Legal cultures and legal traditions, 7-20, legisprudence and comparative law. In: VAN HOECKE, M. *Epistemology and methodology of comparative law*. Oxford: Hart Publishing, 2004.

KELSEN, H. *General theory of law and state*. Manchester: Harvard University Press, 1945.

KENNEDY, D. *Rise and fall of classical legal thought*. Washington: Beard Books, 2006.

KUPER, A. *Culture:* the anthropologists´ account. Manchester: Harvard University Press. 1999.

LADEUR, K.-H. Methodology and European law – can methodology change so as to cope with the multiplicity of law? Legisprudence and comparative law. In: VAN HOECKE, M. *Epistemology and methodology of comparative law*. Oxford: Hart Publishing, 2004. p. 91-121.

MONTESQUIEU, C. de S. baron de. *Spirit of laws*, v. 1. Dublin: Publishing House, 1751.

MUSSON, A. *Medieval law in context:* the growth of legal consciousness from magna charta to the peasants' revolt. Manchester: Manchester University Press, 2001.

PECZENIK, A. *On law and reason*. New York: Springer Verlag, 2009.

RULE OF LAW. *Report on the rule of law, European commission for democracy through law (Venice Commission)*, Study n. 512/2009, CDL-AD(2011)003 rev. Strasbourg: Council of Europe, 2011.

ROSEN, L. *Law as culture:* an invitation. Princeton: Princeton University Press, 2006.

VAN HOECK, M. *Epistemology and methodology of comparative law*. Portland: Hart Publishing, 2004.

VAN HOECKE, M. European legal cultures in a context of globalisation, 81-99, Law and Legal Cultures in the 21st Century, Diversity and Unity, In: IVR CONGRESS, 23., August 1-6, 2007, Cracow, Poland, Plenary Lectures, edited by Tomasz Gizbert-Studnicki, Jerzy Stelmach, Wolters Kluver business. *Proceedings…* Warzawa, 2007.

WAHLGREN, P. *Lagstiftningen*. Problem, teknik, möjligheter. Institut för rättvetenskaplig forskning [CXCII]. Stockholm: Norstedts Juridik AB, 2008.

WAKEFIELD, J. *The right to good administration*. Oxford: Kluwer Law International, 2007.

WATSON, A. Legal culture versus legal tradition, 1-6. In: VAN HOECKE, M. *Methodology and european law:* can methodology change so as to cope with the multiplicity of law? legisprudence and comparative law, epistemology and methodology of comparative law. Oxford: Hart Publishing, 2004. p. 91-121.

WIENER, R. L.; BORNSTEIN, B. H.; SCHOPP, R.; WILLBORN, S. L. *Social consciousness in legal decision-making: psychological perspectives*. New York: Springer, 2007.