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INFLUENCE OF GLOBALIZATION ON THE LAW SYSTEMS

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Abstract

The legal issues compared by litigants to the phenomenon of globalization include the penetration of global juridical values into the national law systems to which they do not traditionally belong and thus, we may speak of the globalization of law. Globalization, a phenomenon that practically extends the communication bridges among states also results in the fact that the internal legal order expands towards a new legal order, namely a global legal order. In this context, the modernization and compatibility of the legal systems through the transfer of law is inevitable, a fact that might mean the total or partial replacement of a law system which proves to be out of date or obsolete by a system or parts of it assumed to be somehow superior and healthier and aiming at enriching or treating such system so as to ensure the compatibility of an internal legal system to the regional and inevitably the international one. In these conditions, the science of law exceeds the borders and the internal organization rules of a certain state may be useful in other state and vice-versa.

Keywords: globalization, science of law, global legal values, transfer of law, legal system

Introduction

Globalization¹ and the transfer of law have become daily realities that establish connections and interdependences between them so that the globalization of law is seen as an ordered and quite rigorous architectural system of legal norms and the transplant of law represents both the influences between the legal systems and those between the national, regional and international legal cultures. In these conditions, such a continuous evolution of the globalization of law has become a permanent challenge aiming at developing a global reasoning of the institutions entitled to interpret the law on the application of the legal norms from one state to another, from particular to general and vice-versa to find the most adequate and convincing solutions for the clarification of the concrete cases and to provide legal order and social peace at national, regional and global levels.

The word globalization has been used very frequently with very many significations referring to the development of global financial markets,² a potential increase of transnational companies and corporations and an increasing domination of these on the national economies and, as a consequence of such phenomena, citizens compare many legal issues to globalization also including the penetration of global legal values into the national law

¹ A.Jones, *Globalizarea. Teoreticieni fundamentali*, coord. Corneliu Nicolescu, CA Publishing House, Cluj-Napoca, 2011, pp. 7-10.

² V.Balaur, C.Vegheș, M.Roșca, S.Toma, *Marketingul în procesul dezvoltării economice și sociale, 1972-200: 30 de ani de marketing în România*, vol. I, *Marketingul în era globalizării*, ASE Publishing House, Bucharest, 2002.

systems that do not traditionally belong to them discussing at the same time about the globalization of law.³

Another definition⁴ of the phenomenon of globalization places it in a set of social, technological, political, juridical and cultural structures and processes resulting from the ever-changing character of goods production, consumption and trade. Massive changes have taken place and are taking place in the world economy⁵ so that we may consider that globalization is the result of creation of a world market which must be controlled by strict and yet sufficiently flexible legal rules to guarantee a good existence and functioning of the commercial relations among the subjects of law, individuals or states. The phenomenon of globalization also has some disadvantages meaning that it may decrease the security of all indicators, the local and regional chronic phenomena become global, the organized crime becomes worldwide, the ethnic and religious fanaticisms radicalize and the threat of terrorism increases⁶.

And the negative aspects are multiple since globalization is an uncontrolled, unguided and ungoverned process and, if got out of hand, economic globalization may lead, for example, to economic chaos and ecologic devastation in many parts of the world. Globalization may influence democracy⁷ as well meaning that it may replace the dictatorship of national elites with the dictatorship of international finances. For instance, the phenomena of fragmentation and weakening of social cohesion and localism in wide areas of the globe are alarming. Practically, by globalization there is a deterioration of income distribution, financial and economic crises multiply with huge effects on the social and political life, including the danger of state disintegration with major influences on social order and implicitly on legal order⁸. The marking of borders no longer has the role of an intangible space of the territory since the state inevitably becomes part of a whole, from the globalized world and its territory is oriented after the logic of flows from all domains⁹: capitals, goods, information, culture and individuals. All these flows represent both power vectors, for those who know how to generate them, to master them and to give them a meaning, and destabilization factors only if they are seen as a fatality. Thus, in recent years, the mobility of law has increased because the enforcement of law no longer supposes the settlement of certain divergences between neighbors but this organization of circulation of capitals, goods, information and individuals among countries and implicitly among continents. The concept of globalization of law¹⁰ appears following the need of existence of some procedures focused on the safety of changes of these flows and implicitly the prevention of potential risks resulted from such processes.

In the specialized opinions¹¹ it has been affirmed that the political organization of a new international society, the transposition at international level of the organization of states as federations and the prefiguration of a potential world state or government lay at the bottom of appearance and development of some international organizations; thus, supranational entities that have become stronger and stronger and are autonomous towards the states they finance or have acquired over time a supranational character have come into existence,

³ G.Soros, *Despre globalizare*, Polirom Publishing House, Iași, 2002, p. 23.

⁴ I.Bari, *Globalizarea și problemele globale*, Bucharest, Economică Publishing House, 2001, pp. 17-19.

⁵ Ph.Kotler, *Managementul marketingului, analiză, planificare, implementare, control*, Bucharest, Teora Publishing House, 1997, pp. 54-56.

⁶ Gh.Văduva, *Terorismul contemporan-factor de risc la adresa securității și apărării naționale, în condițiile statutului României de membru NATO*, "Universitatea Națională de Apărare" Publishing House, Bucharest, 2005, p. 11.

⁷ J.Stiglitz, *Globalizarea. Speranțe și deziluzii*, Economică Publishing House, Bucharest, 2005, p. 53.

⁸ E.Gh.Moroianu, *Considerații privind ordinea naturală și ordinea socială în vechea filosofie greacă*, in "Revista de filosofie", no. 1/1990.

⁹ Z.Bauman, *Globalizarea și efectele ei sociale*, "Antet" Publishing House, Bucharest, 1999, p. 85.

¹⁰ I.Craiovan, *Filosofia dreptului sau dreptul ca filosofie*, "Universul Juridic" Publishing House, Bucharest, 2010, pp. 281-282.

¹¹ Raluca Miga Beșteliu, *Organizații internaționale interguvernamentale*, All Beck Publishing House, Bucharest, 2000, pp. 1-5.

entities that do not have their own colours, such as the International Monetary Fund or the World Bank, have exercised an important influence on the birth and formation of national laws, mainly in the post-communist states.¹²

Of all subjects, the science of law is the most affected one by this process of continuous unification of the world¹³ because the science of law must be updated continuously so that it may cover as many new aspects of the contemporary social life as possible since new spaces and domains of the law, new methods and enforcement strategies or regulation techniques appear permanently that we may come to the situation where many of the things that represented fictions in the past may become an *aquis* at present.

At global level, the existence of preoccupations related to the independence of legal power and the statute of those entitled to make the law has at least two significant explanations.

First of all they refer to the phenomenon of globalization which also determines, among others, a certain convergence of the legal systems by creating some common legal spaces and instruments at continental and regional level, leads to the intensification of institutional cooperation, a fact that necessarily involves a certain adjacency of concepts regarding the independence of justice and implicitly the immovability of judges and their role in a democratic state.

Secondly, we may see that in all states there is the trend of political factor and mainly of the executive organs to try, in direct or less direct diverse ways, to influence the judicial power¹⁴, especially by means of the mechanisms of appointment and promotion of magistrates thus negatively influencing the general law principles and, moreover, bringing prejudice to the rule of law. In this context, the political power is structured into three dimensions¹⁵: the dimension of the national law, the dimension of the international law and the dimension of global policies, this type of power bearing the name of *soft power*.

By its specific object, the science of law¹⁶ currently acquires a special importance which is determined by the need to analyse the law and state from the perspective of globalization. The regional organization is considered as the intermediate stage leading to globalization and relies on the deliberate and voluntary transfer of sovereignty to supranational institutions. In this context, in the world there is at present tens of associations of regional states, associations that differ among them by the intensity of cooperation or the degree of institutionalization.

The transfer of law is in general understood as a transfer of power and institutional structures beyond the geopolitical or cultural frontiers and which may be decided imperatively or voluntarily, it comprises whole legal systems or unique legal principles and intends to get integrated into similar or different legal cultures¹⁷. In the receiving countries, the transfers of law may penetrate the notion of rule of law or non-state social institutions or, in case of many developing countries, they are implemented in the supreme state law superposing over indigenous legal structures. This is more and more internationally connected to the harmonization legislative projects sponsored by the great commercial partners and the donating international agencies.

The transfer of law involves a legal system which includes a legal norm, institution or doctrine adopted from another legal system. It may also refer to the reception of an entire

¹² M.G.Losano, *Drept comparat*, C.H. Beck Publishing House, Bucharest, 2005, p. 72.

¹³ L.J.Constantinesco, *Tratat de drept comparat*, vol. I, *Introducere în dreptul comparat*. Bucharest, All Publishing House, 1997, p. 18.

¹⁴ Sofia Popescu, *Statul de drept în dezbaterile contemporane*, "Academia Română" Publishing House, Bucharest, pp. 146-149.

¹⁵ J.Allard, A.Garapon, *Judecătoria și globalizarea. Noua revoluție a dreptului*, edition reviewed by Mona-Maria Pivniceru, Rosetti educational Publishing House, Bucharest, 2010, p. 70.

¹⁶ N.Popa, *Teoria generală a dreptului*, C.H. Beck Publishing House, Bucharest, 2008, pp. 10-11.

¹⁷ J.Allard, A.Garapon, *op. cit.*, p. 54.

legal system that may appear in a centralized way. To understand the transplantation phenomenon of a foreign law system it is necessary to examine the historical premises existing round the introduction of the foreign law in a particular case, for example, if this is the result of a conquest, colonial expansion or political influence of the state whose law system is being adopted. A territorial expansion by military conquest does not always involve the imposition of legal norms by the winsome peoples to the conquest populations and this type of imposed power bears the name of *hard power*.

The concept of transplant of law is not new¹⁸ since the legal systems all over the world have developed for millennia by transfers of law and some of the best transfer of law that may be documented took place during the military expansion of the Roman Empire. The roman lawyers used to assimilate *ius gentium*, which applied to the colonized persons to *ius naturale* – the law that had to be observed by everybody¹⁹. They considered that the *universal laws of nature* are capable of linguistic culture by means of the universal legal codes. Their conviction was that the differences between the legal systems denied the universal attributes of the human being and the codes of natural laws based on the roman morality superposed over the indigenous beliefs and cultural practices.

The example is given by history, namely in the countries under Roman domination, the Germanic and Islamic populations which represented the subjects of the legal norms of the rule of law continued to be governed by their own systems of law within the so-called *principle of the legal personality*. In some cases, a direct imposition occurred in fact as happened, for instance, with the introduction of legal norms of Spanish law in South America²⁰. In other cases, the law of the winsome nation was introduced partially or in an indirect manner, an example being when during the British and French colonial expansion there was the tendency to introduce elements of the legal systems²¹ of the colonial powers to develop law systems adapted to the local conditions but reflecting to a great extent the character of metropolitan systems. Moreover, they had to accept that the process of transplant of law might have been interrupted by a revolutionary change knowing that a revolution may be defined as a historical event that may change the identity of a social-political system through the modification of the ideological bases of its legitimacy and, consequently, of the orientation. A legitimate revolutionary change is the most radical change to which a social-political system may be subjected because the transformation of the legal system of a country determined by such a change may make the legal system move forward or backward from other law systems, an extent to which ideological differences and similarities related to the social-political and economic structure of different countries is expressed in legal norms²². The newly-born legal institutions may not easily cross diverse contexts since they need a careful inoculation in the social and juridical consciousness that is going to adopt them, somehow contrary to what the idea of a transplant erroneously suggests, namely the institution moved will remain the same, will have the same function, except that all these will happen in the new legal system wherefrom the existence of an extremely limited area of options that makes us enunciate two possible solutions: rejection or integration.

The principle of *complementarity* of the legal norms functions as a quite efficacious mechanism in the evaluation of capacity of the legal systems at global level to find the best possible solutions to solve legal order issues²³ that may occur at a global level – the trial of crimes against humanity, the traffic in human beings, the drug traffic, piracy - as Mircea

¹⁸ Ellen Goodman, *The Origins of the Western Legal Tradition*, Federation Press, Sydney, 1995, pp. 131–36.

¹⁹ N. Barry, *An Introduction to Roman Law*, Clarendon Press, Oxford, 1962, pp. 54–59.

²⁰ M.G.Losano, *Marile sisteme juridice, Introducere în dreptul european și extraeuropean*, coord. M.-C. Eremia, All Beck Publishing House, Bucharest, 2005, pp. 198-201.

²¹ *Idem*, pp. 291-297.

²² R.Rodière, *Introduction au droit comparé*, Dalloz, Paris, 1979, pp. 21-23.

²³ Ch.Debbasch, J.-M.Pontier, *Introduction à la politique*, Paris, Dalloz, 2000, p. 6.

Malița said: “Globality does not ensure the internal order and the enforcement of justice. The states are called to cope with new dares: weapon traffic, money laundering, corruption, terrorism, and drugs”.²⁴

The appeal for the transplantation of jurisprudence of the legal systems of other states in view of argumentation based on the efficacy of the applied and applicable legal norms leads to the creation of a common and inedited juridical space through the creation of some unified legal procedures, and we may exemplify the *European arrest warrant* in this respect, an institution aiming at the elimination of possibility for offenders to exploit the differences between the legal system of the states. For this purpose, it is necessary that the sentences be acknowledged and executed abroad without the formalities provided for the classical conventions regarding the international legal assistance²⁵.

The law systems created or updated by the method of transfer of law must not compete but lead to a mutual and permanent evaluation and maintenance having as a goal the diminution of the risk of rejection of the transplanted norm. The legal norms may be taken out of context and be used as a model for juridical development in a very different society. The absence of some substantial differences in the manner of drafting a legal norm between a donor and a host country does not imply the fact that the legal reality or the daily legal and social practice in the two countries should be identical or similar. The legal reality in the host country may be very different in terms of the manner in which people (including lawyers and civil servants) read, interpret and justify the relevant legislation and sentences rely on these. More than that, the role of law in the receiving country may be weaker than in the donating country and, in particular, it may become a predominant factor. Thus, in practice, social norms might be hindered by people since the initiation of a legal right or even by a decision given by a court to sustain such a request. This suggests that it is not honest to use the perspective and framework of one’s own legal culture when they examine a legal norm or institution borrowed by a legal system in the context of another culture²⁶. Such an approach involves the risk of existence of many more de facto similarities²⁷.

Another goal of the legal transplant is to ensure the adequate functioning of the global society and requires the existence of a single legal order since two distinct and independent legal orders may not be simultaneously valid for the same individuals in the same territory. This way, *legal order* provides the orientation, carrying out and control of social actions and behaviours based on a ranked system of legal norms. Legal rules represent the foundation of legal order and, just like social norms, protect the main social values and relations by imposing, allowing or forbidding certain actions or behaviors. The opening of an international legal space through the assimilation of certain specific legal norms allows the acceleration of the course of international justice and the placement of weaker states under the domination of stronger states as well.

Conclusions

As a conclusion, the legal transplant represents a phenomenon in a continuous development that may lead to the globalization of law by extension to any legal norm that may be useful for a given global topic. At the same time the globalization of law and justice opens a new horizon for the sovereign states called to evaluate the value and place in grouping nations in terms of influence and independence. The efficiency, efficacy and validity of law and the application thereof in a reasonable and convincing manner are the principles that come before independence and dignity of any national law. The globalization of law is

²⁴ M.Malița, *Zece mii de culturi, o singură civilizație*, Nemira Publishing House, Bucharest, 1998, p. 128.

²⁵ J.Allard, A.Garapon, *op. cit.*, pp. 27-29.

²⁶ O.Kahn-Freund, *On Uses and Misuses of Comparative Law*, in *Modern Law Review*, 1974, p. 37.

²⁷ W.Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants* in *American Journal of Comparative Law*, 1995, p. 43.

constituted at present in a wide movement area where national strategies are in their environment and have as a finality the provision of legal order and, by the method of legal transplant, leads to the birth of a global procedural law which is imposed, on one hand, by the need for the instauration and maintenance of social peace and world level and, on the other hand, by a certain attraction between the legal cultures and the attempt to meliorate the differences between the legal systems. The main motivation of the latter aspect is that the global and common principles of justice lie at the bottom of different national law systems. The existence of legal transplants in diverse cultural, socio-economic and political contexts is important in order to examine and establish the opportunity and applicability of transplants and legislative and legal practice that may ensure the adequate functioning of a globalized society with an efficient and efficacious legal order.

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