

Ongoing Global Dialogue on Legal Education

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Abstract

Nowadays, the matter of global dialogue is a subject of great relevance for the legal education and has special key words. We live in a world which moves towards an heterogeneous pluralism that must be harmonized as an expression of globalization and, more specifically of phenomena such as the creation of the European Union, Mercosur or the Free Trade Agreement. The migratory movements and the resurgence of nationalisms make the situation become more complex, with certain consequences in sovereignty's traditional concept, in Law's production sources and in the creation of new jurisdictional bodies. For these reasons, the reality of Law demonstrates a number of problems which need to be overcome through a new understanding and the implementation of new legal techniques for the professionals. The article concludes with a discussion about whether this system would solve the problems that it was designed to remedy.

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1. Introduction: Public and Private Law

I believe should start from the fact that, increasingly, there is a new relationship in the borders between public and private Law. Public authorities are progressively turning to private Law when selling their assets and use contracting to fulfil the missions entrusted to them, providing services indirectly through licences to private companies, extrapolating to the public ones formulas which are used in private Law or resorting to the forming of foundations (Chevalier, 1998, 659-690; Zapatero, 2009, 376- 377).

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Now, another good assumption is that of the trend towards americanization of the Law, explained because globalization is given impetus by the needs of the global economy and by the unequal distribution of power. There is dissemination of concepts, figures and practices coming from the United States of America (Shapiro, 1993, 37 ff.). Although also from this viewpoint, it is worth underlining that it comes from a restructuring of the international legal field, which has its origin basically in the practice of Law carried out by the large American legal firms and by the influence of American legal education on the elites of the Latin American States. But, if we go deeper into the matter in question, this idea of unification which is present in the legal dimension of globalization poses some questions: Do all countries have the political, social and cultural prerequisites to bring this harmonization to a successful conclusion? Can we talk of a genuine harmonization of Law, or rather that there is uniformity of the rules, but not the practice of application? And, in all the fields of Law, are all these tendencies carried out in the same manner? (López Ayllón, 2004, 90-91; Mittelman, 2000, 35 ff.).

2. The New Legal Codes

Meanwhile, we should not overlook the part of the doctrine that advocates the unification of private Law, or in some cases harmonization, through the commercialization and generalization of commercial Law, claiming that its autonomy, which arose spontaneously when trade was carried out exclusively by traders belonging to the corporations, is anachronistic in a period in which acts of commerce are performed freely by all kinds of citizens. In addition, the growing uniformity of the economic environment in the globalized society means that contractual demands are today for all producers. The duality of Codes of private Law has numerous drawbacks because it brings repetitions which are useless, and complicates the application of the Law by stirring controversies with regard to the way in which its provisions have to be combined and, above all, regarding the delimitation of the acts and business which must come under civil or commercial jurisdiction. That, even scientifically, the division is negative because it damages the commercial Law, insofar as it isolates its institutions from the general theory of obligations; and it damages civil Law, by depriving it of the elements which might renew it, adapting it to the new circumstances (Flood, 1996, 169-214).

Nevertheless, what is true is that there are areas of civil Law which are and always have been inaccessible to commercial Law, such as the rights of personality, family relations and successions.

Similarly, there are sectors such as bills of exchange, payment orders, cheques, societies with commercial form, insurance, banking, bearer industries and, in general, all those which require a company organization, which claims an autonomous treatment whether or not it is included in the commercial Code (Wiener, 1999, 18 ff.).

To solve the problems, a proposal expressed with a generalist sense which I consider of great interest is the one made by Günther, who estimates from an internal point of view that communications within the transnational network of pluralist interlegality have a reference in Law. This happens in relation to a formal and material legality oriented at human rights, containing elements of procedural legality in their democratic self-determination aspect. But the current legality does not correspond to that of modernity, becoming transformed into a sort of universal Code of free circulation.

In answer to the question of whether we are faced with fiction, what is true is that transnational legal communication displays some common fields, even despite the differences given by the different cultures. As far as the previously mentioned Code is concerned, in it there are other legal concepts, principles, rules and institutions. For example, Günther quotes the concept of rights assigned to the individual and exercised autonomously, duties complementary to these rights, secondary rules such as authorizations for the decision on primary rules, the concepts of culpable and objective responsibility, the elementary rules which are attached to them for the charge of conducts and their consequences for the physical and/or collective subjects, the principle of forecasting responsibilities and sanctions, the rules for distribution of the test between the actor and the respondent, the presumption of non-culpability, the institutionalization of the role of an impartial third party including the right to present resources against the decisions or the principle of the *audiatur et alter pars*, amongst others.

From the coordinate of internal Law, Günther talks of a universal Code of legality in transnational networks of experts of state and non-state actors, which require concretization in legitimate procedures of creation and application of the Law. But those mentioned previously are concepts, rules or principles of a formal nature.

The programme materials are basically human rights which, in turn, are linked to the formal concepts of subjective right, which is attributed to the individual to be exercised individually, as happens with the link in relation to ordinary positive Law and the supreme Law of the person (Günther, 2003, 229).

3. Codes and Transnational Law, their Influence on the Legal Education

However, even despite appearances, it must be clear that the existence of this procedural and material Code does not produce a generalization or a universal homogeneity of a transnational Law which arises. Its principal feature is that of non-determination. Concrete determinations are established on the basis of a negotiation of the participants, and are valid both for the programme principles and for the material rules. The Code of legality always refers to this Code (Günther, 2003, 247-248). In this line, the horizontal regulatory spaces have an effect on making the Law uniform and coincide with centralizing processes of policy or redistribution of power and the authority between different forces.

This harmonization must be carried out at the same time as the proliferation of the various regulatory orders and of the legal cultures dealt with previously. As intervening factors, there is evidence that the legal cultures have a historical resignation and, when it comes to taking on the global Law by means of the replacement of the national legal order, this does not mean the complete disappearance of the previous legal culture. Other factors are the resurgence or recognition of autonomous legal orders inside and outside national borders. Similarly, we need to point out the emergence of new international institutions and governmental and non-governmental bodies, courts, committees, etc, which contribute treaties, judgments, recommendations and opinions to the world legal panorama (Furger, 2001, 201-245; Hirst, 1997, 50 ff.; López Ayllón, 2004, 91-92).

However, I think that this should be understood from a context in which we understand the existence of a principle of constant change in the legal forms, and a minimum and essential unit must be used. From the comparison between the different models it is possible to extract the idea that a lack of regulation integrated by the relevance of a model from another cultural sphere is reconstructed on the basis of the displacement of the interest it might awaken, moving on to study sociologically the social constitution and the strategies of assimilation which belong to the context.

From this perspective, at the bottom of the reception it can be seen that there is no dialogue or exchange. What was first seen as the reproduction of a legal model which was imported, is now taken as the original production reforming a legal form which is not its own. Nevertheless, the reception has to be contrasted with a new form which adopts the opposite solution consisting of determining above all else the historical originality of certain legal utterances (Serrano, 1991, 180 ff.; Wiener, 1999). So, the aspects which should be taken into account would be the differences in levels between the players involved, the type of objectives pursued, the instrumental variants and the degree of rationalization (Serrano, 1991, 198-199).

4. Conclusion

The globalization of Law has two main regulatory dimensions: the degree to which the world is subject to a set of legal rules, and reference to the certainty that human relationships are governed by Law everywhere in the world. Legal rules undergo conversion into obsessive-compulsive rules and become a system that legitimates itself based on its inherently self-generating nature. In addition, the initial concept of legal relations and their components are transformed into a techno-legal order under the influence of a new technical focus. Thus, a new order emerges, characterized by the formation of networks that imply that the globalization of law must centre around commercial and Contract Law, Public Law, protecting human rights and also the growing importance of lawyers, together with the dissemination of contents and legal procedures. All three of these mean that the regulatory authority of the State with respect to these areas is unlimited, although States can decide whether to participate or else to withdraw. In this state of affairs, linear systematicity is forgotten in order to implement a circular system, surpassed by the specification of new concepts.

In this work, there is an interdisciplinary and plural concept of what the term globalization means. In particular, globalization presents a reference to a social, economic, cultural and demographic process from which Law cannot escape. From this perspective, and starting from the new relationship between the public and private spheres, what stand out are the relevance of deregulation as a reality and the need for the State to continue maintaining its functions, albeit renewed in accordance with the demands of the new scenario in which it operates. But the reality of Law demonstrates a number of problems which need to be overcome through a new understanding of globalization and the implementation of new legal techniques and formulations.

In short, to be able to overcome these serious problems, the objective I think we have to set ourselves is to find a model of Law which is able to carry out an alternative project.

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