

THE PROCESS OF EUROPEANIZATION REVIEWED: THE IMPLICATION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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Abstract:

Currently when we speak about the European Union (EU) this is not only an economic or political integration any longer. EU founds its basis on the rule of law principle and its Court of Justice supervises that the law is observed during the implementation of all Treaty chapters. Furthermore, one of the European integration theories – Europeanization – that generally had a political, economic and even cultural connotation is more often used in the legal context evolving an approximation of laws at different levels either from International to European, European to national or even European to International. The present research paper aims at reviewing the Europeanization process from the law perspective while assessing the role the Court of Justice of the European Union plays on it.

Key words: *European Union, Europeanization, Court of Justice of the European Union*

JEL classification: *K33*

1. INTRODUCTION

Since several decades and even much more nowadays it became very fashionable to discuss about Europeanization (Mair: 2004, p.337). Being rather used in areas not directly linked to the Law, Europeanization seems to find its place also in the debates of legal scholars. In this paper, the authors aimed at assessing the existent literature covering the Europeanization issues in order to identify the main areas this phenomenon is relevant to, while also considering to what extent the Europeanization is applicable in law context. In addition, a special attention was paid to the role and place the Court of Justice of the European Union is given as an actor of Europeanization, making also comparative link to another actor of Europeanization which is the European Court of Human Rights (ECtHR).

2. LITERATURE REVIEW

The word ‘Europeanization’ according to English explicative dictionary means ‘assimilation’, ‘absorption’ and the process of absorption. Despite a big torrent of publications covering Europeanization issues, the concept of Europeanization itself remains poorly and confusingly defined (Mair: 2004, p.338). In addition, there is little consensus in terms of an unified definition of what, actually, the Europeanization means? There are authors considering Europeanization as part of European integration theories (Britz: 2001, p.1-3). While others, mention that the integration theories are not well suited to understand Europeanization since they explain the “dynamics and outcomes of European integration rather than domestic effects” (Radaelli: 2004, p.5). What is meant when researchers speak about Europeanization? This question, as

appeared, is not an easy one to answer. Which Europe the Europeanization phenomenon is referring to? Do we speak about the European geographical continent or about the European Union? In the last case we can speak more about “EU-isation” or “unionisation” rather than Europeanization (Hay: 2002, p.453).

Coming back to definitions, there are several attempts found in the literature trying to give an answer about what Europeanization means, for instance Risse et al. (2001, p.3) define Europeanization as “*the emergence and the development at the European level of distinct structures of governance*”. While Dirzu (2011, p.50) considers Europeanization both as a mean and as an end, representing also a method but also a substance, defining it as a project but also as a vision.

Nonetheless, one of the most comprehensive definitions is found in Radaelli (2004: p.6) specifying that “*Europeanization consists of processes of a) construction, b) diffusion and c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures and public policies.*

Besides the fact that there is no common definition about Europeanization, it became traditional to look at this phenomenon as only referring to Economic, Historical, Cultural and Political Europe rather than to a legal one (Sittermann: 2006, p. 3). In the Economic context Europeanization might be viewed *inter alia* as the process of harmonization/unification of domestic economies and creation of single EU Economy (Capannelli and Filippini: 2009, p.8). Moreover, merely the creation of the European Communities (EC) had as main goal to construct a common market and to achieve full economic integration (Groussot and Pech:2010, p.1). In historical Europe context, the Europeanization deals with territorial expansion of European States covering the colonization phenomenon (Featherstone: 2003, p.6). While cultural Europe surprisingly does not refer to culture as such that would include artistic values but rather sees Europeanization from an anthropological point of view; in other words the change of human beings habits, ‘reshaping of identities’, ideas and traditions (Harmsen and Wilson: 2000, p.17).

When it comes to Europeanization as a political phenomenon in his paper Olsen categorises Europeanization into five possible scenarios examined from the perspective of what is actually changing; therefore considering that it may be seen as:

- (a) Changes in external territorial boundaries;
- (b) Governance institutions developed at the supranational level;
- (c) Influencing and imposing supranationality at the sub-national and national levels;
- (d) Exporting governance procedure and policy specific for EU beyond EU borders;
- (e) A project of a political nature aimed at intensifying the unification of the EU.

In the legal science, the research on Europeanization was for a long time dominated by political science opinions. Moreover, the Court of Justice of the European Union (CJEU) was viewed as having rather a political role than a legal one (Vauchez: 2008, p. 8). Since there is no an unique definition of Europeanization for the other sciences, the lack of a definition of Europeanization of Law should not be a surprise, particularly because Europeanization of Law is quite a young concept (Sittermann: 2006, p.20).

Despite this fact, Ziller specifies that he does not believe that legal scholars are indifferent to that (2006, p.6). Moreover, he even tries to identify the meanings the Europeanization of Law can have. For instance, the first meaning of Europeanization of Law is “*enlargement of EU Law areas*” where the concept supposes a material existence of positive law whose sources are EU instruments or the principles expressly

stipulated in the founding treaties of European Communities and EU, such as interpreted by the CJEU (Ziller: 2006, p.7).

The second meaning includes “*the development of new disciplines of EU Law*”, for instance the attempts to create a civil European law or European penal law that supposes a new connotation of the classical branches of law (Ziller: 2006, p.10).

The third meaning supposes “*the aspect of European Human Rights Law within the Europeanization of Law*”. Here the link is made to the Convention for the Protection of fundamental Human Rights and Freedoms including the Strasbourg Court and their influence over the national systems (Ziller: 2006, p.11).

In this context, it is worth mentioning that the main actor of Europeanization when it comes to geographical Europe and not EU is the Council of Europe and its European Court of Human Rights in particular. The following paragraph will focus on the role the CJEU plays in the process of Europeanization. However, some comparative attention will also be paid to both actors of Europeanization in order to see their similarity and difference.

3. THE ROLE OF COURT OF JUSTICE

The CJEU is a European Union institution (Article 15 Treaty on European Union) that according to Article 267 Treaty on the Functioning of the European Union (TFUE) keeps the monopoly for the interpretation of Treaty provisions. In addition, it is also responsible to rule over the validity and the interpretation of acts of the institutions, bodies, offices or agencies of the Union.

The grand theories of Europeanization, however, have for a long time paid no interest to the role of the CJEU, which remained largely perceived as a technical servant with technical competence (Dehousse: 2000, p. 16). However, the practice shows that CJEU is a force that had to be reckoned with, at least from the following reasons.

It is the CJEU who ruled that EU law must prevail over conflicting national laws including national constitutions, ‘inventing’ the **Supremacy principle**. Indeed, in its Case 6/64, *Flaminio Costa v E.N.E.L*, the Court stated that: “*It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.*” Later on in Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* the Court transpires an absolute character of supremacy that renders inapplicable any incompatible national law. At the same time, CJEU is not an authoritative power, since while considering supremacy of EU law over the domestic one it also mentions that supremacy principle cannot be used in order to limit the applicability of domestic laws that provide for higher standards than those available under EU law (see Case C-50/96, *Deutsche Telekom AG v Lilli Schröder*).

It is the CJEU again that stated on the principle of **Direct Effect**, evolving the capacity of a provision of EU law to be invoked before a national court. It ruled first over the direct effect of Treaty provisions. Namely, in Case 26/62, *Van Gend en Loos* (official name *Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*) the Court stated that the Treaties “*produces direct effects and creates individual rights which national courts must protect*”. Nonetheless, the Court did not limit the direct effect principle to the treaty provisions only expanding it further, subject to some specific conditions, to additional EU law instruments such as Regulations, Directives (including vertical and horizontal direct effect) and Decisions.

Moreover, within the same judgment the CJEU made a revolutionary statement, not only in terms of EU but also in the context of International Law, specifying that “*the European [...] Community constitutes a new legal order of International Law for*

the benefit of which the States have limited their sovereign rights [...] and the subjects of which comprise not only the Member States (MS) but also their nationals” [emphasis added]. Furthermore, it courageously continues stating that “*independently of the legislation of MS, Community Law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage*”(Case 26/62, *Van Gend en Loos*).

In this context, there are authors that consider that the single thing of creating the Community legal order should have been placed CJEU as an active subject of Europeanization (Snyder: 2000, p.6). Furthermore, if CJEU would not have instituted a new legal order and its doctrine of supremacy and direct effect, the European Union would have most likely remained an usual organization of European states like other international alliances (Koch: 2004). Since by developing them the CJEU has “paved the way for a fast and effective European integration” and Europeanization of Law (Koch: 2004, *idem*). That is why, the Europeanization of Law has also been called as ‘Europeanization-through case-law’ (Vauchez: 2008, p. 8). Moreover, the same author goes to the extent to affirm that actually all the successive political undertakings of the EU have referred to the principles developed by the ECJ (Vauchez: 2008, p. 11).

At the same time, it has been argued that CJEU has Europeanized the domestic courts to the extent of influencing their legal reasoning (Smits: 2004, p. 235). It is true that making the EU law directly applicable and allowing individuals to look for redress before the national courts basing their application on existent EU law made the courts to reconsider their method of reasoning the decisions. Moreover, another influence in this sense is the option for the domestic courts themselves to submit questions before CJEU for the interpretation on the EU law under the preliminary rulings procedure (see Article 19(3), b TEU and Article 267 TFEU).

The CJEU has also Europeanized the sources of EU Law itself (Smits: 2004, p. 234). For instance, far before the protection of human rights was codified in a Treaty provision (currently Article 6(3) TEU), the Court stated in Case 29/69 *Erich Stauder v City of Ulm – Sozialamt* and later reiterated in Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* that it also protects the human rights enshrined in the „*general principle of Community Law whilst inspired by the constitutional traditions common to the Community MS*”. Namely, since then the principle of human rights protection became part of the Community legal order (Smochina and Cernei: 2011, p.14).

If we consider both CJEU and ECtHR as actors of Europeanization one should mention that we speak about CJEU as an actor of Europeanization in the context of European Union while ECtHR is the main actor within Europeanization of geographical Europe. Although ECtHR expands its jurisdiction over forty nine MS, twenty seven of them are EU MS. Therefore, we can arguably say that the role ECtHR plays is larger in territorial dimension than that played by the CJEU. However, it should be taken into consideration the fact the ECtHR jurisdiction is limited to human rights protection issues only as enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950) and its Protocols (ECHR) while CJEU’s jurisdiction expands over a vast majority of EU Law aspects, including also human rights issues as enshrined in the Charter of Fundamental Rights of the European Union, fundamental principles inspired by the constitutional traditions common to the EU MS and other Treaty provisions. In addition, although the rights guaranteed by EU Charter are almost copy and pasted from ECHR, nevertheless EU can provide a more extensive protection (see Article 52(3) EU Charter). Therefore, we may conclude that although the Geographical Europeanization realised by ECtHR is larger in territorial meaning but much squeezed in jurisdictional one while EU or supranational Europeanization of CJEU is broader in jurisdictional aspect but also at a different dynamic providing for a

higher level of protection. In this context, there are authors who consider that the binding status of the EU Charter from one side and the possibility of a higher standard of protection, from the other might make it more attractive for individuals to lodge their complaints before CJEU rather than ECtHR (Smochina and Cernei: 2011, p.17).

And last aspect the authors would like to touch in this report is the role of CJEU in Europeanizing the Law on non EU countries. While CJEU is a court whose jurisdiction is limited to EU MS and influence over the domestic law of non EU countries would seem impossible. Nevertheless, it should be mentioned that CJEU case law is part of the EU Acquis that the non EU countries look out for implementing into their internal legal order pursuing the aim to accede to the EU. In practice, for instance, when a provision of an EU instrument that national legislation has to be harmonized with seems to be uncertain or vaguely formulated, there is CJEU that interpret the EU instruments to be in conformity with the treaty provisions.

4. CONCLUSIONS

Regardless the decades of debates Europeanization still remains a mystery as long as there is no unified definition. Moreover, the term 'Europeanization' appears very well established in Economic, Historical, Political and even Cultural sciences with the exception of Legal one.

Although several attempts have been identified trying to explain the meaning of Europeanization in legal science, there is still no consensus on that. It can be clearly said, however, that Europeanization of Law might be at European or geographical level or EU level (supranational), the last raised questions about appropriateness to use the term Europeanization or EU-isation instead.

It has been observed that the role of CJEU in the Europeanization of Law process has been neglected for a long period of time. One could explain this neglecting due to the fact that the Europeanization as such was rather perceived in other fields that did not include the legal one. However, only thanks to CJEU case law the European Communities at that time became a new international legal order, detaching it from the International one.

The CJEU impact has been distinguished in several hypostases including the entire EU order but also the national courts, in relation to the ECtHR but also the impact over non EU MS.

The authors pointed out that although its role is usually neglected, the CJEU is a strong actor of Europeanization that legal scholars and practitioners should reckon with.

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