

# THE PROCESS OF EUROPEANIZATION OF LAW IN THE CONTEXT OF CZECH LAW

M. Večeřa

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## **Abstract**

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The paper is focused on the draft of the process of Europeanization of law. The process of European integration is often understood mainly as an economic process which aims towards the world-wide integration and organization of manufacturing, commercial, banking and financial operations, technologies and information. It is, however, a complex social phenomenon which represents – in addition to economical transformations – a rather complicated cultural, social, political and legal process with an extremely broad impact in all areas of life. Europeanization, the notion increasingly used in connection with the process of European integration, significantly modifies the Czech legal environment, which is regarding to the sphere of enterprise too. Europeanization of law manifests with multi-centrism of sources of law, which brings specific problems both to the bodies which interpret and apply law and also into the legal position of legal entities and their legal awareness.

European integration, globalisation, process of Europeanization, Europeanization of law, EU law, multicentric legal order

The European integration process brought on a fundamental social change for the countries of Eastern and Central Europe after the fall of the totalitarian political regime, both in the economy and importantly also in politics, society and law. Over the past several decades, European integration became a universal social process concerning all areas of social life – unlike previously, when it had been driven particularly by economic interests. The concept of European integration is increasingly conceived as a political process, where EU law plays an important role aimed at achieving a higher stage of integration and formation of a legal and political space *sui generis* (Hix, S., 1999). This process is denoted as Europeanization.

## **1. European integration as a project of Europeanization**

Globalisation trends all over the world also comprise the process of Europeanization. Europeanization can also be understood as a political project aiming to achieve effective European integration through law –

Europeanization of law. The relation between globalisation and Europeanization is generally characterised in a way that Europeanization represents a process of economic and political regional globalisation whose dominant institutional architecture is created by the European Union. It is the institutional establishment of European integration that makes Europeanization undoubtedly an existing phenomenon.

The term Europeanization was used in social sciences as early as in 80s and 90s of last century, it began to be more frequently used as late as after 1999 (Featherstone, 2003) and its reference framework is being shifted even outside the area of the European Union and its Member States for expressing considerable influence of the EU even upon the countries standing outside the immediate process of European integration. The usage of the term „Europeanization“ has not been unified even because it represents the concept of many „faces“ and directions of operation both „inside“ the EU and „outside“. J. P. Olsen distinguishes between five possible uses (Olsen, J. P., 2002):

1. Europeanization as changes in external territorial boundaries.
2. Europeanization as the development of institution of governance at the European level.
3. Europeanization as central penetration of national and sub-national system of governance.
4. Europeanization as exporting forms of political organization and governance that are typical and distinct for Europe beyond the European territory.
5. Europeanization as a political project aiming at a unified and politically stronger Europe.

Olsen's summary of the understanding of the notion Europeanization gives a good description of the many meanings of the notion and the multi-dimensional character of the process of Europeanization taking place in four major areas:

- Europeanization of policies – the effect of membership of the EU on the public policy of the individual member states.
- Institutional adaptation – transformation of social and political institutions in EU member states.
- Europeanization of law – includes not only the forming of a European law, but in particular, convergence of the national legal orders of the member states and the states wishing to join the EU. It is indirectly reflected in international law.
- Trans-national cultural diffusion – consisting in the broadening of cultural standards, ideas, identities and patterns of behaviour within the EU including radiation beyond the European territory.

Discourse on the dimensions of Europeanization is also projected in the themes of scientific study of the process. Symptomatically, the European University Institute in Florence, which has targeted the study of European integration and the process of Europeanization since 1972, is divided into four departments: Economics; History and Civilisation; Law; Political and Social Sciences (Snyder, F., 2000). Thus, in addition to legal science, particularly political science, the study of international relationships and economics are involved in European studies.

Among the many descriptions of Europeanization, the content of the notion is best expressed by what seems to be the most quoted definition today, i.e. Claudio M. Radaelli's, according to whom Europeanization consists of *processes of construction, diffusion and institutionalisation 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* (Radaelli, C. M., 2004). Rather than narrowing Europeanization down to a one-way process towards nation states, Radaelli understands it as a two-way process of mutual interaction between national and European public policies.

## 2. Europeanization as a Response to Globalisation

Progressive internationalization of the world economy getting over the frontiers of states at the same time more and more influences and determines even global political processes and results in a new international division of labour. Globalisation of economic activities is a determining factor for the whole process of globalisation but the information revolution, which contributes considerably to the development of globalisation and enables it, is also of great importance. New information technologies, namely telecommunication and world wide web, have allowed the creation of technical infrastructure for the course of global economy and they also play a key role in the expansion of supranational corporations.

We can ask a question in this connection, whether the legal and political globalisation advances as fast as economic, technological and information globalisation. The answer is no, as a consequence of legal and political developments lagging behind technical and economic developments. The situation in post-communist countries is even more complex because after the fall of the totalitarian system the situation involved a partial return to the legal and political state that had existed before the establishment of the totalitarian system. The globalisation of law, as one of the areas of globalisation, serves as a reaction to increasing interconnectedness of production, commercial, economic, political, cultural and social relations being created across individual political, national and cultural units. Its role can be seen in bringing stability and legal certainty into these relations and it can be characterised as the expression of global integration tendencies appearing in the general process of internationalization of national law.

Globalisation as an ongoing universal worldwide integration process necessarily results in confrontation of the global and the local, where tendency for localisation as a response to globalism also strengthens attempts at regionalisation, which takes political and legal forms. Orientation towards such regionalisation is displayed in the creation of regional trans-national structures such as the European Union in Europe, MERCOSUR in Latin America or ASEAN in Asia. In its displays and consequences, globalisation also marks the framework of the ongoing regional integration processes.

The global does not exclude the local and we are also witnessing the revival or growth of smaller nationalisms and local identities. We can distinguish between „global localism“ and „localized globalism“ (Twining, 2006). Especially the process of economic and technological globalisation results gradually in changes of national and quasination states and leads into gradual regionalization that acquires legal and political forms. This regionalization is

also reflected in the development of European integration.

Francis Snyder characterises the relationship of Europeanization and globalisation as one between friends and rivals at the same time (Snyder, F., 2000). In Snyder's opinion, it consists of two complementary, partly overlapping, mutually strengthening but also competing processes. In a closer look the relationship of both processes – globalisation and Europeanization – can be described in that Europeanization represents a process of economic-political and legal regional globalisation, where the European Union has become its dominant institutional architecture. Europeanization makes the aforementioned institutional anchoring of the European integration of otherwise generally acting worldwide globalisation trends a real phenomenon. Thus, unlike globalisation, Europeanization should be also understood as a political project pursuing set programme objectives.

### 3. Europeanization of law as an Instrument of the Europeanization process

The EU law is a significant display, means and output of the process of Europeanization, while it can be said that the process of Europeanization has similarly fundamental displays in the Europeanization of law. The basic objective of Europeanization of law is to form a common area of law where the differences among the legal systems of the Member States of the European Union would be gradually diminished. This assumes, not only implementation of European law by the Member States, but also Europeanization of the sources of law, the concept of human rights and the rule of law, the judiciary, interpretation of law, legal procedures and methods and, ultimately, also the manner of legal thinking (Smith, J. M., 2004).

European integration is substantially organised and implemented by legal forms and legal institutions. The Europeanization of law acts strongly through, in particular, Europeanization of sources of law, thereby overcoming the traditional idea of a “national legislator” who, in a rather integrated manner, regulates the entire relevant scope of legal relationships using legal means. In contrast, we encounter an increasing number of legal sources, referred to as multi-centrism of the sources of law.

These include, in addition to national law, primarily sources of law to which we summarily refer to as European law. In a broader sense, the not entirely unambiguous term *acquis communautaire* is used in this context, meaning all which has been acquired within the European Union, particularly in the legal field. It is a sum of all rules, particularly of legal nature and in any form, including individual legal acts, which has become “ownership” of the EU. It is specifically *acquis communautaire* that represents everything from which the members of the Union, particularly the new members, must follow up and

respect, because an important part of the agenda of the EU consists in approximation (convergence, harmonisation) of national legal systems with the law of the Union aimed at creating a compatible legal environment, but also the approximation of institutions, procedures and policies. The answers to the challenges given by the process of European integration and the variability of the procedures and the results of this process in the individual countries depend, as Robert Ladrech points out, on whether the country has a unitary or federal structure, the proportion of public and private sectors, long-term traditions of political culture, patterns of cooperation and competition between political parties and a number of other aspects (Ladrech, R., 2004).

Some aspects of the process of Europeanization were described by the term “communitarisation”, which emphasised the broadening of powers of the European Communities to the detriment of sovereignty of the member states, which produces effects in clear communitarisation (supranationalisation) tendencies in European law, both *de lege lata* and *de lege ferenda*.

A fundamental question in this respect arises with respect to the degree to which the supranational entity of EU is equipped with its own sovereignty having primacy over the member states. The aforementioned degree is connected with the organisation of European public authorities, which may aim either towards a federative (confederative) system of the entity or rather an entity taking the shape of a unitary state. From the view of comparative constitutional law, we find many features in the current EU law which are identical with the legal order of a typical federative state.

### 4. EU law and a multicentric legal order

The conception of legal pluralism in jurisprudence emphasizes the plurality of legal systems operating side-by-side within the same society or territory in the relation of co-existence, rivalry or conflict. Legal pluralism is taken as the opposite to the concept of legal centralism which is close to legal monism (monocentrism). The specification of legal centralism is based on the following idea that “law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions” (Galligan, D. J., 2007). The conception of legal monism is, due to the advancing supranational integration processes and the development of plurality in modern societies, neglected by the contemporary legal theory.

The conception of multicentrism of law in its content follows the conception of legal pluralism, it expresses its essential ideas, it emphasizes in a greater extent, however, the involvement of national and supranational official bodies in making binding rules or representing adjudicating bodies. Multicentrism expresses in addition to that not only plurality of sources of law but also plurality of bodies of interpretation of law and plurality

of jurisdiction. Multicentric conception of law is thus a doctrinal answer to the existence of external sources of legal multicentrism originating especially in the process of Europeanization and globalisation of law.

Legal theory, which traditionally aimed at two types of legal systems, i.e. national law and public international law, reflects a fast development of other legal systems in the concept of legal multicentrism. It is not only EU law that operates but there are also other legal systems, e.g.: *ius humanitis*, transnational *lex mercatoria*, Islamic law, transnational human rights law and regional forms of non-state law. The plurality of sources of law in EU causes the changes in approaches to interpreting legislative texts, implementing EU law and applying legal norms in adjudicating cases. It brings specific problems to both national law-makers and national courts of the Member States. Restricting the sovereignty of national states in the sphere of law-making, when the national state ceases to be the exclusive rule-maker in the play and becomes the receiver, implementator and enforcer of the rules, is understood rather negatively because it means reducing the disposition space for law-making activities. A more essential emphasis, however, is put on the issue of quality of binding rules and the formation of a stable and foreseeable global and European legal area.

### 5. Interpretation of European law in decisions of Czech courts

The foundation treaties of the European Union and the entire process of Europeanization of law are based on the principles of democratic rule of law, i.e. on the principle of legal rules binding on all legal entities, particularly public authorities. A reference to the rule of law is emphasized in the preamble of the Treaty on European Union as amended by the Treaty of Lisbon. Art. 2 of this foundation Treaty then explicitly states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

In the conditions of the European Union, the principles of democratic rule of law are reflected particularly in the fact that the EU institutions must unconditionally proceed in conformity with EU law (Jans, J. H., 2007). No EU authority may go beyond the competence conferred upon it, which shall be exercised on the basis of the principles of subsidiarity and proportionality (cf. Art. 5 of the Treaty on EU). The European Union thus represents a close alliance of Member States and their citizens in the form of a legal community where law is entrusted with the basic integrating function.

The constitutional basis of interpreting European Union law was laid by the "European amendment" to the Constitution of the Czech Republic (hereinafter the "Constitution"), which had been prepared in relation to the accession of the Czech Republic to the European Union. In the supplemented

second paragraph of Art. 1 of the Constitution, the European amendment newly stipulated the duty of the Czech Republic to comply with the commitments following for it from international law. This commitment was further specified in Art. 10 of the Constitution, which explicitly stipulates that published international treaties that have been ratified with consent of the Parliament and that are binding on the Czech Republic are part of the legal order; if such an international treaty is at variance with a law, the international treaty shall prevail.

In its Art. 10, the Constitution does not explicitly provide for the general relationship to EU law; however, its binding nature follows from the founding treaties of the EU. In this regard, the Treaty on the Functioning of the European Union (TFEU) did not adopt former Art. 10 of the Treaty establishing the EC, which imposed on the Member States the duty to provide for effective fulfillment of the obligations following from EU law. However, in substantive terms, this Article was reflected in Art. 4 (3) of the Treaty on EU, which imposes on the Member States the obligation to take any appropriate measures, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. This implies the duty to interpret national law in conformity with European law.

An important role in formulating the basic principles of the relationship between European Union law and the national legal orders was played by the European Court of Justice, whose rulings substantially contributed to the unification of the judicial practice of the EU Member States and was thus instrumental in the "Europeanization" of national courts (Groussot, X., 2006).

The following principles may be considered the basic principles of EU law formulated by the Court of Justice:

- principle of autonomy of EU law,
- principle of primacy of EU law (in application),
- principle of direct effect of EU law,
- principle of indirect effect.

Some other important principles formulated by the Court of Justice that have contributed to the Europeanization of judicial activities at the national level could also be mentioned.

### 6. Globalisation, Europeanization, and economic relationships

Globalisation and Europeanization bring about a different economic perception of inter-state relationships and a stronger pressure for integration. "Transnational economic diplomacy" is one visible outcome of this: it leads to the creation of "plural authority" structures, such as the United Nations, the G7 and the EU, and to new dimension of interconnectedness, having to do with technological, organisational, administrative and



legal factors, as well as with a greater mobility of people, goods and capital.

Among the key economic aspect of globalisation are global economic networks. There are for example the customs operations known in EU as the inward processing procedure and outward processing procedure (Snyder, F., 2000). The inward processing procedure allows firms to import into EU market materials for processing in the EU without paying custom duties. On the other side, the outward processing procedure allows materials to be exported temporarily for processing and the resulting products to be re-import with partial or total relief from duties. Globalisation and Europeanization stand for challenge of international trade as increased trade liberalisation imply

increased networking among companies, intra-firm trade in manufactures, and production facilities. EC law bears different responses to trade barriers, such as tariffs or quotas would be no demand or need for export or import.

Economic policy, however, is not free from conflicts. It embodies and reflects conflicting economic interests of the Member States (Bulmer S. J., Radaelli, C. M., 2005). Nevertheless, European integration in the European Union brings at least four macro-dynamics:

- Institutionalization of the single market.
- Advent of Economic and Monetary Union.
- Processes that are more market driven.
- Ongoing process of enlargement.

## SUMMARY

Globalisation as an ongoing universal worldwide integration process necessarily results in confrontation of the global and the local, where tendency for localisation is a response to globalism. Europeanization represents a process of economic-political and legal regional globalisation, where the European Union has become its dominant institutional architecture. European integration is substantially organised and implemented by legal forms and legal institutions. Legal theory, which traditionally aimed at two types of legal systems, i.e. national law and public international law, reflects a fast development of other legal systems in the concept of legal multicentrism. It is not only EU law that operates but there are also other legal systems, e.g.: *ius humanitis*, transnational *lex mercatoria*. It brings specific problems to both national law-makers and national courts of the Member States. Globalisation and Europeanization bring about a different economic perception of inter-state relationships. Europeanization stand for challenge of international trade as increased trade liberalisation imply increased networking among companies, intra-firm trade in manufactures, and production facilities. EC law bears different responses to trade barriers, such as tariffs or quotas would be no demand or need for export or import. European integration in the European Union brings at least four macro-dynamics:

- Institutionalization of the single market.
- Advent of Economic and Monetary Union.
- Processes that are more market driven.
- Ongoing process of enlargement.

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Address

prof. JUDr. PhDr. Miloš Večeřa, CSc., Katedra právní teorie, Masarykova univerzita, Veveří 70, 611 80 Brno, Česká republika, e-mail: Milos.Vecera@law.muni.cz