

**THE PHENOMENON OF LEGAL TRANSPLANTS AND SUBSEQUENT
INTERACTION BETWEEN THE LEGAL FRAMEWORK AND JUDICIAL
PRACTICE: SOME UNIFYING DECISIONS OF THE ALBANIAN HIGH COURT**

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Abstract: Often the lack of or gaps in legislation in the field of private law have dictated the need for judges or lawyers to justify their opinion by referring to legal transplants, which have the necessary authority to impose an adequate solution. The phenomenon of legal transplants, now prominently displayed in the Albanian jurisprudence which seeks to provide solutions to various issues involving uncertainty or lack of law, requires a proper understanding of its nature and effect on the domestic legal order. The Unifying Decisions of the Albanian High Court are creating new practices and skills in the Albanian legal reality, being accompanied by their contradictory argumentations. These decisions are disrupting the balance of the legal system to which the Albanian private law belongs.

Keywords: Legal transplants, legal system, private law, unifying decisions of the High Court, legal consequences, interaction.

1. Introduction

This article aims to address the role and importance of legal transplants in the Albanian legal system, their transposition in the internal legislation and the issues that have emerged from the transposition of some legal transplants, by the Unifying Decisions of the High Court of the Republic of Albania. So, what are legal transplants? In jurisprudence the term legal transplant is defined “as the movement of a rule or a system of law from one state to another, or legal concepts and structures borrowed, but not the spirit of the country's legal system receiver”.¹ Why are legal transplants applicable? Economic development, international relations between countries, the creation of common economic and political spaces and globalization, are often considered as the main reasons for explaining the growing influence of legal transplants.

Thus, globalization brings law and legal cultures often in direct contact. This process affects directly legal professionals that want and need to know foreign laws and their application. The reasons why legal transplants are applicable relate to the authority that they represent, because:

- 1) the prestige and their enforcement;
- 2) the chance and necessity to be implemented;
- 3) the expectations of legal efficiency, and

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¹ Loukas A. Mistelis. Regulatory Aspects(2000) Globalization, Harmonization, Legal Transplants, and Law Reform, Institute of International Commercial Law, 1055-1069

- 4) the political, economic and reputational motivation from one country to another country where they will be implemented.²

2. The authority of legal transplants in the field of private law

The explanation for the considerable introduction of legal transplants is related to the need for authority. In the field of private law, often the lack of legislation or gaps in legislation have dictated the need for judges or lawyers to justify their opinions by referring to legal transplants, which have the necessary authority for supporting such judicial decisions. The authority of legal transplants rests above all on their prestige and imposition. Such prestige and imposition dictates imitation and, understandably, any culture that is confident in itself tends to spread its institutions.

The strong influence of two civil codes, respectively of the French Civil Code and of the German Civil Code, known for their prestige, is widely known and appreciated in the field of private law.³ If we look at Albanian private law from a historical perspective, we can say that the influence of these two codes has been strong in certain periods of time. The first Albanian Civil Code, entitled “Zogu Civil Code” under the example and influence of the French model, came into force on 1 April 1929 and was drafted under the influence of the Napoleonic Civil Code.⁴ For the first time after the declaration of independence on 28 November 1912, the Albanian state was creating its legislation, finally being disconnected from the Ottoman law which had operated for about five centuries in Albania.⁵ The model adopted was exactly the Napoleonic Civil Code, because of its prestige, as a code that belonged to the French Revolution; a model having at the same time a non-negotiable impact, because of the entirety of principles and rules provided under it.

After World War II, the Albanian state became part of the former socialist family countries and followed a similar model to theirs, namely the Civil Code of the former Soviet Union.⁶ Despite issues of ideology and politicization, this model preserved the Germanic tradition on which it was based, defining in this way the physiognomy of the Albanian civil legislation, as a legislation which had features of the system “pandekist”.⁷ On the other hand, the authority of transplants means that taking a foreign law as a model is not simply a matter of choice, but it is a matter of chance or necessity. This approach is evident in the countries of Eastern Europe, which are or want to be part of the European Union. For example in the field of private law the influence of the Dutch Civil Code in the former communist countries of Central and Eastern Europe, including Albania, is due to its influence as an ideal model for the reforms that have been or are being made in these countries. The connection of our

² Irma Johanna Mosquere Valderrama, (2002), Legal transplants and comparative law. *International Law. Revista colombiana de derecho internacional*, 276-361.

³ Zweigert & H.Kotz (1994), *An Introduction to Comparative Law (Basic principles)*, Vol. I, SHBLU, Tirana.

⁴ Juliana Latifi (2009,) *Droit Civil (General Part)*, 5-th ed. Albaper, Tirana.

⁵ Aleks Luarasi (2007), *History of the state and law in Albania*, Luarasi, Tirana.

⁶ D.M.Genkin, S.N.Bratus, L.A.Lunc, I.B.Novickis (1956), *Soviet civil law*, Ministry of Justice.

⁷ Gianmaria F. Ajani (1996), *The revival of private law in central and Eastern Europe*, Kluwer Law International.

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private law legislation with the Dutch Civil Code is related with two arguments that this code presents:

- The mixture of market economy and the idea of rule of law;
- The impact of the German, French and the English law.

These two arguments have made the Dutch Civil Code successful in being transposed into the legislation of former socialist countries. The process of transplants of a legal rule, in case of legal rules of the Dutch Civil Code from Western Europe towards Eastern European countries is closely linked with the effects that the transplants will bring along. This means that the transplanting of a legal rule will have no value, if there is no legal expectation in a host system about ensuring the effect for which it is being transplanted.

Thus, the transposition of a series of legal rules from the Dutch Civil Code, particularly those in the field of contracts in the Albanian Civil Code,⁸ is accompanied by expectations of the legal system, which is now being targeted towards economic reforms of an open market. The international influence and cross-border law and legal ideas cannot be like the influence of scientific ideas, technical and economic, which because of their value have a considerable power. In case of the influence of one law, it must be seen as the contribution it will bring and what is required, in the context of political, social and economic factors of one state. Albania after the 1990's entered in the path of economic reforms, thus sanctioning the existence of private ownership and privatized sectors of the national economy.⁹

The economic development that the Albanian economy is undergoing has always dictated the need to ensure that the legal framework can facilitate it. In this regard, the most important laws were adopted and continue to be adopted, as for example the Law on competition, the Law on copyright and related rights, the Law on Bankruptcy, and recently, the Law No. 9901 dated 14.04.2008 "On entrepreneurs and commercial companies". In the context of political reforms, the road of Albania towards the EU membership, no doubt also requires a political consensus, which means that government policies should be in the context of this economic development, and the law should be a guarantor of these economic reforms.¹⁰ The transposition of legal transplants in Albanian internal legislation, particularly in the field of private law is a process which has already begun as an obligation which flows from the Stabilization and Association Agreement with the European Union, for the approximation of Albanian legislation with the *acquis communautaire*.¹¹

⁸ Michel Fromont (2005), Grands system de droit étranger, 5 édition, Dalloz.

⁹ C.J.J.M. Stolkerl (1996), Drafting a new Civil Code for Albania. Some personal experiences contrasted with the World Bank's initial lessons, available at: <<https://openaccess.leidenuniv.nl/handle/1887/1302>>.

¹⁰ Juliana Latifi (2009) The approximation of Albanian legislation with European legislation, one imperative condition for membership in the European Union. Paper presented to the UACES Conference Exchanging Ideas on Europe 2009: Angers-France.

¹¹ The Stabilization and Association Agreement between Albania and EU countries, Article 70.

3. Legal transplants and the problems of their transposition in juridical Albania reality

The Albanian jurisprudence presents one model of legal transplants. But as results from two Unifying Decisions of the High Court, the transposition of these legal transplants in the Albanian legal reality has created many problems, because their transposition is contrary to the spirit of the law that applies. Two such controversial examples are dealt with here below.

3.1 High Court Unifying Decision No.1, dated 6.01.2009

Article 83(1) of the Albanian Civil Code provides that “The legal transaction of transferring ownership of immovable property and the rights in removing them, must be done by a public notary act and registered, otherwise it is not valid”, similar to the German legal system. However, the High Court in Unifying Decision No.1, dated 6.01.2009, held that the ownership of immovable property passes at the time of concluding the contract for selling this property.¹² The purchaser or beneficiary of this property becomes its rightful owner at the time of signing the contract, winning the rights and obligations related to his existence as the owner on this property.

The registration or transcription of a legal action is not an element of validity of such a contract. With the signing of the contract of sale of the immovable property, the beneficiary becomes the owner of the rights of immovable property and he is legitimized to exercise his rights versus of third parties, except for passing the property in favour of third parties. Through this Unifying Decision a new rule is transposed in our legal system, which brings a fundamental transformation of concept “for profit of ownership for immovable property and real estate rights”. This legal transplant is in contradiction with the spirit of the general structure and content of the Civil Code itself, creating a precedent which is not positive, because it creates problems in the system of registration of immovable property and real estate rights.¹³ In the concept of legal transplants, it is important that its transposition into internal law not bring an entirely new situation which contradicts the spirit and principles of the legal system that the country has already set up and is operational.

3.2 High Court Unifying Decision No.23 dated 01.04.2002

Article 204 of the Civil Code provides that the co-owner, before selling his share of an immovable object to a person who is not a co-owner, is obliged to notify in writing the other owners inquiring whether they wish to buy his share with the same conditions that he would sell to a third person. In the case they do not respond within three months that they want to buy the share, the co-owner is free to sell his share to a third person. The seller is obliged to make known the new co-owner to the other co-owners. On the other hand, article 141 of Civil Code provides that an object is everything that can be owned or other real rights. Also in Article 761 is stated that the subject of donation contract can be objects or real right.

¹² Official Gazette, No 171 January 2009.

¹³ Rustem Gjata (2006), Civil Law, second ed, AlbPAPER, Tirana.

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According to Albanian jurisprudence, in the concept of real rights belong: servitude, 'usufruct', use, housing, pledge and mortgages. The real rights are not prescription, and the right of prior purchase prescriptions for 3 months. In Albanian case law, the deadline of 3 months of the right of prior purchase, is interpreted like decadent deadline, and the right of the right of prior purchase cannot be the real right. In Unifying Decision No.23 dated 01.04.2002 is provided that the right of prior purchase of ex owner (his heirs) will be considered a real right and, as such, it may be available through the donation contract.¹⁴ Even in this transplant the Albania judicial practice brings a new standard, being in opposition with the spirit of the Civil Code, where the principals of prescription are in opposite with the principles of property institution.

4. Conclusions

As already pointed out, often the lack of legislation or gaps in legislation have dictated the need for judges or lawyers to justify their opinion, referring to legal transplants which have the necessary authority to impose an adequate solution. The unifying decisions of the Supreme Court are creating new practices and skills in the Albanian legal reality. The phenomenon of legal transplants is becoming more common in these decisions. These decisions are imposing new regulations, mandatory to be implemented and respected by other levels of the judicial system, but the innovation that these decisions are bringing is associated with their contradictory spirit vis-à-vis the Albanian legal system, to which Albanian private law is a part of. The transposition of legal transplants in Albanian domestic legislation, particularly in the field of private law, is a process which has already begun as an obligation which flows from the Stabilization and Association Agreement with the EU, for the approximation of Albanian legislation with the *acquis communautaire*.

¹⁴ Official Gazette, No 25 May 2002.

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**FENOMENI I TRANSPLANTEVE LIGJORE DHE NDËRVEPRIMI I MËPASSHËM
NDËRMJET KUADRIT LIGJOR DHE PRAKTIKËS LIGJORE: DISA VENDIME
UNIFIKUESE TË GJYKATËS SË LARTË TË SHQIPËRISË**

Abstrakt: Fenomeni i transplanteve ligjore, është një nevojshmëri në realitetin e sotëm juridik të çdo vendi. Shpjegimi i zhvillimit të transplanteve ligjore është i lidhur me nevojën për autoritet. Në fushën e së drejtës private shpesh herë mungesa e legjislacionit ose boshllëqet në legjislacion kanë diktuar nevojën që gjyqtarët apo juristët të justifikojnë opinionin e tyre, duke ju referuar transplanteve ligjore të cilat kanë autoritetin e nevojshëm për të imponuar zgjidhje adekuate. Fenomeni i transplanteve ligjore, sot shfaqet dukshëm edhe në jurisprudencën shqiptare, e cila kërkon t'i japë zgjidhje çështjeve të ndryshme ku paqartësia apo mungesa e ligjit kërkon referimin tek transplant ligjor. Vendimet Unifikuese të Gjykatës së Lartë, po krijojnë praktika dhe shprehje të reja në realitetin juridik shqiptar, duke u shoqëruar edhe me anën e tyre kontradiktore. Këto vendime po prishin ekuilibrin e sistemit juridik, të cilit e drejta private shqiptare i përket.

Fjalët kyç: Transplantet ligjore, sistemi ligjor, e drejta civile, vendimet unifikuese të Gjykatës së Lartë, pasojat ligjore, ndërveprimi.