SOME THOUGHTS ON THE POSTMODERN VIRTUALITY OF LAW

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Law is a complicated phenomenon of a human life. It is not always an obvious fact what place is dedicated for law in our history, culture and social life. We may say that the law is an inherent and non-removable element of society and state. The author really doubts that somebody would not agree with such statement. However, what can we say about it today? In the 21st century, there are a lot of newly arisen processes and phenomena, which are typical for the modern era of globalization and postmodern reconsideration of those basics, on which worldwide-civilized humanity has been relied for centuries.

This can mean that we are witnesses of a crucial moment in all humankind existence. We learned to create virtual reality, where almost anyone can realize his\her desires, ideas, goals and sometimes his\her entire life. We are not talking about a virtual reality like Internet or something related to IT technologies. We learned to live according to legal, social, cultural and business norms and regulations that are also some kind of a virtual reality, because we cannot state that such definitions as law, hope, love, rule, honour have their material presence (appearance) in some things. A law cannot be equal to a text of some legal act.[1]

Now, we can say that it is important to return to the origins. There are a lot of definitions of law. Some of them are very conservative and traditional, others are flexible and disputable. The author does not want to bring just a new empty speculation regarding the matter, but rather to clarify the situation that is currently dominant in legal theory of Euro-Atlantic civilization. Nevertheless, the globalization process, which connects all civilizations together, will spread ideas and thoughts from one society to another, so no modern state will be able to avoid an influence of mainstream legal theories and thoughts.

The material world is overlapped by ideal (virtual) world and humanity has no means to limit information spreading absolutely and stop some kind of undesirable ideology formation, if society is tended to absorb such ideas.

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[1] Even each particular legal act is not equal to its paper expression, because it is usually consisted of norms and rules, which are not material entities.

Welcome to the 21st Century

Virtue and Virtuality

As Anna Mancini states: "the traditional legal world is focused on material wealth, while in cyberspace wealth comes from human beings and not from matter."[2] It is difficult not to agree with such idea, but there are some lawyers denying that fact. Still, this is not a subject of the paper. What we should notice is that human being has several levels of existence: the physical one, psychical, social, spiritual etc. The more complicated this level is, the more virtual it is. By using the word "virtual" the author does not want to say that something becomes less real, but rather more important and fragile, so it needs more care and protection. At the same time, increasing numbers of people are using the new information technologies to participate in virtual communities or to challenge traditional notions of self and identity.

The IT technologies are just tools for human essence revealing. A human is a criterion for everything. The whole Law worldwide is just a fiction, which can be violated and its rules and norms can be changes or broken. It is just like an "*I-love-you-but-you-love-somebody-else*" type of relationship between a couple. The essence of law is that everybody will consider it proper and right, so each one will follow the rulings of law, which is partially based on moral, religious and other values. What will happen to law if each person will decide to live outside law and its regulatory functions will be no longer applicable to this person? Law will obviously die. No wonder that the word "*virtue*" and the word "*virtual*" or "*virtuality*" both have the similar origin.[3] Law should be worth to follow in order to preserve its real virtue or it shall become just a virtual fiction.

The author does not want to be criticized for not proving his statements, so historical facts shall follow next. Unfortunately, the author must bring political element to the essay and its arguments. Law and politics are tightly bound, so this should not be a problem.

The Specific Issues of International Law

Let us analyse the events, which has been taking place for several years in Eastern Ukraine. The Ukrainian-Russian conflict around the Crimea and territories of Eastern Ukraine has forced the parties that take part in it to exchange quotes or rules from international law norms, though in a question of accessory of disputed territories crucial importance is never played by legal formulas. Guns remain final instance always.

[2] Mancini, Anna: Internet Justice, Philosophy of Law for the Virtual World. Buenos Books America LLC., 2005. 41.

[3] See www.dictionary.com/browse/virtual.

This conflict cannot be solved on the basis of international law not only because the stronger side, which is Russia, can force weakness to concede disputed territories without thinking about regulations. The international law is not (or questionably) capable to decide the similar conflicts also for the reason that it is not some code with reference to the paragraphs of legal principles, and it is quite a free collection of the various and mutually contradicting to each other acts, customs and norms.

Ukraine and its supporters constantly refer to the principle of "inviolability of borders" and prove that the Crimea is Ukrainian because it currently belongs to this state, and this is the main justification of its accessory. Russians categorically send to other formula of international law, namely to "the right of the people to self-determination", answering to the American critics with a reference to a scandalous incident of the Serbian Kosovo, which has been torn off from Serbia (and, even without a referendum on this subject). From the point of view of international law, which does not represent harmonious system both the first, and the second argument, are equally well-founded. Each party appeals to the most suitable principle.

Interesting Coincidence

Usually, we are tended to think and say that law is a fairly correct reflection of moral principles in a society. Well, what would we say, if we find some suspicious facts that non-directly state and support another point of view? Let us estimate some regulations from the Penal Codes of several countries:

- Article 115. Murder: "that is wilful and unlawful causing death of another person – shall be punishable by imprisonment for a term of seven to fifteen years."[4]
- § 2332. Homicide: "Whoever kills a national of the United States, while such national is outside the United States, shall..."[5]
- Section 160. Homicide: "Any person who kills another human being is guilty of a felony punishable by imprisonment between five to fifteen years."[6]

What can we see? The vast majority of regulations and norm in penal (criminal) codes of different countries do not define a crime (in this case – a crime of intentional killing of a person) as a prohibited or unlawful act. More than that, there are no references to some moral principles, social values etc. There are only a hypothesis, disposition and sanction – the standard elements of a legal norm. No more. How can we evaluate such lacks and gaps in law? It can be understood that law is only a receptacle for values, which particular society wants and can to contribute into its laws.

[4] Criminal Code of Ukraine entered into force on 1 September 2001.
[5] Title 18 of The Code of Laws of the United States of America.
[6] Act C of 2012 on the Hungarian Criminal Code.

Universalization of Law and Cultural Relativism

Is it possible to create a globally effective and positively evolving legal system at all? Can humanity come to some worldwide substantial law, which is established on fundamental rights that are acceptable for each party on equal terms?

In order to be precise and as objective and possible, we have to agree that it is impossible to deal and successfully solve the problem of "*universalism – regionalism*" relations during globalization process of law. Unfortunately, many of modern universal rights and standards are born in Euro-Atlantic civilization and are not so pleasant for some societies. Therefore, there is a need in not only global and universal legal principles and fundamental rights, but also in specific and individual law regulations on the regional and national levels.[7] That is why modern landmarks specify only minimal requirements for national legislations, where the ones become fundamental principles rather than precise and consolidate legal norms.[8]

Nowadays, some legal, social and cultural scientists support such phenomena as "*cultural relativism"*. This system of criteria denies universal values and principles because of the obvious distinctions that are inherent in separate national, regional or local cultures. In the context of interpretation of fundamental and global human rights, the cultural relativism is shown in the statement that they are a product of the Western culture and therefore cannot be considered as universal. Within the current understanding of human rights, there are jurists and politicians (among other supporters of the cultural relativism movement) from the countries of Asia prevail (in particular, China and Iran); as a rule, this system is used by them as a counter-argument on criticism from the international organizations for an occasion of human rights violation in their countries. Most definitely, this idea has been stated by the delegation of China at the World Conference on Human Rights in Vienna, 1993: "*the countries which are at different stages of development or with different historical traditions have also various understanding and realization of Human Rights. Thus, you shouldn't believe that standards and models of Human Rights in some countries are the only one for exclusive acceptance and grant the right to demand from other countries to live according to them.*"[9] As it was noted by critics of universality of human rights, hungry people without roof over the head would not think of the political rights.

Sure, but can we state that hunger person has no political rights even if s/he does not acknowledge such rights on daily basis? This is an open question and it should be deeper revealed in separate paper.

[7] Марченко М. Н [Marchenko M. N.]: *Тенденции развития права в современном мире* [The Tendencies of Law Development in Modern World], 2015. 323.

[8] Ibid.

[9] Symonides, Janusz: New Human Rights Dimensions, Obstacles and Challenges: Introductory Remarks. In: Symonides, Janusz (ed.): *Human Rights: New Dimensions and Challenges.* UNESCO, 1998. 26.

World Challenges for Law – Different Aspects

Definitely, we live in quickly and radically changing world. You can go asleep in one country and get up tomorrow in completely another country due to constitutional *coup d'etat*. Migration crisis is spread around Europe and the Member-States from the Middle East. Transnational global businesses lobby their interests and spread influence around the globe. Healthcare and education issues overflow modern developed countries, while somewhere the risks of starvation exist.

Where are we all going, you may ask? It is important to understand that the answer on this question is going to be found. The only one way to successfully deal with all problems is to adapt and be both flexible and worth in every complex situation. Modern world is changing, so should do states and its legal systems. Modern law should become postmodern, but only humanity can do it, not law itself.

The main difference between modern and postmodern states is, probably, expressed in the way of social existence on the highest level (education, healthcare, social care etc.). Thus, we consider that a modern state offer access to a good level of education and to information that is reasonably necessary for such social existence. Again, we can talk about information as a virtual entity, which exists only in human consciousness and depends on the spectator rather than on some impersonal object.

Perhaps, the postmodern law should be something like a *New Edge movement*, which eclectically absorbs everything and turns it on its own elements, but the author think that such way of law evolution will lead to a crisis of emptiness, which is actual in the sphere of cultural, moral and philosophical (ideological) values nowadays. Therefore, the postmodern law include some added value, something crucially unique, which will make it relevant for centuries.

Legal measurement of the globalized world induces reconsideration and revision of whole system of legal regulation of the international relations in various spheres. It is caused by emergence of the latest subjects of world economic communication both on national, and on supranational levels. In the conditions of globalization there is a new phase of corporate construction, search of modern forms and methods of legal regulation within a new world order, and first of all – geo-economic one. It is about a new class of the contracts, conventions, frame "laws doctrines", etc. defining new approach to taking into account interests of all participants of a world reproduction cycle, and their responsibility in the conditions of global transformation of the world. *Professor Kochetov* allocates several aspects of legal measurement of the modern world.[10]

Firstly, the law and order in modern conditions cannot be reduced unambiguously only to the international legal relations as zones of its application were considerably narrowed. The state that generates the law including international one, actually

[10] Кочетов Э.Г [Kochetov, Ernest]. *Основные характеристики глобализационного процесса и правовое измерение мира* [The Main Characteristics of the Globalization Process and Legal Changing of the World], 92-95.

delegates law-making functions to numerous economic entities. As a result, the newest model of world legal system is formed.

Secondly, a justification of the traditional legal models which have grown from outdated geopolitical understanding of a world order, and often self-elimination of lawyers from understanding of new world realities become dangerous and can slow down inclusion of any state as equal one to others in the world globalized system. For the last decades, there was a situation in which lawyers saw threat to the traditionally developed legal sciences because of pressure from economy and finance. There is a rough ripening of the new processes: formation of huge network reproduction systems, development of "*new economy*" on the basis of high information technologies (Internet economy), etc. However, legal ensuring of these processes as well as the formation of models of their legal regulation significantly lags behind.

Thirdly, globalization and as her central reflection the geo-economy and geo-finance have generated a number of the most interesting and actual problems, which solution waits for its researchers. First of all, it is about geo-economic crimes, the newest phenomenon on a boundary of the 20th and the 21st centuries. Using high geo-financial and geo-economic technologies, businessmen of global level including the states acting as ones are capable to devastate literally any national economy, dooming to deep deformation her economic and financial infrastructures. Recent financial crisis has visually confirmed such opportunity. The enterprise instincts, which have escaped to the global sphere, are restrained by nothing. It is possible to select, say, without use of weapons, practically all national income and force to the knees any national system, without being afraid of responsibility for it, though in the political sphere the world community has fulfilled system of punishment for crimes against humanity for a long time. So where to look for protection against geo-economic crimes? The legal system has practically lost track of this problem.[11]

Fourthly, in the conditions of globalization, the legal norm (or its absence) as the scientist believes, has turned into the powerful offensive weapon reflecting protection of interests of one country, group, corporation to the detriment of another. Moreover, all fight for introduction of norms, their mitigation or toughening is a reflection of political struggle for long-term domination in this or that sphere (finance, economy, industry, social, military etc.). Whether harmonization of a legal framework in the conditions of the acute fight of interests in political, military-political, financial, industrial and other spheres is possible? The answer should be looked for in the general global and constitutional doctrines, which not studied enough.

The *fifth aspect* of legal measurement of the globalized world that is considered by the scientist is the fact that geo-economic approach dictates adoption of the unified code of a world geo-economic order, and this task can be successfully solved on the

[11] Kochetov: *op. cit.*

international basis within the cooperation of theorists, methodologists, economists, lawyers, sociologists, political scientists and other experts of allied industries.

Based on the abovementioned paradigms of global measurement Kochetov allocates three tiers of system of the right and legal regulation: the national law, international law and the globalized, geo-economic law with special nature of interaction between them.[12] From the point of view of the scientist, the geo-economy (economic measurement of the global world) has acted as a new paradigm of a world order, as the brightest reflection of process of globalization.[13] Proceeding from this concept, he believes that the globalized geo-economic law, which has succeeded, the international economic law is urged to regulate geo-economic activity. The globalized geo-economic law, as well as national and international law, is a component of the world globalized legal system. Globalization of world economy creates prerequisites for formation of the political and legal superstructure that corresponding to a common economic space.

We assume that a state's laws apply only within its borders – and that, similarly, no other state's laws apply here. This is unproblematic as long as domestic transactions are at stake. However, it has even been true, by and large, for questions of public and private international law. In public international law, the idea of territorial integrity and exclusive jurisdiction remains strong – even though it allows for exceptions, and even though the idea of territoriality has been enhanced to include so-called intra-territorial effects of conduct that took place elsewhere. For example, it is now almost universally accepted that a state has jurisdiction over antitrust violations that have an effect on the state's markets, even if the conduct leading to the violation took place elsewhere. Enforcement actions by the state are, traditionally confined by a state's borders. Similarly, territoriality has traditionally played a great role for private international law (or conflict of laws), even though it does not govern absolutely. Thus, the jurisdiction of courts is mostly based on territorial connections like the defendant's domicile, or the place of a tort, etc. Territoriality also governs questions of applicable law: the law applicable to a tort, for example, has traditionally been the place where the tort occurred. Such territoriality has never been exclusive, however. Not infrequently, the applicable law is determined on the basis of non-territorial connecting factors like the parties' nationality.

This great importance of territoriality for the law is not a coincidence. Rather, it reflects the great importance that territoriality has, traditionally, had for sovereignty. Territorial integrity and sovereignty are perhaps the most important characteristics of a state. Now, globalization challenges this importance of territoriality in a number of ways. First, globalization often makes geographical distances less relevant. Not only has travel become much easier, and accessible to large numbers of people. More importantly, improved means of communication (most importantly the internet) have

[12] Ibid.
[13] Ibid.

made such travel far less necessary in many cases. The same document can now be edited at various places at the same time. Global production chains are made possible. And social interaction has undergone a qualitative change. Second, for the same reason, state borders have become less important – and less effective. Previously, it may have been possible to keep unwanted information out by simply closing borders and censoring the press. Today, given the global character of the internet, and the omnipresence of blogs and twitters, this has become much harder.

In legal scientific literature, it was truly noted that "globalization has significant effect on transformation, changes and modernization of state and legal institutes, norms and the relations at the world, macroregional and interstate levels, stimulates, accelerates and updates processes of a universalization in the field of the right."[14]

At the same time, a process of globalization impact on the rights in general, in theoretical and methodical plan differs in such features and lines as:

a) versatility of his influence on the right and its systematics based on the influences caused by the nature of globalization "*as a system integration of ideas, principles, communications and the relations*";[15]

b) fundamental and, at the same time (in the potential plan), very radical nature of influence of globalization on the law and on development of its theory. In this regard, it is far not incidental that Western researchers of this matter pay attention to a potential opportunity, and even inevitability of "*fundamental changes*" in the law, and "*in its modern theory*" indicating applications of "*pluralistic approach*" to the knowledge process of the modern law and development of its theory as the important necessity.[16]

c) big variety of ways and forms of impact of globalization on the law and its theory, of which the internationalization of the law concludes in the form of its reception, harmonization and better efficiency.[17]

d) direct and indirect (generally saying via economy and policy) impact of globalization process not only on national (interstate), but also on international law – on its character, sources, contents, "*the action mechanism*".[18]

[14] Нерсесянц В. С. [Nersesiants, V. S.] *Процессы универсализации права и государства в глобализирующемся мире. Государство и право.* [The Processes of Universalization of Law and State in Globalizing World]. *State and Law*, 2005. No. 5, 38.

[15] Куров С. В. [Kurov S. B.] *Глобализация и образование – правовой аспект. Глобализационные процессы в сфере права: проблемы правового развития в России и СНГ*. [Globalization and Education – Legal Aspect. Globalizing Processes in the Sphere of Law: Problems of Legal Development of Russian and CIS]. Материалы научно-практической конференции], 2001. 29.

[16] Twining, William: *Globalisation and Legal Theory*. Cambridge University Press, Cambridge, 2000. 13.

[17] *Правовая система России в условиях глобализации и региональной интеграции: теория и практика.* [Legal system of Russian in Globalization Conditions and Regional Integration: Theory and Practice.] In redaction of Поленина С.В. [Polenina, S. V.], 2006. 20

[18] Лукашук И. И. [Lukashuk, I. I.] *Глобализация, государство, право. XXI век.* [Globalization, State, Law. XXIth century], 2000. 173.

Globalization of Law

Globalization has some impact not only on the nature of the rights, but also on its content, institutional and functional role, as well as it aims the challenges and objectives. Of course, law, no matter how it is understood and perceived in a given society, it always remains the law. It always contains a generally binding rules of conduct, no matter where they came from and whoever they happen to be secured. It has always acted as a regulator of social relations, and has many other features.

However, as we know, the right has never remained the same at a particular stage of development of society and the state features, and with constantly changing and evolving social relations. This applies to every entity, as well as all other aspects of the legal matter, including its formal-legal, political, ideological, information and other aspect.

On the hypothetical question of what changes in the content of the law as far as exposure to globalization processes, it is possible to give a brief answer. It consists in the fact that the national component in domestic law is constantly supplanted by the global component and, accordingly, the domestic legal standards, filling a formal-legal and other content of the national law with the development of integration processes are consistently superseded by supranational, global standards.

The technical and legal terms, this is done in two ways – namely, by direct transfer of the existing legal standards with a global or regional level, as is the case, for example, in the European Union, at national level, or by activating the existing national legal standards with supranational standards. It should be noted that standardization as a phenomenon in one way or another is not limited to legal, but also many other areas of society such as environmental, social, political, spiritual, etc.[19]

However, the law is the most vivid manifestation. Its concrete expression of the legal standardization, as correctly notices in the scientific literature, is the first and the foremost thing to establish in the framework of international organizations' common minimum standards and requirements for the legal regulation of certain public relations; to establish uniform requirements, relating to the rights and freedoms of man and citizen; in the definition and establishment of "legal standards in the field of justice functioning in entrepreneurial activity in the financial sector, etc."[20]

Naturally, along with the change of formal legal ("standardized") aspect of the content of the rights, to some extent, changes and other aspects, as well as subjected to the well-known "adjusting" the goals, objectives and the very purpose of law. As in nature, the content of the rights as far as the development of the globalization process comes, thus, logically, more space will occupy at national, domestic, and supranational beginning. The globalization process has a definite influence not only on the nature, content and purpose of the rights, but also on its sources or forms of law. This impact

[19] Toffler, Alvin: *Third Wave*. 2002. 89-103.
[20] Marchenko: *op. cit.* 9-10.

affects all levels of the existence of a legal matter – namely, at the global, regional and domestic (national). The sources of law are directly linked mainly to the law-making activities of supranational and international institutions, and at the national level – as before – mainly from the law-making activity of the state. At the present time, as evidenced by social practice, the strongest and most significant impact from globalization have undergone regional and national sources of law.

A good example of the impact of globalization on regional sources of law can serve a process of formation and development in the post-war period, various sources of European Union law – such as the founding treaties; treaties amendments and additions to the constituent documents; the accession treaties of the new states to the European Union; precedents created by the European Court of Justice; and other acts.

Conclusion

The process of postmodern world creation does not seem to be easy, thought we can do our best in order to be well prepared to all possible challenges. As lawyers, we should draw our attention mostly to the problems of postmodern state and law. Law becomes more interactive, it speared deeper into our lives and this give us opportunity to form a better virtual law, which should not be associated with cyberspace only, but rather with all aspects of humankind existence.

The postmodern law will be fair and worth only, if it is based on human being rather than on materialistic entities or relations. There is no need or reason to be desperate that law is just a fiction and has no real force to maintain state functioning and protect private personal life, because in the postmodern world each one could be a creator of his\her law, which has metaphysical essence in particular person, who is a subject of rights and freedoms.

Globalization process should be met with careful but optimistic intentions. There is no need to afraid some intolerance or rights violation by representatives of other cultures that are naturally overlapped in the postmodern world. We can say that there is no law, where is love, because these two things exclude each other, but, unfortunately, humanity has not learned to live under the rules of eternal love (which is obviously a dream that could not be realised), so we need to improve and properly direct the evolution of modern law and state theory in order to guarantee the better life for our ancestors in the inevitable postmodern future.

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