

GLOBALIZATION AND THE CIVIL LAW TRADITION¹

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1. Introduction

The presentation session today is a continuation of an international conference organized by the China Law Society, held in Beijing, in October, 2005, under the title of “Trend of Economic Globalization and Construction of the Rule of Law”, where a number of renowned international scholars participated, among which include a delegation of Macau, composed of four members (namely, Prof. Paulo Castro, Prof. Ignazio Castellucci, Prof. Salvatore Mancuso and myself).

In the Beijing Conference, all members of the Macau delegation had submitted an academic paper. However, while all my other colleagues submitted their paper in English, my contribution was written in Chinese. On the other hand, despite the title of the conference being “Globalization and Rule of Law” – which supposes something transnational and general, the paper I submitted was quite local and specific – “Future Thing and the Sale and Purchase Contract of Future Things”. Nevertheless, such a specific topic also attracted the attention of quite a number of Chinese scholars. I don’t find it surprising. Actually, as far as the relation between globalization and law is concerned, a number of combinations are possible. The premises may be: What

¹ This paper corresponds to a speech given to the students of Master of Law in English Language of the Faculty of Law, University of Macau. I would like to express my gratitude towards my colleagues, Prof. Paulo Castro, Prof. Castellucci & Prof. Mancuso, who invited me to join this presentation.

are the possible consequences that the phenomenon of Globalization could bring to Law? What is the role of Law in the process of Economic Globalization? Should the law be globalized, i.e. unified? Is there already a globalization of legal concept and legal Institute? Or, what makes us so confident that the eventual uniformization or integration of Law is possible? To what extent is the integration possible? The antonyms of globalization and diversification etc.

Despite the above, the presentation given in Macau was targeted to our students of master program in English. It would be quite inappropriate for me to do my presentation in Chinese. Therefore, the choices left for me were two: 1) do a translation of the paper I prepared for the Beijing Conference; 2) write another with related content.

I chose the second. And the result is the production of this article. Although the content of my two articles are not the same, I believe they have something in common: to convey the message that the Civil Law tradition is not only the starting point for the globalization of law, but to some extent, the Civil Law itself is already globalized.

In the article I presented in Beijing, I started with a specific topic of the Macau Civil Code, and traced its origins to Portuguese Law, Italian Law, and Roman Law. In this presentation in Macau, I tried to explain why I can do that (why I can link a topic of Macau Law to European and Roman Law).

Whenever we talk about Globalization and Construction of the Rule of Law, people may easily shift their mind to the future, as if isolation and variation is the present state as well as the nature of Law. However, in my point of view, this is only partly true or by far not the truth. I would say, in the world of Law, globalization is not a future tense but a present tense or past tense. The Civil Law tradition is already by itself globalized.

2. The Civil Law Tradition

As law students, I bet most of you have heard of the following story:

In last decade of the 4th Century, a young and ambitious Emperor had set his mind to a Great Project, that is, to restore a bigger Empire that had been broken down for centuries. In line with this ambition, he has drawn out a very detailed action plan, which included at least three points: 1st, the achievement of political unification in his Empire; 2nd, the Unification of Law and 3rd, the restoration of a lost culture. The name of this Emperor is, Justinian the Emperor of the Oriental Roman Empire. And the second part of his plan is the critical moment in the human Legal History.

So, in the second year of his reign, Justinian nominated a Committee of 10 persons, putting into their shoulders the compilation and organization of the existing



laws. For this purpose, this Committee was given the powers to add, modify, delete and systemize the raw materials they had gathered. Surprisingly, in a relatively short time, that Committee had already produced their fruit: the «Codex Justinianeu», which is supposed to be the inspiration of all modern codes.

In the coming years, Justinian further directed the compilation of the dogmatic works of some famous Roman lawyers, giving birth to the well known «Digesta». Later, for teaching purpose and with the ambition to substitute the old textbook «Instituciones», written by Gaius, which turned out to be outdated, he promoted the elaboration of a new version of «Instituciones». These three works, together with the so-called «Novela», formed the famous «Corpus Juris Civilis».

Obviously, the direct purpose for Justinian to elaborate such legal classics is to salvage the long decaying Roman Empire and restore its glorious legal culture. However, in spite of all his effort, the Empire was never restored to its original dimension. His Oriental Kingdom also fell down in the 14th Century.

After the decline of the Western Empire, most part of Europe are conquered by the Barbarians. The law of Justinianian remained only in force in some part of Italy and in the Hispanic Peninsula. In another word, the Roman Law lost its binding power. However, through the Catholic Church, the main body of Roman Law is preserved. Apart from this, the Barbarian Law themselves were mostly applicable only to there own people, Roman Law continued to be the law applicable to the descendants of the Empire. In fact, the Barbarian Law were generally more simple; it was practically impossible to substitute the Roman Law with Barbarian Law in the Civic and Commercial life. Nevertheless, also owing to its complexity, the application of Roman Law turned out to be beyond the capacity of the legal practitioners. And in view of this difficulty, the Germanic Kings also started their own project of Codification. Those products adopted the model of Justinian, and integrated the customary law into the simplified version of Roman Law. Among those Germanic Codifications, the most famous ones include: Breviarium Alaricianum, Codex Revisus, Lex Visigothorum, Liber Iudicum, etc.. It is needless to say that those compilations are incomparable to the Justinian Law.

Stepping into the XII century, various factors competed to the Rebirth of Roman Law, namely, political (the ambition of reviving the Roman Empire), religious (the development of the Catholic Church) and cultural economical (the excellent technique of Roman Law itself and its flexibility to adapt to the new economic and social reality). Anyway, highlighted by the appearance of the Bolonia College (or the School of Glossators)², there was in fact a revitalization of Roman law.

2 M. J. de Almeida Costa, *História do Direito Português*, Almedina, 2001, p. 211.



Now, the “Corpus Iuris Civilis”, instead of the folk law and the visigothic codes, became the principal subject of legal research. Italy, especially the Bologna College, rapidly became the centre of Law studies. A great number of local and foreign students were attracted. When those foreign students finished their studies and went back to their own countries, they brought with them the legal texts as well as the related knowledge and techniques they learnt. In this way, the Roman Law based on the Corpus Iuris Civilis as well as the works of glossators and commentators, mainly written in Latin, became the common foundation and common language of most European Jurisdictions. In latter days, Corpus Iuris Civilis and the works of glossators and commentators even acquired the dignity of sources of positive law (that is the so called “Ius Commune”).

Starting from the XVI century, the idea of nation and state began to settle in Europe. Gradually, a current of nationalization of law as well as the centralization of power (especially the legislative power) was formed. The once influential “ius commune” little by little lost its binding effect. In substitution, the legislated law turned the exclusive source of law.

We can say the process of nationalization gave way to the trend of Codification, since on the process of producing new ordinance, the legislator needed to make an inventory of the existing laws and costumes, as well as to arrange their work in a systematic way. Under this orientation, various attempts of codification were registered since the 17th Century, among which we can easily name the Ordennance Civil in 1667, Ordennance Criminelle in 1670 etc..

The honour of being the first move towards a modern civil code should be given to the Codex Maximilianeus Bavaricus civilis, in 1756, owing to its systematic approach, but the level of systemization of this code was still not too high. Subsequent to the Codex Maximilianeus, various elaborated civil codes, including the Preussischen Allgemeines Landrecht (or ALR in short) and the Austrian Civil Code (or ABGB in short) had appeared in the Germanic states. The Prussian Code already achieved a high level of systematization, but it is not exclusively about private law. The first modern Civil Code in excellence is the Austrian Civil Code, or ABGB³. The conceptual accuracy and the systematic coherency of this code by far surpassed the ALR. Nevertheless, owing to the simplicity of its system, this code appeared to be incomplete in many points.

Finally, the trend of codification spreaded out all over Europe met with the French revolution. The product of this confluence is the French Civil Code of 1804, which is reputed the highest achievement of the first modern

3 Franz Wieacker, *História do Direito Privado Moderno*, Fundação Gulbenkian, Lisboa, 1993, p. 384.



codification movement. the success of this code surpassed all its predecessors. From a technical point of view, the system of jusracionalist was essentially transplanted to the Code.

As a product of revolution, the French Civil Code has the first objective to demolish the old regime and to unify the national private law. On the other hand, under the influence of natural law thinking, the legislator tried to elaborate a code of reason and applicable in any country and society.

The French Civil Code is turning point of Juridical Science in the human history, its influence is universal. At the beginning, the French Civil Code was imposed to European countries, alongside with the conquest of Napoleon; namely, in the case of Belgium, Luxemburg, Netherlands, Italy, Spain and Portugal etc. Although these countries later restored their sovereignty, the influence of the French Civil Code did not lose its colour, instead, it became part of their legal tradition. When those European countries elaborated their own Civil Code, many formulas and characteristics of the French Civil Code remained.

On the other hand, many countries in Africa, Indo-China and Latin America were colonies of the 19th Century European Powers; therefore, either the French Civil Code was directly applicable or codes influenced by the French Code were applicable to them. At the early decades of the 19th Century, the French Civil Code became a model for legislation.

As the trend of Codification went on, several other renowned Codes⁵ were produced in the late 19th Century and 20th Century, many of them revealed certain innovation either in content as well as in the formal system. Nevertheless, those innovation as well as deviation in no way represented a clear cut to the consolidated tradition of Civil Law.

3. Globalization under the context of civil law tradition

If the above conclusion is correct, i.e., there is really a Civil Law tradition, and this tradition is already globalized, it seems to us the word globalization is meaningless for lawyers. If so, why are there so many attempts (official or private) in the international level fighting for the globalization of legal systems (Think of the U.N Convention on the International Sale of Goods)? Or even fighting just for the harmonization of legal systems in the regional level (Think of the Principles of European Contract law, the Common Core of European Private Law project, the

⁴ Franz Wieacker, *História do Direito Privado Moderno*, Fundação Gulbenkian, Lisboa, 1993, p. 386.

⁵ For example, the German Civil Code (1900), the Italian Civil Code (1942) and the Netherlands Civil Code (1992) etc..



European Civil Code Project etc.)?)

What is the implication of those attempts? It simply tells us that the world legal system is far from being globalized. Well, what a contradiction!

In my point of view, there is no contradiction at all. I say so simply because the word globalization is not an absolute judgment. Instead, it is a relative value and a never ending story.

When we affirm that the Civil Law tradition is already globalized, we are parting from a broader angle. The Civil Law tradition itself, as part of the human culture, to certain extent does receive a wide range of recognition in the international level, for this, we can say it meets the requirements of globalization. Actually, all Civil Codes existing in the modern world trace back to the same origin: the Roman Law, or more vigorously, the Justinian Roman Law. That is why my colleagues, Prof. Castellucci and Prof. Mancusso, both came from Italy, would find our Macau Civil Code very user friendly, and they can go into the respective discussions as quick as any local jurists. What I am saying here is, at the time we adopted the Civil Code as the bases of our private law, our law is at certain extent globalized.

When we say the legal systems existing in this world are far from globalized, or not even harmonized in the regional level, we are pointing to the application in the practical level of law. In this sense, law is of course not globalized. Variations of legal culture and sovereign legislative power are the origins of this situation of non-harmonization. As long as the idea sovereign states persist, this situation of variation also persists. And it persists for good reasons – the conflict of interests among different communities.

Nevertheless, there is also another strong momentum pushing different legal families and particular legal systems towards the goal of harmonization and even unification. That is, the economic exchange as well as the rapid development of technology which lead to more efficient means of communications among people.

It is predictable that in the business world, fairness can only be achieved and business can only be done when the same set of rules applies to all the participants. Since economic power determines the power of a country, and economic well being of a person is the only achievable goal in practice, there is no wonder why the urge towards harmonization of law in the business sector is so strong. In this sector, even more efforts (towards an ultimate uniformity) should be spent. In this process of globalization, I believe the tradition of Civil Law already provided a good framework, which in certain sense constitutes the common language of a great number of jurisdictions in this world.

Nevertheless, we must never forget that law is also a reflection of culture. In certain areas (like family law and property law), uniformity might not be the best



solution Such a concept of globalization is actually impossible or unacceptable, because it implies imposition instead of harmonization.

The most ideal situation is: we all maintain our identity and at the same time live in harmony. Therefore, in the legal sector, I prefer the concept harmonization, instead of globalization.

