Legal Acculturation and Criminal Law. Between Uniformity and Preservation of Identity

Aculturația juridicã și dreptul penal. Între uniformizare și conservarea identitãții

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Abstract

European Union is a concept that, despite initial enthusiasm marked by ambitious and inspiring goals, proved to raise problems that could not be solved, despite the best intentions of all involved. The displayed slogan „Unity in diversity" or „Unity without uniformity and diversity without fragmentation" – has proven to be as logically difficult to accept as easy to use, whenever a problem of alignment and uniformity of national laws of the Member States arises.

The legislative area, the issue of aligning national laws with EU law, the issue of configuring EU legislation so as to take into account all the national particularities of the member states, are matters that, with all the good intentions of the European Legislator, are far from being solved. The European space is dramatically facing the phenomenon of legal acculturation, a phenomenon that occurs naturally when multiple social groups, each with its own rules and specificity, interact for a long time. If uniformity, a natural consequence of the phenomenon of legal acculturation, occurred easily in some branches of law, such as national commercial law, other branches of law, namely those belonging to national public law, and in particular national criminal and criminal procedure law – continue to resist.

Keywords: *European Union; legal acculturation; national identity; unity in diversity; criminal law; criminal procedure law; mutual cooperation*

Rezumat

Uniunea Europeană reprezintă un concept care, în ciuda entuziasmului iniţial marcat de deziderate ambiţioase şi înălţătoare, a dovedit că dă naştere la probleme ce nu ar putea fi rezolvate, în ciuda bunelor intenţii ale tuturor celor implicaţi. Sloganul afişat – unitate în diversitate – s-a dovedit a fi, pe cât de greu de acceptat din punct de vedere logic, pe atât de uşor în a fi utilizat ori de câte ori apărea o problemă de aliniere şi uniformizare a legislaţiilor naţionale ale statelor membre.

Domeniul legislativ, problema alinierii legislaţiilor naţionale la legislaţia UE,

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problema configurării legislaţiei UE în aşa fel încât să ţină cont de toate particularităţile naţionale ale statelor membre reprezintă chestiuni care, cu toate bunele intenţii ale legiuitorului European, sunt departe de a fi rezolvate. Spaţiul European se confruntă dramatic cu fenomenul aculturaţiei juridice, fenomen care se produce în mod natural în momentul în care multiple grupuri sociale, fiecare cu propriile sale reguli, interacţionează o perioadă îndelungată. Dacă uniformizarea, consecinţă normal şi firească a fenomenului aculturaţiei juridice, s-a produs în mod facil în unele ramuri de drept, cum ar fi – dreptul comercial – alte ramuri de drept, respectiv cele care aparţin dreptului public, şi în special dreptul penal şi procesual penal – continua să depună rezistenţă.

Cuvinte-cheie: *Uniunea Europeană, aculturaţie juridică, identitate naţională, unitate în diversitate, drept penal, drept procesual penal, cooperare mutual.*

1. Introduction: Unity in diversity – myth or reality

For so many times now, history has given humanity hard lessons regarding the issue of unifying at all costs communities with fundamental differences, both socially, economically, culturally and religiously, and at the level of mass psychology. Let us just remember the example of the Roman Empire, maybe not the best example, but still…, (27. B.C. - 395 A.C. – when the decline of Western Roman Empire starts. – 1453 A.D. – when the capital of Eastern Roman Empire, Constantinople is conquered by Mehmed). It is obvious that the construction of this Empire Great was made in a completely different manner *(cum manu militari)* than the European Union and that the social and legislative context of those times was altogether very different. The fundamental values of modern society, the desideratum and the standard of respect for human rights and fundamental freedoms, respecting the national identity of the citizens of each state, are just a few of the bricks used in the construction of the European Union. And yet, things started to go wrong in the opinion of some, or in the right direction in the opinion of others[1]: the 2016 Brexit gave courage to the actors who were unofficially considered less important, to express their displeasure and to draw attention to the disturbing realities of the European Union. But, as many whisper, this is only the beginning.

The President of the European Council, Donald Tusk, warned that the Warsaw right-wing government could try to push Poland out of the EU if it is no longer a net beneficiary of European funds. As a matter of fact, Poland is in a conflictual relationship with the European Commission on various issues, including the controversial reforms of justice, which have led Brussels to launch disciplinary mechanisms against Warsaw[2].

[1] BBC News, Brexit: World reaction as UK votes to leave EU, 26.06.2016 http://www.bbc.com/news/uk-politics-eu-referendum-36614643?ns_mchannel=social&ns_campaign=bbc_breaking&ns_source=twitter&ns_linkname=news_central (accessed 1.05.2018).

[2] Simona Stupar, *„Polonia ar putea organiza un REFERENDUM de tip BREXIT”*, published in Evenimentul Zilei, 12.01.2018, http://evz.ro/polonia-referendum-brexit.html (accessed 1.05.2018).

Although the economic and financial aspects were both the initial reason for the creation of the Single European Space and the reason for the numerous intra-Union conflicts, more or less obvious for the outsiders, we believe that legislative unification constitutes also an important stress factor, often overlooked by the scholars. The national legislation of each state is a quintessence of the cultural, social, ethnic, religious and moral features that characterize that state. It is also an organized, formal and legitimate response to the wishes and needs of the people, of their expectations during a specific historical period.

National legislation encompasses both an objective component – the regulation of human conduct that is generally adopted by the Legislative Power of that State – and a subjective component, namely that of the attitude of each citizen and of all of them in regard to what the State, by its specific mechanisms, allows or forbids them to do. Therefore, at the time of internal legislative change by imposing external standards, which now constitute the framework for the adoption of internal legislation, the natural reaction at the level of ordinary citizens was that of opposition and resistance. Accepting „suggestions", recommendations or mandatory provisions which could produce effects at the internal legislation level can only be achieved through ample actions focused on information and education of the population, and we must admit this is, in some states with limited resources, almost impossible.

Restrictions or sanctions, of financial nature or not, imposed by an entity which is viewed as an outsider, artificial, powerful and superior, as a result of internal legislative reforms that do not meet European standards, only increase citizens' resilience and create proper grounds for anti-EU groups.

„Unity in diversity" or *„Unity without uniformity and diversity without fragmentation"* – as main purpose of EU has proven to be difficult to accept and even more difficult to achieve, especially in the matter of alignment and uniformization of national laws of the Member States.

The strategy of EU to achieve the desideratum of unity began of course with an operation to achieve awareness of existing or aspiring members on cultural differences between nations and to promote an international policy of tolerance towards different cultural features of each State. Toleration policy soon turned into an aggressive promotion of cultural diversity that, surprisingly, has become the key argument for unity: unity in diversity!

On 19th of December 1954, the Council of Europe adopted the European Cultural Convention, which is the basis for cooperation in different social areas, the cultural element being included. *„Each contracting party shall regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe, shall take appropriate measures to safeguard them and shall ensure reasonable access thereto"*[3].

According to art. 2, each Contracting Party shall, insofar as may be possible, encourage the study by its own nationals of the languages, history and civilisation of the

[3] Art. 5 of European Cultural Convention.

other Contracting Parties and grant facilities to those Parties to promote such studies in its territory; and endeavour to promote the study of its language or languages, history and civilisation in the territory of the other Contracting Parties and grant facilities to the nationals of those Parties to pursue such studies in its territory.

Respect and promotion of cultural diversity on the basis of Council of Europe values are essential conditions for the development of a society based on solidarity. The document stipulates that measures are to be taken to develop strategies to manage and promote cultural diversity while ensuring the cohesion of societies, to support diversity and artistic creativity, to enhance access to cultural achievements and heritage[4].

Diversity – with regard of ethnic, religious, cultural and other national features – is in fact the essence of European Union. The possibility of moving, travelling working unrestrictedly across the European territory has led to an increase in cultural mixture, people borrowing habits, patterns of thought, taking over and transferring elements of their own national cultural identity to other *„European citizens"* themselves.

„Globalisation brought many benefits and material comforts but also demands for fast, technology-based, and different patterns of work. Multinationals move their staff around from one country to another. As the economy develops diverse cultures come into contact. People who work for different companies have to be aware of the fact that they have to comply with the company value system which sometimes might be incompatible with their moral beliefs and ethics"[5].

Certain irreconcilable cultural differences (especially religious) can generate conflicts or maintain conflicting states despite the concerted efforts of the Member States to overcome them. *„When there is dissimilarity regarding the cultural assumptions, social* norms and societal values conflicts may arise. Culture is a whole heritage of traditions, customs, *values and norms which people follow unconditionally and there are conflicts even within the same society, between people belonging to the same culture as subcultures have different ethical standards or different interests. It is generally recognized that the knowledge of another culture helps you better understand your own culture. To avoid the collision of cultures all the people, not just the business ones, have to be aware of the dangers of inappropriate conduct*[6]*".*

But the obstinate message of „unity" with the result of fading of „diversity" can make EU, and especially some of its member states, look almost ridicule for its excessive efforts. Legislation is one of the most important elements of the State apparatus, The Legislative Authority (Power) being one of the three Authorities in the States based on Rule of Law, according with Montesquieu's Theory of Separation of Powers. Moreover, the separation of powers model is a model of governance for all modern democratic

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[4] Elena Claudia Constantin, *Unity and Diversity in European Culture*, Professional Communication and Translation Studies, 5 (1-2)/2012: 10-16, p. 11. https://sc.upt.ro/images/cwattachments/117_fa1043055ffc4a3f04addf9a5ddd9617.pdf (accessed 1.05.2018).

[5] Constantin, E. C., *Recognizing Culture in the World of business*, in Superceanu R. & D. Dejica (eds.) Professional Communication and Translation Studies, 2, (1-2): 25-29, 2009, p. 26.

[6] *Idem*, p. 29.

states. Legislation is a fundamental element of national identity this being the reason for the resilience reaction of nationals against external pressures.

2. The concept of acculturation: cultural and legal dimensions

2.1. Acculturation

Acculturation has many definitions. According to Schwartz *„the concept of acculturation has cultural idiosyncrasies as its core and cultural values as one of the key elements*[7]*".*

Other scholars argue that *„acculturation comprehends those phenomena which result when groups of individuals having different cultures come into continuous first-hand contact with subsequent changes in original culture patterns of either or both groups"*[8]*.* Acculturation refers to a process in which members of one cultural group adopt the beliefs and behaviours of another group. Acculturation determines changes occurred on both the individual and social-collective levels[9]. However the ways in which groups acculturate depend on the dominance patterns. The dominant group is normally the majority in the society and the non-dominant group is a minority group, which usually holds for more than one group.

Under this definition, acculturation is to be distinguished from culture-change, of which it is but one aspect, and assimilation, which is at times a phase of acculturation. It is also to be differentiated from diffusion, which, while occurring in all instances of acculturation, is not only a phenomenon which frequently takes place without the occurrence of the type of contact between people, but also constitutes only another aspect of the process of acculturation[10].

In order to result acculturation, interaction must take pace between groups of population of equal or different sizes. Several factors may influence the process of acculturation, such as: whether contacts are between groups marked by unequal degrees of complexity in material or non-material aspects of culture, or both, or in some phases of either; whether contacts result from the culture-carriers coming into the habitat of the receiving group, or from the receiving group being brought into contact with the new culture in a new region.

The doctrine has identified situations in which acculturation may occur:

1. Where elements of culture are forced upon people or are received voluntarily by

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[7] Seth J. Schwartz, Marilyn J. Montgomery, Ervin Briones, *The Role of Identity in Acculturation among Immigrant People: Theoretical Propositions, Empirical Questions, and Applied Recommendations,* Human Development 2006, 49:1–30, p. 14. https://www.researchgate.net/publication/225028959_The_Role_of_Identity_in_Acculturation_among_Immigrant_People_Theoretical_Propositions_Empirical_Questions_and_Applied_Recommendations (accessed 1.05.2018).

[8] Robert Redfield, Ralph Linton, Melville J. Herskovits, *Memorandum on the study of acculturation*, American Anthropologist, 38/1936, pp. 149-152, https://anthrosource.onlinelibrary.wiley.com/doi/epdf/10.1525/aa.1936.38.1.02a00330, (accessed 1.05.2018).

[9] Bourhis, R. Y., Moïse, L. C., Pereault, S., & Senécal, S., *Towards an interactive acculturation model: A social psychological approach*, in International Journal of Psychology, 1997, 32: 369-386.

[10] Robert Redfield, Ralph Linton, Melville J. Herskovits, *op. cit.,* p. 152.

them.

2. Where there is no social or political inequality between groups.

3. Where inequality exists between groups, in which case any of the following may result:

a) political dominance by one group, without recognition of its social dominance by the subject group;

b) political and social dominance by one group;

c) recognition of social superiority of one group by the other without the exercise of political dominance by the former[11].

The processes of acculturation are based on acts of selection, determination (practical advantages, ethical and religious considerations, rejection), integration (time, conflict, adjustment – modification, interpretation and re-interpretation, displacement, survivals, replacement of old with new, transfer, shift in the cultural paradigm) and psychological mechanisms (hostility, psychic conflict, role of the individual as member of one of the groups, social status)[12].

The result of acculturation may consist in:

1. Acceptance: where the process of acculturation eventuates in the taking over of the greater portion of another culture and the loss of most of the older cultural heritage; with acquiescence on the part of the members of the accepting group, and, as a result, assimilation by them not only to the behaviour patterns but to the inner values of the culture with which they have come into contact.

2. Adaptation: where both original and foreign traits are combined so as to produce a smoothly functioning cultural whole which is actually an historic mosaic; with either a reworking of the patterns of the two cultures into a harmonious meaningful whole to the individuals concerned, or the retention of a series of more or less conflicting attitudes and points of view which are reconciled in everyday life as specific occasions arise.

3. Reaction: where because of oppression, or because of the unforeseen results of the acceptance of foreign traits, contra-acculturative movements arise; these maintaining their psychological force (a) as compensations for an imposed or assumed inferiority, or (b) through the prestige which a return to older pre-acculturative conditions may bring to those participating in such a movement[13].

2.2. Legal Acculturation

Since any culture has Law as main component, it is obvious that the acculturation phenomenon also produces effects in the legal field.

The legal acculturation, as well as the law-making process, has a multi-factorial determination. In this deterministic process, objective and subjective factors, act together with internal and external ones, natural factors (geographic, biological, physiological,

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[11] *Idem*, pp. 150-152.

[12] *Ibidem*.

[13] Robert Redpiel, Ralph Linton, Melville J. Herskovits, *op. cit*., p. 152.

demographic) and social factors (economic, political, ideological (interests, goals, collective needs, traditions, mentalities, prejudices, habits, theories, etc.), which concern the psychology of the individual (needs, interests, aspirations, goals, attitudes etc.) or psychology of groups or collective psychology (collective needs, interests, traditions, prejudices, habits, taboos).

The most eloquent example of legal acculturation is the one of Ancient Rome, during which time an intense reception of Greek rules occurred, the first codification of legal acculturation being the Constitution of Caracalla[14].

In the Modern Age, legal acculturation has occurred in many cases and consisted of either partial or total legal borrows[15]. In general, legal acculturation in this period took place in the newer states, which have been confronted with the problems of modern life the old rules of law had no longer the power to solve. For example, French law was overwhelmingly received in the Romanian Principalities, the Civil Code and the Criminal Code Carol II from 1936 being almost identical copies of the French codes of that period.

Phenomena of intense legal acculturation have occurred in Central and Eastern European countries, which were part of the ex-communist bloc. The legal acculturation was first determined by the fact that under Soviet influence their legislation fully followed the Soviet model (e.g. the Romanian Criminal Code of 1968 was copied after the Russian criminal code of that period). Then, as a result of the fall of totalitarian regimes, their transition to a democratic society implied the abandonment of legal systems based on the values promoted in communism and their replacement with modern law systems, compatible with the legal standards of the end of the XX-th century.

On the other hand, legal systems develop through their mutual contact, due to their need to communicate, to interact[16].

Legal acculturation within a legal system begins to occur where domestic legal solutions prove unsatisfactory and inefficient, followed by identification of a legislative solution belonging to a different legal system to be taken over by incorporation. Acceptance and incorporation is conditioned by a number of factors such as its technical superiority or facile adaptability to internal context.

Last but not least, in the context of the United Europe creation, legal acculturation becomes inevitable by establishing common standards generally applicable to the domestic law of each Member State. However, if the phenomenon of legal acculturation occurs most of the time naturally, forced only in the case of military capitulation and the establishment of a servitude status, in the case of European legal acculturation the phenomenon seems to occur in an intriguing way: Member States accept common European legislative standards by the time of accession to the EU, the possibility to manifest restraints being extremely limited, but, on the other hand, when the national legislation of a member state does not comply with the common standards or is amended for breach of directives or recommendations, economic or other sanctions are applied (see the judicial reform in Poland or Romania). Can this be pure

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[14] Doru Silviu Luminosu, Vasile Popa, *Sociologie juridică*, Ed. Helicon, Timișoara, 1995, pp. 317-318.

[15] Henry Levy-Bruhl, *Sociologie du droit*, Paris, Presses Universitaires de France, 1971, pp. 119-120.

[16] Victor Dan Zlătescu, *Mari sisteme de drept în lumea contemporană*, București, Ed. DE CAR COMPLEX, 1992, p. 11.

acculturation or are we facing another phenomenon?

2.3. Acculturation and the Criminal Law

The European space is dramatically facing the phenomenon of legal acculturation, a phenomenon that occurs naturally when multiple social groups, each with its own rules and specificity, interact for a long time. If uniformity, a natural consequence of the phenomenon of legal acculturation, occurred easily in some branches of law, such as national commercial law, other branches of law, namely those belonging to national public law, and in particular national criminal and criminal procedure law - continue to resist.

3. The truth: legal transplant

3.1. General aspects on the issue of legal Transplant

The legal transplantation was understood to be a transfer, across the geopolitical and cultural borders, of power and of the institutional structures. This might be imposed or occur voluntarily; this included legal whole systems or single legal principles. Also, it proposed to be integrated in similar or different cultures. In receiving countries, legal transfers could penetrate the notion of state of law or non-state social institutions. Alternatively, by being superimposed on indigenous juridical structures, many developing countries implemented it in the state's supreme law.

In Ciongaru's view, *„a feature of legal transplant was that it involved a legal system which incorporated a legal norm; either the institution or the doctrine adopted from another legal system. It could refer, also, to the reception of a whole legal system; this could appear in a centralized manner. In order to understand the phenomenon of legal transplantation of a foreign legal norm, there had to be an examination of the existing historical premises around the introduction of foreign law in a particular case. For example, if this was the result of conquest; colonial expansion; or political influence the successful state's legal norm was adopted"*[17].

Over the time legal systems from around the world developed through legal transfers and some of the best legal transplants were held during the military expansion of the Roman Empire. The roman jurists assimilated jus gentium, which ought to apply to colonized persons, with *jus naturale* (the law which ought to be respected by all humanity)[18].

The concept of legal transplant, as unusual at it seems, it is not seldom at all. As a matter of fact, it is quite used in the comparative law area with the purpose of comparing

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[17] Emilian Ciongaru, *Negative Effects of Incorrect Legal Transplantation of European Union Legislation Procedia,* in Social and Behavioral Sciences 2013, 92:186-191, p. 187. https://ac.els-cdn.com/S1877042813027882/1-s2.0-S1877042813027882-main.pdf?_tid=fe5b24db-b548-4673-b9c2-601bdd716da7&acdnat=1525204426_ebf0c230eb2116b3b163ad4382533ec9, also available on www.sciencedirect.com, (accessed 1.05.2018).

[18] *Idem*, p. 188.

and contrasting two legal systems in order to borrow from each other[19].

According to Kahn, one may identify three purposes pursued by those who use foreign law in the process of law making: *„Foreign legal systems may be considered first, with the object of preparing the international unification of the law, secondly, with the object of giving adequate legal effect to a social change shared by the foreign country with one's own country, and thirdly, with the object of promoting at home a social change which foreign law is designed either to express or to produce"*[20].

Authors argued that, by legal transplants, it should be possible to create a mega-system of law across societies by focusing on the functional purpose of the law for the benefit of other legal institutions which are functionally comparable[21].

Governments use comparative law for law reform purposes, generally to promote desirable social or legal changes observed to arise from the implementation of such a law in other countries[22].

Scholars were not surprised when, in 1990, the XIIIth Congress of Comparative Law, held in Montreal in 1990, devoted a section to *„Circulation des modèles juridiques",* in other words, to legal transplants, thus emphasizing the importance and its growing receptivity of the issue of legal transplants[23]. Also the issue of the circulation of legal terms was also approached as an important component of legal transplant[24].

According to Krol, legal transplants classify as follows: autogenic, isogenic, allogenic and xenogenic[25]:

a) Autogenic legal transplants have no major legal significance because they occur in the national legislation such in case of transplant of a legal concept used in a branch of law to another branch. (E.g. liability of legal person accepted in administrative law was borrowed as regards its arguments in criminal law in Romania).

b) Isogenic legal transplants are based on the transfer of the normative content from one system of law to another – sibling system. (E.g. the legal systems of the United States and the European Union. The federal law of the USA as „sister" law of American state

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[19] J. C. Gibson, *Impact of legal culture and legal transplants on the evolution of the Australian Legal System*, Reports on the XVIIIth International congress of comparative law on the theme «Legal culture and legal transplants» Washington D.C. 2010, reports presented to the XVIIIth International congress of comparative law on the theme «Legal culture and legal transplants», Jorge A. Sánchez Cordero (ed.) (2011) Volume 1 – Special Issue 1, Article 2, p. 2.

http://www.districtcourt.justice.nsw.gov.au/Documents/Legal%20Culture%20and%20Legal%20Transplants.pdf, (accessed 1.05.2018).

[20] O. Kahn-Freund, *On Uses and Misuses of Comparative Law, Modern Law Review* 1974 37 1:1-27, p. 2, https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1974.tb02366.x, (accessed 1.05.2018).

[21] J. C. Gibson, *idem*, p. 2.

[22] O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 1974 37 Modern Law Review 1:1-27, p. 2, https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1974.tb02366.x, (accessed 1.05.2018).

[23] John Cairns, *Watson, Waldon and the History of Legal Transplants,* 2013 Georgia Journal of Internatinal and Comparative Law 41:637-696, p. 676.

[24] Rodolfo Sacco, *Language and Law*, 2000, Journal of Legal Hermeneutics, Translation in law, Yearbook of Legal Hermeneutics 5:133-130, pp. 115-116.

[25] Malgorzata Krol, *Legal culture and legal transplants. Polish National Report*, Reports to the XVIIIth International Congress of Comparative Law (2011) Volume 1 –Special Issue 1, Article 22, pp. 7-9, http://isaidat.di.unito.it/index.php/isaidat/article/viewFile/55/65, (accessed 1.05.2018).

systems and the law of the European Union and the systems of the EU member states as "sister" laws – are the source of transplants).

c) Allogenic legal transplants consist in the transfer of normative content or a method of legal regulation within different systems of concrete law belonging to the same type of legal culture. (This type of situation can be exemplified with transplants made in the course of harmonizing EU member states law with the law of the European Union, before their formal integration).

d) Xenogenic legal transplants are the most characteristic type. They consist in the transfer of normative content to a system from another legal system belonging to a different type of legal culture. The transfer results in a „revolutionary" change of the normative *status quo* in the host system. This mainly impacts indirectly and gradually the social, economic and axiological environment of the host system. Xenogenic transplants cause a normative revolution. E.g. Japanese legal system was reconstructed at the beginning of XXth century through transplants of West European legal regulations (French legislation in substantive and procedural penal law, followed by Prussian and German solutions, and North American regulation after World War II.)

Isogenic and allogenic legal transplants are used in legal systems belonging to the same cultural environment of low identity. The conclusion is that the transplants do not change systems of homogenous culture considerably, do not contribute to their normative revolution and do not affect the configuration of the communication and regulative code of the legal culture. They are not transplants in the strict sense but mere legal borrowings.

Xenogenic legal transplants are used in reference to legal systems belonging to foreign legal cultures. The identity coefficient is high, the transformation of law results in normative revolution, the transplants do affect the communication and regulative mechanisms of legal systems. Such properties are characteristic of legal transplants in the strict sense.

A further classification can be carried out as follows: direct and indirect legal transplants. E.g. *"the Napoleonic Code of 1804, effective in Poland on the territory of Warsaw Duchy since 1808, transplanted as a whole to Poland and binding in its original French version. Indirect transplants are transferred through a third system. Thus, attempts to transplant Roman law through German imperial law were unsuccessful in Poland and the unintentional reception of Roman institutions was carried out through canon law"*[26].

3.2. Legal transplant in EU

The issue of legal transplant is essential in the discussion on implementing the *Aquis Comunitaire*. European law and national legislations were in conflict at the moment of the request for membership. Sometimes, even after joining EU, the EU rules, conferred rights and imposed obligations on citizens in contrast with a rule of national law. The solution to this conflict was the very EU purpose – creation of an open and free space and of an European legal order. The incorrect transplantation at a national level of the EU

[26] Malgorzata Krol, *op. cit.*, p. 9.

rules*"could lead to extensive vulnerabilities both in the legislative area and in the jurisdictional area. The practical inconvenience was reflected mainly in the act of realization of this law's enactment producing a series of difficulties"*[27].

Article 13, of the European Convention on the Human Rights and Fundamental Freedoms (ECHR) was constantly interpreted by European Court of Human Rights (ECtHR), as being the direct expression of the state's obligation, as provided for in Article 1 of the Convention to protect human rights, primarily in its own system of law[28]. According to this interpretation, Member States were required to implement internal effective means, to adopt clear, unambiguous, uncontradictory, complete, coherent and consistent laws, creating a national legal system, without loopholes of interpretation which provided a full dimension of time and space.

The ECtHR stimulated the principle of subsidiarity and protection of substantive and procedural law with the consequence of the national judge to adopt an active role in a national procedural framework adapted to the requirements of European law. In cases of incorrect legal transplantation of European Union rules, there was the possibility of a conflict between European Union law and national law. The solution, to solve the conflict of laws, was to give priority to the norm of European law and allow it to cancel the effect of national regulations which diverged from European rule[29].

4. Romanian criminal law between legal transplant and legal acculturation

In the following we shall present two examples on how the legal transplant occurred in the Romanian legislation.

E.G. 1:

Legal transplant: plea bargaining

Legal acculturation: change in the vision of the Romanian legislator and in case of citizens who need to accept the need of simplification of criminal procedures, Romanian criminal judicial system being overwhelmed by the increasing numbers of offenses requesting important human, economic and time resources - not occurred yet, since some doctrine, despite the numerous advantages of this institution contest its legal reasoning.

Countries struggling with overburdened criminal justice systems (Romania as well) found in the institution of plea bargaining the golden Key of their problems. The US institution of plea bargaining requests a larger process of criminal procedure reform. Plea bargaining, however, is not simply a technical change in process. Scholars emphasized that law providers should consider the consequences of this new procedure beyond simple case

[27] Emilian Ciongaru, *op. cit.*, pp. 188-189.

[28] Burdov v. Russia (no. 2) - 33509/04, Judgment 15.1.2009 [Section I], Article 13 – *„There was no effective domestic remedy, either preventive or compensatory, that allowed for adequate and sufficient redress in the event of violations of the Convention on account of prolonged non-enforcement of judicial decisions delivered against the State or its entities"*. www.echr.coe.int, (accessed 1.05.2018).

[29] Emilian Ciongaru, *op. cit*., p. 190.

processing. *„The introduction of plea bargaining requires legal professionals to adapt to a new way of doing their jobs. It potentially changes how defendants and victims view the system. It also carries the potential to change how the general public views the legal system. This can be of particular concern in countries struggling to establish the rule of law"*[30].

The introduction of plea bargaining into civil law countries such consisted not in implementing the same model of plea bargaining as Existing in US but in adapting the institution to fit the national legal system. Doctrine expressed concerns that national criminal justice systems may not adequately adapt plea bargaining processes to address local needs[31]. This successful or not operation of implementation would influence the development of the rule of law[32].

Plea bargaining is provided by art. 478-488 RCPC entered into force on 1st Febr. 2014. Numerous issues of interpretation identified in Romanian case-law determined the modification of some of these provisions in 2016[33] to achieve uniformity of national courts decisions.

Result: a not very successful legal transplant.

E.G. 2:

Legal transplant: prevalence of international treaties in the matter of territorial conflict between Romanian criminal rules and international treaties to which Romania agreed to sign.

Result: successful legal transplant

Legal acculturation: principle of open European territory with the consequence of dilution of principle of territoriality of national criminal rules.

Dilution of national identity and independence of the State? (not occurred yet since the public opinion still questions the legitimacy of such a provision, claiming for return to previous regulations, before 2009/2014 when subsidiarity affected only principle of personality, reality and universality governing the application of Romanian criminal rules in space, principle of territoriality being excepted).

Result: acculturation process in progress

In this case could we declare that, by hazard, EU tends to become a Federal State? Where is the desideratum of preservation of national identity in this case.

Could EU Legal Acculturation jeopardize the national identity of member States or their national legal memory is stronger?

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[30] Cynthia Alkon, *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems*, Transnational Law & Contemporary Problems 19:355-418 (2010), p. 357. Available at: https://scholarship.law.tamu.edu/facscholar/268, (accessed 1.05.2018).

[31] Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harvard International Law Journal (2004), pp. 1-64.

[32] Cynthia Alkon, *op. cit*., p. 378.

[33] Modifications by Emergincy Ordinance 18/2016 published in Official Monitor of Romania nr. 389/ 23.05.2016.

5. Concluding remarks

The motto chosen by the European Union in 2000, „United in diversity" signifies how Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by the continent's many different cultures, traditions and languages[34].

The European Union faces the problem of integrating its members into a cohesive social whole. Specialists consider that the challenges EU has to deal with are not easy to surpass since diversity cannot be suppressed and unity cannot be dispersed. The present day European context has to face another reality. The Union is made up of countries, which even in the last century were involved in armed conflicts and now they have to take decisions together. The European Union is aware of the importance cooperation between people, not only at the political and economic level but also at the cultural one; cooperation among people envisages cooperation in all fields[35].

The term legal transplant was coined by Scottish-American legal scholar Alan Watson in the 70s to indicate the movement of a rule of law or an entire system of law from one state to another. Legal transplant in most systems occurs as a result of borrowing, legal transplant being one of the most fertile source of legal development. legal transplants are mentioned in the broader process of diffusion of law or legal acculturation. J.W. Powel is credited with coining the world acculturation, first using it in 1880 in a report by the US Bureau of American Ethnography. It involves psychological changes induced by cross-cultural imitation. Nowadays, legal acculturation refers to diffusion of law in the context of globalization[36].

Legal acculturation consists in a very complex phenomenon with the result of the changing of national legal status quo, manifesting both at the objective level of changing legal institutions and rules, and at the subjective level of changing minds and thoughts, expectations and individual value systems.

Legal transplant is only a tool, the zero moment that triggers the process of acculturation but does not guarantee its success.

At the national level, the legal transplants are occurring constantly due to the pressures of EU, but the acculturation has not occurred yet, at least not in Romania, the national identity being a too stronger feature of Romanian people.

To this result has contributed also the „superiority" of European organisms which intervened with a threatening attitude every time Romania did not proceed by making changings necessary in the eyes of European Council. Indeed, some of the suggestions were healthy for our legal system, but the manner in addressing them to Romanian

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[34] Elena Claudia Constantin, *Unity and Diversity in European Culture*, Professional Communication and Translation Studies, 5 (1-2)/2012: 10-16, p. 12. https://sc.upt.ro/images/cwattachments/117_fa1043055ffc4a3f04addf9a5ddd9617.pdf (accessed 1.05.2018).

[35] Elena Claudia Constantin, *idem*, p. 12. https://sc.upt.ro/images/cwattachments/117_fa1043055ffc4a3f04addf9a5ddd9617.pdf (accessed 1.05.2018).

[36] K.L. Bhatia, *Textbook on Legal Language and Legal Writing*, 2010, Universal Law Publishing Co. Pvt. Ltd., New Delhi, India, p. 270.

Government could have been, in our thoughts, different.

Our laws may be changing, but our thoughts, feelings and pride are the same as they where before EU.