Judicial Interpretation and Substantive Legality in Criminal Law: A Comparative Study on Distribution of Power in Albania and The Netherlands

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1. Introduction

Young democracies are under permanent pressure. Not only do they have to grapple with persistent tendencies in society to restore the old political situation, they also have to meet high standards, in order to become accepted in the community of democratic states to which they want to belong. This general statement may be true around the world, examples of it can be found particularly in the post-communist states of Central and Eastern Europe, who aimed at accession to the European Union. Even if we limit ourselves to the legal aspects of these societies, we can witness an enormous effort to incorporate all types of new legislation. The whole process of implementation of the EU-aquis, mandatory for entering the Union as a member state, is a giant operation, which already more than a few states have completed.

At this moment new candidates have knocked on the door of the EU and have consequently commenced the process of legal adaptation and incorporation, which can also be described as legal transplantation. The process of legal transplantation has been discussed at length by scholars from legal history,
comparative law and legal theory. Basically it can be defined as the process of borrowing legal constructs from a source outside the scope of the law of the land at a given time and implant that construct into the law, be it by national legislation, be it by international instrument, be it by case law of the courts or any other instrument. Legal transplantation is a reality for almost all legal systems, but particularly in the European states we mentioned earlier, that underwent fundamental political changes in their recent history. They very often borrowed (either freely or under pressure) constructs from Western European states as part of the process of accession to the European Union. This process is still going on for some states on the Balkan, often with assistance from law firms or agencies from Western Europe (or the US). In this process provisions are imported from all directions into the various fields of the law. The criminal law is in no way an exception to that. Incentives to change current provisions in the criminal code or insert new ones come from the EU, but also from other international organisations, among which the UN (regarding the fight against drug trafficking and organised crime) and the World Bank (regarding the fight against corruption). There are good reasons to raise the issue of legality in substantive criminal law in this context. When copying provisions from a Western Criminal Code one has to appreciate that these codes operate in a context of a particular justice administration with its own distribution of power, particularly between legislature and courts. Not only does that presuppose a certain view on the limitations the courts, e.g. the Supreme Court, have to observe when participating in the law making process, it also takes for granted the specific nature of the legislative process and the system of the criminal code as a whole in that donor state. We could rephrase this by stating that every provision carries a reflection of the principle of legality as it is embedded in that code, which is not left behind when taken from its context and inserted into the criminal code of another country.

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1) One of the celebrated authors in this field is A. Watson and his chief works on legal transplants include: Legal Transplants: An approach to Comparative Law (Edinburgh, 1974; Georgia, 1993); Society and Legal Change (Philadelphia, 2001); “From Legal Transplants to Legal Formats”, American Journal of Comparative Law 43 (1995), 469; “Legal Transplants and Law Reform”, Law Quarterly Review 92 (1976), 79. See also J. M. Miller, “A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process”, American Journal of Comparative Law 51 (2004), 839.


3) We have to stress that the legality principle comprises many aspects. That did not preclude us from putting one aspect of it in the front: the legality principle as the consolidation of the balance of power (or influence) between legislator and courts in the law making process. Other aspects,