

Conflict of Law in the Process of Globalization

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ABSTRACT

Private international law (or conflict of laws) is a set of rules of law that determine which court has jurisdiction and which law governs a given legal dispute. The new issue affecting this item is globalization. The current study aimed to investigate the effect of globalization on conflict of law. Although various definitions are raised about globalization in scientific communities, and any researcher studied globalization from his view. However, law theoretical aspects are affected by scientific aspect and by globalization issue in international trend; it took a definite trend as equal law and achieving global unit law. The investigation of the effect of globalization on conflict of law is not studied academically yet.

KEYWORDS: Globalization; International Law; Court; Law

INTRODUCTION

Private international law (or conflict of laws) is a set of rules of law that determine which court has jurisdiction and which law governs a given legal disputes. The new item affecting this aim is globalization issue. Although globalization is the product of development in international relations and is raised as seriously in economy and politics seriously, today law is seriously affected by it. It should be considered that the conflict of law and the issues of courts conflict in each country are taken in each country without considering the decisions and solutions of other countries in similar cases. In other words, international relations in various countries are dependent upon the various legal rules and systems. The law systems in coordination with the existing realities lost their traditional rules and went toward the unity [1-3].

The study of the effect of globalization in the conflict of law has some benefits, first by studying this issue, the wanted or unwanted effects of globalization are revealed on national law and namely conflict of law. By modeling the positive points of the problem, it is attempted that by predicting some items avoid the negative or unwanted effects. By investigating the effects at global level and its comparison with the current condition of national law, the legal position of Iran and its update condition are determined and the barriers are resolved to keep up with the global law and international organization capacity is used in this regard. It is attempted in the current study to investigate the effect of globalization on conflict of law as generally and in partial issues of conflict of law [4-5].

The current study aimed to investigate the globalization on conflict of law. Although there are various definitions of globalization in scientific communities and any researcher studied globalization from his view, beside the items, the theoretical aspects of the law are affected by its practical issue and being affected by globalization in international law, it approached equality of rules and unit global law. It should be said that the investigation of the effect of globalization on conflict of law is not studied academically yet [6-10].

The main questions of the study

- 1- Is the effect of globalization on conflict of law similar in legal systems and various issues?
- 2- Is the effect of globalization on conflict of law achieving global equal law?
- 3- Is the international and regional organizations play role in the effect of globalization on conflict of law?
- 4- Is globalization of the law makes the conflict resolution rules similar?

Study hypotheses

- 1- The effect of globalization on conflict of law is not similar to the legal systems and issues.
- 2- The effect of globalization on conflict of law is achieving equal global law.
- 3- The global and regional organizations play role in the effect of globalization on conflict of law.
- 4- The globalization makes the rules of conflict resolution similar.

Legal outcomes of globalization

Regarding the globalization of the law, we should say that globalization is a non-legal concept being in culture, politics, economy, human rights and communications. Globalization helps the similar law in the global field and today important aspects of globalization of the law are observed. The law took to paths for globalization [11].

One of the ways is the common legal rules in the domestic systems and another one is international law. The aim of both of them is the same and it is law globalization. The common rules of human communities in various branches of domestic law of the countries show globalization. But the international law path to achieve the rights globalization is a safe and short path to achieve the aim. Law globalization with any method is a kind of value. Sometimes the value is turned into legal dominance. Some items as Iran sanction in the domestic law of USA or Security Council resolution [12].

Globalization is mostly with the development of international law even transnational law. Thus, international law including private and public can not ignore thinking methods and Asian, Indian and Islamic civilization. The thinking and civilization in which accepting the government as law unique owner and accepting the law as a domestic law is avoided. According to some of the law theorists, law globalization is dependent upon mutual dependency of economy and human rights.

Two main factors of globalization of law are economy and human rights. In the economy, the problem is when a government or a coalition of governments imposes their view of commercial relations. Now, there are three ways for imposition state. First, a government decides to execute the domestic law as internationally. The government tries to include the domestic law in an international legal text [13-15].

Another method is such that a government can issue its model and this is a kind of colonialism and a kind of labor law, the relations between the employer—employee and workers are established in which law is the restriction of qualifications for the benefit of the market. The companies are inclined to invest in the countries their law is for their benefit. The last method is imposing law of a government to the world and international nature of a national and domestic ability [16-17].

Regarding the human rights, it is proved that the common attempts from a government or even a group of governments to establish a common human rights system leads into the risk of collapse. Some cases leading into the division of the law are:

First, the law is divided into civil and economical law. Such as human rights treaties 1946, while Universal declaration of human rights 1948 consider it as completing.

The second one is based on special term of various groups of the governments of human rights and leads into the conclusion of the conventions making the unit culture governments as unified as European convention of human rights 1950 or American convention of human rights 1969 and African chart of human rights 1981 or coordinated feeling of Asian authorities in international and regional gathering.

The third is domestication of predicted law concepts in human rights chart via using interpretation condition according to domestic law such as USA that transformed civil and politic rights to the constitution.

Globalization and equal law

Conflict of law issue in private international law is the study of the rules by which we can determine the executable law of foreign law.

In other words the private international law or conflict of law is the set of rules controlling the private relations of people in the international life. When a foreign element involves a private issue and it is related to more than one legal system, the private international law determines which systems can be applied compared to the mentioned issue. The private international law is a positive law of an international system. Any court via attributing to national rules of conflict resolution determines the underlying law on the issue. Referring to the national rules of conflict solution can lead into external law in which the court resolves the issue in accordance with the foreign country. The private international law is the positive rights of an international system and its aim is the solution of private law relation being related to more than one national system. For example, in the private international law of Iran the foreign citizens' condition is dependent upon their country while the issue of the contracts is dependent upon the location of contract conclusion [18].

In the private international law, applying foreign law in national system is raised and these is fulfilled by the methods being provided by various international courts and make the rules at international level equal. Thus, correct application of foreign law is possible by equal rules as appropriately.

Regarding the globalization of law, we can say that there are four theories. First the concluded contracts between the governments and people at global level controlled globalization. In the second theory, the hierarchy theory is fulfilled based on globalization theory via applying hierarchy governance similar to what is in the federal governments. Another theory is based on international network of state and non-state organizations and private

companies. The relations between the governments, the problems resolution help the countries to use the benefits of non-state institutions in the world. The fourth theory

Is the transnational trading law controlling the rules developed by the tradesmen and controlling economical relations between the tradesmen and trading companies without that the rules are related to a special legal system. Globalization causes that the concepts of institutions and legal rules are transferred from one country to other countries. To control globalization, the legal grounds should be provided to guarantee the trading freedom of the goods and economical activities of the transnational companies. Thus, in globalization process, it is required to use the similar rules.

Based on the importance of law equality as the outcome of globalization, we can say that in a general classification, the legal issues are divided into three groups. The first group is the domestic issues and their continuance is occurred in the borders of a country without transnational outcomes. In other words, it is the law applied in the land of a country to the people living there and to the properties in that country. Thus, equality of the rules to this group of issues is not necessary and each of the countries applies the special rules. Some of the local rules, we can refer to the penal rules about the tax and the like.

The second case is the one in which the government based on the private and trading relations between the governments for their benefit try about some of foreign law application in their land permit and international rules are created against the domestic law. It can be said that the law is executed outside of the country domain, for example item 6, 7 civil law about the conditions of marriage and divorce about Iranian citizens even they live in the abroad and the foreign citizens living in Iran about the conditions about the related government conventions. Another group is the issues in which national rules are not alone adequate for their discipline and through equal rules with other countries, such issues are under the international discipline and achieve the legal goals. For example some issues as smuggling, drug abuse and mass destruction are referred. To fulfill the aims, it is required that all the countries via applying the similar rules can fight against this phenomenon; otherwise we can not be successful in this regard. Some cases as internet offenses, terrorism, supporting the rights of intellectual property owners are the issues requiring equal rules at global level. Thus, an equal rule in some issues is necessary and unnecessary in other issues.

The ways of making the rules equal

Equality of legal rules at national level

Almost in most of the countries in the world, modification of the existing rules and applying new law are used and in most of them some special institutions are obliged to study the existing rules continually and present the results of their study in the proposed rules to the law making courts. To investigate the existing law, we should consider the scientific findings at global level and apply the experiences of other countries at global level. These findings provide the law maker with the awareness to predict the outcomes of the law and choose the best one among the existing methods. In such a view, the legal experts provide the best law in accordance with the experiences of other countries. Based on the scientific findings, we can achieve the legal unity or at least some similarities in legal rules.

Equality of legal rules via voluntarily acceptance

Another way of achieving the legal unity is voluntarily application of the people and institutions of the unite rules being provided via international and regional organizations. This is fulfilled via accepting the standard contracts or unified general conditions at contract conclusion time or via voluntarily acceptance of a set of special rules.

Based on the reality that the rules of the contracts in various countries are not the same and a unified contract in various legal systems led into the different law and obligations. For economical evaluation of a contract, it is required to predict the outcomes of a contract during the conclusion. Based on the freedom principle of the contracts in most of the countries, the tradesmen and trading companies attempted to conclude their contracts with the highest reliability as the rights and obligations of two sides are expressed in the contract text and the intervention of the underlying national rules to determine the contract obligations is restricted. To help the tradesmen and trading companies, many organizations at global and regional level provide the standard contracts and public conditions in various trading fields and the sum of them created independent law called transnational trading law. The voluntarily acceptance of the standard contracts and general conditions caused that the rules of various economical and trading fields are unified.

The role of the model rules and international conventions in equality of the law

Equality of the legal rules is done via providing the international conventions and accepting them via the countries or the application of the law maker of the model rules. These treaties can be made bilateral and only between two government or concluded as collectively or multi-lateral. Bilateral contracts are simple compared to

multi-lateral contracts in form and they have limited conditions and agreeing about them as their government participates is possible easily. Their drawback is such that their rules is relative and they are valid only about the citizens of signing governments and don't include the citizens of other governments, except the citizens of the governments with the "most favored nation" principle. In other words, the conditions considered for them except for the cases approving the general law about the foreigners; it is including only a group of foreigners. Their execution only in one country cause that the rights of foreigners of their benefits are more compared to the rights of the foreigners in that country. The difference or discrimination can be reduced gradually or be eliminated. The effective factor in this regard is the verdict of the courts.

In the past century observed the growth of the international and regional organizations being active to provide such conventions and could provide valuable conventions and some of them are accepted by the countries well such as united nation convention about the international goods sale contracts being accept from 63 countries and it means that some of the sale rules observing the international sale contracts in 63 countries are unified. Most of the international law rules guaranteeing the general obligations are global such as international law making conventions.

The role and position of international, regional and non-state organizations in equality of the rules

United nation

As it was said, these organizations are created by the governments and the most important case is UN. United nations one of the symbols uniting the people. At legal ground, the activities of the organization are considerable not only as expressing the rights but also forming the legal rules.

Today, in UN besides all the member countries, other international and non-international organizations not only have close relation, but also are directly the object of obligation. The issues of penal law and human rights are some aspects of the unity [19].

Regional organizations

European Union

European countries formed a union for unity. This union is considered a regional intergovernmental organization; it acts as a federal government. The member countries in the union by restricting their national sovereignty gave special power to the union. The European Union member countries are dependent upon different legal systems. Some countries as France, Germany and Italy are written by law system, England by common law, Scotland mixed system and some countries as Finland and Sweden by Scandinavian law system and ten countries joining the Union on May 2004, they can belong to socialist system. Increasing the power of the union regarding the equal rules in the member countries and creating an independent legal system show that the union follows its special legal system independent of the member countries and it reached the turning point by ratification of the constitution of the union.

The united nations Economic Commission for Europe (ECE) relate to UN

This commission is one of the commissions of fifth region of UN being founded in 1947 and more than 45 countries are members. The commission was established to improve the economical commission level between the members one of the duties is the development of international convention and standard contract. This commission had the best role in providing standard contracts.

Non-state organizations

The international trade room

This is a non-state organization being established in 1919 in Atlantic and the central office is located in Paris. The organization is consisting of 130 countries in the world. There are national trading rooms in any country reflecting the views of international trading room to the governments and introduce the permanent representatives to the international trading council. One of the main aims of international trading is coordinating the trading procedures, developing trading and investment and encouraging taking open economical policies.

The world Red Cross

This organization was established after the civilian war of Italy in 1859 by a Swiss person Henry Donant and then it was established in 1863 with four people.

In summer 1859 around Solferino, a village in the north of Italy, "Henry Dunant", a young businessman of Geneva observed a serious battle between Austria Army forces and France and Italy armies.

He saw that thousands of wounded lost their life without being aided while if there was effective health services, they would be alive.

In 1862, “ Henry Dunant” published his famous work” A memory of Solfrino” and after describing the terrible scenes of the war offered to establish relief organizations to look after the war prisoners in all the countries in the world during the war.

Dunant proposed to ratify an international treaty to recognize the support of health relief organizations and wounded organizations from the belligerent sides.

Human Rights watch (HRW)

Human rights watch was established in 1978 after the conclusion of Helsinki convention by a group of human rights activists including Robert Bernestein and Arie Nieer in USA. Helsinki convention permitted the people and organizations to put pressure on the governments in execution of the convention and there was a clause in the convention obliging the governments to consider human rights and freedom namely freedom of speech prisoners. Human rights watch has some various sections as Africa (1987), Asia (1985), Europe and Central Asia (1978), Middle East and Eastern Africa (1989) and America (1981).

The effect of globalization on barriers of execution of foreign law

To execute law in another country, at first in accordance with conflict resolution, the qualified foreign law is recognized. The foreign law is executed unless it is in contradiction with the public order of the original country and it is executed with the false work in the rule.

Foreign law qualification doesn't mean full acceptance and when the qualification of a case is proved to an item, first the law is tolerated for our legal organism or not. In other words, it is in contradiction with the public order or not. Second the law is qualified normally or it is provided due to cheating to Iran law. In cases when foreign law is in contradiction with the public order or it is recognized qualified due to cheating condition and it is avoided.

Public order in private international law

Public order in domestic law is the rules used in a country for public services benefit, ethical security in people relations and the people of the society can not conclude in contradiction with it. While if the public order has such a meaning in international relations and opposing with the public order was violation of private international law, it will lost its existence philosophy.

The public order is wide in the private international law and it is including many rules but the concept of public order in the private international law can not include all of them. Indeed, the public order is in contradiction with the rules and mixed in the civilization of a country and the judges of the country prefer their execution to the foreign law as they are in accordance with conflict resolution.

The effect of globalization on public order and accepting equal conflict resolution rules

The issue of the rules conflict in the private international law is the study of the rules by applying them; we can achieve the foreign law to determine the executable law. In the law contradiction rules, the law maker is dedicated to determine the criterion and avoids determining the verdict about the nature and delegates selecting the qualified law for the court. The conflict rules are only for solving the conflict of law and determining the qualified law and when the conflict was solved and the law was enforced, the court by materialistic rules, the rules about the claim principle and to resolve it directly solve the dispute.

Some people as Barton considered the private international law as the result of various views of law theorist in the principle of common international law. He believed that if the law of a country is executed in another country properly, some conditions are required including their conflict of law are common to some extent and the lack of common legal society is the basis of public order. He believed that performing the conflict of law depends upon the common legal society and if the law can be executed in another country, these two countries should be a part of legal common society. It is inside a legal family with legal close relation.

The coordinated process of law globalization is done via three ways, first is the mutual, regional or multi-lateral commission between the governments, the second is coordination of the law via regional union including European Union and regional organizations as European council. Finally, the third is equal rules formation in the framework of a unified legal system under the supervision of international institutions.

Conclusion

Globalization simply means the development of scale, size growth, the deep transcontinental effect of the social models. Globalization means the movement or change at human organizing scale linking far communities to each other and develop the access to power relations in the world continents. But it shouldn't be considered the emergence of a global society or a public process of the global integration in which the cultures and civilizations are

convergent. Globalization is a process of change in which the political and economical borders are less emphasized, the communication is development and the interaction of the cultures is increased. Globalization is a multi-dimensional phenomenon, their effects are developed to social, political, legal, cultural, military and technology activities.

Based on the definitions presented of globalization and the effect of globalization on conflict of law, we can refer to the following items:

1- Conflict of law is the rules controlling the private relations of people in the international life. When a foreign element involves a private issue and it is related to more than one legal system, the private international law determines which systems can be applied compared to the mentioned issue. The private international law is a positive law of an international system. Any court via attributing to national rules of conflict resolution determines the underlying law on the issue. The private international law is the positive rights of an international system and its aim is the solution of private law relation being related to more than one national system.

In the private international law, applying foreign law in national system is raised and these is fulfilled by the methods being provided by various international courts and make the rules at international level equal. Thus, correct application of foreign law is possible by equal rules as appropriately.

This process is done at national level via modification of the existing law or new rules and at international level via conclusion of international convention or via voluntarily acceptance of some rules via the companies and institutions.

Via this method, the International Commercial Arbitration of Iran that was ratified based on UNCITRAL law on September 17, 1997 by Islamic council parliament being coordinated with the judgment rules of 40 countries. Another example of such rules is labor law in Iran being influenced by the rules of other countries.

Voluntarily acceptance of the rules is the voluntarily application of the people and institutions of the unite rules being provided via international and regional organizations. This is fulfilled via accepting the standard contracts or unified general conditions at contract conclusion time or via voluntarily acceptance of a set of special rules. In such cases, rules equality is not done via signing convention or sample law ratification by the governments, the people and institutions accept the rules for their benefit and prefer to do their activities in accordance with the rules. This led into the legal unity and rules equality. Equality of the legal rules is done via providing the international conventions and accepting them via the countries or the application of the law maker of the model rules. These treaties can be made bilateral and only between two government or concluded as collectively or multi-lateral.

There are considerable organizations and institutions attempting that via providing the international conventions make a part of legal rules of the member countries. Some of the international conventions impose definite obligations to the member countries and the members should observe in their national rules as a minimum. Some issues as human rights and children rights are some examples. Accepting some of the conventions causes that a part of national rules become equal in accordance with conventions.

Most of the international law rules guaranteeing the general obligations are global or can be globalized including international law making conventions.

The convention including the formulation of general common global rules or it is turned into global common law as UN chart.

One of the effective international model conventions in law equality is including the following:

UN commission about transportation of goods via sea, European economical commission, the commission for execution of foreign judgment verdict, UNCITRAL rules, etc.

2- Some international and regional organizations were established playing an important role in formation of unified rules at international level and they were successful in this regard. Their activities were including the entire world and some other a special region such as UN that not only all the countries in the world are the members, they are used directly in most cases and this organization is including legal, penal and trading sectors, etc.

EU is one of the regional organizations being formed to be united in the form of a union. EU countries by restricting their national sovereignty gave special power to the Union. Increasing the power of the union regarding the equal rules in the member countries and creating an independent legal system show that the union follows its special legal system independent of the member countries and it reached the turning point by ratification of the constitution of the union and it paves the way for more integration of most of the countries. EU is a political institution that its law making power is manifested in the framework of common European community as a legal institution and acts in other issues as coordinated political institution between the member countries.

One of the issues in conflict of law is to execute law in another country, at first in accordance with conflict resolution; the qualified foreign law is recognized. The foreign law is executed unless it is in contradiction with the public order of the original country and it is executed with the false work in the rule.

In the law contradiction rules, the law maker is dedicated to determine the criterion and avoids determining the verdict about the nature and delegates selecting the qualified law for the court. The conflict rules are only for solving the conflict of law and determining the qualified law and when the conflict was solved and the law was enforced, the court by materialistic rules, the rules about the claim principle and to resolve it directly solve the dispute.

Public order is the set of organized or unorganized principles that is fundamental in a legal system and agreement on the related offence is impossible, or the rules that the common relation of the governments. In a wide definition of global public order, it means the benefits of the countries in the world without direct harm of the society between the governments and such order is not possible based on public order variety of the countries.

The judge by referring to the court avoids the execution of foreign verdict in contradiction with public order. The law permitted the judge to avoid the execution of the law if an external verdict is in contradiction with the public order.

Regarding the effect of public order in accepting the rules of coordinated conflict solution, although it is possible that public international and domestic order is in a government or some other governments, it doesn't mean the common public order for all the governments in all the issues. Because it is not fulfilled yet and the concept of public order is relative and it is changed over the time and place.

Although there is an inclination to equality of the rules in this regard in globalization process, as it was said the public order is not fixed and is changed based on time and place. Regarding the globalization, we can achieve coordinated rules of the lack of executing foreign orders in contradiction with the public order. The multi-lateral commission between the countries at regional or global level applies the minimum unified principles about the public order. The identification of absolute verdict in international relations is facilitated; it stabilizes the people relations in all over the world.

4- Cheating to the law is resorting to a legal tool to achieve a non-legal aim. It is said that as people can change some of the communication elements involving in determining the law, they can use the situation to escape from the special law and by creating new condition for them show the foreign law qualified that in normal case can not be qualified. There are two elements for cheating in law, materialistic as changing the dependency element and spiritual element as it is escaping from the law or refusing to perform contradiction resolution rules.

The first condition of cheating to the law is the cheating presence. Cheating to the law in international life is such that people by the legal tools use to achieve a false aim. The second condition is harm; the third condition is shown there is no way except avoiding cheating.

The important effect of the rule of avoiding cheating to the law is avoiding foreign law execution and replacing the law of the country in which the court is. The effect should be restricted and to avoid cheating, some cases as public order and avoiding cheating are the cases that can not be presented a unified concept in the private international law in all the countries.

It seems that if the global concepts of law in public order and cheating to the law are raised via using interpretation condition in accordance with domestic law, that the countries can transform the examples to their rules, we can achieve a world process regarding the rules of avoiding cheating to the public order.

The effect of globalization and equality of the rules in globalization of the law and conflict of law are investigated, finally it can be said that we are living in the world that is turned into a global village in which the people are not separated from each other. This close relation in the global village caused that international law people live with each other and can have active participation in rule making and common rules and lead into establishing global order.

Thus, it seems that a common agreement of the countries and governments in global international rules can be of great importance in avoiding the conflict of law and private international law created by various rules and leads into the globalization and development of international law globalization and an ideal world.

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