EXPORTING LAW OR THE USE OF LEGAL TRANSPLANTS

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Abstract
From the general theory of law, we are aware of the migration of legal concepts, practices and institutions. We believe that there are no legal system anywhere in the developed world that has not used legal transplants, that has not borrowed from another country's laws. This paper intends to explore the concept of "legal transplants". Why are they used? Where do they come from? Is their assimilation uncomplicated? Why are they rejected in some cases? A transplanted law should be comported with the host state in order to be accepted? Should be discussed the relationship between law and culture when contemplating a study of legal transplants? What forces propel those borrowings? However, this paper does not claim to offer definite answers to the above mentioned questions. Its goal is more modest. In understanding the phenomenon of legal transplants, we underline the fast growing importance of using the comparative research.

***Keywords**: legal transplants, legal transfers, globalization, culture, borrowing.*

Introduction

It is interesting that "as far as we can look, the law, it seems, is an experienced and eager traveller. As far as we can look, *the migration of legal concepts*, practices, and institutions has been a commonplace occurrence all around the world: from the "reception" of Roman law in many countries; from America's constitutional exports to the defeated countries after World War II to the large-scale transfer of Western legal knowhow to the post-socialist countries of Eastern Europe. We will not find a legal system anywhere in the developed world that has not borrowed from another country's laws. That much is undisputed."[1]

In the present, the process of *globalization* (economic, political, legal) engages a redimension of the law sciences functions'. The debates on the evolution of law concern the harmonization of the legislation in the 27 states that compose the European Union, the creation of effective instruments at EU level able to cope with the "globalization" of organized crime and, in general, with the crime phenomenon, the increase of the cooperation in combating international terrorism, the improvement of traditional legal instruments (e.g., the entire contractual arsenal). As professor Nicolae Popa underlines[2], there is a real legal process of ideological and institutional contamination. In this context it is familiarized the concept of "legal transplant" or "legal transfer". In a reality marked by the encounter of the legal civilizations, lawyers can not only address the phenomenon only from the perspective of national legal traditions, but from the perspective of interdependencies that competition of legal values from different areas of law imposes.

Alan Watson, the legal historian and comparativist, created the notion of *legal transplant* and in a monograph described its effect as „the moving of a rule or a system of law from one country to another, or from one people to another"[3].

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[1] Inga Markovits, *Exporting Law Reform – But Will It Travel?*, 37 Cornell Int'l L. J. 95, (2004);

[2] Nicolae Popa, *Teoria generală a dreptului (i.e. General Theory of Law)*, third edition, (C. H. Beck, 2008), p. 10;

[3] See Allan Watson, *Legal transplants. An approach in Comparative Law*, 1st ed. (1974), 2nd ed. (1993), 21 *et seq apud* Holger Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties*, 2 ECFR 378 2005, p. 378;

From a theoretical perspective, his choice of terms has been criticed[4]; for instance, *Rodolfo Sacco,* head of the Italian Guild of Comparative Law, prefers the expression *legal formants*[5], *Gunther Teubner*, a leading German legal sociologist, suggests *legal irritants*[6], *Pierre Legrand*, a Franco-Canadian comparativist, denies the possibility of legal transplants[7]. But, beyond the terminological dispute, what is legal transplant and why do we need it? Where do they come from? When are they used? And how does it work as a balance between the globalization of law and the indigenization of it?

My own work has been to critically examine the doctrine on this topic and to try to answer the above mentioned questions. However, this analyse should go deeper, because more interesting findings could be revealed.

Paper content

It is interesting that in the doctrine there is disagreement about what forces determine those borrowings and what happens to the borrowed laws and institutions as they are "planted" into foreign soil. Doctrinaires like Alan Watson see no problems with exporting law from one country to another, from one historical period to another. Watson believes that law is not "the natural outgrowth of a particular society, but the intellectual creation of clever lawyers, easily adaptable to local use by other clever lawyers elsewhere on the globe"[8].

What is globalization? Globalization is not a new phenomenon; it has existed for a long time in different forms: from the military expansion of the Roman Empire through Genghis Khan, to the so-called capitalism of today, these are all different types of globalization in different times. Therefore, all through history, globalization has always existed in military, religious and economic form. The word "globalization" we use refers to an economic, technological and cultural transnational process since World War II, and particularly refers to how this transnational process surmounts national boundaries and becomes a new challenge to national sovereignty.

However, the *globalization* of law and the *indigenization* of it are two inalienable elements in contemporary legal development. They do have certain contradictions and conflicts, which are inevitable. But how should we co-ordinate these conflicts? *Legal transplant* is introduced by most countries to the homogenization of international rules. In other words, legal transplant has become a method used to balance the conflicts between the globalization of law and the indigenization of it.

Doctrinaires sustain that a positive legal transplant is an effective way for indigenization to resist the globalization of law.

And it does make legal traditions continue even under the explosion of globalization. Even more, it does, to some extent, prevent legal colonialism.

Although globalization does exert such a huge influence, indigenization also appears similarly strong. Every nation is seeking to gain maximum benefits from the impacts of globalization. In that case, legal transplantation is of course the first and best choice.

It was discovered that ancient Phoenicia and countries around the Mediterranean had systematically transplanted the Commercial Code from Babylonia, which has been proved by

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[4] Holger Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties*, 2 ECFR 378 2005, p. 379;

[5] See Sacco, 39 Am J. Comp. L. 1 (1991) under the heading „Legal Formants: A Dinamic Approach to Comparative Law"; Rodolfo Sacco preffered the expression *legal formants* because it captures the social, economic, political and doctrinal elements of a particular legal system;

[6] See Teubner, 61 Mod. L. Rev. 11, 12 (1998); Teubner suggested *legal irritants*, which cannot be transferred from something alien into something familiar, but rather will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change;

[7] See Legrand, 4 Maastricht Journal of European and Comparative Law 111 (1997) under the title *The Impossibility of Legal Transplants*;

[8] See Alan Watson, *Legal Transplants and Law Reform*, 92 Law Q. Rev. 79, 79 (1976);

massive unearthed legal literature[9]. Afterwards, the Phoenician Commercial Code was absorbed by its colony Rhodian, and it became the famous Rhodian Law[10]. Then, the Rhodian Law was copied to a great extent by Greek Law and Roman Law[11]. Moreover, most western countries' private law was more or less directly from either Roman Civil Law or English Common Law in Middle Ages. Also, most Asian and African countries' laws were transplanted from Mohammedan law. It is obviously that the phenomenon of transplantation is not restricted to the modem world, it happens all the time whenever law exists[12].

In modern times, this kind of phenomenon occurs on a large-scale, and legal transplantation becomes more common. For example, France transplanted law from Ancient Rome, Germany transplanted law from France, the United States from the United Kingdom, Japan from France and Germany, Asian countries from Japan and western Europe, Japan from the United States after World War, and most developing countries in Africa, Asia and Latin America transplanted their laws from either Common Law or Civil Law country, and so on. There are so many that we cannot point all of them out.

The literature on transplants showed that legal systems can accommodate a plurality of models. Though only some legal systems are currently classified as "mixed", many more exhibit features revealing that borrowing or transplantation are regular occurrences, even across boundaries that would not have seemed to be so permeable. This finding casts serious doubts on the utility of the established approach to comparative law with its heavy reliance on the classification of legal systems into legal families[13].

Please note that the legal transplant is possible and it is a quite complex process. Concerning the institutions and the content we choose, there are some important points to be considered prior to transplanting the institutions. Firstly, do we want to transplant the entire legal system or only the specific legal rules, legal concepts or legal principles? Secondly, is the law we want to transplant closely linked to politics, the economic system, ideology or value sense or is there no relationship between them? Thirdly, does the rule in question have different political purposes or social functions? Fourthly, do we want to transplant international law or specific national and traditional law? It is obvious that what we discussed above is much more closely linked to the possibility of legal transplant and the methods we use.

But what are the causes of legal transplant? Two types of law reform can be discerned: one is qualitative law reform and the other one is quantitative law reform. Moreover, of all the legal changes that occur, perhaps one in a thousand is an original innovation.

We consider that nowadays most legal changes are imitation, in other words, they adopt or transplant institutions from other nations and it is rare that one sees an original innovation.

But must the rules or institutions transplanted fulfil the same aims and achieve the same results in their society of adoption as in their society of origin? Thus, it is important to notice that the question of success can arise at more than one stage of the transfer of legal rules and institutions. We may be concerned about how a legal transplantation emerges or the way it exerts its influence.

Why is a legal transplant necessary? *First*, it needs low experimental costs and can achieve results in a short time. Comparing to original innovation, it is fair to say that legal transplantation require low costs in investigation of problems, research and testing of systems, and drafting bills. *Second*, it can help to adjust the new social relations evoked by reform and also avoid legal

[9] See Feng Zhuohui, Falv Yizhi Wenti Tantao, in He Qinhua (Ed.), *Fa de yizhi yu fa de bentuhua* 20-21 (2001);

[10] We can also find some relevant resources about it in the Rome Digest;

[11] Feng Zhuohui, supra note 9, at 21;

[12] Shaohong Zhuang, *Legal Transplantation in the People's Republic of China: A Response to Alan Watson*, 7 Eur. J.L. Reform 215 2005;

[13] Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 Theoretical Inq. L. 723 2009;

backwardness during the reform. *Third*, in learning international conventions and universal procedures in various countries, it can ultimately decrease unnecessary transaction costs due to differences between different countries.[14]

Therefore, legal transplantation is exactly what legal modernization needs. The differences between legal systems are not only caused by differences in legal methods and legal techniques, but also in legal values and legal mentalities. It is actually the differences in legal spirits and legal values that distinguishes traditional and modern, developed and underdeveloped legal systems. In those legal systems which are still traditional and backward, it is better to transplant some laws and institutions from developed countries, especially those laws or institutions which are well developed and tested, in order to accelerate their legal innovations. Without doing that, they will face an enlarging distance between developed countries and themselves and the delay of their legal modernization. Moreover, they will lose opportunities to modernize their legal systems.

But when should we solve the problems arising from transplanting the law? Should we start to solve it when it arises after every single law is transplanted? This would be a inefficient. Why not solve the issues properly before the transplant? In this way, a lot of problems can be avoided or solved before legal transplantation takes place.

The experience of "moving a rule or a system of law from one country to another" has indicated that the transplanted laws usually cannot achieve the same results and fulfil the same aims in their society of adoption as in their society of origin. This is because the result caused by the law usually is limited to the specific time and place.

Moreover, transplanting laws which deal with citizens, marriage, family, property, assignment etc., will be extremely difficult, because those laws are based on a country's social values which vary from one country to another. Transplanting these laws would involve putting different social values together. In most cases conflicts exist between these different values, which make the implementation difficult.

However, transplanting laws which are dealing with nature relations, social management, maintenance of public security etc., might be easier and more successful. These laws usually come from national rules, and are an accumulation of social experience, for example, environmental protection law and technology law. Moreover, international conventions and international treaties can be transplanted easily, especially those that deal with international trade, because these international conventions and treaties are usually negotiated among many countries and meet their interests.

When transplanting laws, one country should not only make some choices according to its actual situation, but also create some corresponding systems to make sure that the transplanted laws can be implemented successfully. It will take some time to be able to assess the result of legal transplantation. The goals of legal transplantation set by the country of adoption should be reasonable, because there would be the same laws or institutions, implemented in the same way, but they could not possibly have the same domestic resources as the donor country. The transplanted laws usually cannot achieve the same results in the country of adoption as in the country of origin.

Therefore, legal transplantation is a massive systems engineering project; it is not simply transplanting a single law or institution, but also creating the circumstances and the legal framework to make sure that the transplanted law can perform successfully.

Moreover, a successful legal transplantation also sets certain requirements on an acceptor's social circumstance. Legal transplantation usually happens on a large-scale as social reform happens. Thus, if one country's social, economic and political situation has seen remarkable changes, and it is changed to have more enlightened social values, then it will inevitably accept legal transplantation more easily.99 In that case, those countries which have a market economy and democratic political systems will find it easier to transplant laws then those who do not.

[14] See He Qinhua, *Fa de yizhi yu fa de bentuhua*, China Legal Science. Vol. 3. at 90 (2002);

Legal culture, in other words how to deal with the relations between different legal cultures, is another factor. As an important part of national culture, legal culture is usually based on social values, local customs and national feelings.' When transplanting laws, we should not only have a comprehensive understanding of the legal culture of the country of origin, but also have a scientific appraisal of the compatibility between transplanted laws and local legal culture, after making a rational choice." 2 It is again those laws which deal with citizens, families and marriages that have close relations with domestic culture and are more difficult to be transplanted; those laws which have more technical elements and are commonly used in international trade, such as securities law, patent law and contract law are easier to be transplanted for these laws are less influenced by domestic culture.

Defining the word "culture" is the subject of debate in every language. However, culture:

„includes speech, knowledge, beliefs, customs, arts and technologies, ideals and rules. That, in short, is what we learn from other [persons], from our elders or the past, plus what we may add to it. ... Culture might be defined as all the activities and non-physiological products of human personalities that are not automatically reflex or instinctive"[15].

Cultural identity plays a significant role in individual identity and in personality formation. Although culture is inseparable from the existential and experiential state of persons, it is not uniform from one region of the world to another. In the doctrine, there is underlined the idea that „there is tremendous amounts of cultural variation around the world. This fact is important before analyzing the concept of „legal transplants" because it raises the possibility that the culture into which a law is transplanted will differ from the culture in which that law was created. Thus, the relationship between law and culture must be discussed when contemplating a study of legal transplants"[16]. Between law and culture there is a very close relationship, because the law must comport with the cultural context in which it is located in order to that law to be effective.

Thus, legal indigenization is a key point in a successful legal transplantation. It is believed that the law is a mirror of society and it reflects specific national histories, cultures and social values. The legal systems of any two countries cannot be possibly the same. Without legal indigenization, it is difficult to transplant a legal culture to another successfully. And in order to harmonize different legal cultures, it is necessary to pay attention to both external and internal legal cultures, particularly the internal legal culture. By harmonizing the internal legal culture, the external culture will be harmonized as well.

After more than twenty years from the first edition of his influential monograph on legal transplants, Alan Watson underlined in a law review article that "The act of borrowing is usually simple. To build up a theory of borrowing on the other hand, seems to be an extremely complex matter"[17].

Watson used the concept of "legal transplant" in the very narrow sense of the transfer of a legal rule from one jurisdiction to another, and did not seem to consider it necessary to acknowledge the strong determining role of culture of the "sending" or "receiving" society when assessing the fate of any such rule.

A Japanese jurist, Masaji Chiba, defines it in the wider sense of a "law transplanted by a people from a foreign culture". Very pertinently, Chiba includes the transfer of law through the migration of people from one place to another in his concept, specifically mentioning the

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[15] A. L. Kroeber, *Anthropology: race, language, culture, psiychology, prehistory, 253* (rev. Ed. 1948); see also Clyde Kluckhohn, *Culture and behavior,* 73, (Richard Kluckhohn ed., 1962) *apud* Philip M. Nichols, *The viability of transplanted law: Kazakhstani reception of a transplanted foreign investment code*, U. Pa. J. Int'l Econ. L., vol. 18:4, 1997, p. 1237;

[16] Philip M. Nichols, *The viability of transplanted law: Kazakhstani reception of a transplanted foreign investment code*, U. Pa. J. Int'l Econ. L., vol. 18:4, 1997, p. 1238;

[17] Alan Watson, 44 Am. J. Comp. L. 335 (1996);

immigration of people from the Korean peninsula in the 3rd century AD as having involved "probably the first transplantation of foreign law to Japan"[18].

But there is also negative opinions regarding the use of *legal transplants.* For example, Sir Otto Kahn-Freund considers that the use of foreign law as a model for domestic law "becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law"[19]. This idea is based on the observations of Montesquieu who stated that it is „un grand hazard" (a great coincidence) if the laws of one nation fit into the legal system of another one[20]. He concludes that "Montesquieu's pessimism has remained valid in all matters". Allan Watson, responding to Kahn-Freund argued that "Montesquieu badly – very badly – underestimated the amount of successful borrowing which had been going on, and was going on, in his day"[21]. The best argument is, according to Watson, the reception of Roman law in Western Europe.

It seems that Alan Watson may, at times, be right about the ease of legal transfers[22]. Some legal innovations work indeed like clever mechanical contraptions that the law reformer can pack into a suitcase and unpack where needed. For instance, the abolition of the death penalty. This proposition does not take its strength from the cleverness of experts but from a society's basic moral principles. One would assume that legal culture plays an important role in its acceptance or rejection. But while you need legislative approval to repeal the death penalty, you do not need public compliance. The hurdles to abolition lie in parliament, not among the people. Since renouncing the death penalty is a prerequisite for joining the European Union[23], Eastern European parliaments have been eager to comply with a reform requirement that at very little cost can signal their political maturity. Like their Western European role models, they have done so in the face of a strong public preference for retaining capital punishment[24]. But as in the case of electoral reform, the public, in this case, cannot avoid, bypass, or undercut by daily acts of disassociation and defiance a liberalization of which it does not approve. No administrator needs to worry about the hangman going it alone. With luck, the public may eventually come around to share the abolitionists' convictions, as it did in Germany. But it will not matter if that does not happen. In the case of self-executing law reforms, transplanting legal rules seems indeed, as Watson claims, "socially easy".

That means that transplants such as antitrust, bankruptcy, or money laundering laws do not arrive like bare-root plants in their new surroundings but come with at least a little bit of soil clinging to their roots that may help them grow. Take bankruptcy, for instance. Bankruptcy statutes do not deal only with the consequences of economic failure. They address many other questions (often implicitly relying on answers that a legal culture has provided elsewhere): questions about securing credit, concepts of property or contract, social fairness, and moral rights and wrongs. Like a tent fastened by the stakes that surround it on all sides, a bankruptcy scheme might begin to wobble if

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[18] Masaji Chiba, *Legal Cultures in Human Society* (Tokyo: Shinzansha International, 2002) at 20-21 [Legal Cultures] *apud* Prakash Shah,*Globalisation and the Challenge of Asian Legal Transplants in Europe,* 3 Annals Fac. L. Belgrade Int'l Ed. 180 2008. Subsequent streams of migrants from the Korean peninsula continued to have a crucial bearing on legal developments, notably with the introduction of Buddhism in the 6th century AD, and also agricultural and artisan techniques over many years.

[19] O. Kahn-Freund, *On uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1, 27 (1974);

[20] Montesquieu, *De l'esprit des lois*, Livre I, chapitre 3 (J. P. Mayer & A. P. Kerr eds., Gallimard 1970) (1749)) ("Les lois politiques et civiles de chaque nation … doivent etre tellement propres au people pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir a une autre.") *apud* Philip M. Nichols, *The viability of transplanted law: Kazakhstani reception of a transplanted foreign investment code*, U. Pa. J. Int'l Econ. L., vol. 18:4, 1997, p. 1241;

[21] Alan Watson, *Legal Transplants and Law Reform*, 92 Law Q. Rev. 79, 80 (1976);

[22] Inga Markovits, *Exporting Law Reform – But Will It Travel?*, 37 Cornell Int'l L. J. 95, 2004;

[23] See Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 6, Apr. 28, 1983, 212 U.N.T.S. 262;

[24] See, e.g., Alexander S. Mikhlin, *The Death Penalty in Russia* 171 (1999) (reporting that in Russia, only 6.6% of the population favors the complete abolition of the death penalty);

some of the stakes that uphold it break or are left ungrounded. That means that bankruptcy reforms cannot be designed in splendid isolation.

They are much more susceptible to being undermined by cultural dissonances than my "potted plants". Despite their "newness" to Eastern European citizens, bankruptcy or antitrust reforms still must mesh with the instincts and convictions that former Socialists carry over from their pasts.

That makes the choice of the model from which these law reforms are copied crucial to their success. Again, take bankruptcy. In times of fundamental economic change, the law might want to encourage new beginnings and reward entrepreneurial risk-taking that for so long had to lay dormant under Socialism. Thus, Eastern European countries might favour laws modelled after the American Bankruptcy Code of 1978, which is debtor-friendly and with its provisions on reorganization, consumer bankruptcy, and debt forgiveness, gives even ordinary citizens the chance to start anew after economic failure. The liberating aspects of America's bankruptcy model also appeal to Western Europeans: the new German Insolvency Law of 1994, which after much debate entered force in 1999, introduced reorganization and, for natural persons, a court-managed procedure for debt release, in the Federal Republic.

But the German example also shows how tricky it can be to establish reforms that clash with deeply held cultural convictions. Because, to Germans, debt forgiveness looks very much like moral capitulation, German creditors have been reluctant to contractually agree to cancel unpaid debts.

Moreover, the path to court-managed debt forgiveness for natural persons under the new German law is littered with substantive and procedural obstacles. Already in the first year of the new law's application, commentators were calling for "a reform of the reform".

Conclusions

So where does all this leave us? With some fairly banal and unreliable rules of thumb about the likely viability of legal transplants. Legal rules requiring no individual compliance are easily incorporated into foreign legal systems.

Reforms that carry with them their own surroundings ("potted plants") will do better, the more institutional support and personnel they have and the less dependent they are on local cooperation and approval. Law reforms that are inconsistent with deeply held moral and political beliefs may work if they only slightly affect convictions at the periphery of the local value system. But their success is doubtful if they contradict fundamental cultural gut reactions. The more complex and multilayered a particular environment, the greater the danger that legal imports will irritate local sensibilities. For this reason, procedural changes might be riskier than substantive reform because procedure is based on repetition, role-playing, and tradition ("we've always done it like this") and is saturated with unspoken assumptions and conditioned reflexes. Finally, law reform that corresponds to common habits and beliefs or that can connect with institutions and procedures that have performed reasonably well in the past-grounded change-seems much more promising than change that had to start from scratch.

It is actually very difficult to decide whether a legal transplant is a success or not.

In conclusion, the topic of legal transplantation will never be out of date. And we should always bear in mind that, as different countries exist with different levels of legal development, legal transplantation will always be unavoidable.

I have merely sketched some outlines of current legal debates concerning legal transplants. It remains vital for more research to be conducted. The study of legal transplants provides a vital critical supplement to mainstream theories about legal change.

However the doctrine considers that it is worthwhile continuing this intellectual and interdisciplinary endeavour[25].

[25] Holger Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties*, 2 ECFR 378 2005, p. 378.

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