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ON LEGAL NORMS AND THEIR CULTURAL CONTEXT : SOME OBSERVATIONS REGARDING LEGAL TRANSPLANTS

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Abstract

The evolution of legal rules is placed in relation of direct dependency with the mechanism of *legal transplant*. The transfer of legal rules describes a complex demarche with profound extra-juridical implications. Amongst these, cultural implications are obvious especially if we take into consideration the main dilemma that hovers over the study of legal transplants : with concern to the problem of transfering a legal norm, we can analyse the success of this operation in the hypothesis of assuming de plano the content of the norm or in the hypothesis of divorcing the content from the context that relate to the legal system of origin. In the present paper we aim to underline the difficulties that are connected to the processes of defining the *conceptual* sphere of legal transplants by means of various attempts of contextualization; from these, we assess as being particulary special the comparative method.

Key words : legal transplant, legal culture, universal legal values, comparative method.

Legal transplants – conceptualization and contextualization endeavours

The correct understanding of the law is a challenge that may be optimally exploited by reference to *legal transplants.* Given that legal representations appear in multiple socio-political-juridical dimensions, the observation of the manner in which rules of law are transfered from a system to another, from a legal family to another is an epistemological exigency. In relation to the subject of *legal transplant*, epistemology is a necessity in the sense that, in the uncertain coordinates of the conceptualization of *legal transplant,* the elements that are linked to its characterization become *auxiliary tools in the process of fulfiling knowledge within science*. It bears no lesser truth the fact that, inside the theoretical approach of legal transplant, the pretenses of scientific characterization of the term are almost as dimmed as any attemps of rigorous conceptual delimitation.

As a juridical reality, a legal transplant is more easy to observe in its concrete applicability by comparison to the endeavour of understanding its conceptual essence. Thus, the expression *legal transplant* behaves, from a terminology perspective, as the *appearence* of a self-explained content. When demonstrating the practical applicability of the concept, its characteristics appear. From this results *the mainly descriptive*

perspective of the concept and *its conceptualization difficulty stricto sensu.* On the grounds of common sense, the term *transplant* signifies both the action of *moving from one place to another* and also the action of *acclimate to the conditions of another region.* The junction of the two significations under the aegis of a sole conceptual envelope leads to various ambiguities –that, once identified within the process of enforcement –will compose the features of the notion of *legal transplant.*

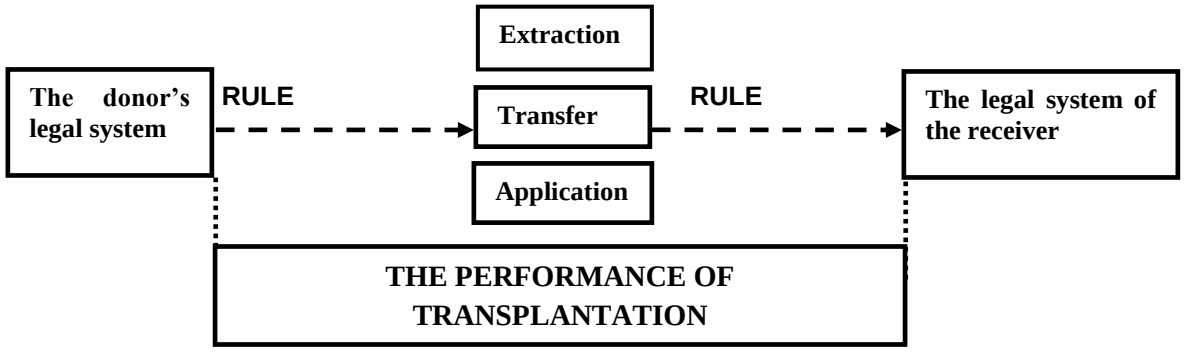

Figure no. 1 Legal transplant- conceptualization attempts and the illustration of its function

The conceptual passage from common sense to the juridical paradigm by means of imposing the notion of *legal transplant* pertains to Alan Watson who defines the notion as *moving a rule from one country to another, from one People to another.* [1] By accepting the conceptualization advanced by Watson as working hyptothesis, it is just to underline some observations : (1) the operation of *moving* logically implies the *the extraction of a norm (rule) from the original system and implementing it within a foreign system;* (2) as a consequent of the undertaken operation, the rule of law that is subjected to the transplant subsists in both the original law system and also within the legal system where it was implemented; thus, the rule still exists in the law system from where it was extracted and, at the same time, it becomes an active part of the juridical system where it was transfered; (3) the definition does not offer any signs concerning *the modifications produced in the original law system* and *in the receiving law system* in the post-transplant period. Watson's conceptualization creates the pretense for some possible theoretical problems

: *what is the status of the transplanted juridical rule in the original juridical system? What is the manner of action of the transplanted juridical rule in the new legal system? Is there the de plano possibility of action or is there the necessity of accommodating the transplanted juridical rule?*

The theoretical observations addressed to the working definition have allowed to associate the notion of *legal transplant* and its theoretical content with other notions that, from our point of view, are adjacent to *legal transplant.* In doctrinaire studies [2], was signaled an abusive utilisation of the notion of *legal transplant* – as it is associated to other notions like *legal diffusion, convergence, mimesis, legal borrowing.* We feel that the association of legal transplant with the enumerated notions determines both a defective understanding and a defective interpretation. In light of the aspectes (ennunciated and derived from the definition advanced by Watson) *legal transplant* evokes an organized action that is rationally accomplished by means of identifying, extracting and transfering the legal rule unlike *legal diffusion – a* notion that implies a process of propagation and dispersion that does not have an intrinsical logic of deployment.

Likewise, *legal transplant will not be confused with the notion of legal convergence* taking into account that the latter expresses *a result and not a process.* [3] In the same token, *legal transplant* does not equate to the *mimesis* notion because legal transplant involves a preliminary dialogue between the two legal systems (the original and the one where the transplanted rule lies) even if the manner of fulfiling the transplant is, at the end, of unilateral nature (not autocratic!) Mimesis implies *the assumption* and not the *accommodation* of a legal rule; on the other hand, legal transplant describes a process that, ultimately, entails effects by means of accommodating the transplanted rule to the legal receiving system. In the words of Alan Watson, in order for the transplantation to be successfully completed, it is not mandatory for the transfered rule of law to produce the same effects in the receiving State as the effects produced in the donor State. [1]

The scientific references comprized in the lines above demonstrate that *legal transplant is not a self-explained concept.* If we admit that descriptive aspects are enclosed in the attempt of conceptualizing legal transplant then we reach the conclusion according to which *context* is a factor that must be taken into consideration. In the analysis of legal transplant, the conceptualization cannot be separated from context. The context

that will be deemed in our analysis has cultural origin. The transfer of legal rules from a juridical system to another constitutes the essence of the legal transplant introduced by Alan Watson. The „export" and „import" of legal norms between different legal systems is possible amid accepting the *thesis of law-culture separation.* Legal transplant is a determiner of legal change produced within the juridical system and *the main premise that makes possible legal transplant resides in the independence between the law and the socio-cultural climate within which it is born.* [4] Being totally detached from the cultural reality that society expresses in a certain point of its evolution, the rule can be extracted and implemented in another legal context and, consequently, in another cultural context. Once suppressed the cultural dimension, legal transplant is feasible. In opposition to Watson's thesis- that associates the success of legal transplant to the suppression of the cultural factor-, is situated the thesis of Pierre Legrand- who introduces the cultural factor within the analytic sphere of the legal transplant. According to Legrand, legal transplant is feasible if we refer to the *exterior form* expressed by the legal rule; *the content of the rule* will always have a cultural determiner that will not allow a *de plano* accommodation of the respective rule in another cultural-juridical context. The content of the rule is not self-explanatory as it must be extracted from its original cultural context. [5]

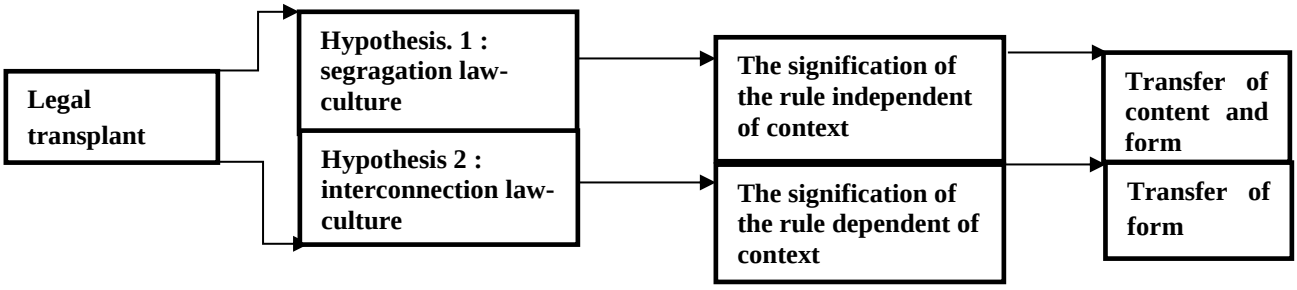

Figure no. 2 Legal transplant –radical conceptualization attempts

Both representations highlighted in the lines above constitutes *radical forms of contextualizing legal transplants.* We deem that-, as we cannot *de plano* transfer a rule that has an obvious attachment to the cultural rules that are peculiar to a certain society within the juridical system of a State that does not recognize those cultural rules-, we cannot deny the possibility of *de plano* transfer of a legal rule that is the bearer of recognized universal cultural values. For instance, the rules that protect fundamental

social values-acknowledged as universal moral values- may be easily transfered; the rules that bear *suis generis* cultural values either cannot be transfered (on account of the rejection attitude adopted by the donor State), either will be transfered through relevant adjustment made within the system of the receiver State. Returning to Watson's thesis, legal transplant is valid *even in the absence of the accommodations achieved by the receiver State with the purpose of implementing the rule that is subjected to legal transplant.*

The question of legal transplant becomes obvious : can we discuss about the legitimacy of the transplant of a rule of law in the absence of a mechanism of adapting the rule that is the object of transplantation to the requirements of the receiver juridical system? In other words, can we discuss about the transfer *of a given norm if, for lack of an adequate accommodation with the cultural requirements of the receiver State, the rule transfered produces other effects than the effects substantiated in the legal system of the donor's State?* We deem that there is a connection of direct proportionality between rules and culture and cultural differences between the donor State and receiver State : the more there is a stronger connection between the rules and the culture of a State, the more the cultural and juridical differences between the donor State and the receiver State will become clear. Thus, the legal transplant will take place only in the context of the flexibility of the juridical system of the receiver State. *Exempli gratia,* the juridical institution of *mahr* – that expresses the price that the husband must pay when celebrating the marriage-has known different experiences when transplanted to Western law systems. Taking into consideration the religious nature of mahr, Western States have attempted legal transplant through *inaction* (accepting and assuming mahr as a religious norm) and through specific *actions* – of identifying rules and juridical institutions able to accommodate the essence of mahr. Consequently, in the cause *Nathoo vs. Nathoo* the Supreme Court of British Columbia has assessed *mahr as a juridical-religious institution (according to the pattern of Islamic law)* whereas in the cause *Amlani vs. Hirani* the Supreme Court of British Columbia evaluates *mahr as a laic institution, detached of any religious signification*. [6] The lack of coherence in achieving legal transplant of *mahr* consists, in the given case, in two variables : (1) the cohesion between *mahr* rule of law

and Islamic religious precepts; (2) obvious cultural differences between traditional-religious system of Islamic law and laic legal system, of Western nature.

The feasibility of legal transplant resides in the prior assessment of *legal values comprized in the legal rule subjected to transplant.* Although different by means of the sanction they provide, legal and moral norms derive from the culture of the origin State. Culture operates at the level of individual mental representations, constituting a source of interpretation. It also refers the individual-receiver of a certain cultural norm to the social enviroment. Relating to the manner of cognition through culture, doctrinaire studies [7] assess that superior mental functions are, by definition, cultural mediated. Within the legal paradigm, culture acquires identity valencies, prescribing a desirable human behaviour. Legal culture expresses a pattern of stable behaviour and attitudes socially manifested and assessed as desirable by inoculating those behaviours and attitudes in the content of a legal norm. [8] In the hypothesis in which transplanted legal norms enshrine moral values *universally validated* then legal transplant may be fulfiled even if the respective legal values are impregnated by legal culture (in the field of human rights, the most representative application consists in jus cogens norms). If the transplanted legal norms are the bearers of moral norms resulted from local culture, that are not universally represented, legal transplant will have succes only in the hypothesis in which between the donor's-State legal system and the legal system of the receiver-State is a convergence of moral-cultural values. In the hypotheis of a cultural divergence, legal transplant may be fulfiled by means of the receptivity of the legal system of the receiver State.

By admiting the idea according to which *the degree of achieving legal transplant directly depends on the universal-cultural nature or on the relativ-cultural nature of the moral norm enshrined in the legal norm subjected to legal transplant,* we take a median position between the thesis of denying the influence of legal culture upon legal transplant and the thesis of absolute connection between legal transplant and the convergence between the legal cultures of the donor's and the receiver's State. By including the cultural factor in the analysis of legal transplant we advance the following peculiarities : (1) moral norms derive from the existing cultural norms; (2) although moral norms derive from cultural peculiarities, they can be ranked in moral norms of universal

ackowledgement and moral norms of regional or local applicability; (3) norms (either moral or legal) cannot be completly free from social pressure because the reverse hypothesis would implicitly lead to denying *the law-configuration factors;* (4) the latter ensure the connection between legal norms and State peculiarities nevertheless, unlike the cultural element that is transplated through an ideological, spiritual dimension, law-configurating factors imply also material circumstances; (5) in the case of rules of law based on universally recognized moral rules, legal transplant is *a given* whereas for legal transplant regarding moral rules subjected to cultural relativism, legal transplant is *a construct;* (6) legal transplant is understood in terms of a *construct* by means of creating cultural convergence; (7) cultural convergence between the system of the donor State and the system of the receiver State derive either from (a) the openess of the latter towards the cultural norms advanced by the rules of the donor system, either (b) through unilaterally imposing the norms of the donor system through prestige and through emulation cultivated by inter-system relations.

The utilitarian dimension of legal transplants : the comparative method of research

The introduction of the cultural factor within the analysis of legal transplants constitutes the essential premise of instrumenting *the comparative method of research.* Taking into consideration that the cultural factor highlights the duality of moral norms contained within the transplanted rules : the latter may regulate some conducts that are universally assessed as desirable or that it may establish patterns of social interactions having distinctive cultural pressures. Thus, although cultural differences cannot be denied, rules of law express rules of conduct having universal recognition because, in the opposite sense, we would discuss either *exclusively about the legal elements that are common to all analysed member States*, either *exclusively about their cultural peculiarities*. In both cases, the comparison is impossible, as it does not have any efficiency in the endeavour of finding the contrast between ressemblances nor in the endeavour of finding common points between differences. The analysis of legal rules through the lenses of ressemblances and differences is achieved by virtue of *cultural peculiarities* that, in their turn, determine the notions of *legal families* and *legal cultures.*

As mentioned in the lines above, culture is recognisable at the ideal level, comprizing attitudes, values, opinions about norms and society. [9] Consequently, legal families (under their official denomination of legal systems) represent juridical infrastructures reunited under *a structural unity of the mind.*

In interpreting the works of Lawrence Friedman undertaken by Tom Ginsburg, legal systems are identified with epistemologies that *orient legal decisions*. Although it responds to some peculiar social needs, the legal decision is independent from the social framework within which it manifests thus assuming from society, only the problem that needs to be addressed and its context. Society offers the pretense and the context of questions without being a source of solutions for legal decision-makers. [9]

The comparative method of research is, by its nature, *heuristic.* The act of comparing undertakes correlations that are placed within a given context. It is restrictive to construe the comparison as an analysis act that is addressed to rules or juridical institutions; the underlining of similarities and differences is an act that is placed inside specific cultural and mental patterns. [10] The rapprochement of juridical norms and institutions pursues the improvement of the general understanding of human prerogatives, that have the vocation of being finally transformed in norms that would respond to various situations. From this point of view, the essential utility of the comparative method is noticeable in the context of transfering norms of private law. [11] In reverse, public law norms are assessed as being closer to State peculiarities, not being liable of transplantation in the same degree. Studying the possibility of applying the method of comparative law to the analysis of constitutional law, the hypothesis sustained by judge Antonin Scalia in the cause Printz vs. United States consists in the fact that there is a situation where the invocation of foreign legal rules in the context of construing constitutional norms represents a situation that reveals the lack of legitimacy. In Scalia's judgement, constitutional rules cannot be interpreted by means of imported legal norms nor can they be subjected to a severe separation from the cultural context of birth.

In order for the interpretation of constitutional rules to be functional it is necessary that the sense of interpretation leads towards maintaining the original signification of the constitutional rule. The process of interpretation is ought to be undertaken under the awarness of the importance of maintaining the paramount

signification of constitutional norms given the fact that those rules are the main legal surety of the People's sovereignity and of the citizens' rights and freedoms. Placing the process of interpretation under the cupola of present times and also under the severe segregation between the process of interpretation and the context of adopting the norms, leads to a lack of coherence and stability in the field of constitutional law. [12] Even if we admit the fact that external law may be only in restrictive conditions a source of guidance for the rules of public law of another State (we mainly refer to the convergence between legal cultural values), we cannot adhere to the thesis according to which *the interpretation of rules of law (either if they are comprized or not in the sphere of public law) entail a static process thus undertaken with the purpose of ensuring the stability of the legal system.* The impossibility of denying the connection between culture and rules brings us in front of the following reasoning : (1) cultural norms are dynamic as they adapt to the degree of State-evolution; (2) legal norms derive from and are influenced by cultural rules –hence, the necessity of subjecting them to a dynamic hermeneutics, according to the cultural epistemology to which they owe their formation.

The convergence between the values contained in the legal cultures of States is, undoubtedly, a favorizing factor of legal transplant. The scientific sustenation of this resides in *the theory of legal origins* that describes the process of legal transplant from the perspective of assuming the law of colonizing powers by the colonized States. The theory of legal origins sustains the idea of innovating the transfer of rules between those States that recognize the same legal values. [13] It is reiterated the connection between the rule of law and legal tradition, underlining the possibility of legal transplant only in the hypothesis of the convergence between legal traditions. The transplant fails if the transplanted rule is implemented within a receiver State that is in dissonance with the donor State in the field of the transfered legal values. The comparative methodology fails amid the segregation of legal values but also in the hypothesis of a perfect identity between legal cultures. The *sine qua non* premise of applying the legal transplant and the utility of comparative methodology resides in the existence *of minimum two juridical systems that relate to a set of common values.* As we take into discussion *at least two independent legal systems,* common cultural values must not find themselves in relations of identity neither can their relation describe a void mass.

Colonial relations mainly describe a state of insubordination in parameters according to which the right to self-determination of colonized Peoples is breached and the decisional factor (including in legal matters) becomes the colonizing State. The transfer of legal rules from the colonizing State to the colonized State is achieved by the integration of the following factors : (1) formal powers exerted by the colonizing State; (2) the prestige of the legal system of the colonizing State and the authoritative enforcement of its norms within the legal system of the colonized State; (3) the pressures derived from change and necessity; (4) the hold status regarding the expediency of the transplanted law; (5) the financial and political recompenses granted to the colonizing State. [14]

Concluding, legal transplant does not imply a perfect (normative) compatibility between the analysed juridical systems. Within State-imposed conditions is allowed the withdrawal of a given rule and it is imposed the accommodation of the latter within the receiver State. Legal transplant is a mainly heuristic phenomenon whose scope may be segregated in two senses : (1) the modernization of the receiver State through the acknowledgement and assimilation of new standards in the field that is subjected to transplantation; (2) the study of the standards assimilated by the receiver State and the advancement of methods that will ensure the performance of adopted standards.

Conclusions

Legal transplant is possible by transfering the signification of the rule and by adapting it to context. The latter is, mainly, a context of cultural source. First of all, we take into consideration legal culture and its original determiner -social culture; social culture is understood as an aggregation of law-configurating factors. In the matters concerning legal transplants, the cultural factor is not (necessarily!) a limit as it is an indicator of the degree in which legal transplant may be achieved in concreto. Beyond the opposition between the universality and the relativity of cultural standards, it is clear that there is an assembly of common moral values that may be applied with the purpose of implementing legal transplants and, implicitly, with the purpose of demonstarting the utility of the comparative method of research.

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