



On Several Problems in Legal Transplantation

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Abstract

Legal transplantation, existing between nations and national districts, usually means the digestive and absorptive process happened in legal article, legal principle, legal system, legal norm, legal concept and technology, legal idea. It usually includes four aspects about its qualities. There have been two significant legal transplantations in Chinese history. Legal transplantation is an important way that enriches our legal culture in terms of legal development.

Keywords: Legal transplantation, Norm group, Legal culture, Legal system

By the explanation of "Chinese lexicography", the word "transplantation" has two main meanings: (1) grafting. This is a botanical sense, refers to botanical transplantation. (2) Technological transplantation, refers to a particular organ or body part of human beings. The transplantation which refers to medical sense is always related to autograft (transplant one part of the body in another part of the same body) and allograft (transplant one part of the body in the same part of another body). The specific purpose of transplantation is to survive the life. Since the 50s of this century, with the birth of variety of cross-curriculum, "transplantation" was gradually evolved into the concept of "multi-disciplinary". In addition to biological and medical meaning, there are a cultural sense (cultural transplantation), the legal sense (legal transplantation), the political sense (political transplantation). The article mainly discusses the legal transplantations.

Part 1. The meaning and the characteristics of legal transplantation

In terms of legal transplantation, there is a variety views between domestic scholars and international scholars. One view is that the legal transplantation is "followed by the identification, recognition, adaptation, integration, based on the introduction, absorption, adoption, uptake, assimilation of foreign law (including the legal concepts, technology, norms, principles, systems and legal concepts, etc.)" Arlanwosen, British legal history scholars, on his book "legal transplantation - a study on comparative law", pointed out that: "legal transplantation means a transition of legal system from one country to another country, or from one family to another family." A lots of organist argued that the attention should be paid to the internal and external coordination, that is: legal principles, concepts, structures and social relations between mutual adaptation and coordination. The above point of view is basically correct, but it has not fully revealed the profound meaning of transplantation and all characteristics. The author believes that the grafting law should be such a transplantation existing in few countries or within one country .The various administrative areas of law and specific legal principles always have different legal systems, regulations, norms, rules, concepts and technology. Legal transplantation is a mutual process happened in mutual digestion and mutual absorption. It has the following characteristics:

1. It is a mutual transplantation:

Legal transplantation is a mutual processing including implantation of the law and explanation of the law. Explanations mean one country's legal norms, rules, principles migrated in another country .Implantation or dissemination means one country's legal norms, legal principles, output to another nations. The performance of the introduction of legal means absorbing. Above two together constitute a two-way of migration. Historically said the legal transplantation is sometimes dependent on the output and dissemination of military expansion, and sometimes relying on the superiority of their own legal culture. Implantation of the law is mainly based on the needs of the construction of domestic law. In a field of legislation, due to their lack of traditional legal culture and legislative experience, in order to promote the progress of the country's rule of law, this country usually introduced foreign law system through the running of the history.

2. Legal transplantation is a relevant grafting

From the botanical sense the term "transplantation" means the whole implantation, but from the medical point of view, organ transplantation is clearly means part implantation rather than comprehensive transplantation. Organ transplantation also suggests that the human body is composed by series of exclusive physiological activities. This shows that we are talking about medical transplantation rather than the botanical transplantation. "This transplantation based on certain commonality between civil law and international law which is dominated by the same legal system.

There will be an attraction between them. It was not simply dimension indicated the possibility of legal occurrence. "The relevance of legal transplantation showed that legal grafting is not simply a legal integration, it always means cultural transplantation. Ermain, comparative jurists of United States, pointed out that legal transplantation rely on "standardize certain systems and move from one culture to another culture". Generally speaking, the transfer of the legal system and the implantation of the law has always related to the cultural traditions of the special mechanism. There will be a convergence process between explanation and implantation. This process is not only mean the digestion and absorption but also mean the cultural convergence.

3. Legal transplantation is an unification between autologous transplantation and allografting

Autograft refers to a specific legal system or the principle of unity in the body .It was limited in the scope of interior countries and the various administrative areas. For example, in the United States, with the exception of the Federal Constitution and Federal Law, the States also have its own Constitution and Laws, in order to promote the regional rule, the States often implant other region's law. Legal system of European Community is also originated the comparison, the adoption and integration of member countries. Legal transplantation, based on the formation between legal system and international practice, can be said to a production of legal migration. With the corresponding autografting and allografting, Legal transplantation is a specific intercourse happened to two countries. Autologous grafting should be viewed dialectically. For example, as a unified regional legal movement, if see the region as a whole, the area of legal migration between countries is an autograft; but if not see the region as a whole, then such transplantation is called allografting. In short, autologous transplantation is always explained by lawyer dialectically.

4. Legal transplantation means methods and techniques of grafting

Transplantation of laws and regulations is not only a means or a legal system from one country to another or from one region to another region, but also refers to such skills and methods of transplantation. This is reflected in the legal requirements. Legal implantation and explanation can not be copied by another legal system and can not be applied mechanically. This implantation often indicated a particular aspect. Transplantation of foreign law is a intricate process. It is focused on methods and techniques .It can be transplanted to the "norm group". This" legal norm "will become more effective after the implementation. Practice has proved that the only way to make legal transplantation is to engage in a new healthy growth of the social body. The viewpoint was made that: there are no individual transplantations. Legal transplantation is always activated by group. On this point of view, I beg to believe efficient legal scutinizations. There are two reasons: (1) the history and realities display that there were provisions transplanted by individual legal system. Such as the Silla (now North Korea and South Korea) law, implanted "norm group"of Tang Dynasty. Certain specific provisions really existed in Japan, France and Germany. (2) regulating the transplantation group should be a specific task.. For example, we can not overall implant any civil or criminal law to China, but also can not explain Chinese administrative procedure law to Japan or other countries. So, the question is what kind of normative group allowed to transplant? The author believes that the only way to transplant is to analysis the normative group and affirmed that the norms of particular group are an integral part of departmental laws. In terms of the specific provisions of "group norms" there are the same questions. The logic of the provisions is as the same well. We need legal rights and inseparable nature of the obligations. China's contract law and foreign investment law were all developed by new countries. The introduction of foreign legal norms of a particular group is just a case at random.

Part 2. two large-scale legal transplantation in Chinese history

1. The legal transplantation in Tang Dynasty is the largest legal explanation in Chinese history

The legal transplantation in Tang Dynasty is characterized by that: Tang Dynasty have made great progress in political transition and economic development. At the same time the neighboring countries has largely implanted Tang's cultural in the light of initiative and lessons. This transplantation is mainly relied on sending students to Tang .Completing legal system of Tang Dynasty is a strong imperative. Tang also implanted external factors existing in neighboring countries, such as Japan, Southeast Asia. Other countries also implanted Tang's law comprehensively. These two factors combined to render large-scale transplantation.

For example, in 700 AD Japan immigrated a large number of the laws of Tang Dynasty .Such as "dabao imperative," a total of 16 volumes, composed by 11 vol, equivalent to the Criminal Law, really imitate Tang's norms.The civil law, administrative law, procedural law are suitable for actual Japanese society in the era of the Tang Dynasty. On penalties, "dabao imperative" provided five kinds of categories: caning, cane, resettlement, flow, death."Dabao imperative" also provided eight kinds of penalties: the act of murder conspiracy, destruction of imperial tombs and the palace, conspiracy of the State, rebelling crimes, assault and murder of grandparents and parents, acts of killing, crimes on the road, stolen artifacts."Dabao imperative" indicated that unfilial conduct and unjust crime of National Secretary will be punished severely. These provisions not only from the content, but also from the name are both comprehensive system. In addition, at the 19 century Okinawa and Southeast Asian countries have close relationship with Tang Dynasty. They have implanted a large number of Chinese Law.

2. The largest legal implantation at the end of Qing Dynasty

After the Opium War, China's legal system has made great changes in history and legal actions has always been associated with implantations. At the end of Qing Dynasty legal reform was a notable feature in Chinese history. There were great conflict between Chinese law and Western law. Foreign law has an unprecedented impact on traditional Chinese law. The impact carried a series of amendment and a large number of foreign legal methods.

At the end of the Qing Dynasty the legal implantations were mainly concentrated in the following aspects:

(1) The "constitutional framework", published in 1908, is the first constitutional document in Chinese history. It provided the rights and obligations of citizenship. The first of these two stated that: "subject to the principle of all speeches, all press, all assembly, all association, all quasi, are all free." Article 3 provided that: "according to the law of penalty there was non-custodial punishment." This Constitutional outline was completely absorbed the spirit of Japanese Constitution. Hsiao, Taiwan scholars, pointed out that: "The constitutional framework, purely constituted by copying Japanese Constitution."

(2) In 1911, the Qing dynasty was crumbling in the wind, the development of "Constitution" was deeply sunk into the "creed" of the emperor, the royal family's right was restricted by the British law. All above regulations embodied the principle of constitutional monarchy. The "Constitution" stated that: "Emperor's right is limited" (Article 3); "international treaties, Congress's resolutions, shall be confined" (Article 12); "the employment of people should be regulated by the Congress" (Article 15); "royal ceremony shall not be inconsistent with the constitution" (Article 16); "the government should be divided into two organizations" (article 17). As a legal document the "Constitution" clearly reflects the principles and spirit of Chinese monarchy, but it did not save the life of Qing Dynasty. In the late 1911 Qing Dynasty was quickly overturned by Xinhai Revolution.

(3) At the end of the Qing Dynasty, legal transplantation was related to the structure of the bourgeois, the penalty system, probation, parole, timeliness and principle of statutory crimes.

(4) There is no formal announcement about the "Draft Law of Civil Procedure" and "the draft Criminal Law". Chinese judicial system introduced the principles and system of Britain, France, Germany and other countries. The penalty system is borrowed from the French and German traditions. At the same time they carried out the "Company Law", "Bankruptcy Law" and a series of "Economic Law".

Part 3. Legal transplantation is a significant way to enrich Chinese legal culture

Legal development shows that a country's legal culture is a result of its own accumulation. Now we will continue to accumulate the experience so as to promote the country's progress. Development of law proved that: "to a large scale the history of the country's legal system is to borrow materials which it is outside the native country, this is the history of assimilation." [2] Chinese culture has strong cohesion and assimilation, and if we can emancipate the mind, a bold introduction, absorption and assimilation to foreign law will appear. Outstanding achievements will adapt to create a practical and unique legal system. The legal transplantation is a result of cultural conflict. Of course, we must remember that the law is a specific national history, culture, social values and the general concept of ideology. The law is a cultural form of expression. Without the process of localization it can not be easily transplanted from one culture to another culture. China's legal system has its characteristics. To absorb and transfer domestic legislation is an intellectual property. International intellectual property protection system needs mature experience and advanced technology. We will to develop and improve the "Patent Law", "Trademark Law, " "Copyright Law ". We must discuss the spirit of the laws and regulations and other implementation details. We have recently formulated "State Compensation Law," "Administrative Punishment Law". We absorbed conception in varying degrees including Western country experience. To release "National Civil Service Law" we will absorb and transplant foreign law systems and principles. As long as the legal transplantation combined with the cultural transplantation, our country will enter a new healthy growth era. It is the most important missions to forming the legal system with Chinese characteristics.

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