THE PROCESSES OF LEGAL ACCULTURATION
A MEXICAN PERSPECTIVE*

Jorge A. SÁNCHEZ CORDERO

To Professor Rodolfo Sacco
An avant-gardist scholar

Section One. I. *The Scenario*. 1. The Cultural Stage. 2. The acculturation process. 3. The turbulences of our time. II. *Dramatis personae.* 1. The International Organizations. 2. National States. 3. Private Organizations. 4. The Scholars. III. *The movements of legal transculturation*. 1. The "*Law and Development"* movement. 2. The "*Law and Society"* Movement. 3. The "*Law and Finance"* Movement. IV. *The school of thought.* 1. The instrumentalist school. 2. Culturist school. 3. The economic school. 4. The post-modernist school. V. *Legal Culture and Legal Tradition*. VI. *The International Legal Practice*. VII. *Latin America and its Legal Vicissitudes*. 1. The periods of legal acculturation. 2. Commercial Law. 3. Legal Formation. 4. Regional Organizations. 5. Legal Literature. 6. Jurisdiction. VIII. *Conclusions*. Section Two. The Analysis of the National reports presented in the General Congress of the International Academy of Comparative Law, held in Washington D. C. in May 2010. I. *From the encounters of two worlds to the French Revolution*. II. *From the French Revolution to the First World War*. III. *From the end of World War I to the fall of the Berlin Wall in 1989*. IV. *From the fall of the Berlin Wall to Post-Modernism movement*. Section Three. Conclusions.

This general report is divided into two parts; the first (Section I) develops the analysis of the most recent and relevant trends in legal hybridization with the second one (Section II) being dedicated to the analysis of the National Reports published in this report, that were presented to the General Congress of the International Academy of Comparative Law, held in Washington D.C. in May 2010.

SECTION ONE

I. THE SCENARIO

One of the greatest contributions of the twentieth century was undoubtedly the expansion of the concept of culture. While this is true in regards to this increasing conceptualization the same cannot be said for the

* I would like to express my gratitude to Thomas Scott for the revision of this paper and his immense patience to discuss all the details. Of course the ideas are and remain my full responsibility

clarification and accuracy of the notion of culture. One of the consequences of the amplification of the notion of culture was that it permeated all social disciplines, and law was evidently no exception. Research into law and culture was somewhat belated; still, studies conducted in the recent past, particularly in relation to culture, have yielded a multitude of interesting literature and relevant inquiries.[1] These inquiries have sought to explain the manner in which law has framed culture or even in which culture has contributed to a better understanding of law;[2] one of the main features being the processes of legal acculturation.

In this debate, legal acculturation has become highly controversial, mostly due to the fact that legal acculturation has been one of the most natural consequences of the intense interactions which occurred throughout and between legal systems in a distinctive era of globalization. These cultural processes have occurred repeatedly and with great frequency in recent times resulting in a multiplication of the number of analyses carried out in this sphere and a complete redefinition of the underpinnings of comparative law and its methodology.

1. *The Cultural Stage*

The concept of "culture" seems somewhat alien to legal rhetoric and one could question the feasibility of opening a whole discussion of this term, particularly when considering it strictly in a legal context. Nonetheless, to ignore it would be to disregard the links that exist between "culture" and "the national state" and the ways in which they interact.

The thinking of social science suggests that culture and law emerged and developed as autonomous social fields, from the second half of the eighteenth century with the European Enlightenment and later with the German *Sturm und Drang* movement up until the end of the nineteenth century. Culture and law followed parallel social paths and gave rise to many complementary ideas. This was most notable in their ever-evolving visions of human civilization and development, which were involved in the incessant

---

[1] Refer to the works of Silbey, Susan. "Making a Place for a Cultural Analysis of Law ", *Law and Social Inquiry* 17, 1992; Macaulay, Stewart, "Images of Law in Everyday Life: The Lessons of School. Entertainment and Spectator Sports", *Law and Society Review*, núm. 21. 1987, p. 185; Chase, Anthony. "Toward a Legal Theory of Popular Culture", *Wisconsin Law Review*, 1986, p. 527; Chase, Anthony, "Historical Reconstruction in Popular Legal and Political Culture", *Seton Hall Law Review*, núm. 24, 1994, p. 1969; "Symposium: Popular Legal Culture", *Yale Law Journal*, núm. 98, 1989, p. 1545.

[2] Coombe, Rosemary L., "Contingent Articulations: A Critical Cultural Studies of Law" *Law in the Domains of Culture*, in Sarat, Austin y Kearns, Thomas R., eds., United States of America, The University of Michigan Press, 2000, p. 21.

spread of the West.[3] The relevant scholarship of the twentieth century concluded that law was subsumed into cultural processes and contributed to the makeup of human relations.[4] The research between culture and law was, however, fatally interdisciplinary, as was the case with everything that explored cultural processes.[5]

Both social science and the legal discipline are always reluctant to employ notions as ambiguous as "culture." The term "culture" is not easily defined,[6] invoking ideas of knowledge, feelings and values. Beyond the resulting controversy, which stems from conflicting conceptions of "culture" or "cultures" and "civilization" or "civilizations," it can be agreed upon that within every society exists a cultural life of greater or lesser wealth, or of more or less development, orientated towards one or even several different areas.[7]

Similarly, it has been possible to witness an endless catalogue of attempted definitions, each looking to impart a new and novel element to the discussions that comprise the constant thoughts and reflections which have been made in the construction of these ideas. Indeed, particular interest surrounds the concept of culture as a national consequence of a modern élan.[8]

In anthropological theory, an evolutionary position maintains that culture is a process of accumulation, sedimentation and evolution suggesting that societies participate in different ways in the development of an overall universal culture. In contrast with this theory, there is a belief that each society has its own culture differentiated by its customs, beliefs and social institutions.

The contribution of the American scholar Geertz, who integrated the ideas of Max Weber and Talcot Parsons into anthropology, is a key reference in the scaffolding of the notion of culture. According to Geertz, the natural world is devoid of form and meaning. It is through culture that

---

[3] *Idem.*

[4] Post, Robert, *et al.*, *Law and the Order of Culture*, Berkeley, University of California Press, 1991, p. vii.

[5] Commbe, Rosemary J. *Contingent Articulations: A Critical Cultural Studies of Law.* Supra note 2, o*p. cit.*, p. 49.

[6] Le Roy, Étienne. *Le jeu des lois. Une anthropologie "dynamique" du Droit*, Droit et Société. Recherches et Travaux, n. 28, Série Anthropologie, Librairie générale de droit et de jurisprudence, 1999, p. 23.

[7] Pontier, Jean Marie, *et al.*, *Droit de la Culture*, Seconde édition, Dalloz, 1996, p. 7.

[8] González Moreno, Beatriz, "Estado de Cultura, derechos culturales y libertad cultural", *State of Culture, Cultural Laws and Religious Liberty*, prólogo Rafael Navarro-Valls, Civitas, A. Thomson Company, Madrid, 2003, p. 84.

society gives the natural world such meaning and forms. Therefore, culture can be understood as a system of meanings expressed as symbols; in understandings that are inherited and historically transmitted. It is precisely through the legacy of these understandings that the cultural-being communicates, perpetuates and develops the knowledge of its existence and determines its attitude towards it. These ideas were converted into the legal discipline by the seminal essays of the Italian jurist Rodolfo Sacco, among others.[9]

This concept of "culture" was markedly expansive and included values, beliefs, languages, knowledge, the arts, traditions, and institutions, as well as the way of life by which a person or group expressed the meanings given to their existence and development.[10]

At the intersection of competing notions of "culture" there exist a number of eclectic theories.[11] Even so, the search for a precise definition of the notion of "culture" persists; with its lack of operational elements, it is safe to say that the notion of culture has become considered by many an "art notion". Weighing in on the debate, Paul Ricoeur asserts that "culture is a human experience which is difficult to define".[12]

Within the general discussion of culture, the notions of popular and high cultures have become of great relevance. Recent research has even argued that every tradition forms part of a collective imagination, even though some of these appear to be rooted in ancient events. In this view, new traditions are not only constantly reinventing themselves under values of modernity and post-modernity, but also evolve in tandem with these alleged ancient traditions.[13]

Globalization has made it possible to overcome the concept of separate and independent cultural forms, and as previously suggested, has

---

[9] Sacco, Rodolfo. *Anthropologie Juridique. Apport à une macro-histoire du Droit*, París, Dalloz, 2008, p. 50.

[10] Project of declaration about cultural laws. Appendix C. "Cultural Laws: The point of view of the Social Sciences". In the collective work: *Cultural Rights and Wrongs*, Halina Niec, edit., Paris, Institute of Art and Law, UNESCO Publishing, 1998. "Declaration of Cultural Rights". Informal working draft prepared by a group of experts and representatives of several organizations which may be presented to UNESCO for adoption, Halina Niec, edit., Institute of Art and Law, UNESCO Publishing, 1998, p. 319.

[11] Prieto De Pedro, J. Jesús, *Cultura, culturas y Constitución*, Madrid, Congreso de Diputados, Centro de Estudios Constitucionales, 1995, pp. 23 and following.

[12] Ricoeur, Paul. *Fundamentos Filosóficos de los derechos humanos*, Barcelona, Serbal, 1985. pp. 219 and following. Cited by González Moreno, Beatriz. *Estado de Cultura, derechos culturales y libertad religiosa* , o*p. cit.* p. 86, note 144.

[13] Hobsbawn. E and Rangerl T., *"The invention of Tradition"*, Cambridge University Press. Reprinted 2000. p. 7.

formed the fundamentals of a uniform culture as a consequence of the free market. Yet simultaneously, the existence of cultural and social differences has been identified, deeply rooted amongst societies and their identities. It is easy to identify a real cultural homogeneity in which individual endeavors oppose the various attempts at integration.[14] This sentiment is particularly pertinent in law.

2. *The acculturation process*

The survival of a social system presupposes an efficient social organization and the transmission of cultural heritage. The methods of transfer have varied historically and have been bound up with political and economic systems, in such a manner that they produce a change in the cultural makeup of a society, and therefore can be considered as a readymade source of social changes. Culture, in this way, is not only an intertwinement of knowledge, arts and technologies acquired through learning, but is more the means by which the personality of those who steer societal values is fashioned.

At the World Conference on Cultural Policies held in Mexico in 1982, a new dimension of "culture" came to prominence. This dimension diverged from the traditional cultural notions, such as arts and objects of cultural heritage. This new conceptualization included the ideas of fundamental human rights as well as human systems of values, traditions and beliefs.[15]

Culture is embedded in the various processes of globalization, which in turn are both unequal and asymmetric. They account for the phenomena of "acculturation" that is to say, the voluntary reception or involuntary imposition of an alien culture on a group or community. Cultures are deeply intertwined and far from being static or permanently isolated;[16] they interact, evolve and are ultimately burdensome on one another.[17] Cultures are not

[14] Legaré, Anne, *La culture et la Politique*, In the collective work: *Histoire de l'Humanité*, [History of Humanity], vol. VII, Le XXe siècle de 1914 à nos jours, UNESCO, 2008. p. 484.
[15] Refer to the Intergovernmental Conference of Political Culture in Europe (Helsinki, 1972); the Intergovernmental Conference of Political Culture in Asia (Yogyakarta, 1973); the Intergovernmental Conference of Political Culture in Africa (Accra, 1975); the Intergovernmental Conference of Political Culture in Latin America and the Caribbean (Bogota, 1978) and finally the Final Declaration adopted by the Global Conference of Political Culture in Mexico in August 6t, 1982 (MONDIACULT).
[16] "Our creative diversity", *Report of the World Commission on Culture and Development*, EGPRIM. 1995, p. 16.
[17] Stavenhagen, Rodolfo, "Cultural Laws: The point of view of the Social Sciences", *op. cit.*, supra note 10, p. 25.

abstract entities; humankind carries them and they are adapted to a specific geographical region whilst being immersed within a history.

The notion of acculturation requires elaboration, as do the different variants of acculturation evident within legal traditions and legal systems.

Legal acculturation shares distinct traits with social acculturation. Within the social acculturation processes it is possible to identify different variants of legal acculturation, in which the terminology arises as one of the substantive elements of analysis.

A. *The notion of acculturation*

The notion of acculturation[18] is paradoxical and ambiguous. In response to the need for an accurate definition, there has been elaboration on the idea of acculturation, however, no general theory has been developed, and in fact, convergent definitions have arisen. Evidently there is no general consensus surrounding any one definition.[19] The dictionary of ethnology and anthropology[20] by Bonté and Izarda assumes an eminently critical position. Alternatively, some suggest acculturation is a unilateral process that opposes the notion of transculturation, which describes a synallagmatic process.[21]

The term acculturation refers to the complex processes of cultural contact through which societies or social groups assimilate or have imposed upon them a meaning or a set of meanings which have come from other societies[22] It is safe to say that the term "acculturation",[23] implies the idea of

---

[18] The term «acculturation» was coined around 1880 by anthropologists in the United States, who were working on the cultures of the Native American. The essential idea was that of a subordinate culture adopting traits from the dominant culture. In other words, "assimilation" a word frequently used in discussions that took place in the early twentieth century about the culture of the new wave of immigrants to the United States. In Burke, Peter, *Cultural Hybridity*, Cambridge, Polity Press, 2009, p. 41.

[19] Recently, the term accommodation has been revived, notably by historians of religion who are critical of the concepts of "acculturation" (because it implies a complete change) and "syncretism" (because it suggests a deliberate mixture) In Burke, Peter, *Ibidem*, p. 44.

[20] *Dictionnaire de l'ethnologie et de l'anthropologie*, Bonté, P. and Izard M. (edits.), Paris, Presses Universitaires de France, 1991.

[21] BURKE, Peter, *Cultural Hybridity*, *op. cit.*, supra note 18, pp. 44 and 41.

[22] «..The notion of acculturation refers to complex processes of cultural contact, by which societies or social groups assimilate or resent the imposition of elements or groups of elements coming from other societies…» (Free translation from the author).

[23] Malinowski was opposed to the use of the term. The term "acculturation" is an ethnocentric term with a moral meaning ethnocentric which entails an *ad qui* clause, and the concept of terminus *ad quem.* The ignorant man should receive the benefits or our culture: it is the man who must change to become one of us. Cited by R. Bastide, in "Problème de l'entrecroisement des civilisations et de leur œuvre», en Gurvitch, G., *Traité de sociologie*, Paris, 1963, p. 316, note 2.

one culture integrating into another, not the suppression or annihilation of another culture. Acculturation is the permutation of a human being, a group, or a society, that is to say, the transposition of one culture to another. This process involves discussions, teachings, confrontations and, not infrequently, the threat of or even the blunt execution of power.[24]

Acculturation implies cultural exchanges (*transferts culturels*),[25] synthesized in a few eloquent words, it is: "…the history of all cultures is the history of cultural borrowing".[26] All cultures evolve in the context of one another, according to Edward Said, none is single and pure, and all are hybridized and heterogeneous. Exchanges are a natural consequence of social intersections that give rise to an infinite number of situations. The receptive societies can react in varying ways; they may respond with acceptation, which comes from fascination with the foreign systems. Alternatively, the receptive societies may reject the foreign systems in one of two ways; either by resistance or purification or by segregation or adaptation.[27]

Acculturation arises when two or more cultures intersect, causing a series of phenomena of acculturation, but the notion of acculturation is far too general to be heuristic. Definitions of the diverse methods of acculturation are insufficient to respond to the specificities of each concrete case; moreover they concomitantly develop various difficulties. One of these difficulties comes from the eye of the lens that analyses it; meaning the emphasis is put on the culture of origin or the culture of reception.

Within specialized literature, acculturation has been defined as an inter-exchange between two societies immersed in a long and deep social exchange. At this intersection, the two societies meet, with one more complex than the other, and the first ends up dominating the process of inter-culturality.[28] The *Harper Dictionary of Modern Thought* complements this definition by adding that acculturation is the instrument of analysis of social changes, referring both cultural transition and cultural reception. Moreover,

---

[24] Dupront, A., *«De l'Acculturation»*, *XIIe Congrès international des sciences historiques,* Vienne, 1965, p. 7.

[25] Muchembled, Robert. *Cultural Exchange in Early Modern Europe*, Cited in Burke, Peter. *"Cultural Hybridity"*, *op. cit.*, supra note 18, foot note 90.

[26] Said, Edward, *Culture and Imperialism*, London, 1993, Cited in Burke, Peter. *"Cultural Hybridity", op. cit.*, supra note 18.

[27] In Burke, Peter, *op. cit.*, supra note 18, p. 79.

[28] "Acculturation: the process of intercultural exchange between two societies, involving persistent and interpenetrative change and accommodation over a prolonged period of time. The term usually is applied to contact situations where one society possesses a more complex culture and dominates the intercultural process". In Voget, Fred W., *History of Ethnology*, New York, p. 861.

Harper extends the definition to include micro and macro cultures, as well as other psychological, pedagogical and sociological phenomena.

B. *Legal acculturation*

Acculturation occurs when a culture evolves and comes into contact with another. In the contemporary world, the idea of cultural autarchy in law is highly controversial.[29] The process of legal acculturation may lead, however, to an aggressive character, in which dominant societies might simply harass those that are feeble into relinquishing their cultural beliefs and values. The concept of "legal acculturation" has a fronting one of "legal de-acculturation"[30] that is to say the cultural loss or alteration of a group or community, including the loss of its deeply-rooted references to a specific legal model anchored in time. Occasionally, in the receiving legal culture, there is social resistance which can be classified as legal re-acculturation or legal anti-acculturation in that it looks to reestablish the cultural identity of that group, community or society.[31] Even with such obstacles, however, there will be a process of selection and at least partial acceptation of some legal elements of the imported culture, which still causes a reinterpretation of the receiving legal culture. [32]

C. *Different variants of the processes of legal acculturation*

Other cultural processes can be identified throughout the course of history. One to be mentioned from the outset is that humankind has become a *"cultural being,"* inheriting, internalizing, and developing the cultural values of a given society.

a. The enculturation

Enculturation[33] is an efficient and far-reaching form of cultural evolution, which gives the "*cultural beings*" a vast array of models by which to guide their lives. The process of enculturation is simultaneously conscious and unconscious, pervading the entire existence of the *"cultural being"*.[34]

---

[29] Madelin, Henri, "Culture, cultures nationales, interculturation, acculturation et inculturation", *Histoire de l'Humanité*, vol. VII, Le XXe siècle de 1914 à nos jours, UNESCO. 2008. p. 976.
[30] Pontier, Jean Marie, o*p. cit.*, supra note 7, p. 7
[31] Madelin, Henri, *Culture, cultures nationales, interculturation, acculturation et inculturation*, o*p. cit.*, supra note 29, p. 976.
[32] *Idem*.
[33] *Ibidem*, p. 975.
[34] *Idem.*

b. Imposed Acculturation and Spontaneous Acculturation

At the intersection of two societies, it is often possible to identify the dominant society and receptive society. The process of acculturation is governed by a notion of domination which is inherent within human nature. This feature of acculturation was especially salient in the legal acculturation of the colonial era.[35]

In the struggle between the dominant and receptive societies, there are two clearly identifiable outcomes. One possibility is that the dominant society forces direct control over the receiving society, whilst legal acculturation is imposed on the receptive society through the exercise of power or by the use of diffuse sanctions. At the other extreme, the receiving society could find itself free of direct control and, instead, spontaneously adopts certain legal elements of the dominant society.[36]

During imposed legal acculturation, the receiving society resists the newly-coerced legal values as consider contrary to their traditions.[37] Accordingly, the receiving society is reluctant to accept, or even outright rejects of the legal values of the imposing society.

On the contrary, when legal acculturation is spontaneous, the values of the receiving society govern the process. As a result, the new values can be accepted freely and in sync with the own dynamism of the acquiring society.[38]

Legal acculturation can be analyzed from two different perspectives: studying either more the process or instead the results. In the latter analysis, three forms of legal acculturation can be clearly identified: legal acculturation by integration, legal acculturation by assimilation or legal acculturation by hybridism.[39]

c. Legal Acculturation by integration, by legal assimilation or by legal hybridism

Legal acculturation by integration occurs when a legal institution or value is transposed from the originating, dominant legal system and is fused

---

[35] Wachterl, Nathan, "L'Acculturation", *Faire de l'histoire*, Jacques Le Goff and Pierre Nora (edits.), Paris, Gallimard, 1974, p. 177.
[36] *Idem*.
[37] *Ibidem*, p. 178.
[38] Wachterl, Nathan, o*p. cit.*, supra note 35, p. 178.
[39] Refer to the Quebec report published in this volume, "La culture juridique et l'acculturation du droit: le Québec", by Sylvio Normand, who follows Nathan Wachtel proposals.

into the receptive legal system. The receptive society incorporates it into their own legal system and subjects it to their schemes and categories. The natural consequence is that the transposed institution loses its original fundamental characteristics and gains those of the receiving system. Nevertheless, this new institution stimulates changes in the receptive legal system, which results in changes to the society at large.[40] This transformation can be observed at all social levels and can even cause modifications in the political organizational setup. This innovation ends with the creation of a readapted legal tradition.

Conversely, in acculturation by assimilation, an inverse phenomenon occurs:[41] the transposition subjects the receptive society's legal system to the values of the imposing society, provoking a change in the fundamental characteristics and legal traditions of that system.

Between both acculturations, a legal syncretism[42] can be observed that results in the hybridization of heterogeneous legal elements; that is to say, dominant and dominated cultural meanings coming from different legal traditions. The combination of these results is the emergence of a new legal tradition, distinct in its fundamentals to those which reigned in the traditions of the origin.

This legal acculturation process can refer to a specific, exclusive environment in the dominated society in which new legal elements are integrated. This can be termed as legal dysfunction. This form of legal acculturation has come to be known as legal acculturation by hybridism.[43] "Hybridity" like the word "acculturation," is "slippery and ambiguous, at

---

[40] Wachterl, Nathan, o*p. cit.*, supra note 35, p. 181.

[41] *Idem*.

[42] The word syncretism was first used by the Greek writer Plutarch (c.46-120) in the sense of a political alliance; it came to be re-employed in the 17th Century to deplore efforts like those of the Lutheran theologian Georg Calixtus (1586-1636) to unite different groups of Protestants. It meant a kind of religious chaos. Positive terms for similar processes included "consensus" (used by Calixtus about his own goal) and "conciliation", employed to describe the efforts of some Renaissance scholars, such as Giovanni Pico della Mirandola (1643-94) to reconcile Christianity with paganism. In the XIX century, the word «syncretism» acquired a positive meaning in the context of studies of religion in classical antiquity carried out by the Belgian scholar Franz Cumont (1868-1947) and others. It is used in particular to discuss the identification, so common in the Hellenistic period, between gods or goddess from different cultures (the Phoenician goddess Astarte, for example, was identified with Aphrodite, and the Egyptian god of writing Toth with Hermes.). In Burke, Peter, o*p. cit.*, supra note 18, p. 48.

[43] Refer to the Quebec report *La culture juridique et l'acculturation du droit: le Québec* by Sylvio Normand.

once literal and metaphorical, descriptive and explanatory",[44] such as the term "literary palimpsest".[45]

The processes of legal acculturation by assimilation, integration or hybridism the latter in terms of its syncretism[46] or legal dysfunction, can be observed repeatedly in the same society over time. Acculturation by integration frequently correlates with a spontaneous acculturation, whereas acculturation by assimilation occurs after a large period of direct control by the dominating society over the receiving one.[47] Often these processes lead to relatively stable legal systems with their own fundamentals, in addition to the tensions and natural, predictable, internal contradictions they produce.

The combinations generated by these phenomena can be delineated in an effort to create a comprehensive typology of legal acculturation, thus rendering it difficult to further reduce the phenomena of acculturation. While a typology of legal acculturation could provide fundamentals of general order as well as operational categories, the result would be insufficiently clear to explain the dynamic complexity of the processes of acculturation. In the same society a succession of different types of acculturation processes, coexistences or interferences can be observed over time. The magnitude of the social innovation and the intensity of the domination vary from society to society. The internal conflicts that cause the adaptation and social restructuring, the lack of correspondence between the old and new traditions, and distortions, accelerate temporary social syncopated rhythms.[48]

The legal acculturation process requires two methodologies which complement each other: first, a comparative inventory, and second, an analysis which is both structural and historical, and which must be conducted on a case-by-case basis. The phenomena of acculturation do not depend solely on the structures in which they are inserted or the fundamentals to which they respond, but rather in the practice which defines the adopted elements and gives them meaning, using them to answer to a specific situation. Hence, acculturation is both ambiguous and tensely semantic. A single act can lead to different meanings, even contradictory ones, according to the context in which the act occurs and the project which drives the resulting meaning.

---

[44] In Burke, Peter. *Cultural Hybridity*, o*p. cit.*, supra note 18, p. 54.
[45] *Ibidem.* p. 19.

[47] Wachterl, Nathan, o*p. cit.*, supra note 35, p. 183.
[48] *Ibidem*, p. 184.

Legal acculturation is not limited to the addition of legal mechanisms or isolated legal institutions, as all legal tradition constitutes on its own a universe with its own meanings. Rather, legal acculturation is a process that develops on multiple levels on the same frequency with different temporary rhythms.

The elements of acculturation (fundamentals, structures, the dynamics of practice, and temporary pluralities) develop constantly in a historical realm, which offers a myriad of endless and successive heterogeneous cultures. Finally, it should be considered that cultures possess both weak and strong traditions that contribute to the processes of adaptation or of appropriation.

d. Vocabulary

In analyzing the processes of acculturation, both the institutions and the vocabulary are indispensable references, not only in understanding the legal system, but also for the development of legal disciplines such as legal anthropology.

Anthropology describes vocabulary analysis as the art of translation.[49] That is to say, the fundamental problem in the analysis is the translation of the lexicon of one legal culture into the vocabulary of another. This "translations of cultures" has ceased to belong to the philosophical arena, and today occurs even among legal practitioners. George Steiner could give us guidance in this context: "…when we read or hear any language statement from the past….we translate, inside or between languages, human communication equals translation…".[50]

Translation develops along two basic axes. First, individuals or groups may undertake social effort to understand a foreign legal culture, and the methodology that they employ to make it effective is this translation. Second, there may be "neutrality" in the process of translation, with clear associations of legal culture relativism.

In this process of legal translation, there exist conflicting criteria between the legal system of origin and that of reception. Those operating the legal system of departure will support that any adaptation of the translation of their legal tradition inevitably indicates an error, having arisen in the receptive system. The adaptation is perceived as an accumulative process of multiple errors. Institutions or legal mechanisms exist which are not

[49] In BURKE, Peter, o*p. cit.*, supra note 18, p. 56.
[50] *Idem.*

functionally translatable. The translation of a legal culture, to paraphrase Burke,[51] is a metaphor which, like all metaphors, is illustrative and confusing.

3. *The turbulences of our time*

The cusp of the twentieth and twenty-first centuries was a time of particularly intense activity, with the metamorphosis of social structures and an unprecedented and unparalleled movement of capital and goods, facilitated in large by technological and economic changes. It is highly likely that these changes will continue, and that the movements of goods and services will continue to increase, not only at a global level, but also in free-trade zones. It is precisely in these free-trade zones, full of trade and social permeability, where different systems coexist and interact with relative frequency. This intensity has been augmented in very recent times. Indeed, the social sciences have witnessed countless phenomena that have not been satisfactorily explained by the tools presently available. The answers are scarce and the uncertainties that emerged still govern current conditions. Absolute values and predictability were replaced by uncertainty and volatility, with the fundamentals of social science being no exception. Things previously thought of as certainties now existed merely as probabilities.[52]

Inter-legality, or inter-normativeness,[53] a syntagma of the interaction of legal systems, cannot be considered a new cultural process; that is to say cultural isolation has only ever occurred sporadically in history. Nevertheless, the present intensity of this interaction is unprecedented in the modern world. A result of this intensity is that the effects of inter-legality have now stretched even to all enclaves of the globe hitherto unheard of.[54]

This inter-legality is particularly appealing because it occurs in regions and national states with radically different socio-cultural contexts, such as the People's Republic of China and the Commonwealth of Independent States (CIS), whose apex is the Russian Federation, Southeast Asia, the European Union and the OHADA in Africa. Moving to the Americas, treaties and free-trade agreements were frenziedly juxtaposed, such as in the cases of NAFTA, CAFTA and MERCOSUR. These agreements have been scornfully characterized as *"the American Commercial Spaghetti"*.

---

[51] *Ibidem.* p. 64.
[52] Prigogine, Ilsa, "The arrow of time and the end of certainty", *Keys for the XXI century*, Barcelona, UNESCO, 2000, p. 24.
[53] Santos, Boaventura de Sousa, *Toward a New Legal Common Sense"*, 2nd. Ed., 2002, chapter III.
[54] Smits, Jan, "A European Private Law as a Mixed Legal System", Maastricht Journal of European and Comparative Law, núm. 5, 1998, p. 328.

This analysis will concentrate on a particular historical period, primarily the inception of the twenty-first century, to recount the distinct movements of transculturation and the different ways of thinking that resulted in important changes to the faces of the legal systems which composed the legal landscape in Latin America.

Legal transposition and legal acculturation is a subject that, given its vastness and complexity, forces the spectrum of analysis, on a case-by-case basis, to be more reflective and thought-provoking than intensive; this will inevitably raise further questions with only sparing answers.

The legal acculturation process is reflected in a legal kaleidoscope, whose evolution has been molded by the simultaneous combination of the human and physical environments. In this process, the physical environment determines the impact on the cultural boundaries of one society,[55] as well as, and most importantly, the values that migrate with each individual person. Throughout history it has been possible to witness how colonizers, missionaries and merchants, along with slaves, refugees, and jurists, have brought with them their own legal systems.[56]

This intensity and the migration of legal systems, that is to say, the transposition of legal systems and the legal acculturation process as a correlative notion, has evoked the interest of international organizations, governments and, of course, academics. This analysis will highlight some of the *dramatis personae.*

II. DRAMATIS PERSONAE

1. *International Organizations*

The scientific programs and deliberations of UNCITRAL, UNIDROIT and The Hague Conference on Private International Law have traditionally been occupied by these legal acculturation processes. However, in recent decades, other international organizations such as the World Trade Organization, the European Bank for Reconstruction and Development and the International Monetary Fund,[57] among others, have incorporated into their objectives the study and research of these phenomena, and have exerted their absolute rule on this scene. Due to the fact that the World

---

[55] Weber, David J. et Rausch Jane M., *Where Cultures meet. Frontiers in Latin American History*, Jaguar Books, num. 6, United States of America, 194, p. XV.
[56] Twining, William, *Diffusion of Law: A Global Perspective*, London, University College, Rev-7.12.04 14k, p. 25.
[57] Ajani, Gianmaria, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe", *American Journal of Comparative Law 1*, num. 43, 1995, p. 112.

Bank, the European Bank for Reconstruction and Development, and the IMF lack any kind of legislative power, they are seriously limited in their reach, and therefore 'standard-setting' is their most appropriate form of contribution.[58]

2. *National States*

Governments have also succumbed to this investigative temptation and have developed endless related programs; to mention only some of them: USAID, the legal initiative of the American Bar Association for Central Europe and Eastern Europe, the British KHF (British Know How Fund), the German GTZ (German Technical Co-operation), and the French MICESCO (French Inter-ministerial Mission for Central and Eastern Europe).[59]

3. *Private Organizations*

In the same tenor, it is not only governments and international organizations which have been seen as involved in the shaping of legal systems, but also other important field players such as private foundations. including the likes of the German foundations *Stiftung für international rechtliche Zusammenarbeit* and *Robert-Bosch Stiftung,* the French *Fondation pour le Droit Continental*, the American foundations *Ford*, the *American Center for the Economic Analysis of Law*, and the *Civic Education Project*, who have all subsequently yielded substantive research on specific legislative projects.

In one particular case, the USAID provided substantial funds to IRIS, the acronym of the Center for Institutional Reform in the Informal Sector (based in the University of Maryland, College Park), who has provided legislative support to Bulgaria, Poland, the Russian Federation, Kazakhstan and Armenia.[60] IRIS has provided important funds and invaluable expertise, this coming from the American legal practitioners and has been intensively involved in legislative reform. Its legislative programs have explicitly sought to foster the development of some or all of the following: the rule of law, legal and institutional requisites of sustainable democracy, and legal and institutional frameworks for economic markets. More specifically, the principal goals of IRIS include economic restructuring, democratic transition, checks and balances in government structures, legal

[58] Mistelis, Loukas A., "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform. Some Fundamental Observations", International Lawyer, num. 34, 2000, 1055-1069, p. 1061.
[59] *Ibidem*. p. 1062.
[60] *Idem*.

accountability of executive branch, and the free flow of information about the government and of the privatization of state-owned assets.

From all these statements it is crystal clear that there is fierce competition among exporting countries to engross the legal market and find niches for their legal products.

4. *The Scholars*

It is not by chance that we are greeted with myriad new analyses relating to and focusing on these new phenomena. In the academic field there have been particularly intense debates and, as a natural consequence, several new studies have been conducted. These new reflections have impacted heavily on the methodology of comparative law which, in recent decades, has suffered a very profound metamorphosis.

Until recently, comparative law [61] was limited to determining the compatibility of foreign legal concepts and to highlighting the merits of other legal systems, while also providing an anthology of foreign legal ideas and concepts.[62] Analysis was concentrated on first identifying the sources of legislation or the institution which had been thought to be transposed, and subsequently trying to explain whether these transpositions could be functional in practice. This contrasts with the modern methods of comparative law, which are intimately intertwined with transplantation, transculturation, and acculturation of foreign law. The metamorphosis has been deeply profound and the subsequent studies have merited it being label as a *belle époque* of comparative law, recalling memories of the Comparative Law Congress celebrated in Paris in 1900.

It is essential in this analysis to acknowledge the recent varying perspectives in comparative law which have appeared in the recent past, both with respect to the movements of legal transculturation or acculturation and the schools of thought that try to explain them.

---

[61] Demleitner, Nora V., "Challenge, Opportunity and Risk: An Era of Change in Comparative Law", *The American Journal of Comparative Law*, vol. 46. p. 648; Ainsworth, Janet E. "Categories and Culture. On the Rectification of Names in Comparative Law", *Cornell Law Review*, vol. 82:19, p. 20; Kennedy, David. "New Approaches to Comparative Law: Comparativism and International Governance", *Utah Law Review*, 1997, pp. 545 and following; Monateri, Pier Giuseppe, *The Weak Law: Contaminations and Legal Cultures (Borrowing of Legal and Political Forms)*, Belgrade, University of Belgrade, 2008. *www.alanwatson.org*.; Twinning, William, "Social Science and Diffusion of Law", *Journal of Law and Society*, vol. 32, num. 2, june, 2005, pp. 203 and following; Chiba, Masaji, "Other phases of Legal Pluralism in the Contemporary World", *Ratio Juris*, vol. 11, num. 3, September, 1998, pp. 228-245.
[62] *Ibidem*. p. 1064.

III. THE MOVEMENTS OF LEGAL TRANSCULTURATION

In science, with the social disciplines no exception, it is vital to seek the right questions. In this debate, it could be right to pose the question: "Is modern law the cause or the effect of development?" Furthermore, the persistent issue in this field is the question of whether institutional transfers are, in fact, even culturally possible. In the traditional comparative law studies, the main focus was to trace the borrowings of legal institutions across borders and to ascertain whether or not these borrowings were workable.

The assortment of answers to this question range from the technocratic view that law can move easily and intentionally from one jurisdiction to another, to a radical culturist position that argues that the term "legal transfers" is a contravening one, and that the cultural specificity of the recipient country's legal system inexorably transforms to that of the borrowed institution or rejects the transposition. The fundamental difference with both theories is what results in the encountered positions in the conception of the legal state and of society towards the law.

The various answers given to the prior questions, with some of them born out of the Americas, have predominantly come from the United States.

1. *The "Law and Development" movement*

The analysis will be focused on the most significant movements that have occurred on American soil. One of the greatest and most prolific movements was named the *"Law and Development Movement"*,[63] occurring under the auspices of the American government, as well as some of the U.S.'s leading foundations, schools and faculties of law, such as the universities of Stanford and Yale.

The *"Law and Development Movement"*[64] has been one of the most influential conceptual movements, with Latin America being one of its main targets for action. The underpinnings of this movement sought to transfer skills, institutions and ideas of already-developed countries to the still-developing world. This movement considered that, through legal education, it was possible to reach easily predictable results.

---

[63] Ginsburg, Tom, "Lawrence M. Friedman's Comparative Law", *Law, Society and History: Essays on Themes in the Legal History and Legal Sociology of Lawrence M. Friedman*, Robert Gordon (edit.), New York, Cambridge University Press, 2010, p. 1.
[64] *Idem.*

Nevertheless, Dezalay and Garth,[65] following the sociological model of the French thinker Pierre Bourdieu, postulated and demonstrated that the ideas about law and its legal institutions migrated from one jurisdiction to another as a result of the individual efforts of legal plaintiffs working for their own interests such as their careers, family or class status, or for their own legal offices and organizations. The influence of the American law firms in the Latin American region and the evolution of international practices have brought forth international strategies supported by practitioners simply looking to heighten their "social capital." This phenomenon has given rise to empirical studies about the function of the transnational legal elite in the transmission and transformation of legal rules.

2. *The "Law and Society" Movement*

In clear opposition to the "*Law and Development Movement*"[66] emerged the "*Law and Society Movement*," which maintained that the hopes for legal-institutional transformation were naïve. In their view, law was an inherently local technology despite its purported claims to universality.

These sociologically-informed scholars adapted their arguments from political science and applied them to legal reasoning, suggesting that efforts to transfer formal law into very different informal environments would be unsuccessful, and possibly even counterproductive. The movement and the scholars behind it maintained concerns that the *"Law and Development Movement"*[67] was too analytical and positivist rather than technocratic in nature, seeking to understand the process of social and legal change more than actually contributing to it.[68]

3. *The "Law and Finance" Movement*

These approaches are now joined by another instrumental, but no less controversial movement, known as the *"Law and Finance Movement"*,[69] propelled to prominence by Professor La Porta, among others, and sponsored by the World Bank. This movement fostered the program of *Doing Business,* a program which, from the year 1990 until now, has sponsored at

---

[65] Dezalay, Yves y Garth, Bryant G., *The Internationalization of Palace Wars. Lawyers, Economists, and the Contest to Transform Latin American States*, United States of America, The University of Chicago, 2002, pp. 33 and following.
[66] Ginsburg, Tom, *op. cit.*, supra note 62, p. 4.
[67] *Ibidem*, p. 5.
[68] *Ibidem*, p. 6.
[69] *Ibidem*, p. 5.

least 330 legislative projects and invested more than three billion dollars[70] worldwide. *Doing Business* signifies, in this context, the choice of a more efficient and less costly system.[71] On the American continent, this movement has been driven in large by the *National Law Center for Inter-American Free Trade*, indulged by the American Department of State.

All of this creates the perception that laws are discrete technological problems to be imported as instruments of legal and social modernization. This "instrumentalist" view sees the process as being essentially one of problem solving, in which solutions developed elsewhere are imported to solve local problems. From this perspective, legal rules, institutions and practices are essentially a form of technology, propagating metaphors such as importation, exportation, invention, adaptation, transfer, imitation, legal engineering, *legal hardware* and *legal software.*

In this frame of reference, legal transpositions belong with formalist and technocratic perspectives from summit to base, underscoring the importance of the informal process of inter-legality. The values and orientation of legal transpositions are consonant with bureaucratic rationalism and ideas of economic efficiency, the emphasis being on the use of technical means to work towards taken-for-granted successes.

IV. THE SCHOOLS OF THOUGHT

Different schools of thought have attempted to explain the movements highlighted here. The tension between the theories of Alan Watson, Otto Kahn-Freund, Pierre Legrand,[72] Patrick Glenn,[73] Rodolfo Sacco,[74] Esin Örücü,[75] David Nelken, Reinhard Zimmermann,[76] and Oliver Brand[77] among many others is part of the core of this debate.

---

[70] Graziadei, Michele, "Comparative Law as the study of transplants and reception", *The Oxford Handbook of Comparative Law*, Reimann, Mathias and Zimmermann Reinhard (eds.), United States of America, Oxford University Press, 2008, p. 459.

[71] Muir Watt, Horatia, "Globalization and Comparative Law", *Ibiem*, p. 601.

[72] Refer to Legrand, Pierre, "The Impossibility of *Legal Transplants*", *Maastricht Journal of European and Comparative Law*, num. 4, p. 111; also refer to Legrand, Pierre, "Legal Traditions in Western Europe: the limits of commonality", *Transfrontier Mobility of Law*, Örücü, Esin, *et al.* (eds.), The Hague, Kluwer Law International, 1995, pp. 5 and following.

[73] Refer to Örücü, Esin, "What is a mixed Legal System: Exclusion or Expansion", *Electronic Journal of Comparative Law*, vol. 12, May, 2008, p. 11, *http://www.ejcl.org.*

[74] Sacco, Rodolfo, *op. cit.*, supra note 9, p. 46.

[75] Refer to Örücü, Esin, "Law as Transposition", *International and Comparative Law Quarterly*, vol. 51, April, p. 205.

[76] Zimmermann, Reinhard, "Roman Law and the Harmonization of Private Law in Europe", *Towards a European Civil Code*, 3rd. ed., Kluwer Law Internacional, 2004, p. 21; Also refer to Gillespie, John, "Towards a discursive Analysis of Legal Transfers into developing East Asia", *International Law and Politics*, vol. 40, p. 671; Refer also to Smits, Jan M., "Convergence of

1. *The instrumentalist school*

The debate surrounding the theory of legal transpositions was unique in its origins. Toward the end of the twentieth century, the jurists Watson[78] and Kahn-Freund,[79] in unrelated works, presented competing theories of the viability of legal transplants. Watson's "instrumentalist" view postulated that no inherent link existed between law and the society in which it operates. The belief was that law is largely autonomous, with a life of its own. Watson claimed that the law develops by transplanting, not because some such rule was an inevitable consequence of the social structure. That is, legislation emerges simply because it is familiar to those who control the legislative process, functioning like the Mandarins, who persuaded others of their social benefits of their laws as suitable answers to various social needs. According to this theory, a rule of law was merely a transplant, imposed because the legal elite held it to be a good idea. While Watson does not explicitly present a method to predict the viability of a proposed legal transplant, his writings provide the guidance for such a method. He has further identified several factors that he believes must be considered to determine if the conditions are ripe for legal change by transplantation.

For the instrumentalists and for Watson in particular, the dichotomy between legal culture and legal tradition, in most circumstances, was not real. Legal culture is legal tradition and legal tradition is legal culture, but

---

Private Law in Europe: Towards a New Ius Commune?", *Comparative Law. A Handbook"*. Örücü, Esin and Nelken, David (eds.), Oxford and Portland, Hart Publishing, 2007, pp. 219 and following.

77 Brand, Oliver, "Conceptual Comparisons: Towards a coherent methodology of comparative legal studies", *Brooklyn Journal of International Law*, vol. 32, issue 2, pp. 405 and following.

78 Watson has been particularly meticulous with his work; to this respect you can consult: Watson, Alan, "Aspects of Reception of Law", *American Journal of Comparative Law*, núm. 44, 1996; from the same author: "Comparative Law and Legal Change", *Cambridge Law Journal*, num. 37, 1978, p. 313; "Legal Transplants and Law Reform", *Law Quarterly Review*, num. 92, 1976, p.79; *Society and Legal Change*, 2nd. ed., Edinburg, Philadelphia, Scottish Academic Press, 2001; *Sources of Law, Legal Change, and Ambiguity*, Philadelphia, University of Pennsylvania Press, 1984; *The Evolution of Law*, Baltimore, Johns Hopkins University Press, 1985; *Legal Origins and Legal Change*, London, Hambledon Press, 1991; *The evolution of Western Private Law*, Baltimore, John Hopkins University Press, 2001; "Legal Culture v Legal Tradition", *Epistemology and Methodology of Comparative Law*, Mark Van Hoecke (ed.), Oxford and Portland Oregon, Hart Publishing, 2004, pp. 5 and following; Also refer to Sacco, Rodolfo, "Legal Formants: A Dynamic Approach to Comparative Law", *American Journal of Comparative Law*, vol. 39, num. 2, 1991, p. 343.

79 Mistelis, Loukas A., "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform. Some Fundamental Observations", *op. cit.*, supra note 58, p. 1064.

with an exception. Those immersed and living in a specific legal culture,[80] namely practitioners, judges and law professors should understand the sediments and paths of their own legal culture. Nevertheless, they are often blissfully unaware of the tradition and are indifferent to its history. Finally, Watson argued that the core of law is authority, hence law must be authoritative. This explains why legal transposition is simpler than creating new rules and institutions with the permanent search for authority. This conjunction of legal borrowing and the need for authority in law results in legal tradition.

An analysis of Watson's work,[81] one of the most conspicuous exponents of this school, has resulted in an outpouring of criticism, revealing that the instrumentalist theory has not been sufficiently explored. Paradoxically, the works of Friedmann,[82] a relevant exponent of the *"Law and Society"* movement, are somewhat coincidental in this context.[83] Friedmann[84] claims that Legal Culture has two different approaches, one of which is internal and the other external. The internal, in particular, refers to the legal culture of the elite, which has an enormous influence on the structure of legal culture. It is this environment of Legal Culture to which Watson and Ewald[85] refer to when they propose that law is a simple artifact of society and that legal differences must be studied from an outside perspective.

Kahn-Freunds's disagreement with Watson[86] begins with disputing his opposite number's that there is no inherent relationship between a state's

---

[80] This is one of the great controversies to which the functionalist methodology is subjected; its studies are narrowed by analyzing formal legal aspects, and lack of cultural immersion. Nevertheless, it is argued by Kohler and Grossfeld that comparative jurists are fatally bound by their preconceptions and a clear cultural prejudice. In Brand, Oliver, *op. cit*., supra note 77, p. 414.

[81] Westbrook, David A., *Theorizing the diffusion of law in an age of globalization. Conceptual difficulties, unstable imaginations, and the effort to think gracefully nonetheless*, Belgrade, Unverzitet u Beogradu, Pravni Fakultet, 2008. p. 3, *www.alanwatson.org*. Also refer to Monateri, Pier Giuseppe. Belgrade, Unverzitet u Beogradu, Pravni Fakultet, 2008. p. 1, *www.alanwatson.org*.

[82] Ginsburg, Tom, *op. cit*., supra note 63, p. 1.

[83] Cotterrell, Roger, *op. cit*., supra note 70, p. 719; also refer to Samuel, Geoffrey, *op. cit*., supra note 78, pp. 5 and following.

[84] Refer to Chiba, Masaji, *op. cit*., supra note 61, p. 228.

[85] Ewald, William, "Comparative Jurisprudence: The Logic of Legal Transplants", *The American Journal of Comparative Law*, num. 43, p. 489. Also refer to Cotterrell, Roger, "Comparative Law and Culture", *op. cit*., supra note 83, p. 720.

[86] Watson, Alan, *Legal Transplants and European Private Law*, Belgrade, Unverzitet u Beogradu. Pravni Fakultet, 2008, p. 4, *www.Alanwatson.org*, and *Comparative Law: Law, Reality and Society*, Belgrade, Unverzitet u Beogradu, 2008, p. 1, *www.Alanwatson.org*, the first three chapters of the forthcoming book. Also refer to Watson, Alan, *op. cit*., supra note 76, p. 98, and *Legal Transplants. An approach to Comparative Law*, 2nd. ed., University of Georgia Press, pp. 88 and following.

law and its society. Rather, Watson claims that laws must not be separated from their purpose or from the circumstances in which they are made. Kahn-Freund argues that it cannot be taken for granted that rules or institutions may be more or less transplantable; instead he argues the contrary, that there are degrees of transferability. Kahn-Freunds's theory suggests that legal institutions can be gradually embedded in a national state and thus are readily transplantable from one system to another.[87]

Furthermore, Kahn-Freund theorizes that there is a close relationship between the legal rule to be transplanted and the socio-political environment of the host country. When transposing a law, there is not only a need to have knowledge of foreign law, but it is also a prerequisite to understand the social and political context of both the origin and recipient countries.

2. *Culturist School*[88]

For Professor Legrand,[89] who is one of the most outspoken representatives of the *"Culturist Movement,"* comparative law is not a search of function, but rather a hermeneutic exercise, described in his words as a *"démarch herméneutique."* The task of the comparative jurist goes further below the technical surface. His task is to uncover what a rule signifies in terms of political, social, economic and ideological context.

For Legrand,[90] the specificity of legal traditions and cultures are central in the analysis of legal transplants. When Legrand regards cultures as unique "spiritual creations" of the community, the tribute to Montesquieu's ideas is clear. Montesquieu proclaimed the dependency of law on local

---

[87] Mistelis, Loukas A., *op. cit.*, supra note 57, p. 1065. Also refer to Twinning, William, *op. cit.*, supra note 61, p. 210; and from the same author "Globalization and Comparative Law", *op. cit.*, supra note 75, pp. 69 and following.

[88] Small, Richard G., "Towards a Theory of Contextual Transplants", *Emory International Law Review*, vol. 19, p. 1432.

[89] Legrand, Pierre, *op. cit.*, supra note 72, p. 112, and "A Diabolical Idea", *op. cit.*, supra note 76, p. 245; The culturalist theory is supported by two different schools: the culturist and the deconstructivist movements. The culturalist movement was born in the early 1980's, supported by Stuart Hall, as opposition to the structuralism and universalism; he postulated that the culturalist movement would ensure that each society should be evaluated based on its own uniqueness, and its individual social and political complexities. Since then, the diversity of cultures has become sacrosanct. Culturalism found points of common tendency within the deconstructist theory, since it is the last to support hermeneutics, that is to say the human comprehension of texts and their interpretation. In, Brand, Oliver, *op. cit.*, supra note 77, p. 431.

[90] Legrand, Pierre, *op. cit.*, supra note 72, p. 114.

conditions as early at 1748 with his seminal *"De l'Ésprit des Lois"*.[91] He argued that law was so much a creature of its environment that it is an extraordinary *"grand hazard"* if the political and civil laws of one country would suit another. This device is reminiscent of Von Savigny, who maintained that the law is the manifestation of the people's national spirit, the *Volksgeist.*[92]Coined by the German Romanticism movement, the idea of the *Volksgeist* is particular for each nation and is the natural product of all society. It must be watched for and discovered, rather than tampered with. In a similar vein, Legrand postulates the *"irreducible differences des mentalités."* That is to say that a foreign lawyer or a comparative jurist is incapable of really understanding the true meaning of different legal institutions of different legal cultures. Indeed, legal transplants are a kind of totalitarian rationality that favor regulation and technical standardization of law, as well as epigrammatic answers from foreign law. Legrand's theory expresses the important differences between the knowledge of the rules of law and the knowledge of law itself.

According to Legrand, the lawyer must act beyond the traditional boundaries of positive law. The law must form part of the culture and, at the same time, understand "the deep structures of legal rationality." For Legrand, the positive rules were merely superficial; what was relevant was not the law itself, but instead what the law signified in terms of the political, social and ideological contexts where it appeared. Legrand's[93] methodology finds its roots in literature and linguistic theories as well as in the works of the anthropologist Marcel Mauss.[94] Legrand omits, however, that the purpose of Mauss's work was to introduce a contrast with pre-capitalist traditional societies.[95]

The likeness to Montesquieu is also tenuous because his theory, proposed in his influential work *l'Esprit de loi,*[96] is argumentative; that is to say that it merely notes the failure or rejection of the possibility of the processes of transplantation, rather than considering the successes.[97] Furthermore, at

---

[91] Montesquieu, *De l'Ésprit des Lois*, Paris, Librairie de Firmin Didot Frères, Imprimeurs de l'Institut, 1849, p. 187, avec les notes de l'auteur et un choix de l'observation de Dupin, Crevier, Voltaire, Mably, Le Harpe et Severan.

[92] Cotterrell maintains that Savigny tried to identify this elusive aspect of the law in the notion of *Volksgeist*, which carries the enormous risk of slipping into dangerous mysticism. In Cotterrell, Roger, "Comparative Law and Culture", *op. cit.*, supra note 83, p. 734.

[93] Refer to Legrand, Pierre. "The Impossibility of Legal Transplants", *op. cit.*, supra note 72, p. 116.

[94] Refer to Riles, Annelise "Comparative Law and Socio-Legal Studies", *The Oxford Handbook of Comparative Law*, *cit.*, supra note 70, p. 797.

[95] *Ibidem.* p. 798.

[96] Graziadei, Michele, *op. cit.*, supra note 70, p. 466.

[97] Refer to Örücü, Esin. "*What is a mixed Legal System: Exclusion or Expansion*", *op. cit.*, Supra note 73, p. 13.

the time of Montesquieu's publication Roman law was still enforced in parts of France's territory.[98]

Von Savigny took up the relationship between law and society on similar grounds, adding that Roman law was inextricably embedded in German law. The ideas of Montesquieu[99] and of Van Savigny, who posited an organic relationship existing between the law and the particular character of society,[100] were widely accepted in Europe and rapidly became a feature in the thinking of legal Europe.

Given Von Savigny's theory, it is ironic that during his time this was one of the most important universal movements of legal systems in recorded history, one which was fostered by the European colonialist powers. Moreover, and even more surprising in the nineteenth century, different legal systems were enforced on German soil despite there´s only being a single culture. This legal acculturation process can still be witnessed in current times where a single legal system is intended to be enforced in a diverse range of cultures; the archetype of this being the European Union.[101]

3. *The Economic School*

Other approaches try to give us answers for legal transpositions. The *"Comparative Law and Economics"* movement, led by Professor Ugo Mattei,[102] seeks to explain the convergences and divergences that result from competition between legal systems. He explains that the legal systems must be considered as functional markets that supply different solutions for specific problems. If transaction costs were zero then the law would be freely transplantable (i.e. free movement of legal rules) and would therefore evolve naturally towards the most efficient rule. Legal diversity,[103] or 'transplantation resistance,' results from the transaction costs of tradition, culture and ideology.

---

98 Graziadei, Michele, *op. cit.*, supra note 70, p. 466.
99 Graziadei, Michele, "Legal Transplants and the Frontiers of Legal Knowledge", Series *Theoretical Inquiries in Law*, vol. 10, num. 2, July, 2009, art. 15, p. 728.
100 Graziadei, Michele, *op. cit.*, supra note 70, p. 466.
101 *Idem.*
102 Mattei, Ugo, "The Rise and fall of Law and Economics: An Essay for Judge Guido Calabresi", *Marlyland Law Review*, 2005, p. 221.
103 Örücü, Esin,"Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition", *Nederlandse Vereniging voor Rechtsvergelijking*, Kluwer, Deventer, 1999.

4. *The Post-Modernist School*

At the crepuscule of the twentieth and twenty-first centuries emerged a movement propelled by the French philosopher Jean François Lyotard.[104] This movement was originated by the dissolution of the National state and the normative social entities, such as the law, the decline of the idea of progress and the enormous difficulty in identifying the traditional social functions and identities and the deception of traditional political processes.

The term 'post-modernist' is extremely ambiguous,[105] its significance depending on the discipline to which it refers: literature, philosophy and other disciplines, as well as the definitions of "modernism" and "modernity." The post-modernist position finds its foundations in the experiences of diversity, in the difference and confrontation with the monopolist and totalitarian views of certain levels of rationality, and in the struggle with the supposed universality of the concepts that claim an absolutist vocation.[106] Frederic Jameson,[107] one of the conspicuous exponents of post-modernism, prescribed that post-modernism must be understood as a form of present-day thinking, something which this era has historically forgotten how to do. Post-modernism seeks ruptures, but particularly those in the modern world.

One of the significant consequences in the legal sphere of this movement concerns codification. Codification had been considered until the seventies the perfect representation of the normative social order, possessing an omniscient character. The postmodernist approach rejects the traditional conception of universal truths and values. This legal discourse is based on a minimal apparent social consensus that legitimizes adjudications. Legal adjudications are in sync with this juridical discourse, but it is precisely this rhetoric that disguises social conflicts, such as gender equality.

The post-modernist premise rejects the supposed universality of the notions until now considered absolute truths. By the means of analysis of post-modernism, the codification legal systems recognize three new elements: the openness of legal sources; a much broader scope for the judiciary and a new valuation of individuals. In the latter posit a profound change of valuation of the individual occurred through the acknowledgement of their rights and liberties and an effort of appreciating the interests that govern their lives. Thus the intersection of civil rights and the rights of personality fostered the emergence of a new legal culture.

---

[104] Jean François Lyotard wrote his seminal work *"Le Differand"*, which inspired the postmodernism and was one of the founders of this philosophical movement.
[105] *Ibidem*, p. 801.
[106] *Ibidem*, p. 802.
[107] Jameson, Frederic, *op. cit.*, supra note 105, p. ix.

The diversity of the sources and the absence of a privileged model have assured codification an autonomous character, one becoming omni-comprehensive in the legal system. But simultaneously, they provoked the disjunction of areas traditionally reserved for the competence of codification, a consequence of which was a reduction of codification's preponderance in a specific legal system. Post-modernism provided evidence in that the premise that codification should remain separate to social and political realities was a misconception. This misconception fostered the development of specific legislation as a response to these social needs. As stated by Michelle Graziadei, although codification appealed the attention of jurists, lawyers and judges alike (even in the halcyon days of codification and legal positivism), this piece of legislation was hardly conceived as a source of ultimate truths.[108]

The analysis of post-modernism in comparative law is also relevant. Some of the main exponents came from the United States, with the American scholars Kennedy [109], Esquirol,[110] and Frankenberg,[111] as well as the School of Law at the American University of Utah, belonging to this movement.[112] Comparative law[113] departs from post-modernist theory and tries to develop a new approach in this field. Its criticisms of the methodology of comparative law are based on the premise that the legal reasoning and language are bound up in legal contexts, which are difficult to avoid. Until recently the methodology of comparative law had been considered an ideal vehicle to overcome parochial analyses.[114] Post-modernism, however, argues that a *ius comparatist* must resist employing his own legal terms to explain other cultures, as it would inevitably lead to incorrect conclusions. The post-

---

[108] Refer to the Italian Report published in this Volume.

[109] Kennedy, Duncan, "Two Globalizations of Law and Legal Thought: 1850-1968", *Suffolk University Law Review*, vol. XXXVI, num. 3, 2003, p. 632. Also refer to Muir Watt, Horatia, "Globalization and Comparative Law", *The Oxford Handbook of Comparative Law*, *cit.*, supra note 70, p. 593.

[110] Esquirol, Jorge L., "Writing the law of Latin America", *George Washington International Law Review*, vol. 40, pp. 693 and following.

[111] Frankenberg, Günter, "Critical Comparisons: Re-thinking Comparative Law", *Harvard International Law Review*, num. 26, 1985, pp. 411 and 434.

[112] Peters, Anne y Schwenke, Heiner, "Comparative Law Beyond Post-Modernism", *International and Comparative Law Quarterly*, vol. 49, num. 4, October, 2000, p. 800. Also refer to Mattei Ugo and Robilant, Anna di, "The Art and Science of Critical Scholarship: Post Modernism and International Style in the Legal Architecture of Europe", *Tulane Law Review*, num. 1054, March, 2001; Jameson, Fredric, *Postmodernism or the Cultural Logic of Late Capitalism*, London, Verso, 2009, pp. 5 and following.

[113] Muir Watt, Horatia, *The Oxford Handbook of Comparative Law*, *cit.*, supra note 70, p. 593.

[114] Peters, Anne and Schwenke, Heiner, "Comparative Law Beyond Post-Modernism", *op. cit.*, supra note 105, p. 820.

modernist theory claims that study of comparative law should be carried out with an interdisciplinary focus.[115]

V. LEGAL CULTURE AND LEGAL TRADITION

The discussion should now be focused on the understanding of legal culture. There have been a plethora of attempts to define legal culture, and yet, it is a scarcely-developed notion with little consensus. In the Legal Encyclopedia of the Max Planck Institute, Ralf Michaels analyzes the different definitions of legal culture and concludes that the concept is still in gestation. It is safe to say that although there is agreement on some of the elements of "legal culture," there is less agreement, if any; on how could it be defined. Undoubtedly there are certain recognizable elements of "legal culture" which merit being preserved.

"Legal culture",[116] as understood in this paper, is the sediment of the historical memory and traditions. More generally, it is the practices, attitudes, expectations, and ways of legal thinking. Therefore "legal culture" does not exclusively refer to those brought up in law, but to society as a whole. The normative power of the "rule of law" comes from its link with political, social and legal traditions, as well as the law, institutions, enforcement and informal experience of the legal culture. Moreover, "legal culture" does not only occur within the legal community, but more importantly, outside of it. This alludes to attitudes about what law is and what it should be, and how it should be embedded in institutions, institutional roles and in procedures and laws. In short, legal culture refers to legal systems.

In this respect, an approach put forward by Professor Glenn[117] is very appealing. This scholar[118] postulates a historically based vision of complex major traditions in continuous and reciprocal interaction. In Glenn's work, transposition and acculturation are continuing processes.

---

115 Kennedy, David, "New Approaches to Comparative Law: Comparativism and International Governance", Utha Law Review, num. 545, 1997, p. 546. Also refer to Ainsworth, Janet. E., *op. cit.*, supra note 61, p. 24.

116 Derret, J. Duncan M., "The Administration of Hindu Law by the British", *Comparative Studies in Society and History*, vol. 4, num. 1, November, 1961, p. 47 *http://www.jstor.org/177940*, Last consulted June 21st, 2010; Caterina, Raffaele, "National Traditions and Historical Backgrounds", *IA, Italy, Electronic Review*, p. 1.

117 Glenn, Patrick H., "Comparative Legal Families and Comparative Legal Traditions", *The Oxford Handbook of Comparative Law*, *cit.*, supra note 70, p. 428.

118 Glenn. Patrick H., *Legal Traditions of the World*, 2nd. ed., Oxford University Press, 2004, pp. 32 and following; also refer to Glenn, Patrick H., "Com-paring", *The Oxford Handbook of Comparative Law*, *cit.*, supra note 70, pp. 91 and following, and Glenn, Patrick H., "Legal Cultures and Legal Traditions", *Epistemology and Methodology of Comparative Law*, *cit.*, supra note 78, pp. 7 and following.

Throughout history, traditions have interacted, both influencing and resisting each other. Traditions are seen as simple information lasting over time, and as such, makes dialogue and conciliation possible. Tradition is also an invaluable tool required for understanding the law of the national state and other laws enforced in its territory. Furthermore the notion of tradition encourages the jurists to look beyond legal systems and families as static and isolated entities. So understood legal traditions have become the dominant paradigm in understanding the different systems.

In this debate, Sylvio Normand suggests that internal legal culture refers to both the thinking and the practice of jurists, whereas external legal culture is the perception that laymen have of the law. This notion is therefore profoundly useful in describing the nationally -and locally- specific thinking and the practice of jurists in specific communities.[119]

VI. THE INTERNATIONAL LEGAL PRACTICE

One of the most striking issues in recent decades is the emerging process of practicing law in a transnational manner.[120] Legal practitioners take advantage of this new tradition, beyond and above the sovereign power of the national state law. This process, labeled in the international world as *"Contractualization of Law,"* has come with consequences, including the disappearance of the traditional sources of rules of law, that is to say, an outright displacement of orthodox national legislative power and of the assumption that knowledge of the rule of law is, and only is, knowledge of law.

It must not, however, be ignored that law is ideology and international lawyers have ideological interests, as is also the case with national legislators.

VII. LATIN AMERICA AND ITS LEGAL VICISSITUDES

1. *The periods of legal acculturation*

It is starkly surprising[121] how *ius comparatists* have ignored the Latin American region in contrast to other cultures and regions such as India, Southeast Asia, China and many others. One of the reasons for this could be

---

[119] Refer to the Quebec report, "La culture juridique et l'acculturation du droit: le Quebec" by Sylvio Normand.

[120] Muir Watt, Horatia, "Globalization and Comparative Law", *The Oxford Handbook of Comparative Law*, *cit.*, supra note 70, p. 606.

[121] Kleinheisterkamp, Jan, "Development of Comparative Law in Latin America", *The Oxford Handbook of Comparative Law*, *cit.*, supra note 70, p. 262.

down to its lack of exoticism.[122] Topics in both Latin American law and comparative law, such as the methodology employed in the development and formation of Latin American jurisprudence, have remained in the shade, despite having traditionally been sought after areas of influence and legal domination.[123]

There exist two clearly identifiable movements in Latin America during this period of legal acculturation: the French movement, which is motivated by the creation of a linguistic environment, and by Latin American Culture that is known as Iberian Americanism[124] and also the Pan-American movement, which is the American answer to the French model. These two models are clearly mutually exclusive and have consequently resulted in fierce competition between models of harmonization involved in the nostalgia of the creation of a regional *jus commune* as a legal entity, which prevailed in the region during the three hundred years of colonization.[125]

2. *Commercial Law*

It is indisputable that the region has remained under the influence of American trade, which has had an immediate effect on the uses and customs of commercial law. Corporate law is governed by principles similar to those of American law, as well as other legal fields. The list could be enormous, including crucial areas such as insurance, commercial, banking, and central banking law, among many others. The influence has become so extreme that the term "warrants," as coined by the American legal system, is transposed and used *verbatim,* as is the case in Argentina where this term is employed in current everyday legal language.[126]

Another clear symptom was the *Kemmerer* mission, whose name derives from Professor *Kemmerer* of the University of Princeton.[127] This American mission was of such importance that Colombia,[128] Peru, Chile and Bolivia were able to introduce the "trust" into their legislation, which would also be known in the region as "Trust Commissions". (*"Comisiones de Confianza"*)[129] Before being adopted in Argentina, Columbia, Ecuador, Mexico, Peru, Uruguay, and Venezuela, it was introduced in Panama in 1924, which also incorporated the corporate laws of Arizona and Florida

[122] *Ibidem*, p. 263.
[123] *Idem*.
[124] *Ibidem*, p. 289.
[125] *Idem*, also refer to Riles, Annelise, *op. cit.*, supra note 94, p. 734.
[126] *Ibidem*, p. 289.
[127] *Ibidem*, p. 286.
[128] Berkowitz Daniel, *et al.*, "The Transplant Effect", *The American Journal of Comparative Law*, num.51, p. 178.
[129] Kleinheisterkamp, Jan, *op. cit.*, supra note 121, p. 286.

into its legislation. This had the direct consequence of converting Panama into a friendly environment for the formation of businesses and corporations, especially for U.S. traders.[130]

The second part of the twentieth century saw the fostering of enormously liberal policy with clear origins in the United States, notably in corporate law and security transactions. In this realm, it is worth mentioning that Chile also amended its corporate law, substituting the traditional concept of government supervision with a system of injunctions in the case of govern malpractice.[131] Similarly, the non-par-value shares used in commercial law were also incorporated into Mexican legal practice.[132]

3. *Legal Formation*[133]

One of the most important social functions of the Latin-American Universities was to become a focal point of upward social mobility, with the law faculties being one of its axes.[134] These faculties were the stamping ground of the politically elite, thus was a natural vein of lawmakers, cabinet ministers and high-ranking public officials. The study programs were structured in a holistic fashion; what is quite symptomatic of this is that the study of law was addressed as "political science".[135] The law faculties were the nucleus from which emerged the economic, political science, history and even literature departments, which would all later become faculties in their own rights.

In the second half of the twentieth century, diverse events lead the course of public universities to change; amidst these were demographic growth and political turbulences, such as the movement of 68'; a consequence of this was an unfathomable expansion of their matriculates. This also explains the emergence of private universities that provided the cultivation of business lawyers or the provision of an elitist education to a limited number of students. This confined the lawyers to the strict legal fields and secluded them in a culture of codes and old books.[136] The involvement

---

[130] *Ibidem*, p. 287.
[131] *Idem.*
[132] *Idem.*
[133] For more information refer to the excelent studies of Rogelio Pérez Perdomo, In Pérez Perdomo, Rogelio, *Latin American Lawyers: A Historical Introduction*, Stanford, Stanford University Press, 2006; Perez Perdomo, Rogelio and Rodríguez Torres, Julia (eds.), *Formación Jurídica en América Latina: Tensiones e innovaciones en tiempos de globalización*, Bogotá, Universidad del Externado de Colombia, 2006.
[134] Pérez Perdomo, Rogelio, "Legal Education in Late Twentieth-Century. Latin America", *Law In Many Societies: a Reader*, Friedman, Lawerence, *et al.* (eds.), Standford, Stanford University Press, 2011, p. 60.
[135] *Ibidem*, p. 59.
[136] *Ibidem*, p. 63.

of lawyers in the structure of the state and the emergence of these business lawyers has been coined as a "double helix".[137]

One of the avant-gardists of the teaching of law was the Brazilian Professor Francisco San Tiago Dantas[138] who postulated the teaching of law through academic interaction of scholars with the case system and with a multidisciplinary scope. This educational system was in principle fostered in the University of Brasilia. The Latin-American conferences of law schools incorporated this teaching methodology into their agendas.

There is a strong tendency for young lawyers to pursue an LLM at North American law schools. For Latin American lawyers, access to these universities is heavily controlled or often impeded by financial and linguistic factors.[139] It is safe to say that this emerging legal generation, will create in the near future a different legal reasoning in Latin America. Furthermore, interest in the French, German and British universities has become subsidiary to the North American universities, strongly declining in recent years, and testament to the strong American influence in the region.

One of the great features of the brand new business lawyers formed in the American style was the restructuring of foreign debt in the 1980's and later they were a crucial apex in the movement toward the privatization and the building of institutions of internalization in the 1990's as is the case in Mexico.[140] The American Model provided a mode of organization of work that permitted lawyers to mobilize their social capital to gain privileged positions in the field of power. As stated by Dezalay and Garth"…Despite the openness, however, those dominant in the field of economic power remain best able to afford the luxury of the service of these legitimate intermediaries between business power and the state".[141]

---

137 Dezalay, Yves and Bryant Garth, "Law, Lawyers and Social Capital. Rule of Law versus Relational Capitalism", *Law In Many Societies. A Reader*, Lawerence M. *et al.* (eds.), Standford, Stanford University Press, 2011, p. 283.

138 Santiago Dantas, Francisco, "A educaçao juridica ea crise brasileira", *Revista Forense*, num. 159, ano 52, pp. 449-459; Rosenn, Keith, "Legal Education in Brazil", *Journal of Legal Education.*; Steiner, Henry, "Legal Education and socioeconomic change: Brazilian perspectives", *The American Journal of Comparative Law.*

139 Refer to Dezalay, Yves and Garth, Bryant G., *The Internationalization of Palace Wars. Lawyers, Economists, and the Contest to Transform Latin American States*, Chicago, The University of Chicago Press, 2002. pp. 33 and following.

140 Dezalay, Yves and Bryant Garth, *op. cit.*, supra note 137, p. 283.

141 *Ibidem*, p. 291.

4. *Regional Organizations*

One of the traditional forums in the region is the Conference of International Private Law of the Organization of American States known by the acronym "CIDIP". It specializes in private international law matters. The influence of this conference has ebbed and flowed, but most recently has seemed to decline significantly, if one considers the number of international instruments that have successfully been ratified.

Recently, CIDIP has changed its direction to explore the uniformity of substantive law, rather than focusing its studies solely on private international law matters. In light of this new trend, it is worth mentioning the Mexican-American proposal, later joined by Canada, which introduced a legal model for secured movables,[142] clearly inspired by article nine of the American Uniform Commercial Code.

5. *Legal Literature*

Latin America should be a natural habitat for comparative law research, given its constant flow of legal transpositions. The region's lawyers have conducted sophisticated studies of comparative law, resulting in a proliferation of legal-thought based on foreign theories.

In the twentieth century, legal European literature had en enormous influence in Latin America. The *Escola de Recife* in Brazil, clearly inspired by German legal literature, is one of the epitomies of this, and the ground-breaking writing of the Brazilian legal author Francisco Pontes de Miranda, *Tratado de Direito Privado* ("Treaty of Private Law") is emblematic. This author cites a number of German sources, both jurisprudential and literary, some of which are strikingly different from those enforced in Brazilian legislation. Notwithstanding this striking legal thinking, a whole generation of the Brazilian legal community was brought up with these ideas. The innovative writing of Mexican jurist Manuel Borja Soriano is similar in this regard, entitled *"Teoría General de las Obligaciones"* (Treaty of Contract Law). *Teoría General*, which had a dominant French influence, served as an important written reference during a large part of the twentieth century amongst the scholarship of Mexican law schools.

The last part of the twentieth century and the outset of the twenty-first century dramatically changed the legal landscape in this field.

---

[142] Kleinheisterkamp, Jan, "Development of Comparative Law in Latin America", *The Oxford Handbook of Comparative Law*, *cit.*, supra note 70, p. 292.

6. *Jurisdiction*

Two main features should be raised by this analysis. The most afflictive of these is consistently evident in Latin-America, being the huge divide that exists between the focuses of the sophisticated elite and the poverty of the local practice.[143]

The other feature is the constant reference to foreign literature by the judiciary. This event provides evidence of how deeply the legal communities have been infatuated by the writings of foreign scholars and jurisdictional criteria, such as the case of Argentina, where the Supreme Court of Justice utilized U.S. constitutional doctrine in interpreting its own constitution.[144] This practice in European countries and elsewhere was and is completely unprecedented.

VIII. CONCLUSIONS

History has repeatedly shown the migration of legal institutions and it is probable that these phenomena will persist. It would be incorrect to continue to assert the purity of a legal system; on the contrary, it would be more obvious to suggest that the movement of legal models has been transformed into inter-legality or inter-normativiness.[145] Therefore, a "pure" legal system simply does not exist.[146] The debate over the concept of legal culture provides a good illustration of the difficulties in defining and working with such concepts. A consensus can be found in that everybody agrees that law and culture are embedded,[147] but there is little agreement on how to determine or measure this.[148] Culture and legal culture[149] should be seen as something that changes and is changeable, shaped by the past and orientated towards the future. Legal culture, like other aspects of culture, may also rest on imaginary and previously invented traditions.[150]

---

143 *Ibidem*, p. 297.
144 *Ibidem*, p. 298.
145 Véase Riles, Annelise, *op. cit.*, supra note 94, p. 794.
146 *Ibidem*; Also refer to Örücü, Esin, "Mixed and Mixing Systems. A conceptual Search", *Studies in Legal Systems: Mixed and Mixing*, Örücü, Esin, *et al.* (eds.), Kluwer Law, 1996, pp. 335 and following.
147 Refer to Riles, Annelise, *op. cit.*, supra note 94, p. 794.
148 Mouspurakis, George, "Transplanting Legal Models across Culturally Diverse Societies: A Comparative Law Perspective", *Osaka University Law Review*, num. 57, February 2010, p. 100.
149 Van Hoecke, Mark and Warrington, Mark, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a new model for comparative law", *International and Comparative Law Quarterly*, vol. 47, p. 496; also refer to Nelken, David, "Defining and Using the Concept of Legal Culture", *The Oxford Handbook of Comparative Law*, *cit.*, supra note 70, pp. 169 and following.
150 *Ibidem*, p. 90.

Rather than having to decide between culturist or rationalist explanations, the above analysis mandates a focus on cultural processes,[151] including recognizing that many of these practices are not necessarily "local," nor do they necessarily constitute social resistance to the viability of legal transpositions or legal harmonization.[152]

To put the analysis into perspective; through this globalization process, national states around the world are obliged to implement dramatic political and economic changes in response to external and internal developments; this presupposes radical alterations of their legal systems. In making these changes, legislators should determine whether the borrowing of foreign law is feasible and if the international harmonization of a particular set of laws is viable. There is strong support for the argument that there is no need for legislators to struggle to reinvent the wheel when others have already dealt with the same issues. This is further supported by the fact that national states are under pressure in this increasingly interdependent world to create uniformity in law. Nevertheless, cultural processes are more complex than simply altering a legal system. The culturist movement is therefore correct with respect to transplants that have been roughly cut and pasted into an incompatible culture.[153] Such transplants may well be rejected because of cultural incompatibilities. However, culturist theory fails to account for instances where laws appear to have been successfully transplanted despite clearly differing legal cultures.

In the nineteenth century, Latin America adopted a "mentality of codification" that responded to the conception of the law; this was at a complete contrast to that which was prevalent at the time. It was only viable and workable through the forced imposition of legal codes. The changes in the model of Latin-American legal reasoning and law enforcement, as well as in the Latin-American judiciary and academia, were pervasive and unprecedented in legal history. This rupture in the form of legal invention and legal reasoning was revolutionary. This success justified the Latin-American predilection for the system of codification. Codification ended up being one of the most invigorating driving forces in this period of transculturation. However, it is important to bear in mind that a code alone does not create a national legal culture; to argue that once a code has been drafted and enforced, the acculturation period is complete, goes directly against reality. The "code" signifies not only a new normative methodology, but also the confirmation of the positivist dogma that the law is and will

---

151 Refer to Nelken, David, "Comparative Law and Comparative Legal Studies", *The Oxford Handbook of Comparative Law*, *cit.*, supra note 70, pp. 5 and following.
152 Refer to Örücü, Esin, *op. cit.*, supra note 73, p. 4.
153 Small, Richard G., *"Towards a Theory of Contextual Transplants"*, *op. cit.*, Supra note 88.

remain to be a monopoly of the national state, crucial in the newborn Latin-American national states.

It is easier to imagine borrowing and learning from places which are similar and face comparable problems.[154] Some societies, however, make the effort to borrow from legal systems that are different from them, endeavoring in an almost vain way to emulate them and become more like of them.[155] But this simplistic statement undervalues the function of the law. To better understand the law, it must be put in context. The functionalist analysis[156] explains that the law was designed to resolve social problems and needs in the community. Different legal systems face similar challenges in the context of their own societies and have developed laws in an attempt to solve these issues. These laws would likely be ideal for legal transposition. This appraisal, however, has serious limitations as experience has shown that legal transpositions must first be scrutinized to see if a comparison can be made with other societies with similar problems and if the law solved them. This analysis highlights how cultures built what were considered social issues and the need to solve them using the "rule of law." What is fascinating is how when they solve these problems, they do not necessarily employ the "the rule of law" to do so. It is also pertinent to consider how the perception of the society towards the law varies completely between legal systems. This difference can make transposition unfeasible.

It is necessary for legal ideas and the law to be contextualized in a series of *factual* events for which their function is clear. It follows that comparison will be useful for the *ius comparatists* if the legal situation in one society is similar to that in another; otherwise the comparison would be unviable.

This analysis coincides with Professor Örücü's assertion that the future development of law will be heavily entwined with the transculturation of ideas and institutions. It is of the utmost importance to identify the divergences and convergences of a legal system in order to successfully effect legal transpositions. It is safe to say that by convergences, it does not mean the attempt to create sameness, but on the contrary, to accept diversity. The aspiration is to look not so much for harmonization, but rather for harmony

---

[154] Refer to Örücü, Esin, *op. cit.*, supra note 73, p. 5; Also refer to Örücü, Esin, "A General View of *Legal Families* and of *Mixing Systems*", *cit.*, Supra note 76, pp.169 and following; Örücü, Esin. *"Comparative Law in Practice: The Courts and the legislator*, *op. cit.*, Supra note 76, pp. 411 and following; Örücü, Esin. *"A project: Comparative Law in Action"*, *op. cit.*, Supra note 76, pp. 435 and following; Sacco, Rodolfo, *Legal Anthropology, A Contribution to the Macro-History of Law*, Il Mulino, 2007, p. 46.

[155] Nolan Jr., James . *"Legal Accents, Legal Borrowing. The International problem-solving Court movement"*, New Jersey, Princeton University Press, 2009, pp. 24 and following.

[156] Oliver, Brand, *op. cit.*, supra note 77, p. 412.

and compatibility.[157] The mere effect of legal transposition is not sufficient; legal education in all fields of the host country is indispensable. The real difficulty in legal transposition is not to transpose different legal formulas, but instead to transpose values and content. Legal ideas and institutions are crossing cultural borders rapidly. There will always be new movements and new transposition. Law, after all, is the outcome of a series of transpositions.

The real challenge in performing legal transpositions is how to transpose values and beliefs rather than simply transplanting formulas. Legal acculturation is the absorption of specific concepts and doctrines without the hybridization of ideas, as these ideas have already been absorbed and have developed their own characteristics. The ideas and the legal institutions quickly transpose borders. History has continually demonstrated the rise of new movements and transpositions and it is predicable that this will continue. The correct conundrum is to identify how to develop legal tradition and legal culture in relation to other mechanisms of reception throughout the translation, adaptation or acculturation of institutions, ideas, concepts and laws or mechanisms that encourage outright rejection.

The term "transposition," as used in music, seems to be more appropriate. In musical transposition[158] each note takes the same relative place in the scale of the new key as in the old. The "transposition" is employed to suit the particular instrument or the vocal range of the singer. So, in law, each legal institution or rule introduced is used in the system of the recipient country to suit its particular socio-legal culture and needs. In fact, there may be a number of "transpositions," since no single model is necessarily used by any one recipient country.

The spirit of transpositions must also prevail to avoid the explanations of legal transpositions[159] being reduced to merely laws, institutions or concepts. Legal transpositions also refer to rituals, methods, and types of legal literature as well as to legal education, legal practice and documentation. Other less obvious transpositions exist in methods of reasoning and arguing, and even more elusive is ideology and legal mentality.

It must start from the premise that there are no legal transpositions without legal transformation. It is still extremely complex to identify the

---

[157] Cotterrell, Roger. *"Comparative Law and Culture"*, *op. cit.*, supra note 81, p. 733; Also refer to Cotterrell, Roger. *"Is it too bad to be different? Comparative Law and the appreciation of diversity"*, *cit.*, supra note 81, pp.169 and following.

[158] Örücü, Esin. *"The enigma of Comparative Law. Variations on a theme for the Twenty-first Century"*, Leiden/Boston, Martinus Nijhofff Publishers, 2004, pp. 93 and following.

[159] Örücü, Esin, "Transfrontier Mobility of Law", *cit.*, supra note 72, pp. 5 and following.

exact origin of a legal system, its destination, and evidence of its reception in the recipient country, since its sources are so diverse. It is simply impossible for a legal transposition to retain its identity without significant changes. This is not merely a case of interpretation or of the application of its legislation, but of its use, its daily enforcement, and its impact, as well as its local, political, economic and social significance. On some occasions it is clear that the particular legal institution could continue in force and be operational because it forms part of an asset of the legal elite. What cannot be overlooked, however, is the part of the legislative reception that comes from the interaction between the legal transpositions and the local conditions.

Other distinct methods of legal transposition of legislation exist, in sources such as literature, trade, education and even religion. These sources can be every bit as important as government action. To put it straightforwardly; the government route is not necessarily the unique and only vehicle through which legal transpositions can take place.

This analysis tries to highlight what factors are truly relevant in the processes of transculturation, their underlying values and principles, and the political interests which motivated them, rather than the particular associated laws and regulations. In this view, legal materials are impregnated with political values and convictions.

A last general reflection is unavoidable; the exploration of the links between law and culture will not produce the predicted results if they do not extend past and transform their initial categories.

SECTION II

THE ANALYSIS OF THE NATIONAL REPORTS PRESENTED TO THE GENERAL CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW, HELD IN WASHINGTON D.C. IN MAY 2010

The development of this analysis has been limited to private law; nevertheless, it could encompass other legal disciplines. However, as stated by the French scholar Doyen Jean Carbonnier: "…Civil Law is the civil constitution of a society…"[160] and this analysis wholeheartedly agrees with this assertion.

Indeed, civil law is anything but the normalcy of the prominent relations between human beings; rather, it is the most intimate expression of a society. It is civil law that regulates the major and essential relations of a

[160] Carbonnier, Jean, "Le Code Civil", *Le Code Civil 1804-2004. Livre du Bicentenaire*, Paris, Dalloz, 2004, p. 30.

society. Civil law does not refer to the prevalence of the state structure (i.e. political organization and economics) but instead, to the organization of the great moments of the lives of humankind, i.e. birth through filiations, the union of the sexes by marriage, and death, which gives rice to inheritance law and the organization of economic relations between men through contract law, as well as the mode of appropriation of wealth as regulated by property law.

Civil law, whose evolution is as slow as it is deep, is dominated by length. Therefore, a legal reform can only truly flourish when, and only when, civil law has absorbed into the roots of a society. Civil legislation is the result of a social effort which aims for a common goal; it is the cultural expression of a society and reflects its needs as much as its aspirations and objectives.

In addition to the aforementioned, the cohesion of acculturation analysis could be jeopardized by its comparative and expansive nature, which would certainly thwart the achievement of the intention which surrounds this theme. The suggested investigation should be illustrated with relevant and specific examples such as: codification, the function of the jurisdiction, laicism, the transference of property ownership, and the adoption of a specific law with an identifiable source of origin, among others. In the acculturation process, there are two perspectives that must be considered and which are two sides of the same coin: the receiving countries and the countries of origin.

It is useful to mention one of the final classifications of different jurisdictions,[161] with the purpose of giving a joint perspective of the different

[161] The Danish Professor Ditlev Tamm claims regarding this classification the following: In the questionnaire a starting point is taken in a classification A-H in which Denmark (together with the Faroe Islands and Greenland) is placed in group D: Franco-Latino-Germanic systems, whereas the other so called Nordic countries (Finland, Iceland, Norway and Sweden) are placed in group C: German-Scandinavian legal systems. Without entering into details as to the classification indicated you may, as a first remark, state that the law of Nordic countries do present so many common features that they should not be separated into different groups. In comparative law theory you may consider establishing a specific Nordic legal family and thus Denmark, if you use the classification suggested, should definitely be put alongside the other Nordic countries. It should be mentioned that you may divide, the Nordic countries, as seen from a historical perspective into a western and an eastern group. Denmark and Norway with Iceland for historical reasons (Denmark and Norway were united from 1380-1814) constitute one group, whereas Sweden and Finland are another group based on the fact that Finland until 1809 was a part of Sweden that, even under Russian domination 1809-1917, kept Swedish law. Since the 1870's, the Nordic countries have collaborated in many fields of private law, thus creating a common legislative basis within the law of obligations, family law, the law of persons and other disciplines. This collaboration has led to a harmonization of the Nordic legal systems. Natural law did not replace earlier models-it was a supplement and a way of introducing a new way of legal thinking. Natural law was received be legal scholars

legal systems currently in existence, This classification highlights the number of jurisdictions in which they are applied and the number of inhabitants who are subject to these jurisdictions, as arguable as it can be:[162]

1. The traditional Anglo-American legal system of common law,[163] which is applied in 146 [164] different jurisdictions with an estimated population of 1,797 million inhabitants, representing 33.4% of the world's population[165]

2. The Roman-Common Law legal system,[166] which includes 15 jurisdictions and 243 million inhabitants, representing almost 4.5% of the world's population[167]

---

through reading and also partly by studying abroad. At this point it should be noted that Germany, as a neighboring country, has played a decisive role in the development of Danish legal thinking. However it should also be noted between Denmark and the Holy Roman Empire and also a borderline between Roman law and a system which, until late, was based on legislation in the vernacular with medieval roots and high degree of lay participation in justice. Only gradually since the 18th century did a legal profession comes into being".

[162] Rose, A. O. and Alan D. "The challenges for Uniform Law in the Twenty-First Century", *Uniform Law Review*, UNIDROIT, vol. I, 1996, I, p. 9.

[163] American Samoa; Guam; Johnston and Sand Island; Liberia; Marshall Islands; Micronesia; Midway Islands; Northern Marianas; Palau (Belau); Virgin Islands (USA), Wake Island.

[164] The United States, Australia and Canada are subject to individual treatment. In total there are 85 jurisdictions or 65 if Australia and Canada are treated as one.

[165] The jurisdictions belonging to this group are: Anguilla, Antigua and Barbuda; Australia; the Bahamas; Bangladesh; Barbados, Belize, Bermuda; British Indian Ocean Territory; Brunei (Negara Brunei Darussalam); Burma; Canada (excluding Quebec); the Cayman Islands, the Cocos (or Keeling islands); the Cook islands; Cyprus; Dominica, England, Falkland Islands; Fiji ; Gambia, Ghana; Gibraltar, Grenada; Guyana; Hong Kong; Northern Ireland; the Irish Republic; the Isle of Man; Israel; Jamaica; Kenya; Kiribati; Malawi; Malaysia; Montserrat; Nauru, New Zealand; Nigeria; Niue; Norfolk Island; Pakistan, Papua New Guinea; Pitcairn island, The Seychelles; Sierra Leone, Singapore, Solomon Islands, Grey waxbill; Saint-Kitts-and-Nevis; St Lucia; Saint-Vincent and Grenadines; Sudan; Tanzania; Tokelau; Tonga; Trinidad and Tobago; Turks and Caicos Islands; Tuvalu; Uganda, Vanuatu; Virgin Islands (British); Western Samoa; Zambia; American Samoa; Guam; Johnston and Sand Islands; Liberia; Micronesia; Midway islands; Northern Marianas; Palau; Virgin Island (US); Wake island.

[166] The Scottish National Reporter Professor Esin Örücü states that: "…the Scottish legal system is classified by our General Rapporteur, as belonging to "the Roman-Common law legal system, which includes 15 jurisdictions and 243 million inhabitants, representing almost 4.5% of the world's population, tough he does not call these mixed jurisdictions.The distinction and separateness of is laws form those of England, Wales and Northern Ireland, has justified regarding the Scottish legal system separately from the start, especially since when considering mixed jurisdictions, Scotland is always seen in a special light, and also since recently, it has even been put forward as a model for the European Union. Indeed, the Scottish legal system does not sit comfortably in the classical jurisdicition of different jurisdictions: as a simple mixed jurisdiction it lives in this periphery of two legal families, the common law and the civil law. Scotland has one of the simple mixed systems: a system mixed

3. The German-Scandinavian legal system, which includes 13 jurisdictions with a total population of 360 million inhabitants, representing almost 6.7% of the world's population.[168]

4. The Franco-Latino-Germanic legal system, which is applied to 13 jurisdictions with 279 million inhabitants, or 5.2% of the world's population.[169]

5. The Franco-Latino legal system, which is applied to 76 jurisdictions with a total population of 982 million inhabitants, or 18.3% of the world's population.[170]

6. The system of emerging jurisdictions, which has 18 jurisdictions with a total of 1,488 million inhabitants, representing 27.7% of the world's population.[171]

7. The Islamic system, which is applied in 14 jurisdictions with a total population of 108 million inhabitants, or 2.0% of the world's population.[172]

---

only at the substantive level…" Refer to the Scottish National Report published in this volume.

[167] The jurisdictions included in this group are the following: Alderney and Sark; Botswana; Guernsey, Japan; Jersey; South Korea; Lesotho; Liechtenstein; Mauritius; Namibia; Quebec; Scotland; South Africa; Sri Lanka and Swaziland.

[168] The jurisdictions belonging to this group are; Aruba; Finland; Germany; Iceland; Indonesia; Netherlands; Norway; Poland; Surinam; Sweden; Switzerland; Taiwan.

[169] The jurisdictions belonging to this group are; Austria; Czech Republic; Denmark; Faeroe Islands; Greenland; Hungary; Italy; Louisiana; Panama; Philippines; Slovak Republic; Thailand; Turkey.

[170] The jurisdictions in this group are the following; Algeria; Andorra; Angola; Argentina; Belgium; Benin; Bolivia; Brazil; Burkina Faso; Burundi; Cameroon; Cape Verde; Central African Republic; Chad; Chile; Colombia; Comoros; Congo; Costa Rica; Cuba; Djibouti; Dominican Republic; Ecuador; Egypt; El Salvador; Equatorial Guinea; France; French Guyana; French Polynesia; Gabon; Greece; Guadeloupe; Guatemala; Guinea; Guinea-Bissau; Haiti; Honduras; Iran; Iraq; Ivory Coast; Jordan; Lebanon; Libya; Luxembourg; Macao; Madagascar; Mali; Malta; Martinique; Mauritania; Mayotte; Mexico; Monaco; Morocco; Mozambique; New Caledonia; Nicaragua; Niger; Paraguay; Peru; Portugal; Puerto Rico; Reunion; Romania; Rwanda; Sao Tóme e Principe; Senegal; Spain; St-Pierre & Miquelon; Syria; Togo; Tunisia; Uruguay; Venezuela; Wallis and Futuna Islands; Zaire.

[171] The jurisdictions included in this group are as follows; Albania; Armenia; Belarus; Bosnia; Bulgaria; China; Croatia; Estonia; Georgia; Latvia; Lithuania; Moldova; Mongolia; Russia; Serbia; Slovenia; Ukraine; Vietnam.

[172] The jurisdictions included in this group are as follows; Afghanistan; Azerbaijan; Bahrain; Kazakhstan; Kirghizstan; Kuwait; Oman; Qatar; Saudi Arabia; Tajikistan; Turkmenistan; United Arab Emirates; Uzbekistan; Yemen.

8. A system that includes 13 unallocated jurisdictions with a total population of 116 million inhabitants, totaling just 2.2% of the world's population[173]

This analysis focuses on one period of time, which could be considered arbitrary,[174] but it corresponds to events that set the guidelines for geopolitics, which have also prompted the movement of legal models. This periodization responds to diachronic criteria,[175] notwithstanding that the evolution of the legal system obeys a synchronous criteria. Despite these severe limitations, it was considered appropriate to resort to them since these events have had a universal transcendence.[176]

1. The first period begins with the encounters of the two worlds and finishes at the end of the eighteenth century with the French Revolution.

2. The second period begins at the French Revolution and includes all of the nineteenth century, one of whose important events was the independence of the Americas. This period concludes with the end of World War I, marking the end of the colonialist period as well as substantial geopolitical change. The nineteenth century was undeniably a long one.

3. The third period begins from the end of World War I and terminates with the fall of the Berlin Wall in 1989.

---

[173] The jurisdictions included in this group are as follows; Antarctica; Bhutan; Cambodia; Eritrea; Ethiopia; North Korea; Laos; Maldives; Nepal; San Marino; Somalia; Vatican City; Western Samoa.

[174] The Danish Professor Ditlev Tamm claims about this periodization the following : " My other preliminary remark refers to the historical framework taking the discovery of the Americas as a starting point. Denmark, as other European countries, has a history of law that predated this. Historically you may consider legal history and also thus the history of legal culture and legal transplants as starting around 1200 when the first Danish legislative texts were drafted. It should be mentioned that an influence from Canon Law is to be seen in the legal texts from the 13th century and also some knowledge of Roman Law. However shortly after 1500, with the emergence of the modern state and especially also as a consequence of the introduction of the Lutheran Reformation in Denmark, changes in the law were introduced that may constitute the basis for a historical periodization that consider the period after 1500 as a whole. In the following paragraphs Iwill therefore accept a periodization based on the four periods: around 1500-the French Revolution, the "long" 19th. Century, the period from 1918-1989 ant the time after 1989".

[175] The author would like to note that other periods have been subject to analysis in other publications.

[176] Mertus, Julie, "The Liberal State vs. The National Soul: Mapping Civil Society Transplants", *Social and Legal Studies*, 09644 6639 (199903) 8:1, London, Thousand Oaks, CA and New Delhi, SAGE Publications, p. 121.

4. The last envisaged period starts at the fall of the Berlin Wall and continues with the emergence of the Post-Modernism movement[177] to the present time.

With respect to this last reference, some historians have concluded that the twentieth century was a short one which started with the end of World War I, and that the twenty-first century began with the fall of the Berlin Wall. Aside from the acceptance or rejection of this assertion, what is undeniable throughout is the fact that geopolitics varied substantially after the fall of the Berlin Wall and the political boundaries started to move again, especially in Europe and Asia. This caused significant changes and the consequent circulation of legal models.

I. FROM THE ENCOUNTERS OF TWO WORLDS TO THE FRENCH REVOLUTION

All the European national reports show evidence that their legal system's evolution was intimately bound up in the history of the old continent and the building up of its culture. The Belgian legal system is crystal clear evidence of this; its French annexation in 1795 introduced revolutionary French law and the Napoleonic codes, thus displacing the previous legal system.[178]

From the outset Scotland is an appealing case in comparative law, because of the unique make up of its legal system. In this period of time, as stated by the Scottish National reporter, the Celtic law was very influential especially in the eleventh century in the "Book of Deer" and the collection "The Law of the Brets and the Scots". This event has a significant relevance because "it could be said that the ethos of Celtic law remains with the Scots today...".[179]

Notwithstanding the Union of the Crowns of Scotland and England, the Scottish legal system continued to develop independently; the protection of its church and education system being protected, belonging to the Scottish sovereignty, culture and identity.[180] Nevertheless the treaty of Union had significant consequences in the Scottish legal system, with the new

---

[177] Post- modernism is a term which was first used in the arts; however, from 1990, it was extended to other fields such as literature, philosophy and other areas of social science. In the visual arts, it meant the search for a new form of expression not previously seen in past terms, such as the reality of the XX century. The other great tendency in the XX century was precisely the radical transformation of this reality.

[178] Refer to the Belgian National Report published in this Volume.

[179] *Idem*.

[180] *Idem.*

Parliament of Great Britain being empowered to legislate for the new Kingdom as a whole.[181]

During the feudalist period Celtic law was absorbed in some parts into feudal law, but preserved its own distinctive notes. This was a "dark age" of the Celtic law, attributed to its lack of creativity. The inter-legality with the Feudal law, coming from England, the Canon law from the Church, and Roman law from the continent, impregnated the Celtic law and Scotland became "a mixed jurisdiction from the very beginning".[182] Scotland can thus be considered as a receptive legal system. These receptions were direct and indirect, conscious and unconscious. There was no codification and no laicism.[183]

Nevertheless, it is at the edges of this continent where legal interculturality can be observed most clearly. The East and the West have been perceived as symbols of different evolutions of mankind and of different perspectives in the formation of national identity and of legal order. While this is recognized as a generalization, it ignores political and legal factors.

The clash between the East and West occurred with great intensity on Russian soil.[184] In this realm, the influence of the West could be felt even more strongly as highlighted by the Russian report. The inspired western institutions attempted to overcome the age-old backwardness of Russian society by implementing a new administrative system as well as a brand-new government, substituting a senate for the Council of Boyards.[185] With the adoption of western individualist models, there came to be a shared conviction that could modify the legal system. The introduction of institutions and foreign legal systems demonstrated the firm intention of the Russian state to ensure a level of public development and to match the modernity of the foremost European nations of the time. This explains why the Russian legal reception was basically undertaken by the state itself.[186]

As a preliminary conclusion, the Russian report indicates that in choosing the Scylla of the West and the Carbides of the East, the question did not pertain to the humanitarian plane.[187] The social price of both the Asian reforms of Ivan the Terrible and the Western-like reforms of Peter the Great was a drastic reduction in the country's population, by as much as

---

181 *Idem.*
182 *Idem.*
183 *Idem.*
184 Refer to the Russian National Report published in this Volume.
185 *Idem.*
186 *Idem.*
187 *Idem.*

twenty per cent in Peter's time. This confirmed one consistent pattern; namely, that the successful development of a state was frequently achieved at the expense of the people's quality of life.[188]

On American soil, the experiment of migration of legal systems had begun and the confrontation between two legal systems was manifested; notably, the confrontation between the Anglo-Saxon common law system and the French Codification. Quebec opens an interesting space to develop this analysis. Once the colonial link was interrupted, the legal culture of Quebec was considered in Canada as a peripheral culture, constantly marked by foreign influence. The synthesis was inevitable: a mixed legal system.[189]

An historic event marked the course of the legal system of Quebec. First, English pragmatism refused to impose overly and abrupt change in Lower Canada; but secondly, the English Parliament's decision to vote for "the laws of Canada" was taken in consideration of the independence movement of the American colonies.[190]

In Asia, notably in India, the legal system was strongly imbued with religious content and with moral consequence from its inception. To perceive this feature, both then and now, it is helpful to examine the concept of "Dharma." …Dharma signifies general daily rituals of spiritual culture, but also entails legal duties and obligations as well as the law itself".[191] The Dharma word comes from the root *Dhri*, which signifies both the human mind and the state. It generated the ethical context of the people, evolved individual consciousness about duties and obligations, and maintained the state within the boundaries of law and order. The Indian report warns us, however, that the word Dharma should not be misunderstood as religion.[192]

India can add cultural value to the analysis because its territory was a convergence of diverse and even exclusive legal cultures. The social system of Muslims was based on Islamic law. Sovereignty, in the Islamic state, is the divine God, based on Shari'a. The Qur'an is of absolute authority; with all controversy centering on its interpretation. It is this interpretation from which Muslim Law or Shari'a law derives.[193]

---

188 *Idem.*
189 Refer to the Quebec National Report published in this Volume.
190 *Idem.*
191 Refer to the Indian National Report published in this Volume.
192 *Idem.*
193 *Idem.*

The final reflection in this period is about the edges of the countries that supply the legal systems and legal interactions. The East and West on Russian soil; legal systems which are governed by religious fundamentals, such as the case of the Near and Middle East, but above all, in this analysis India is and remains unique.[194]

II. FROM THE FRENCH REVOLUTION TO THE FIRST WORLD WAR

The formation of law was heavily dependent upon European legal systems. The Australian report suggests that it had been subject to the "tyranny of distance". [195] Australia was too far from Europe and the Americas, and surrounded by British, French, Dutch, German and American colonies. The Australian judiciary followed English precedents without further analysis. Nonetheless, the creation of Australia's High Court at the same time of the creation of the Federation produced substantial changes in the next cycle of Australian history.[196]

Meanwhile, China was under the control of the West, and only Japan and Thailand were outside Western domination and rule. One of the most relevant cases in the processes of legal acculturation in Asia was, and undoubtedly still is, Hong Kong.[197] At the outset of this colonial era, a multicultural system existed where Chinese legislation, along with a system of common law, was applied. Chinese uses and customs were also enforced unless modified by the authority of the British Crown, or if they proved to be inconsistent with the fundamentals of the common law. Consequently, it is argued that, in the colonial age, a "fused" common law system was enforced.[198]

In the same region, and from a different culture perspective, Portugal colonized Macau and faced, due to its iron-fisted codification system, substantial problems in its colonization.[199] The effectiveness of its system of law was hindered in an environment in which Chinese law and the customs and traditions of Cantonese culture ruled. The outcome, which was a hybridized system, was inevitable.[200]

Farther south, in India, the colonial period was instrumental in the formation of its current legal system. Laws and institutions were based on

---

194 *Idem.*
195 Refer to the Australian National Report.
196 *Idem.*
197 Refer to the Hong Kong National Report published in this Volume.
198 *Idem.*
199 Refer to the Macau National Report published in this Volume.
200 *Idem.*

English law, the English legal system and the English language.[201] This was one of the most relevant legal transpositions in legal history. Unlike many other empires, the huge edifice of this empire was created by a company that was organized in England for promoting British commercial interests.[202]

The Indian reporter[203] provides the analysis by documenting that the Indian laws existing at the time were very much interwoven with religious customs, institutions and beliefs and were inconsistent with the beliefs, principles, feelings and habits of the European Christians. This demonstrates the need for the "enlightened policy" known as the Warren Hastings act of 1772, which gave equal status to the Hindu and Muslim laws, with an element that gave stability to this varied legal system, by incorporating the English concepts of *justice, equity and good conscience*.[204] To ensure further stability, the Privy Council accepted the authority of the ground-breaking writings of Hindu jurists, where the custom was established as one of the principle sources of law. The Islamic law took another route where the Privy Council gave priority to ancient writings of Islam, which led to rigidness in this legal system.[205]

In Europe, many countries had been wallowing in the same culture for a long time. Due to this same background, it was not surprising that the adoption of the first Italian Civil code of 1865 incorporated a significant French influence.[206] French literature was translated and widely diffused throughout Italy. The Austrian legacy also epitomizes an important source of legal transculturation. The Italian legal elite turned their eyes to the German historicist school for jurisprudence, leading to a wide array of German legal literature being translated and studied intensely in Italy.[207]

Farther north, Professor Husa, referring to the so-called Nordic States, maintains that the stories we tell ourselves do not describe the reality; however, they do affect our understanding of that reality. Common law and civil law, as well as Nordic law as a subgroup of civil law, still exist as pieces of organized macro-comparative discourse. To touch on only one episode in this period in Imperial Russia, the Napoleonic Code of 1804 was revived in Poland (Tsardmon of Poland) by decree of the Tsarist Government effective in Poland when the country was part of the French Empire.[208] Finland has special laws based on the Swedish Code of 1734; the Hidayah, an Islamic

---

201 Refer to the Indian National Report published in this Volume.
202 *Idem.*
203 *Idem.*
204 *Idem.*
205 *Idem.*
206 Refer to the Italian National Report published in this Volume.
207 *Idem.*
208 Refer to the Swedish National report published in this Volume.

code, containing legal rules drawn up in the twelfth century that regulated such issues as personal status and property relations, remaining in effect in the Central-Asian Khanates.[209]

In Russian territory, there was a constant confrontation between Slovophil and Westernphil[210] that prevailed during the whole of the nineteenth century and the early years of the twentieth century. The outcome of this ideological battle determined the major development pattern: namely, inclining to be "Western" or "Eastern" was the dilemma.[211]

The Russian report noted that in general, the reason for this was the prevalence of the East throughout the whole history of Russian law against western private-property-centered legal orders that became more and more powerful. They determined the legal ideology of liberal reforms from the end of the nineteenth century until the beginning of the twentieth century.[212]

In the southern part of the European continent, in the African Maghreb, the evolutions of law took a different course, evidenced by the Tunisian case, which describes a different periodization.[213] Three periods are identifiable: the first extends to 1881, the date in which the French protectorate began. As a Muslim country, Tunisia was governed by a religious law, namely Islamic law, which was essentially doctrinal and not written. The second period was characterized by the link between the French and Tunisian legal systems. The third period[214] began with Tunisia's independence in 1956, when the legislature regained its sovereignty.

Moving to the Americas, in Lower Canada, the French inhabitants saw in codification the possibility of resisting the penetration of the English system's "judge-made law". Additionally, they saw that codification could facilitate the diffusion of law amongst the immigrants.[215] In this way, Lower Canada was given the task of adopting codification largely based on the French model and drafting it into both French and English language. As a result, biculturalism became the backbone of the Canadian Confederation.[216] The Legislative Assembly of Lower Canada used the codification of civil law to standardize the customary law in the whole province. This movement was characterized by a conciliation of the two main legal traditions existing at this time: the Anglo-Saxon common law and the written law. The

[209] Refer to the Russian National report published in this Volume.
[210] *Idem.*
[211] *Idem.*
[212] *Idem.*
[213] Refer to the National Tunisian report published in this Volume.
[214] *Idem.*
[215] Refer to the Quebec National report published in this Volume.
[216] *Idem.*

vocabulary employed is French, even when the legislation clearly recognizes Anglo-Saxon influence, especially in relation to the advertising of real rights. The use of Anglicism's in the code illustrates the legal acculturation process of the law of Quebec.[217]

As referenced by the Quebec reporter,[218] the defense of the French model and the neutralization of other influences reveal a principle of representation of the society and its values. Where it is existent, the mixed character of the tradition of Quebec is clear in the judicial law, which undoubtedly marks the mixed character of the legal system of Quebec.[219]

In this period of history, a legal system emerged that would change the legal landscape of the world. The thirteen American colonies hindered the enforcement of the common law system at the outset, especially in New Jersey and Rhode Island. The French system did not provide a suitable alternative, due to the simple fact that the vast majority of the population did not speak, write, or read French.[220] Additionally, the judges were not trained in the enforcement of French or any other foreign language.

With the expansion of commerce, industry and agriculture, the former English colonies implemented new rules of law to settle disputes.[221] The compatibility between the colonial and English legal traditions and cultures, especially with the tradition of *stare decisis* in the colonies, facilitated the expansion of the common law in the brand-new American system.[222] The only exception to this was Louisiana, whose population, in large part, spoke French and not English, thus did not understand the new legal system, nor, with its monarchic culture, the system of democratic governance.[223]

It was not until 1839 that Field, a lawyer from New York, set out to codify and reform the civil and criminal legislation of New York. His objective was straightforward: make the legislation understandable to the people in a simple, clear and concise way.[224] What must be emphasized is that the introduction of the Field' Codes by no means signified abandoning the tradition of the Common law, but quite the opposite. He wanted to preserve and exalt it, by cutting out its excrescences and translating it into

---

[217] *Idem.*
[218] *Idem.*
[219] *Idem.*
[220] Refer to the American National Report published in this Volume.
[221] *Idem.*
[222] *Idem.*
[223] *Idem.*
[224] *Idem.*

the language of the people. The Field' Codes were the catalyst to reform state law, both civil and criminal.[225]

Farther south in the Americas, the Argentine report[226] highlights the Veléz Sarsfield' Code of 1869 as a clear example of legal transpositions whose sources were varied. The code clearly identifies with the Argentine ethos. Veléz Sarsfield himself predicted his success by saying: "Give me a different society and I will give you different laws".[227]

This period concludes with the end of World War I, marking the end of the colonialist period and a substantial geopolitical change.

III. FROM THE END OF WORLD WAR I TO THE FALL OF THE BERLIN WALL IN 1989

In Asia, particularly in Australia,[228] this period marked a gradual detachment from the British Crown. The Australian High-Court started by examining and defining laws and rights, building up a base of Australian-made law that, in some regards, strayed away from other common law countries like the United States, but at the same time maintained the existing legal culture.[229] An interest in national identity began to permeate the country in such a way that, in the influential essay "The Cultural Cringe," the writer Philips accused the Australians of underestimating their talent and local products and looking slavishly to other countries, particularly England. Furthermore, it was argued that Australia had a "legal cringe" with England, as mentioned by the Australian reporter.[230]

More revealing, however, is the approach supported by the Australian Chief Justice Gleeson,[231] who maintained that the Australian constitution was not the outcome of a political or legal culture, and was even less due to historical circumstances, which would have created an expectation of significant limitations to the legislative branch with the aim of protecting individuals. The Australian constitution was not a result of a revolution or of a revolt against oppression, but rather an agreement to constitute a federal government under the British Crown.[232]

---

225 *Idem.*
226 Refer to the Argentina National report published in this Volume.
227 *Idem.*
228 Refer to the Australian National Report published in this Volume.
229 *Idem.*
230 *Idem.*
231 *Idem.*
232 *Idem.*

Likewise, in many other countries in this period, Australia[233] was subjected to an economic interdependence on a grand scale,[234] dominated by multinational corporations, which had resulted in a redefined relationship between globalization and what has been called "legal transnationalisation".[235]

In India, after the Independence, there was a surge of strong national sentiments that believed India should break away from the borrowed laws of England and develop a legal system under new values.[236] Free India had to find its conscience in its own realities and no longer in alien legal thought.[237]

An irrefutable test of the process of hybridization is the adoption of the precedent that forms the basis of common law. In the common law system, it is the judge who hears the controversy and it is he who is bound by the theses of precedent.[238] The justification for this is that it is conducive to legal certainty and that it provides a basis for an orderly development of legal rules. The national report also points out that the Englishmen who presided as judges and practiced as lawyers in the courts of India, whether of the Crown or the Company, followed the English tradition and relied on precedents.[239] The Company's courts, under the premise of "justice, equity and good conscience," and the Crown's courts being bound to administer it, used to draw freely on the English law and therefore on the decisions of the English courts.[240]

In this way, the constitution of India requires that the law declared by the Supreme Court[241] be recognized as binding in all courts within India. However, as regards the decisions of the High-Courts, the theory of precedent is still based on such judicial declarations. It is thus clear that the binding force of precedents is firmly established in the Indian legal system. The judgments delivered by the higher courts are as much the law of the land as legislative enactments.[242]

---

233 *Idem.*
234 *Idem.*
235 *Idem.*
236 Refer to the Indian National Report published in this Volume.
237 *Idem.*
238 *Idem.*
239 *Idem.*
240 *Idem.*
241 *Idem.*
242 *Idem.*

Currently, the striking features of India are of course its large population and its diversity of religion and culture.[243] The present legal system and hierarchy of courts, as well as the codification of the laws through legislation on the various aspects of private law affecting succession, inheritances, marriage, matrimonial remedies, guardians, maintenance and adoption, is based on the English legal system.[244] This was particularly relevant for the Hindus, who were the majority of the population, as it was instituted soon after independence and after secular law had been made applicable to other communities. Furthermore, after independence, the custom of excluding the Muslims, who are governed by their personal laws, is still recognized as legal and legitimate.[245]

The complexity in the shaping of India, however, makes it appear like a kaleidoscope. In this way, in the region of Pondicherry, under French control at the time, the French legislation did not only apply those laws which were of French origin, but also those known as "renonçants," as well as the laws of the Christians living in this region.[246] The term "renonçants" was employed by the French courts to refer to all those, including Christians and Hindus, who belonged to lesser castes. It renounced their personal status and espoused French law.[247] These people were governed by the French Civil Code in matters relating to marriage, divorce and other family matters. French law, thoroughly elaborated in Europe, thrived well and could be applied smoothly on Indian soil. The descendants of the "renonçants" continued to be governed by the French Civil Code even after the territory of Pondicherry became part of the Union of India.[248]

The presence of Portugal in India differed in substance to that of the British presence. The Portuguese entered into Goa as the representatives of the Portuguese Crown and not as a company of traders.[249] The Portuguese believed in the right and duty on the part of their sovereign land to administer justice in Goa, just as the administration of justice was the business of the King of Portugal from 1510. The Union Territory of Goa, Daman and Diu (as it was then known before the grant of statehood by the Central Government), had, at the time of liberation, a well-developed judicial system based on continental jurisprudence.[250] The system was not

---

[243] *Idem.*
[244] *Idem.*
[245] *Idem.*
[246] *Idem.*
[247] *Idem.*
[248] *Idem.*
[249] *Idem.*
[250] *Idem.*

merely structures and rules, but was a sum of attitudes and an approach to legal problems; in other words, a sort of legal culture.[251]

Moving north into China, the legal transpositions that took place there began towards the end of the nineteenth century and the beginning of the twentieth century. In this case, the legislation was written following the Japanese model of European transpositions of private law.[252] This legal culture remains in force today, as China maintains fidelity to a system of written law, even amidst an important convergence of codification and common law. In such a way, according to the national reporter Professor Shijan Mo,[253] legal culture and legal transplants are two interactive concepts that have evolved in combination with the transposition of common law into China since 1978. The use of legal culture and the common law legal transposition is qualified by the convergence of civil law and common law in China.[254]

One of the most relevant issues in the Chinese report[255] is how legal culture is understood. Legal culture in Chinese terms is twofold; the first part being inclusive of all law-related elements, such as legal thoughts, legal conscience, legal acts, and legal institutions as well as the implementation of mechanisms and the symbolic system consisting of codes, precedents, customary law and practices. The second part consisting of a body of formal law (such as codes, legal institutions and facilities) and legal values (such as knowledge, beliefs, judgment and attitudes) as well as human behaviors of those closely related to law.[256]

After the Second World War in Scotland occurred what was coined as the "first legal Renaissance",[257] which sustained that the Scots law was an authentic emanation of the Scottish spirit. As stated by the Scottish national reporter: "Scots law has a destiny to be a bridge between the common law and civilian systems within the European Community".[258] Roman law emerged again as a driving force in the Scottish legal system even in the organization of university courses. Needles to say, that the other important driving force was England, which fostered the transfer of techniques of law making and enforcement.[259]

---

[251] *Idem.*
[252] Refer to the Chinese National Report published in this Volume.
[253] *Idem.*
[254] *Idem.*
[255] *Idem.*
[256] *Idem.*
[257] Refer to the Scottish National Report published in this volume.
[258] *Idem.*
[259] *Idem.*

In Continental Europe, the rise of the European Union signified the course of evolution of many, if not all of the European countries that have been influenced either directly or indirectly by this legal model.

In this way, the legal system of Denmark[260] has been hallmarked by the directives of the European Union. Additionally, it has taken a significant lead in the harmonization of European legislation through the salient *"Lando Principles."* Nevertheless, in Denmark there has been, as is the case in many other countries, a natural resistance to admit the importance of the legal transpositions that have played an integral role in the evolution of its legal system.[261]

The legal transposition has not only been realized through legislation, but has arrived through other, very different routes, notably legal literature. In this way, it is revealing how German legal literature in Italy reinvigorated the development of law, and worked as an antidote against the widespread attitude that the highest level of thinking about a law was merely to learn the text of the civil code.[262] With respect to the impact of foreign law in a domestic environment, the Civil Code of 1865 was substituted in Italy for the Civil Code of 1942 at the height of the fascist era. While the Italian code was close to the French Civil Code, the structure of it never managed to satisfy the Italian writers who were more influenced and convinced by German literature. They complained that the French Civil code was too elliptical and imprecise in practice.[263]

The early 70's consummated one of the greatest metamorphoses of the Italian system,[264] whose conceptualization was drawn from prestigious and internationally-recognized Italian scholars. The Italian legal landscape changed with the introduction of divorce and reform of family law based on the principle of equality between spouses.[265] American law started to ingrain itself in the Italian practices, specifically in the area of law and economics.[266] Additionally, it started to be commonplace for Italian judges to adjudicate with mention and reference to foreign law. Needless to say, Italy could not detach itself from the directives coming from its peers, the European Union and the jurisprudence of the Court of European Justice.[267]

---

[260] Refer to the Danish National Report published in this Volume.
[261] *Idem.*
[262] Refer to the Italian National Report published in this Volume.
[263] *Idem.*
[264] *Idem.*
[265] *Idem.*
[266] *Idem.*
[267] *Idem.*

Right at the crossroads between Europe and Asia was Turkey,[268] which is recurrently mentioned as one of the irrefutable successes in legal transpositions. This country adopted Swiss legislation verbatim.[269] To make it effective, Turkey had to abandon the religious system of Islam, abandoning a legal plurality that had dominated the Ottoman Empire. It also prohibited polygamy through the introduction of civil marriage and divorce, subject to certain rules. The effect of these transpositions was an innovation of new forms and concepts in Turkish law and a deep change in its social structure.[270]

In the extreme situation of Eastern Europe, the Socialist legal system dominated the twentieth century. During the Soviet era, the former USSR was composed of a number of diverse nationalities: Ukrainians and Belarusians, Kazakhstanis and Turkomans, Armenians and Georgians, as well as many others that were able to preserve their national identity and statehood.[271] Nevertheless, there was a severe centralization of power imposed by Soviet Law and subject to the ideologies of the Communist Party. This is considered one of the causes of the collapse of the Soviet Union and its precipitous dissolution into fifteen new sovereign states, many of whom still preserve features of the former Soviet Law.[272]

It is worth mentioning that one of the features of Russian legal culture finds its roots in the Stalin era. This feature contributed to strengthening the nihilistic attitude towards the law. The power of the state was considered to be one that should not be limited or contained by law or justice.[273] The primacy of the state and the idea of the supremacy of force led to perverse principles of justice. The main objective of law was that it should be functional, executable, effective and culturally based upon the historic mentality of different members of the society in order to comply with their moral expectations.[274] That is to say that the Russian people obeyed laws, treating them as the supreme power; consequently, this made people morally suppressed and opposed to the laws. Therefore, every time a law was breached it was because the actions of doing so were expected to remain unpunished.[275]

---

[268] Refer to the Turkish National Report published in this Volume.
[269] *Idem.*
[270] *Idem.*
[271] Refer to the Russian National Report published in this Volume.
[272] *Idem.*
[273] *Idem.*
[274] *Idem.*
[275] *Idem.*

Even the definition of "law" acquired a specific meaning in the Russian political and legal environment.[276] While law is mainly a decision-making tool in the West, in Russia,[277] it is a synonym of competence, a mixture of wisdom, authority, justice and truth, similar to its definition in traditional Eastern legal cultures. However, while the integration of power, law and politics is treated as a main principle in China and Japan, and any disputes, or even the possibility of disputes, were discouraged at all, in Russia, any doubts in the impartiality of the law lead to circumvention of law and the negation of its regulating power and, as a result, legal nihilism.[278]

Modern Russian legislation developed under the influence of legal models of the most developed states: the United States, the United Kingdom, France and Germany. It was most obvious in the early 1990's when institutions of the Western law were actually transposed in such fields as bankruptcy, the securities market, banking and exchange trades, to name a few.[279]

Despite this, foreign legal rules have not taken root. In this regard, it is important to mention the fate of the 'Enterprises Insolvency (Bankruptcy) Act of 1992' modeled on American legislation.[280] In 1998, it was replaced with a new act which did fall within the scope of the legal regulation traditional for Russia, or the 'Trust Decree of the President of the Russian Federation of 1993.' In 1996, the Anglo-Saxon institution of trusts was introduced into the second part of the Russian Civil Code.[281] However, it has not been widely enforced, which is why the Committee of Improvement of Civil Legislation of the Russian Federation suggests a complete exclusion or significant amendment of the Chapter of the Code of Trust Contract.[282]

Moving to the American continent, the re-codification undertaken in Quebec in the second half of the twentieth century, accordingly, the Quebec reporter[283] alludes to the post-modernist flow that questioned the abstract and universal character of the law. At the end of the process of codification, the code in some ways reflected a post-modernist character, opening a dialogue between the different external sources and conferring a great power on the judiciary, as well as giving individuals great freedom of action.[284] The diversity of these sources and the absence of a specific-privileged model

[276] *Idem.*
[277] *Idem.*
[278] *Idem.*
[279] *Idem.*
[280] *Idem.*
[281] *Idem.*
[282] *Idem.*
[283] Refer to the Quebec National Report published in this Volume.
[284] *Idem.*

allowed great freedom for drafters of laws. This methodology favored acculturation by integration of foreign sources and it is precisely the acculturation by integration that marks the new Civil Code of Quebec, which, as a result, can be considered as an autonomous text that dominates the entire legal order.[285]

Farther to the south, mass production and consumption created a need for the United States to harmonize its commercial legislation.[286] This legislation was created without transpositions from other legal systems. In the Uniform Commercial Code no traces exist of any previous foreign legal system.[287] Furthermore, the United States developed a judicial system on its own, unique both in its composition and in its procedure. But in Texas and Louisiana, remnants of Spanish and French tradition still existed. The legal traditions of Texas and Louisiana remain pronounced, living illustrations of their foreign foundations. These foundations can be tight to the philosophies, ideologies, religions, sociological models and languages of the civil law systems, or the two sovereign powers that held sway, at one time or another, over these two states. This was identified in the American report, written by the scholar Levasseur.[288]

IV. FROM THE FALL OF THE BERLIN WALL TO POST-MODERNISM MOVEMENT[289]

Australia's history is marked by a movement towards acceptance of Australia's historical origins and the rights of indigenous people, which has made the absence of an Australian Bill-of-Rights increasingly obvious and salient. The Australian report suggests,[290] accurately that issue will occupy the debates in Australian legal fora in the coming years.

The Indian reporter also documented information about future trends of the Indian legal system, which, as a result of its history, will be marked by great complexity.[291] There are two essential requirements for any sound, effective system of administration of justice: first, a well-organized system of courts and secondly, a well-developed system of law. In ancient

---

285 *Idem.*
286 Refer to the American National Report published in this Volume.
287 *Idem.*
288 *Idem.*
289 Post- modernism is a term which was first used in the arts; however, from 1990, it was extended to other fields such as literature, philosophy and other areas of social science. In the visual arts, it meant the search for a new form of expression not previously seen in past terms, such as the reality of the XX century. The other great tendency in the XX century was precisely the radical transformation of this reality.
290 Refer to the Australian National Report published in this Volume.
291 Refer to the Indian National Report published in this Volume.

India, the laws themselves, as well as their evolution, implementation and administration were identified with the monarch being the source of justice.[292] The King and his appointees were bound by the rule of Dharma, which was a combination of religious instructions, a kind of code of conduct of life and laws. Customs remained a major source of law, exercising an overwhelming influence in the administration of justice.[293]

During the medieval period, the personal laws of the Hindus were not abolished or interfered with by the Muslim rulers, who created, transposed and established a sound and effective judicial system and laws based on the Qur'an. The British, who established sovereignty through a trading company, preserved and applied the personal laws of the indigenous population.[294]

However, the principles and doctrines of English law found their way in, creating a new legal culture through the interpretation of *shastric* laws and customs through the Privy Council. In addition, English law continued to apply the maxims of "justice, equity and good conscience".[295] The legal system and the laws were first established by the company, and then later enforced through the sovereign, creating strong and deep roots. The transposition is evident from its continued domination, as well as the adherence of the people to it in India's present system. Pre-independence-era laws are part of the present legal system in the Constitution of India.[296] The indigenous personal laws have been codified, particularly for the Hindus and Christians, in all major areas like marriage, succession, adoption and maintenance, while case law and custom remain un-codified.

Nowadays, Hong Kong is in a transitional phase.[297] In the Sino-British Joint Declaration, Hong-Kong was given great autonomy, except in politically sensitive areas such as foreign and defense affairs. In addition, a brand new legal system has been introduced, summarized by the phrase "One Country, Two Systems".[298] This model has been highly prized as a "significant breakthrough for the Chinese political and legal system." Whatever can be said, this new model has provided Hong Kong's residents with human rights, economic freedom, open society and pluralistic culture.[299]

---

[292] *Idem.*
[293] *Idem.*
[294] *Idem.*
[295] *Idem.*
[296] *Idem.*
[297] Refer to Hong Kong National Report Published in this Volume.
[298] *Idem.*
[299] *Idem.*

One study reveals that a significant majority of Hong Kong's society accepted the common law system, and they shared the conviction that it had to be preserved even when China reestablished full sovereignty.[300] The Chinese legal system, and in general the Chinese legal culture, is not absolutely incompatible with the fundamentals of the common law system. It can be argued that the interaction of the two legal systems, the Chinese and the "fused" common law system, has just begun, and under current trends the legal system of Hong Kong will go on to become one of mixed jurisdiction.[301]

With respect to Macau,[302] another Asian system in transition, a fifty-year formal agreement to respect its new economic and legal system was memorialized in the joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal.[303] It has been argued, however, that in contrast to Hong Kong, Portugal has left Macau with insufficient institutions to be able to preserve Portuguese cultural heritage, and without the fundamental and stable institutions that could nurture the development of the Portuguese legal system.[304]

Moving to Europe, the continent has also undergone significant and interesting legal metamorphoses. The legal systems of England and Wales were the source of the Anglo-American legal system, but with respect to legal culture and rules, there has also been a significant influence from the European Union in the last part of the twentieth century.[305] The processes of globalization have fostered an unprecedented movement of people and technology, but despite this, the English report maintains that a continued conceptual difference exists between civil -and common-law lawyers.[306] Common law has preserved its fundamental characteristics: trust, the doctrine of consideration, and the use of a formal document as deed, among others. Nevertheless, as the English reporter herself recognizes, through the 'Human Rights Act of 1998,' important areas of private law have been shaped by European jurisprudence, where fundamental rights at issue are: property law, family law, the law of defamation and privacy, as well as employment law.[307]

In the other part of the Island, emerged what was coined to be "the second legal Scottish Renaissance" due to the membership of the European

---

300 *Idem.*
301 *Idem.*
302 Refer to the Macau National Report published in this Volume.
303 *Idem.*
304 *Idem.*
305 Refer to the English National Report published in this Volume.
306 *Idem.*
307 *Idem.*

Union, devolution and the setting up of the new Scottish Parliament and the Human Rights Act[308] This fostered a rejuvenation of the "mixedness".

Central and Eastern Europe have also observed diverse transformations. At the turn of the twenty-first century, the Czech Republic went through a prodigiously important transition, witnessing the modification of key legal areas, including private law. In this way, a new Civil Code, a Commercial Code, and new Private International Law were created.[309] In forming the Civil Code, the drafters attempted to maintain Czech traditions, but still incorporated significant influences from the principles of private European law. This Civil Code was not intended to be an instrument to manage society, but more a guarantee of the free organization of private life to allow for a greater individual initiative. [310] The emphasis was on the autonomy of will.

The Romanian legal system, according to the Romanian report,[311] still conserves some Roman-Germanic elements and contains a mixture of coded and non-coded normative laws. The non-coded laws come mainly from the twenty-first century, and their application requires an interpretive process that is imposed not only by historical, social and economic elements, but principally by the need to integrate with community law and the jurisprudence of the Court of European Law of Human Rights.[312]

Such a method of application frequently generates a non-unitary legal practice, which has been strongly criticized by European institutions. Romania has made a significant effort to modernize their legislation, such as the adoption of new Civil and Penal Codes.[313] It is important that the new Civil Code both strengthens the private properties that already have a constitutional component and that the Code also completely eradicates the remnants of the Socialist regime. In sum, Romania is entering into a legal transition in accordance with the directives of the European Union.[314]

In Turkey, the Swiss legislation was finally replaced by the Audit Commission in November of 2001.[315] The Commission is made up of Turkish professors of law, judges, lawyers and officials of the Ministry of Justice.[316] The works of UNICTRAL, diverse international instruments, and

---

[308] Refer to the Scottish National Report published in this volume.
[309] Refer to the Czech National Report published in this Volume.
[310] *Idem.*
[311] Refer to the Romanian National Report published in this Volume.
[312] *Idem.*
[313] *Idem.*
[314] *Idem.*
[315] Refer to the Turkish National Report published in this Volume.
[316] *Idem.*

the directives of the European Union have been important in the change of the Turkish legal landscape.[317]

On the other side of the Mediterranean, the Tunisian report [318] maintains that the change in the system of law is only viable if a change in social values occurs concurrently. Without ignoring the legislation, the reforms of personal status are a clear example. Family Law in Tunisia was dominated by religious law and its form was easily modifiable at the time of independence.[319] Family structures are far from homogenous and evolution is not the same for all. The new Family Law of 1956 was consistent with at least one part of the society, and through legislation, it generated a social unity. The new legislation was a catalyst of modernization and evolution.[320]

Finally, on the American continent, the Quebec report[321] identifies a process of de-codification, where the legislature enacted specific laws in areas that were traditionally considered areas of the Civil Code. This resulted in a reduction of their preponderance in the legal system. Within the Quebec legal system,[322] numerous forms of legal acculturation become evident when examining judicial interpretation. When judicial interpretation hinges on the origin of the text, it can be considered legal acculturation by assimilation. Conversely, if legal interpretation is performed with a broader perspective, it produces a legal acculturation by integration. The mixed cultural character of the system is evident in the emphasis placed on the practice of law above the text of the code.[323]

The reduction of common law in the legal system is consistent with the post-modernist stance. The post-modernist thesis can be seen in the way people are valued, through recognition of their rights and liberties, and through the effort made to appreciate what governs a person's life and interests. Equally significant is the change in the Quebec public and private laws, through which fundamental rights are interspersed with civil law.[324] As a result, a new judicial culture was born.

Another symptom of the mixed character of the Quebec legal system is the institution of the trust. The initial trust model was Anglo-Saxon. Quebecois jurisprudence determined that English Law is pertinent in this

---

317 *Idem.*
318 Refer to the Tunisian National Report published in this Volume.
319 *Idem.*
320 *Idem.*
321 Refer to the Québec National Report published in this Volume.
322 *Idem.*
323 *Idem.*
324 *Idem.*

regard to the extent that it is compatible with the text of the Civil Code.[325] In the same way, Quebecois jurisprudence maintains that the bifurcation of property and the trust itself is totally alien to Quebecois law. Quebec has placed the trust directly in the law of property, though it has not done so without controversy, as is the case of France and Luxembourg, who incorporated the trust into their law of obligations.[326] The incorporation of the trust law of Quebec changed from a legal acculturation by hybridization to a legal acculturation by integration.[327]

SECTION THREE

CONCLUSIONS

An important insight, made by the Australian Judge Gibson, is that in this era, a battle will be very likely be fought between those with power and those without, which could ultimately cause a "culture war".[328] Some of these battles will be about gender equality, e.g. if woman should cover her head, face or entire body, according to religious convictions. The Australian report[329] ends by stating that "the increasing role of human rights legislation and the need to consult current social values may reduce the role of precedent, rendering this area of the law over to convergence between common and civil law systems in search of universal human values".[330] In her analysis the three biggest challenges to the legal system of Australia in the twenty-first century are: whether Australia should consider enacting a Bill-of-Rights; whether Australia should adopt a kind of American First Amendment about freedom of speech (or other human rights legislation); and whether Australia should become a republic. In the meantime, the Australian report refers to what currently prevails in Australia as "common law with Australian characteristics".[331]

If any categorical statement could be made, it would be that China is a country of civil law, or at minimum, that that was the path China followed when it began to undertake the recreation of its legal system in 1978.[332] China, however, did not transpose legal mechanisms without reservations. Quite the opposite in fact, it adapted many of the principles of its system of codification to conform to economic, social and cultural values. It is precisely this wisdom that has made China look for other jurisdictional solutions to

---

325 *Idem.*
326 *Idem.*
327 *Idem.*
328 Refer to the Australian National Report published in this Volume.
329 *Idem.*
330 *Idem.*
331 *Idem.*
332 Refer to the Chinese National Report published in this Volume.

legal problems.[333] To this end, China has initiated a legal inter-exchange with the American legal system. The simple question posed by the Chinese legal elite is: is the civil law tradition or common law tradition a religion or a solution-based achievement of human intelligence and knowledge developed in different, but incidental, historical and cultural backgrounds?[334] Hence, China may eventually propose the creation of a system that is, in principle, largely based on the convergence of both civil and common law.[335]

The Japanese report highlights Japan's legal cooperation in Southeast Asia, as well as the complexity of the legal transpositions promoted by the International Monetary Fund, the World Bank and other international bodies.[336] One tendency is clear: the international pressure to "westernize" the legal systems of the countries in this region. The Japanese reporter[337] notes that the countries in the region are now suffering even more from the systematic inconsistency of the legal system, as a result of the pressures of globalization and of the pressure of donors who have brought in various individual legal models that not only contravene each other, but also the existing local systems.[338] Accordingly, Japan has been cautious in its legal cooperation, conducting carefully customized surveys prior to each legal reform effort, and focusing on the judicial independence to allow judges to be catalysts to bridge the normative gap. This perhaps stems from Japan's own historical experience with code application in which judges have taken a serious catalytic role.[339]

An important analysis of this project comes from the Italian Professor Graziadei,[340] who argues that it is a great Western myth to claim that modern law is an asset of the West, who generously offers it to other civilizations. This myth, Graziadei claims,[341] belongs only to the West and does not correspond with reality. Another mistaken premise is that private law cannot be separated from political and social realities, despite the tendency to claim that it is autonomous from other branches of the law and other regulatory systems.[342]

The Italian example is symptomatic, in that alone the code does not create a national legal culture, and that legal culture is the outcome of legal

---

333 *Idem.*
334 *Idem.*
335 *Idem.*
336 Refer to the Japanese National Report published in this Volume.
337 *Idem.*
338 *Idem.*
339 *Idem.*
340 Refer to the Italian National Report published in this Volume.
341 *Idem.*
342 *Idem.*

tradition.[343] The codification process was successful because it was a new symbol of autocratic power; subsequently, it signified national unity and finally confirmed the positivist dogma that the state has a monopoly on the law.[344]

Professor Graziadei maintains[345] that the cleavage between the learned law of a country and the law by which a great part of its population lives may be so deep that these two normative worlds are truly alien to one another. This may happen even when the first of these laws rests on the foundations of a tradition firmly rooted in the history of a country, while the second relies on local practices with little or no official recognition.[346]The issue here is not what is foreign and what is not, but rather who controls the law and who instead only experiments with its application. The distance between the law in the books and the law in action is often painfully evident. Consequently, comparative law has been a vehicle for receptions and transpositions.[347]

For the Dutch report,[348] legal culture must be analyzed with respect to the link between politics, law and justice that determines it, and should be determinable by the perceptions and expectations (which are also determined by tradition). The legal transpositions do not materialize foreign ideas, rules and institutions; they describe a process of translation and acculturation in the legal culture of the receptive society.[349] The success of a legal transposition depends on whether the legal innovation fits into the existing legal culture when the political conditions and the prevailing social needs allow.

The English report[350] rightly suggests, in turn, that it is inappropriate in these times to argue that a legal system is completely indifferent to others. Although the English and Welsh system resists codification, the importance of legislation is ever-increasing. The enormous increase in analysis of this movement among academics is contributing to the critical spirit and encouraging different perspectives on legal systems.[351] In the British Isles Scots laws and the Scottish legal system have attracted the attention of the European Union, where sometimes it is regarded as a model for the new *ius commune* that is being developed.

---

343 *Idem.*
344 *Idem.*
345 *Idem.*
346 *Idem.*
347 *Idem.*
348 Refer to the Dutch National Report published in this Volume.
349 *Idem.*
350 Refer to the English National Report published in this Volume.
351 *Idem.*

To give a clear idea of the different metamorphoses that can occur even in Europe itself, the case of the Nordic countries[352] is especially symptomatic of them, especially with respect to harmonization and legal collaboration. Until recently, such collaboration had two aspects: national and Nordic.[353] In the national aspect, each state generated its own legislation on that which they believed to be relevant issues within the framework of legal cooperation (e.g. maritime law, law of obligations, family law), but part of the preparation was done in joint committee meetings.[354] This feature of collaboration in basic fields of law led to a high degree of harmonization, which legitimized the idea of conceiving of the Nordic countries as one legal family. Despite the strong collaboration and partnership, membership of some of the Nordic countries in the European Union, combined with the obligation to implement the communitarian directives, slowed the pace of this harmonization.[355]

The European directives have even led to the case of the Belgian reporter rightly asking, "…one could wonder whether Belgian law really exists. Somehow, the attempts to go our own way have been shallow".[356] The same consideration is valid for Croatia, a state whose independence throughout history has always been challenging.[357]

One of the most positive conclusions is that of the German report,[358] which suggests that the German legal system has been constantly influenced by foreign cultures and legal transpositions. The debate over the idea of legal transposition is included in the German literature in the analysis of the reception of law. Recently, German legislature has become the uniform international law, and is referred to as "soft law," especially with respect to those "principles", such as the "Lando Principles", that have a European approach, or the "UNIDROIT Principles" which are intended to be universal.[359] The European Directives have fostered a dual national and community system where it is much harder to identify legal transpositions and to implement European-Union ideas into domestic law. This statement is equally valid for Greece.[360]

---

352 Refer to the Danish and Swedish National Reports published in this Volume.
353 *Idem.*
354 *Idem.*
355 *Idem.*
356 Refer to the Belgian National Report published in this Volume.
357 Refer to the Croatian National Report published in this Volume.
358 Refer to the German National Report published in this Volume.
359 *Idem.*
360 Refer to the Greek National Report published in this Volume.

The Polish report[361] contains final reflections that cannot be ignored. The process of globalization leads to a degree of integration and evokes a process of cultural diffusion." Cultural diffusion", as Eward Burnett Tylor defines it, "is a process of social changes resulting from international and intercultural contacts, the spread and infiltration of the products of one culture to the other, and the use of "transplants".[362] The culture diffusion process leads to the transformation of cultural system interaction, through transculture to acculture, to its ultimate level of deculture, that is to say, the disappearance of a specific culture based on local tradition".[363]

Serbia, as a European state, is associated with the culture of the continent.[364] In this way, all the principles that did not originate in Serbia were transposed from other European legal systems.[365] The reception of diverse principles and institutions has had mixed success. One of the possible reasons for this may be that the reception must harmonize with the real needs of the society.[366]

Finally, in Russia, as Dr. Khabieva, the Russian national reporter[367] affirmed, national laws should intrinsically reflect the rational axiological basis of a society, as it constitutes the backbone of the social culture and political life in the country.[368]

It is sometimes necessary to determine whether the judicial development vector is correct or incorrect. Cultural progress rests on fine-tuned algorithms for the assimilation of intellectual and material products to ensure production, growth, social welfare and everyday comfort. [369] Therefore, positive movement is supported, in the first instance, by sustainable rules for the reproduction of the means of subsistence; and in the second instance, by innovative processes such as the spirit of creative work, improvement, optimization, or invention. This creates an optimal synthesis, leading to a beneficial cumulative effect. Without conducting previous research into the consequences of legal borrowing, transposing legal institutions most commonly yields negative results.[370]

---

361 Refer to the Polish National Report published in this Volume.
362 *Idem.*
363 *Idem.*
364 Refer to the Serbian National Report published in this Volume.
365 *Idem.*
366 *Idem.*
367 Refer to the Russian National Report published in this Volume.
368 *Idem.*
369 *Idem.*
370 *Idem.*

Various phenomena may indicate apparent patterns at different stages of historical development. Traditions and tacit legal rules seem to be the most significant indicators. Emerging social issues could require legal transpositions that cause no resistance because such processes turn out to be less linked to legal views and traditions.

The general cultural or civilizational level of the development of any society may prevent reception of law.[371] The law of the more socially and economically developed state is likely to reject other legal systems from less developed states, like, for instance, the rejection of Mongol customary law by the Russian State during the Tartar Yoke.[372]

In the same way, according to the Russian report,[373] in the last few years there has been an excessive adoption of Western terminology that is incomprehensible not only for the population, but for many lawyers as well.[374]

Foreign terms are often introduced without taking into account legal definitions that have been developed by Russian legal science.[375] As a result, contradictions arise wherein the same concepts are defined differently in different sectors of legislation. But there must be a unity in the terms and they must service the legislation as a whole, regardless of the sector.[376]

The situation is made worse by the fact that the terms are adopted from different legal families, mainly from continental law and common law.[377] As a result, a "double-layered" basis for conflicts between legal rules arises, where the first layer is the contradiction between the Russian and foreign terms and the second layer is the contradiction between terms from different legal families.[378]

In sum, an important tension between traditionalists and liberals can be observed in Russia.[379] On the one hand, development is oriented towards the static ideal of preserving former norms of life, and on the other, to its transformation through the embracement of new ideals, the refinement of state institutions, increasing the efficiency of production, and expanding the

---

371 *Idem.*
372 *Idem.*
373 *Idem.*
374 *Idem.*
375 *Idem.*
376 *Idem.*
377 *Idem.*
378 *Idem.*
379 *Idem.*

potential of the individual.[380] Static ideals are the most important for traditional culture, while dynamic ideals are the most important for liberal culture.[381]

The question Dr. Khabrieva[382] poses is fundamental: "Which of the cultures and traditions is the dominant one?" It is clear that judicial science is insufficient for this kind of comparison; here we need a socio-cultural comparison of the historical experience of different countries and their development programs, which could become the basis for the integration of society, thus preventing its collapse and disintegration.[383]

After the chaotic development of Russian legislation in the last decade, where a large part of the legislation was made under the direction of various business groups to serve their own interests, the Russian situation has changed substantially.[384] This has been achieved by the adoption of systemic legislation, such as the Civil Code, as well as peripheral regulations. In the immediate past, a large part of the legislation was imposed by the government. Some processes of hybridization have been successful as a derivative of the synthesis of different legal categories.[385]

In Russia,[386] the perception that society has about the law has changed substantially, invoking references both from the West and the East e.g. Japan and South Korea, These references have created a conviction that law is an effective means to promote economic growth, restore order, shore up the democratic process and ensure the protection of rights and freedoms.[387]

The signs of legal hybridization are the combination and synthesis of diverse elements of law. They can be recognized in legal terms, norms and institutions. However, it is very difficult to recognize legal hybridization. Sometimes specific adopted features can be found in authentic national and traditional elements of legal cultures. On the other hand, various configurations of legal institutions and norms make it impossible to definitively recognize hybridization that appeared some time ago.

Legal hybridization can have both positive and negative results. Accordingly, the task is not only to select those elements of foreign legal

380 *Idem.*
381 *Idem.*
382 *Idem.*
383 *Idem.*
384 *Idem.*
385 *Idem.*
386 *Idem.*
387 *Idem.*

experience or advanced ideas of international juridical science that can ensure positive legal improvement, but also to weave these elements skillfully into the texture of domestic legislation and into the traditional environment of legal activity. Thus, it is important not only to meet juridical technical requirements, but to comply with the mentality and expectations of the society.

In the near East, Israel[388] has proven a paradigmatic case. It could be suggested that "transposition" refers to a law that migrates from one legal system to another, but nothing is further from reality. The Israeli report[389] highlights precisely that legal transpositions refer as well to foreign sources, historical influences and the inclusion of ideas. Israel may be a pioneer state in this regard. The most recent draft of the Civil Code could be a particularly salient place to observe legal transitions, and specifically, how foreign ideas are received and reworked into a foreign jurisdiction. But equally, and most relevantly, as is maintained in the Israeli report[390] the adoption of foreign models is not compatible with the development of a national legal culture.

And in the Americas, as a final reflection, the Quebec report[391] must be mentioned. The Canadian reporter maintains that anyone who may be interested in the process of acculturation must develop their analysis in two relevant parts: the legal institution and the legal vocabulary.[392] Acculturations are phenomena closely linked to the evolution of law, and history has demonstrated that these processes have occurred with different intensities.[393] The post-modernist era is characterized by marginalization of the system of codes and as a defense of civil law and the values it conveys. Post-modernity has created new paths and incorporated new values into civil law.[394]

The Mexican reality, a land that has been host to a number of transpositions over time, is a salient point of reference in our research. Often, key figures, though strangers to the discipline of law, offer perspectives which give clarity to legal thinking, such as the Nobel Prize Laureate, Octavio Paz. Paz, when referring to Mexican history, stated: "…Beyond the success and failure, Mexico is confronted with the same fundamental notions that have troubled the most brilliant minds since the nineteenth century: how to

388 Refer to the Israelí National Report published in this Volume.
389 *Idem.*
390 *Idem.*
391 Refer to the Québec National Report published in this Volume.
392 *Idem.*
393 *Idem.*
394 *Idem.*

modernize Mexico. In the nineteenth century they thought that just incorporating the liberal ideas and democracy was enough. Nowadays, after two centuries of trial and error, it seems quite evident that societies evolved very slowly, and in order for the reforms to bear fruit, they have to be in harmony and respect with Mexican traditions…".