LEGAL CULTURE AND LEGAL TRANSPLANTS
POLISH NATIONAL REPORT

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1. In the modern world —the Global Village, as described by Marshall McLuhan in 1960— the spread of information is very rapid. It has the direct impact on the shape of the world and speeds up its social, political and economic changes. Even the most remote corners of the world are brought closer and integrated. Information contributes to the removal of old barriers and prevents the forming of new ones, whereas closer relationships and interdependences are built up. The process has been noticeable since the time of the great geographical discoveries and it has gained its momentum since the computer revolution in the second half of the 20th century. The spectacular accelerated exchange of information on the global scale has supported and increased the dynamics of the globalization process for many political, economic and social institutions. It particularly affects the legal functions of societies. The universal character of the globalization process can be noticed, associated with convergence in all aspects of social life.[1] The process is spontaneous, as provoked by the availability of information to private actors of social platform; it can also have its intentional and controlled dimension, especially if public entities are involved. In the latter case, the globalization results in institutional instruments meant to unify the world on different levels, above all in economic, social-cultural and legal aspects. The globalization of the world causes many phenomena criticized by its opponents and judged positively by its proponents.

2. The goal of the globalization is the social, economic and cultural integration of the world. The integrated global world should be characterized by high intensity and frequency of social contacts, pluralism and acceptance of existing systems of values and standards; a highly developed system of rules and standards of social coexistence, or even legal standards, should be included. Globalization is the approach and infiltration of societies, their different systems and institutions and values, also on the cultural level, including legal culture.

3. Globalization leads to integration (even though the notions of globalization and integration are not the same) and evokes the culture

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[1] Cf. Kaliński, J., "Globalization in Historical Perspective", *Globalization A to Ż*., 2004, Warsaw, National Bank of Poland, p. 34.

diffusion process. Culture diffusion, according to sociologist Edward Burnett Tylor, 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". Consequently, cultures become more similar and progress of culture can be noticed, independent of factors stimulating cultural evolution. The culture diffusion process leads to the transformation of cultural systems interactions – through transculture to aculture, to its ultimate level of deculture, i.e. the disappearance of a specific culture based on local tradition.[2]

4. The effect of globalization results from different social, economic and cultural phenomena. Legal transplants are included in the problems of globalization and worldwide integration, regarded as a way of the unification of the world and its institutions.

5. The fundamental questions related to law and legal culture must be pointed out to determine the scope of this contribution.

Firstly, the deliberations on the legal transplants are related to the systems of statutory law.

Secondly, the deliberations concern the systems of concrete law as sets of legal norms effective in specific place and time, within their hierarchic order and, in principle, coherent in logic and axiological aspects.[3] Furthermore, the systems are not identical and can be differentiated. It is worth mentioning that the theory of law disputes whether distinctive characteristics can be indicated to decide upon the identity and uniqueness of the systems of law. Some believe that it is not the systems of law themselves that have the unique characteristics; but they become unrepeatable in consideration of and in the environment of specific moral principles, political institutions, economic and cultural factors and their impact on legal thinking, procedures and institutions.[4] Opposite opinions also exist. Joseph Raz wrote of the unity of legal systems, in its formal and substantive sense, and he defined the formal unity as „identity".[5] In his opinion, the distinguishing factor of the systems is"the content of the law and the manner they are applied"[6]. According to this author, the identity of the systems is not based on the identity of institutional details but it pertains to

[2] Cf. *New Universal Encyclopaedia of Polish Science Publishers*, volume 2, Warsaw 1997, page 156.
[3] Cf. Lang, W. *et al.*, *Theory of State and Law*, Warsaw 1986, p. 19.
[4] Cf. e.g. Feldman, E., "*What's Japanese*, About the Japanese Legal System? An American Perspective", *Paper presented at the annual meeting The Law and Society Association*, Montreal, Quebec, Canada, May 27th, 2008, *http//www.allacademic.com/meta/p235960_index.html.*
[5] Cf. J. Raz, *The Authority of Law. Essays on Law and Morality*, Oxford, Clarendon Press, 1979, Chapter II item 5.
[6] *Ibidem*, p. 79.

"…the all-pervasive principles and the traditional institutional structure and practices that permeate the system and lend to its distinctive character".[7] For the sake of this essay, I accept his point of view of basic uniqueness of the systems of law; I also accept that the identity of the systems is gradated. Concrete legal systems belonging to the same cultural group have low level of identity whereas those from different cultural groups are highly identifiable. Low identity is demonstrated in the material aspect – procedural and institutional similarities, manifested also on the level of details of legal institutions; the normative content of these systems is repeatable, they are hardly differentiated and characterized by sui generis identity interference with full formal identity. However, high identity level is noticeable in legal systems belonging to different legal cultures. The differences pertain not only to institutions, procedures and other details of legal regulations, but also to principles, structures and even functions of law (e.g. in western philosophy of law, resolving of a conflict is discussed, whereas far eastern philosophy dissolving of a conflict is aimed at, which has a direct link to legal procedures and the philosophy of the process).

Thirdly, it need be assumed that legal systems are a part of the specific type of legal culture and at least some functional relationship between them exists.

Legal culture is a part of general culture and deals with the relations and attitudes of legal entities to law. It consists in "habits and values related to the acceptance, assessment, criticism and use of existing law".[8] In other words: "Legal culture is the specific environment of statutory law. Ahead of the law, legal culture shows the legislators the aims of law and acceptable methods of their implementation, fulfilling the function of repairing the legislative errors and setting merciless criteria of assessing its norms. Legal culture is autonomous of legislative authorities and reminds of the autonomy of law. Its principles and rules protect the fundamental values of law, such as reliability, openness, confidence .... it provides a great value".[9]

Legal culture is strictly interconnected with tradition and undergoing changes in the development of law. The history of law and the tradition of law can be divided into three basic stages: primitive, old and modern law.[10] They are a point of reference in the assessment of the development of law nowadays and in the past. Tradition, alongside with other factors, is

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[7] *Ibidem*, p. 79.

[8] Podgórecki, A., *The Prestige of Law*, Warsaw, 1966, pp. 179 and 180.

[9] Wronkowsk-Jaśkiewicz, S., *About the Proclamation of Law and Legal Culture http://www.trybunal.gov.pl/wiadom/komunikaty/250107a/Slawomira%20Wronkowska.pdf*, p. 17.

[10] Cf. Uruszczak, W., "Problems of Scientific Research", *Tradition in the History of Law. In memoriam of professor Adam Vetulani*, vol. 3, 2002, pp. 429 and the following ones.

significant in the typology of law systems, as distinguished by Rene David. He classified the following six types – families of law: Roman-Germanic system, common law, the family of socialist laws, Islamic laws, Far Eastern laws and African laws.[11] Most of the classification has become historical. Each of the families of law consists of national legal systems, similar in their normative and formal aspects. Each of the aforementioned types of law – "grand legal systems" – is a part of its specific legal culture, co-creating it and existing under its impact.

Legal culture is also a domain of symbolic legal actions in a specific community in specific time.[12] From this point of view, legal culture together with the existing system of legal norms determines a specific communication and regulative code of law for social communication and limitation of human behaviour. Members of the community learn to understand the code in the course of social interaction. Among other things the awareness and understanding of legal regulative mechanisms decides about the consciousness of law.

Fourthly, this contribution is a description, from the functional and theoretical point of view, of legal transplants as existing elements of law or those whose existence is possible. No dogmatic, comparative or historical legal analysis is presented, even if it is a very interesting point of view, demanding further investigation.

6. The term "legal transplant" must be explained. "Transplant" originated in the medical field and means the moving of an organ from one place to another. Several types of transplants are known from the medical point of view:

- autogenous transplants, the removal of one's own organ and placing it in another place (e.g. removing skin transplant from buttocks and placing it on the face);

- isogenic transplants, between genetically identical persons (e.g. monozygotic twins);

- allogenic transplants, between genetically different persons, within one species (e.g. liver transplant from one man to another), and

[11] Cf. David, R., *Les grands systems de droits contemporains*, VIIIe ed., Paris, Dalloz, 1982, p. 21 and the following ones.
[12] Cf. Pałecki, K., *About the Usability of the Idea of Legal Culture*, vol. 2, Państwo i Prawo, 1974, pp. 73 and 74.

- xenogenic transplants, between two different species (e.g. placement of a pig heart into a man).[13]

7. A broad linguistic convention is assumed and the term "legal transplant" will be based on a transfer of the normative content in its legal form constituting functional entirety, having considerable load of normative novelty, or a transfer of a new method of legal regulation, not yet present in a legal system, from one system of law (foreign) to another one (host).

The transfer of the normative content is certainly a metaphorical expression. The content is not "removed" and "put" into another system but the transfer means in fact verbatim repetition of the content or of its general idea - in the host system.

The transfer of some normative content from one system to another results in a change of the host system, i.e. either the replacement of the existing legal regulation or its supplementing or amendment. The change can also be based on the introduction of a new method of legal regulation for a range of social relations.

There are different ways of effecting changes in the field of law. Some forms involve peaceful evolution of legal institutions by gradual and spontaneous transformation, preceded or accompanied by the transformation of all social and cultural environment, often also in their economic and political aspects. The source of such changes is law itself and its development. Philosophers often term this type of political and legal arrangement as institutional legal framework.

In other cases, the need of the transformation of law, the trends and the pace of the legal changes are decided upon by the legislator, an authority external to law. Such a need can emerge in connection with the pursuit of an assumed social ideal or the necessity of the amendment (modernization) of law. It can result from instrumental attitude to law, used by rulers to achieve their political objectives, without regard for the legal awareness of the society and "the state of readiness" of the system to accept the changes. Normative revolutions can arise therefore. Among other factors, legal transplants cause normative revolutions. Furthermore, some of them lead to the "colonization" of host systems in extreme conditions, in particular in less developed countries, if the goal of the transplant is the impact on the society of a given system, by introducing foreign legal culture. Lawmakers can search inspiration, as to the trend and the transformation of law, within their own

[13] Cf. *New Universal Encyclopaedia of Polish Science Publishers*, vol. 6, p. 440.

legal culture or in other legal systems. In the latter case, legal transplants are concerned.

Normative content constituting functional entirety is the subject of legal transplant. So it is a set of elements of foreign legal regulation, suitable for making changes in a host system in its transferred form or together with other elements. In addition, legal transplants are used for the sake of a situation in which normative content transferred from a foreign system constitutes normative novelty for a host system. "Normative novelty" is used in this contribution in accordance with language intuition, to mean new content or scope or a new method of legal regulation; without any reference to the problems of normative novelty widely discussed in the theory of interpretation of law.[14]

The transfer of normative content from one legal system to another must respect the legal form adequate for a host system. In the systems of statutory law, legislative procedures must be used and the inspiration (voluntary or involuntary) to start legislative proceedings in a host system pass form a foreign system.

The starting point for the existence of a legal transplant is unique normative content of a foreign system and host system, in the environment of unique legal culture, to which they are relativized. The type of the legal culture of both the systems is analogous to the function of species of individuals in medical transplantations.

8. Using the medical terminology, we can attempt to classify the basic characteristics of different types of legal transplants.

Autogenic legal transplants have no major legal significance. The idea is not intuitional in law and meets no requirements of the language convention-especially as regards the "foreign" character and the uniqueness of foreign systems.

The idea of isogenic legal transplants must receive consideration. The transplant is based on the transfer of the normative content from one system of law to another "sister" system. The legal systems of the United States and the European Union are good examples. The federal law of the USA as "sister" law of American state systems (with some exceptions, e.g. the Louisiana system with its Civil Code based on the Napoleonic Code is unique in the States) and the law of the European Union and the systems of the EU member states as "sister" laws - are the source of transplants.

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[14] Cf. Ziembiński, Z., "Creation, Proclamation and Use of Law", *Ruch Prawniczy Ekonomiczny i Socjologiczny*, num. 4, 1993.

Allogenic legal transplants are based on the transfer of normative content or a method of legal regulation within different systems of concrete law belonging to the same type of legal culture. This type of situation can be exemplified with transplants made in the course of harmonizing Polish law with the law of the European Union, before the formal integration of Poland in the EU. Other examples are transplants within the family of socialist states, following the ideology of the states of the so-called "socialist democracy".

Xenogenic legal transplants —the most characteristic type— can be regarded as the best transplant paradigm. The idea is referred to the transfer of normative content to a system from another legal system belonging to a different type of legal culture. The transfer results in a "revolutionary" change of the normative status quo in the host system. This, in principle, impacts indirectly and gradually the social, economic and axiological environment of the host system. Xenogenic transplants are assumed to evoke a sui generis normative revolution. A good example is a well known history of the transformation and normative "revolutions" of Japanese law. After Japan had been opened in the end of the 19th century, its social and legal system was reconstructed and West European legal regulations were adopted almost directly; starting from French legislation in substantive and procedural penal law, followed by Prussian and German solutions, and North American regulation after World War II.15 Other spectacular legal transplants were transferred from the area of Soviet law to the area of Central and East Europe after World War,[15] alongside with ideology, political institutions, models of thinking and behaviour. The transplants formed a part of the far reaching sovietization policy of the region, controlled directly by the Soviet Union. The host legal systems were thus ruthlessly colonized.

Isogenic and allogenic legal transplants are used in legal systems belonging to the same cultural environment of low identity, as mentioned above. The conclusion is that the transplants do not change systems of homogenous culture considerably, do not contribute to their normative revolution and do not affect the configuration of the communication and regulative code of the legal culture. They are not transplants in the strict sense but mere legal borrowings.

Xenogenic legal transplants are used in reference to legal systems belonging to foreign legal cultures. The identity coefficient is high, the transformation of law results in normative revolution, the transplants do

[15] cf. Izydorczyk, J., *Japanese Code of Penal Proceedings*, Prokuratura i Prawo, 2007, pp. 105 and the following ones.

affect the communication and regulative mechanisms of legal systems. Such properties are characteristic of legal transplants in the strict sense.

8. Apart from the division of transplants described under 7, further classifications can be carried out.

Direct and indirect legal transplants can be distinguished. Direct transplants are transferred directly from foreign legislation to a host system. An example is the Napoleonic Code of 1804, effective in Poland on the territory of Warsaw Duchy since 1808, transplanted as a whole to Poland and binding in its original French version (!). Indirect transplants are transferred through a third system. Thus, attempts to transplant Roman law through German imperial law were unsuccessful in Poland and the unintentional reception of Roman institutions was carried out through canon law.[16]

From the point of view of introducing transplants into other systems, enforcement of law must be pointed out; i.e. transplants accepted under the pressure of foreign systems, by force or after conquest (see the Napoleonic Code imposed in Poland). Another class is composed of voluntary transplants, accepted and initiated by a host system, constituting the reception of law (legal regulations accepted by Japan from France, Germany and the USA). The third type of transplants are transfers of law, effected unintentionally and over long historical periods (reception of Roman law via canon law in Poland). The three types of legal transplants have played their role in the history of law many times.

In another classification, simple transplants can be distinguished, transferred from a legal institution or another separate element of a legal system, as well as complex transplants, transfers of a branch of law or a complex of legal regulations. In both cases, the transplants consist in normative content, being a functional entirety.

Transplants from the past can be distinguished (a great historical role of the reception of Roman law) from modern transplants (transfers from European law to the systems of the member states); the transfers are carried out from one legal system to another system coexisting in the same time, on a specific territory.

Another classification is based on the source of the transplant, therefore, whether it stems from a foreign legislative authority (the

[16] Examples owed to Professor Jacek Matuszewski, *The Head of the Chair of the History of Polish State and Law in Łódź*, University of Łódź.

Napoleonic Code in Poland) —system transplant, or from foreign legal practice or jurisprudence— cultural transplant (the reception of Roman law).

Formal transplants can be distinguished for transfers incorporating verbatim new legal content, as opposed to informal transplants, reflecting the spirit of foreign law, not necessarily reproducing language formulations.

The last classification distinguishes successful and unsuccessful transplants. The new normative content of successful transplants becomes well rooted in host systems and gradually affects their legal environment to build up new tradition. Unsuccessful transplants are, sooner or later, derogated and replaced by other regulations.

9. Considering all the above criteria, one must state that they can be interconnected and sometimes "overlap". The criteria can be merged to attain new qualitative characteristics of legal transplants. For example, the well known legal transplant resulting from the reception of Roman law, of great importance for the continental legal systems in Europe, can be characterized as an allogenic, direct or indirect in some European areas, constituting the reception of law, cultural, informal, obviously successful complex transplant from the past. Each aspect of the transplant deserves thorough analysis, but even this short overview indicates how vast the spectrum of the effects of the transplant was.

10. Legal transplants can cause far reaching changes not only in laws of host systems, but also in their legal environment, especially in legal culture and sense of law on social scale.

Legal culture, as the whole of opinions and attitudes to law, is systemic and coherent to a certain degree. This statement is significant for the problem of legal transplants. It can be assumed that, depending on their legal culture, some transplants constituting new legal norms can be rooted in host systems, whereas other transplants can never be rooted. The key factor is the influence of compliance/non-compliance of legal rules with their axiological and ideological environment. Jurisprudence and policies of law emphasize that such compliance contributes to the stabilization of legal rules and their impact on recipients of law, strengthened with cultural background. Whereas non-compliance of legal rules with their environment weakens their effects and leads to their rejection (e.g. by desuetudo).

Are transplanted legal norms controlled by the same mechanisms? Generally so, but different historical situations have been experienced. If a legal transplant is transferred from the area of different legal culture, its rooting is difficult and its effect on the recipients of law is weaker. Two

consequent scenarios are possible: either the rejection of the transplant or a gradual change of the legal culture of the recipient law system under the influence of the transplant. The legal transplant acts like a stone thrown into water, causing the spread of water circles for a long time.

The reception of law, an intentional and planned transplant —in spite of cultural differences— would remain in the system and constitute an active factor of change within the recipient legal culture. It can even contribute to the change of the cultural legal paradigm of a specific society. The reception of Roman law in middle ages led gradually not only to the change of legal solutions in European states but also caused the changes of European legal culture and resultant changes of the sense of law in Europe. On the other hand, even when enforcement of law takes place for different political or economic reasons a transplant can be rooted and last for a long time, as evidenced by the rule of socialist law in Central and Eastern Europe.

Another question, very important from the point of view of legal transplants, is the role of local legal culture. As S. Wronkowska – Jaśkiewicz clearly put it: legal culture is the natural environment of legal norms. It is obvious that local culture is always very important reference for any system of law, and of primary relevance in the interpretation of law or the use of different interference rules. If legal norms fixed in a system after the transfer of a legal transplant should undergo the process of legal concluding or require the interpretation - legal practice usually uses local tradition, which is emphasized in legal reasearch.[17] Specific transplant environment is formed. Nevertheless local legal culture affects transferred regulations and their culture and they react to shape the culture of host systems to some degree. Culture diffusion process does not, however, reduce the leading role of local legal culture for the transplant environment. A principle of the predominance of local legal culture is decisive but it is partly reduced by the "revolutionary" character of the transplants. The illustration of the principle can be the case of Japanese law, also German law introduced in Poland in middle ages, implemented as "Polish German law".

11. A question arises what functions can be attributed to legal transplants in history and in contemporary legal cultures.

First of all, "legal transplant" is a very illustrative term and it reflects the idea of using foreign legal solutions in recipient legal systems. No axiological connotation of the term has matured and it can have a pejorative or morally indifferent meaning.

[17] cf. Izydorczyk, J., *op. cit.*, pp. 105 and the following ones.

The transplants can perform different functions, dependent on the way of their transfer – either the reception of law or enforcement of law.

If transferred by the reception of law, the transplants can perform the civilizing function, by the use of transplanted legal content for the development or modernization of the recipient law. In addition, a transplant can have pragmatic and rationalizing significance, by using new experience in the area of specific legal regulation.

The functions can be different or the same in the case of the enforcement of law. In particular, the civilizing function can be performed also by enforced law, if the cultural difference between foreign systems and host systems is considerable. As a rule, however, the primary results of imposed law are political, economic and ideological impact of the host system, and the recipient law becomes colonized.

Both in the past and nowadays, legal transplants are used in the globalization process and perform their diffusion function in legal culture, by letting different elements permeate from one culture to another, changing systems of values and reshaping legal cultures. The transplants are an important factor of changing legal systems and their cultural environment. Their role in the modern world is becoming increasingly important.