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The Communicative Function of Legal Transplants in Mixed Legal Systems

Elena N. Trikoz[1, 2], **Elena E. Gulyaeva**[2]

[1] *MGIMO University, Moscow, Russian Federation*

[2] *Diplomatic Academy of the Ministry of Foreign Affairs of the Russian Federation, Moscow, Russian Federation*

Abstract: The article analyzes the definition of the communicative function of law from the point of view of legal communication between the dependent legal systems of the former colonies. In this context, the "evergreen issue" arises about *legal transplantation*, the legal transfer of norms and institutions and reception of nomadic legal constructs. The modern comparative lexicon uses three *types of metaphors* related to the interaction of legal systems and their law hybridization: anthropomorphic, communicative and mechanical metaphors.

Among the best-known cases of legal transplantation, the authors pay attention to the spread of codes, the diffusion of common law, and the emergence of *mixed legal systems*. They explore the positivist concept of "*legal transplants*," which appeared in comparative discourse thanks to the *theory of Alan Watson*. The article discusses the comparative opposition to this theory — the so-called *cultural concept* of legal transplants (*transferists vs. culturalist debate*), as well as the musical metaphor "legal transposition" and the process of diffusion of law in dependent legal systems. The practice of legal transplants in mixed common law systems and their application in practice are analyzed in national jurisdictions.

The article shows criminal legal bijuridism and the process of the so-called "*diffuse codification*" in India, Canada, Australia and other British former colonies, which is an example of codistics communication

of dissimilar political and legal cultures and circulation of model codes between them. In conclusion, attention is drawn to the discourse of the effectiveness, applicability and effectiveness of transplants. It is concluded that the *success — failure discourse* of legal transplants depends on the *degree of communicativeness* of transplanted and receptive constructs, their ability to "speak" in an understandable language for the host cultural environment of law.

Keywords: comparative law; communication of law; legal transplants; diffusion of law; reception; legal pluralism; bijuridism; mixed legal systems; legal culture; law and development; common law; Indian Penal Code, legal codistics

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Contents

I. Introduction. Understanding the Communicative Function of Law in Mixed Systems

The heterogeneity of legal regulations and the legal heterogeneity of countries with mixed legal systems aggravate the problem of connectivity of legal transplants and the legal unification, convergence and development of countries.

The unifying principle becomes more important when a legal entity, which combines elements of two or more legal traditions/families, tries to survive under the conditions of unstable poly-legalism and increasing legal fragmentation (Denisenko and Trikoz, 2018, pp. 29–31). Against the backdrop of contrasting cultural-geographical, technical-legal and religious-ethical features of local law, the role of the legal system's communicative capacity increases. The latter lies in the high degree of transparency of the legal environment, in the perception, reception and circulation of analogue court decisions and statutory models (colonial model codes and integral model laws).

In mixed jurisdictions and poly-legal settings, communication and discourse are vital and constitute an ever-present context of legal development in these pluralistic legal orders.

Yet, the communicative function of law is particularly tangible in the post-colonial "*hybrid legal family*," where it can potentially bring together different borrowed and syncretic legal subsystems both within the boundaries of a single nation state (Hooker, 1975), or at the level of sub-regional international organizations, like the British Commonwealth of Nations in the ruins of the former world empire. The development of uniform or harmonized legal norms at the international level has been a major force driving legal transplants around the world in the last half century. The communicative function of law in the space of *bijuridism* is, at the same time, difficult to realize because different legal scholars, "speaking" in an eclectic legal dialect with a mixed glossary (Brierley, 1992), approach variously even the very essence definition of law as a phenomenon of human civilization (Antonov and Denisenko, 2015). We are mistaken when we assume that "two different legal cultures share common epistemological accounts of what is meant by law" (Carvalho, 2019). If the positivist conception of law makes legal transplants less

problematic and the instrumental conception of law favors or hinders transplantation and reception depending on whether the borrowed institutions achieve a certain effect in application practices, then in contrast the culturalist conception of law accepts legal transplants only if they are able to prove themselves compatible with the local culture and legal tradition (Cotterrell, 2001, p. 79).

Through legal transplantation, legal transmission, legal reception, nomadic constructions or legal migration, the diffusion of legal models in the world remains an evergreen issue (Roghină, 2020, p. 142). The search for a harmonious concept that can unite the communicating legal traditions and legal cultures will continue in this context through the palette of different types of legal understanding: "law and legal theory," "law and history," "law and economics," "law and development," "law as rules," "law as system," "law as culture," "law as tradition," "law as social fact," "law in context," etc.

No legal system exists in the contemporary world that develops exclusively through its internal legal resources without interacting mutually with other legal systems, which can never survive in isolation, not communicating and exchanging experiences through borrowing and reception, transmitting *legal transplants* to one another (Denisova, 2012, p. 329). Through successful communication and subsequent cross-breeding of initially incompatible, genetically different donor-mother and recipient-donor legal systems, a hybrid legal landscape is constructed based on the interaction of two or more cultural traditions, legal practices and normative techniques as well as styles of legal thinking.

II. The Positivist Concept of "Legal Transplants" in Comparativist Discourse: Alan Watson's Theory

Legal transplants are based on the concept of *diffusionism of law*, where the majority of changes in most legal systems occur as a result of borrowing. Classic cases of legal transplantation are the reception of Roman law; the diffusion of codes; the diffusion of common law; and the intermingling of legal systems (Graziadei, 2019, pp. 445–450).

Since the 1970s, the study of legal reception, legal borrowing and transplantation as a form of communication and dialogue of legal systems has been dealt with by a separate sub-field of comparative law — legal transplants as "*applied comparative law*." The topic of "global receptivity to foreign law" was first developed in a separate section of the Eighth Congress of the International Academy of Comparative Law (AIDC — IACL, Pescara, Italy, 1970). Subsequently, at the thirteenth IACL congress in Montreal (1990) an alternative terminology was discussed which has gained recognition particularly outside the common law world — the "circulation of legal models."

A new category of "legal transplants" and the anthropocentric metaphor of legal *transplantation* was also introduced in the early 1970s and was discussed in parallel by three renowned professors: O. Kahn-Freund, A. Watson and R. Sacco. The Scottish lawyer and novelist Frederick P. Walton was the first to use the metaphor of "legal transplantation" to explain legal development, which was due to his imperial academic career in Scotland, Quebec and Egypt. In his view, mixed (hybrid) Scottish law, "like the law of Lower Canada and Louisiana, has undergone profound changes as a result of contact with English common law" (Walton, 1902, p. 17*)*. In August 1927 Walton first gave a talk on "The Historical School of Jurisprudence and the Transplantation of Law" at a meeting of the International Academy of Comparative Law in the Hague, which was then published (Walton, 1927, pp. 183–190).

Around half a century later, Otto Kahn-Freund, Professor of Comparative Law at Oxford University, began using the essentially medical term "transplantation," borrowing it from the popular discussion of organ and tissue transplants in the late 1960s and 1970s. In his 1973 lecture "The use and misuse of comparative law" which he delivered at the London School of Economics, Kahn-Freund stated that in the 20th century British law had become a specifically open field for foreign influence and borrowing, especially in the area of commercial law and family law. He analyzed the practice of using various "*foreign legal patterns*" as instruments of social or cultural change "which raises most sharply the problem I am discussing — the problem of *transplantation*" (Kahn-Freund, 1974, pp. 2–5). He also applied the category

of "exchanging mechanisms," such as *carburetors*, in this lecture. The professor thereby attempted to develop ideas of transferability in law and used this metaphor to discuss a spectrum of transplantable rules: from mechanical (*easy*) to organic (*difficult*). Kahn-Freund emphasized that a comparative analysis of law "becomes an abuse… if it is based on a purely legalistic spirit which ignores the context of the law" (Kahn-Freund, 1974, p. 27).

The anthropocentric metaphor appeared at the same time in a book by the Scottish legal historian and novelist W. Alan J. Watson under the same title "Legal Transplants" (Watson, 1974; 1993), where he argued that this problem should become a major subject of comparative legal research in order to study contacts between legal cultures and the complex patterns of change that such contacts bring about (Cairns, 2013, p. 637). By "*legal transplants*" Watson means "the transfer of a rule or an entire system of law from one country to another" (Watson, 1974, pp. 22–24). He considers *transplants* to be the most fruitful source of legal development and therefore the role of legal transplants in a system of globalization of law should be thoroughly studied in the future. *Watson's* writings fill some twenty books and one hundred articles including "Legal Transplants and Law Reform," 1976; "Comparative Law and Legal Change," 1978; "Two-Tier Law — A New Approach to Law Making," 1978; "Legal Change; Sources of Law and Legal Culture," 1983; "The Future of the Common Law Tradition," 1984; "Chancellor Kent's Use of Foreign Law," 1993; and others.

Comparing the approaches of F.P. Walton and A. Watson to the concept of "*legal transplants,"* Walton's metaphor was more horticultural than surgical. Yet the similarities between the two remain striking: borrowing is central to the development of law; legal culture is central to the legal system and the adaptation of rules; law is not related to society in the necessary way. Rodolfo Sacco stated a similar position at the same time, stressing the importance of legal transplants and reception in the system of general methodological questions of comparative jurisprudence (Sacco, 1974, pp. 127–131).

But it was not until a quarter of a century later that Thomas Charbonneau, in his review of Patrick Glenn's book "Legal Traditions of the World, Sustainable Diversity in Law," tried to argue that since

Alan Watson, *"legal transplants"* have transformed into a vital and "constructive discourse" of comparative law (Carbonneau, 2000, p. 729). Watson's book itself, almost half a century after its first publication, despite its author's initial reservation about its untimeliness and still-birth, has become the obvious "*landmark book"* of legal comparativism.

If we proceed from the assumption that *legal comparativism* is not limited to the study of one or more legal systems or to a simple comparison of their elements and institutions, but must also involve lawyers in the study of relations and communications between different legal systems, a special attention to the problem of the methods and techniques of such inter-system *legal communication* becomes evident.

In this context, the practice of transferring legal rules or institutions from one legal system to another or importing definitions and terminological labels of individual legal phenomena or methodological techniques and methods of such legal convergence acquire an important status in the system of legal knowledge. The French comparativist-criminologist and distinguished judge Marc Ancel (1975, pp. 303–304) insisted on this as early as half a century ago in his review of A. Watson's book on legal transplants.

A. Watson in his study has proposed a *theory of legal change* and argued that the phenomenon of "legal transplantation" is deeply rooted in the foundations of the Western and extra-Western tradition in a diachronic section. He argued that *legal transplantation* is alive and well today, no worse than in the days of the ancient Eastern ruler Hammurabi. As well as discussing the underlying identity of national legal systems and the key concept of *Volksgeist* ("national spirit"), Watson nevertheless argues that legal transplants are a universal, common and ancient phenomenon. He traces their origins from the ancient Sumerian influence on the Babylonian code of Hammurabi, the ancient Greek reception in the Code of XII Tables and the spread of Roman law in Egypt (Watson, 1974, pp. 29–30), to the legal reception of the ancient Roman law of Aquilius and the Roman contract *emptio-venditio* in Western European medieval law and the Roman construction of property rights in the basis of all European systems, including France, Germany and Switzerland (Watson, 1974, pp. 82–87). As an illustration, he mentions a number of rules relating to matrimonial

property that were transmitted "from the Visigoths to become a legal provision in the Iberian Peninsula as a whole, and then migrated from Spain to California, from California to other states to the western United States" (Watson, 1993, p. 21). Watson gives more examples of "legal transplantation" such as the reception of ancient Roman legal methods and substantive law in Scotland,[1] Roman-Dutch law in South Africa, medieval compilations of the reopened Code of Justinian, the collection of the Massachusetts General Laws and Liberties (Grayson, 1981), the first code of the Western World in 1648, and the spread of English law to New Zealand in the 19th century (Watson, 1974, pp. 39, 44–46).

In discussing the reasons for borrowing and adopting transplants through which a particular legal model is to be disseminated, Watson spoke of the authority of the legal system communicating with the recipient. He had in mind a high degree of "respect for such a dominant system" as well as the "reputation and authority" of the model or its creators, and linked acceptance of transplants to "the ease with which the norm [can] be acquired" and the particular use of language and "accessibility" factors, regardless of the suitability of the law to meet the needs of the local society that would implement the transplant (Watson, 1977, pp. 104, 135).

In his studies of the problem of legal communication between cultures and the resulting legal changes, Watson insisted on a direct link between foreign cultural transplants and local legal reforms. In this context he refuted a number of *mirror theories* which see a direct and deterministic connection between law and society. Outstanding authors such as Montesquieu, Savigny, Pound, Marx and Engels, whom Watson criticizes for their moderate and particularistic, romantic and dogmatic, pragmatic and functionalist, materialist and socialist views, represented this position in political and legal thought. Metaphor of law as "mirrors of society" and on content of "mirror theories" see (Ewald, 1995, pp. 492–493).

In his view, however, comparative studies and legal history show a sharp decline in the weight of "mirror theories" in the modernization of legal systems. All the more so because their proponents do not

[1] See, for example Reid and Zimmermann, 2000.

adequately address important factors in legal culture such as developmental inertia and the obstacles to modification posed by power elites and law enforcement actors who tend to monopolize the interpretation of the law. So, Watson has developed nine factors that influence the transplantation process: Source of Law, Pressure Force, Inertia, Opposition Force, Transplant Bias, Law-shaping Lawyers, Discretion Factor, Generality Factor, Felt Needs (Watson, 1978, pp. 328, 331). The majority of these factors are indeed irrational and subjective (Kyselova, 2008).

Watson's concept of the *"nomadic character*" of legal rule1993 s (transplants) proves that changes in the law do not depend on the action of any social, historical or cultural substratum; rather it is a function of the rules themselves, borrowed from another legal system. Therefore, "the transplantation of legal rules is socially easy" (Watson, 1993, p. 95).

III. The Culturological Concept of "Legal Transplants" and the Comparativist Opposition: A Critique by Alan Watson

The phenomenon of *legal transplants* gained more interest, adherents and critics especially in the 1990's and 2000's. From that time theorists and comparativists began to appear and took on the burden of identifying mechanisms that could explain the motives and ways of legal transplants and their direct relationship to the processes of globalization and economic development (Mattei, 1994, p. 3). Alan Watson himself has kept pace with the comparativist mainstream, which he once unwittingly initiated by juxtaposing "legal transplants" with "legal formants" (Watson, 1995, pp. 469–471). In the later period, Watson confined himself to a theory of legal transplantation in the private law field, tendentiously Western, but with outlets beyond it as well (Watson, 1977, pp. 8, 132).

His Italian colleague R. Sacco more clearly formulated a comprehensive theory of the "circulation of models" or the circulation among legal systems of certain legal models — prototypes (*it. teoria della circolazione dei modelli*). He superimposed this concept of the model on the notion of a *legal formant* (Latin: *formans, formantis* — forming something from the maternal basis) (Sacco, 1991, pp. 1–34). He showed that models circulate between different systems primarily

through homologous formants, although these circulations of legal models can be mutually dissociated. Without compiling an exhaustive list of "legal formants," Sacco analyzed *statutory rules, formulations of scholars, judicial reasons and conclusions*, highlighting the multi-layered and complex nature of transplant objects. It is typified by the circulation of the French model of codification in relation to the legislative formant, or the reversal of the German dogmatic model in relation to the doctrinal formant. At the same time, the circulation of the judicial formant throughout history has been a relatively less frequent or, in any case, less studied type (Di Martino, 2021, pp. 750–751).

Sacco also introduced the category of *cryptotype* in the legal field, which refers to an implicit model (Italian *modello implicito*) that is strongly contextualized and cannot be influenced by circulating legal transplants, especially as far as the mentality of lawyers or legal thinking is concerned (Sacco and Rossi, 2019, pp. 136–137). The circulation of legal models and the coming changes in the law, however, do not always lead to the unification or standardization of the communicating legal systems. The uniformity of law has often been interpreted in light of colonial history as a *"deculturation"* in the field, in contrast to legal anthropology, which helps to conceptualize the specificities of the original indigenous cultures, suggesting a competition between legal models (Luther, 2009).

Watson's positivist conception of transplants became heavily criticized because the author reduced them to purely legal-technical rules, indifferent to practical implications (purely door-to-door) and socio-cultural context (Abel, 1982, pp. 785–786; Cotterrell, 2001, pp. 71–79). Critics rebuked Watson for a simplistic and even caricatured version of "mirror theories," subjectively lumping Montesquieu, Savigny, Pound and Marx into a single bundle of functionalists and obscuring the complexity of their thought. Watson himself adheres to an equally instrumental version of "anti-functionalism" reasoning about communicating legal systems based on goals that he himself set in advance. However, these systems could not achieve this in the process of interaction, thus reinforcing the image of "aimless legal systems" determined by the arbitrary choice and inertia of legal elites (Nelken, 2003, pp. 437–440).

Finally, for authors sensitive to the "hermeneutic turn" in legal thought, Watson's conception of legal transplants does not do justice to the interpretive differences associated with various cultures, since these contexts are envisioned as semantic networks involving both law and society type (Wise, 1990, pp. 12–13).

The possibility of legal transplants itself has also been contested. Pierre Legrand, a French comparativist and professor at the University of Tilburg (Netherlands), has initiated a lively debate on the usefulness and feasibility of legal transplants, drawing even more attention to the topic type (Legrand, 1997, pp. 111–112). His argued that legal transplants in their pure positivist form are impossible because the transfer of a text to another context consequently changes its meaning. Thus, we can only talk about the "dislocation" of the legal norm itself and not its meaning that is closely linked to the cultural environment into which it is immersed and where its text was first "articulated" type (Legrand, 2001, pp. 55–56).

Legrand, as an alternative to Watson's positivist understanding ("law-as-geometry"), proposed his cultural interpretation of law as a "multivalued signifier that connotes cultural, political, sociological, historical, anthropological, linguistic, psychological and economic referents." Every manifestation of law and its norms must therefore be apprehended as a 'fait social total', a complete social fact (Legrand, 2001, p. 116). The social and cultural boundaries of the legal system will always retain an intractable element of autochthony that limits the epistemological receptivity to the incorporation of legal norms from other jurisdictions. According to the Latin principle "*Extra culturam nihil datur*," as M. Reinstein has stressed, "even words of the same language can have different meanings in different legal systems" (Rheinstein, 1968, p. 419).

For his part, Günter Frankenberg, the famous German constitutional comparativist, challenged the simplification of P. Legrand's position on the impossibility of transposition and comparison, which only means an inevitable change of meanings in different legal environments. The transfer of a legal institution from one system to another requires awareness of all inherent risks as well as the decontextualization, objectification and formalization of such legal provisions while, on the other

hand, their recontextualization occurs in the new host environment, whereby the reproduced institution will necessarily be accompanied by "reinterpretation, redesign and bricolage" (Frankenberg, 2013, p. 1).

Bill Bowring, professor at Birkbeck College, University of London, is another critic of "legal transplants" which he believes "follows logically from the frequent condemnation of human rights discourse as hopelessly Western" (Bowring, 2021, p. 7).

Matthias Siems, professor at the University of Cambridge, criticizes the phenomenon of transplants, dedicating a chapter to it in a comparative law book entitled "*Malicious Legal Transplants*" (Siems, 2018, pp. 103–110). Transplants have been negatively assessed because they are rarely able to "adapt" to the country of transplantation due to differences in the socio-economic context, and they have also been opposed as "legal irritants" or even stated that legal transplants are "impossible" (Teubner, 1998, p. 11; Legrand, 1997, p. 111).

Sometimes the criticism has also been directed against the very essence of transplants and their nature. After all, legal transplants and receptions of law have often been the result of military conquest or expansion. Contemporary military operations in different parts of the world still trigger legal transplants affecting various dimensions of the law (Graziadei, 2019, p. 467).

IV. The Metaphors "Legal Transposition" and "Diffusion of Law" in Subsidiary Systems

A decade ago, the methodological device of "legal transplants" was included in an authoritative monograph on the methods of modern comparative law as a quite standard methodological approach accepted in the discipline and in comparativist practice. A separate chapter on "legal transplants and transnational codes" was devoted to this device in terms of cultural prejudices and doctrinal positions in relation to them (Geoffrey, 2012, pp. 165–170; Chen, 2012, p. 192).

Roger Cotterrell, Professor at Queen Mary College, University of London, has suggested a distinction between four types of communities according to the degree to which "legal transplants" are perceived:

instrumental, traditional, affective and faith communities (Cotterrell, 2001, pp. 71–92).

Instrumental communities, for example, are characterized by short and weak interpersonal relationships, being functionally oriented towards certain economic goals, and therefore have a closer relationship with law and more readily accept transplants, especially in the field of commercial and contract law. However, *traditional communities* are typified by a relationship of legal proximity and an exchange of practices and terminology, where the right to coexist and communicate in certain areas of criminal law, property rights and civil liability is firmly respected. A third category of *affective communities* is built on a more ethical regulation of family-patriarchal, mutually friendly and trusting relationships, seeking to escape from the rigid legal ones, therefore quite resistant to legal transplants, which affect private succession, family law and rules relating to sexual abuse.

Finally, the so-called *belief communities* are distinguished by the sharing of religious values and the existence of apparently stronger interpersonal ties and links between the value system and community identity, which prevents foreign cultural transplants, unless certain issues are "degraded" to instrumental problems or problems of traditional stability (e.g., the protection of human rights).

As Professor R. Cotterrell concludes, the instrumental logic of community development makes legal transplantation markedly easier if legal solutions have similar objectives, whereas it is less frequent and less effective (Cotterrell, 2001, p. 82) among affective communities, where the application of heteronomous norms is more complex.

Within jurisprudence, there is a *contradictory approach* to the understanding of the term "reception of law," and in addition to "legal transplantation" there are transterminous "legal acculturation" (Abramov, 2005; Sokolskaya, 2009, pp. 1289–1290) and "legal mutation" (Bowe, 1985). As Micheli Graziadei notes, the term *"reception of law"* is sometimes used as a *synonym* for any and all of the above, though it also has a specific denotation referring to global *legal transfers* (Graziadei, 2019, p. 724).

More recent contributions speak of the "*transfer of law*" instead of "*legal transplant*." The concept of legal transplants has rapidly

become a central "paradigm" in not only traditional but also critical legal comparativism over the years, with various biological and anthropomorphic metaphors (such as *"body of law"* or *"body politic"*). In addition to the term *"legal transplants,"* comparativists use related categories such as *"legal borrowing"* (in the works of *Grosheide*) and *"legal imitation"* (in the works of *Sacco*).

Turkish comparativist E. Örücü, professor at the Universities of Glasgow and Rotterdam, distinguishes between such legal terms as transposition, imposition, implantation, grafting, re-filling, cross-pollination, emulation, infusion, infiltration (Örücü, 1999). Generic expressions such as "*legal influence*" or "*inspiration of law*" are also in use, while other terms, for example, "*cross-fertilization*," are gaining currency (Graziadei, 2019, p. 725).

In order to study legal systems Esin Örücü suggested making use of the concept of *"cross-fertilization"* (i.e., the legal systems interaction). Örücü describes this process stating that "All legal systems contain ideas, concepts, structures and rules born in other legal soils, moving and cross-fertilizing. All systems are mixed in the sense that even when the nation state is regarded as the only source of law, systems have mixed sources, that is, the elements that combine to form a system are from different legal sources... These differing normative systems may also reflect differing socio-cultures..." (Örücü, 1996). An unusual notion of "legal transposition" is also applied, borrowing it from music and preferring in some contexts the terms *"law transposition"* and *"legal tuning"* (Örücü, 2002).

Her understanding of *"law as transposition"* means that each note, i.e., a legal institution or legal rule, is sung — introduced and used, in the same place in the scale of the new tone ("receiver-recipient") as in the original tone (the sample-donor). "Transposition occurring according to the specific vocal range (socio-legal culture and country needs) of the recipient singer" (Örücü, 2013).

Transplants are often referred to in the broader discourse of the so-called "transfer of law," which includes the concepts of *legal acculturation* and *diffusion of law*.

J.W. Powell is credited with creating the word "acculturation," having first used it in an 1880 report of the US Bureau of American

Ethnography. He explained that the term refers to psychological changes caused by cross-cultural imitation. In a wider context, many modern scholars apply the term of "acculturation" to legal ideology and legal policy.

Ludmila V. Sokolskaya considers reception of law to be a variant of legal acculturation, and proposes to define it as a unilateral process of transferring elements of the legal system of the donor society with obligatory assimilation by the recipient society (Sokolskaya, 2009, pp. 1289–1290). In addition, the initiator of the reception is the party that wishes to implement in part or in full the legal system of the donor, while the donor is usually indifferent to such a process of borrowing (Kuryshev, 2010). Vladimir N. Sinyukov, noting that the involvement of foreign state and legal institutions does not make the *recipient* civilized and does not solve the problems of its legal culture. However, the scientist did not deny that *legal reception* is an objective factor of legal progress (Sinyukov, 1995, pp. 162, 366).

Diffusion of law is a particularly new area of research that appeared at the beginning of the 21st century (Farran, Gallen, and Rautenbach, 2015). The diffusionists, for example, speak of the *sovietization* of the law in Central and Eastern Europe after World War II.

At the same time, William Twining identified the following possible objects of diffusion of law: any legal phenomena or ideas, including ideology, theories, personnel, mentality, methods, structures, practices (official, private practitioners, educational, etc.), literary genres, documentary forms, symbols, rituals, etc. (Twining, 2006, p. 514). The term "diffusion" has the merit of being a standard concept in the social sciences, suggesting a movement from "metropolitan power to colony, from center to periphery, from rich, modern, developed country to poor, traditional, underdeveloped one" (Twining, 2006, p. 510).

The American international lawyer Charles Maechling, studying the relations between legal systems in a historical context, suggested a new field of analysis in the form of "migrations of legal rules" (Maechling, 1975, pp. 1037–1038). Maximo Langer uses the linguistic metaphor of *"translation"* to distinguish between the original "text" (a legal idea or institution) and the translated text. Such a metaphor allows us "to distinguish the source language or legal system from which the legal

idea or institution originates, from the target language into which the legal idea or institution is translated" (Langer, 2004, p. 33). Overall, as Margit Cohn rightly observes, in fact "the study of legal transplants has reached a saturation point" (Cohn, 2010, p. 583).

The process of interaction and hybridization of legal systems has given rise to three kinds of metaphors in the comparativist lexicon: 1) anthropomorphic-organic type metaphors (in particular legal grafting, legal contamination, cross-legal pollination, etc.), 2) communicative type metaphors (for example, legal interaction, legal communication, conflict dialogues, etc.), 3) mechanical type metaphors (legal transplants, law transplantation, export/import, prestigious reception, etc.).

According to the Italian constitutionalist Alessandra Di Martino, some metaphors also include additional elements and mixed aspects: for instance, the metaphor of legal migration contains communicative and organic components, while the metaphor of the circulation of legal models contains mechanical and communicative elements (Di Martino, 2021, p. 866). However, such metaphors often significantly "help researchers to justify their approach to conceptualizing the phenomenon of legal borrowing" (Sorokina, 2008, p. 33).

V. "Legal Transplants" Practice in Mixed Common Law Systems

A large number of studies in the current discourse focuses on the practical application of "legal transplants" in individual national jurisdictions. Such studies are particularly relevant in the so-called mixed legal systems, since they have communicated with other legal traditions and practices, which have borrowed and "transplanted" new legal institutions, legal procedures or legal regimes to their own domestic environment. The American institute of trust, for example, is reflected in the Chinese legal reality, the estoppel has moved to the French legal space, the jury transplant has appeared in Japanese court practice, Brazilian jurisprudence has borrowed from corporate law and biolaw, etc. (Foster, 2010; Dean, 2011; Cuniberti, 2012; Pargendler, 2012; Travieso et al., 2021).

In this context, a distinction is proposed between legal transplants that are voluntary or compulsory in nature. The voluntary nature of the process leading to legal transplantation means that it is less intentional and more fluid when a common language and similar culture converge and influence the intellectual exchange. Here, the terms like "legal circulation," "cross-fertilization," "diffusion" or "migration" are appropriate to describe voluntary transplantation (Perju, 2012, pp. 1306–1308).

In a context of heightened territorial disputes and multi-polarity, with the revival of the rhetoric of neo-colonialism, the notion of *legal expansion* (Benton, 2001) is becoming increasingly topical today. The introduction of foreign law is often reinforced by the permanent political control or military presence of a dominant or more powerful power. The legal regime thus established often gives rise to ambiguous and contradictory perceptions of the legitimacy of "legal transplants" and the inequality of the parties in such a legal mix. Thus, instrumentalist jurisprudence (instrumentalist approaches), principally the Old and the "New" *law-and-development genre*, remain concerned with issues of efficient management of *transition* from "*non*"-modern to modern law (Baxi, 2003).

The subject of legal transplantation has increasingly become a topic of interest in a variety of legal reform programs adopted or supported by international institutions and regional frameworks that aim to bring about legal change on a global scale. It also features prominently in the literature on "law and economics," which explores the significance of legal transplants for the economy.

Next, consider the practical example of *"diffusion of the common law"* in the countries of the British Commonwealth of Nations, most of which have been transformed by this practice of imperial powers into countries with a mixed legal system in the post-colonial period.

Apropos, the metaphor of *"transplant"* in this particular context of the spread of metropolitan law was first used by the English utilitarian philosopher Jeremy Bentham. He proposed in his 1782 work "Of the Influence of Time and Place in Matters of Legislation" (Bentham, 1802) the general principles of "transplantation" of law in the context of the spread of English common law — "Rules Respecting the Method of

Transplanting Laws" (cited in Huxley, 2007, p. 177). Bentham wrote that "when attempts have been made to transplant laws without revision from one country to another and the consequences of such attempts have proved disastrous." Bentham insisted on the laboriousness of the transplantation process and called for consideration of both external factors and the internal state of legal thinking or legal consciousness of the host country. But this does not mean, according to the legal philosopher, that *"the laws of barbarous nations should therefore be eternal, while those of the most civilized demand a change."*

Jeremy Bentham, who pioneered European legalism (lawmaking techniques and legislative tactics) and was passionate about codification techniques (*legal codistics*), also developed legal technical rules for the transposition of law in the new colonies (Bentham, 1802).

The English common law became the applicable law in the Indian colonies in most cases where the local courts were directed to adjudicate cases according to *"principles of justice, good conscience and equity"* if found applicable to Indian society and circumstances. The High Courts in Calcutta, Bombay, and Madras had original jurisdiction to apply *the English common law directly* (Lau, 1994, p. 266). Werner Menski illustrates the influence of English rule and British law on Hindu law (Menski, 2003, p. 131). The French legal historian Jean-Louis Halpérin applied the ideas of transplantation to colonial India (Halpérin, 2010, p. 12).

From 1857 onwards, the British Crown began to rule directly over the British colonies in India, hence the decision to promote a program of codification and consolidation of law in the colonies in compliance with and on the model of English law (Graziadei, 2019, pp. 451–452). *Pattern of the common law transition* was applied here in areas such as contracts, the sale of goods, partnerships, succession, civil procedure and criminal law in creating sectoral consolidated statutes (Krasheninnikova and Trikoz, 2022, pp. 230–235).

This *"criminal Bijuridism,"* voluntarily for reasons of prestige, can be observed as a consequence of the so-called "diffuse codification" that began in India in the 1840s and spread rapidly to Canada, Australia, South Africa and other colonial possessions of the British Empire and later to the Commonwealth countries (Bois and Visser, 2003,

pp. 593–595). This codificatory communication of different political-legal cultures and the circulation of model codes between them led to innovative outbursts and great creations. The treatise of the great historian-statesman and codifier of law, Lord Thomas Babington Macaulay, who served in colonial India in the 1940s, can be credited with this.

The legal genius, enlightened attitude and liberal views of T.B. Macaulay enabled him to create at the crossroads of three great cultures (Hindu, British and Muslim) an unsurpassed example of criminal law technique and doctrinal codification — the 1860 Indian Penal Code. For the North American colonies, the "legal transplantation" of English common law was active after independence, when many of the new states adopted "*reception statutes"* receiving the English common law and Acts of Parliament as they existed as of a certain date (usually 1507, 1620, or 1776), provided that they were not contrary to U.S. federal or state constitutions or statutes.

In the Australian colonies the spread of *common law* in the 18th century was justified by the concept of "right of first possession" because these English settler colonies were considered de jure unoccupied by anyone (Lat. *terra nullius*), although the factual background to this claim was sometimes questionable.[2]

Outlining the history of the institution of criminal prosecution in England and its spread to the Canadian colonies, Douglas Hay stresses that Canadian historians "are more inclined to speak of legal transplants, of the imposition of law and martial law, and of the slow and controversial way in which English law became part of our culture" (Hay, 1984, p. 24).

The term *"criminal law transplant"* was used by Eulalio A. Torres when investigating the origin of the Penal Code in Puerto Rico in 1902 (Torres, 1976, pp. 42, 71). The California Penal Code of 1873 was essentially introduced under the guise of this code, and the occasion for transplantation and copying was the punitive nature of this American code, and its bilingual text, which included both English and Spanish translation. In turn, the source of the California Criminal Code was the

[2] *See* Mabo and others vs Queensland (No. 2) (1992) 175 CLR 1.

draft New York Code prepared by David Dudley Field in 1864 and the reproduction of selected Anglo-Saxon criminal statutes (Muñiz, 2008).

It is often difficult to identify who created the original innovation that later became the legal model for the diffusion of transplants and their circulation in the legal circle of contiguous legal systems. A prime example is the diffusion of a system of registration of rights in immovable property called the "Torrens' title system" after Sir Robert Richard Torrens, an Irish immigrant to South Australia in the 19th century, who allegedly invented this particular legal regime for recording land transactions (Taylor, 2008, pp. 230–235).

These "legal transplants" were not always possible merely by the fact of the dominance of the common law system, but also due to the social fact of prestige (Ajani, 1995). "Prestige" motivates imitation, as it is rooted in the desire to have the best of another legal system, which can provoke transplantation or reception.

VI. In lieu of a Conclusion. Transferists vs Culturalist Debate and "Success — Failure Discourse" of Legal Transplants

Two poles can be distinguished in the current multi-polar continuum of attitudes towards transplants with their communicative function: *transferists* and *culturalists* (*transferists versus culturalist debate*) (Foster, 2000, p. 611; Small, 2005, p. 1431). The first group of comparativists, led by Alan Watson, argue that the development of the civil law family is the result of "purely legal history" and can be explained "without reference to social, political, or economic factors."

Alan Watson in his book "Society and Legal Change," developing the concept of legal transplants and the divergence of legal systems, introduces the term *"legal scaffolding,"* i.e., scaffolding that exists to support the established legal system and ensure its workability and modification. Here he focuses on renewable codification and the code as a transplant, asking whether codification can destroy the "legal scaffolding" and remove legal divergence between donor and recipient law (Watson, 1977, pp. 136–137).

The second group of comparativists, starting with the work of P. Legrand, argues that the transplantation of law is not possible at all,

because each law is defined by its own culture and social context. In this extreme, they proceed from the understanding of communicating legal systems as "operationally closed social discourses," which do not allow the historical factor to play a major mediating role.

But it is always easy to challenge this radical negativism of the "culturalists" by referring to the historical examples of the reception of foreign law and legal transplantation in Japan and Turkey. As a "classic example of foreign transplantation," the Japanese Constitution of 1946 has been very successful and has never been changed (Inoue, 1991), also because of the successful combination of the American principle of gender equality and protection of personal dignity with the traditional Japanese social hierarchy and the concept of aristocratic honor (Alston, 1999, p. 627).

Obviously, most legal transplants, if not stillborn, acquire over time a social dynamic in the new legal environment that differs from that of the autochthonous norms. The limitation of the *"transnferist"* approach, as opposed to the "*culturalist"* approach here, is that they considered the life of legal transplants on a door-to-door basis, up to the point of entry into the new legal system and consolidation in a law or judicial decision, but did not follow their legal implementation and practice.

An important aspect of the analysis of legal transplants today is the discourse of effectiveness, applicability and efficiency of transplants and their success — failure discourse of legal transplants (Galinou, 2005).

An Italian comparativist Elisabeth Grande writes about this in her study "Imitation and law: hypotheses on the circulation of legal models" (Grande, 2002, pp. 43–45). She distinguishes between three types of such models: scientific-cultural, technical-legal and political-philosophical.

Thus, the first of these, the *scientific-cultural legal model*, is meta-positivist, due to the focus on the quality of theoretical elaboration and legal dogma; its examples are German dogmatic jurisprudence and American legal realism. According to E. Grande, a "dogmatic formant" is thus transmitted.

The *technical juridical model* broadcasts an underlying humanitarian ideal, understood as the defense of individual freedom

and the advancement of civilization and can be influenced by the criminal law and procedure. According to E. Grande, a "legislative formant" is thus transmitted. Hence the European idea of the criminal code spread in the American states, where the principle of legality in criminal cases, linked to popular legitimacy, was seen as an element of progress, compared to the concept of criminality in case law because of its chaotic and subjective nature of decisions. Another example is the spread of a more liberal accusatory procedural model in Italy, replacing the former inquisitorial procedure, in which the judge is directly involved in establishing the truth of the case (Grande, 2002, pp. 84, 110, 113).

Describing the third, *political-philosophical legal model*, E. Grande sees the main reason for this imitation in the greater efficiency of the proposed legal solutions, such as the extension of the institution of criminal responsibility of legal persons, the concept of insanity and criminal conspiracy, probatory sentences from Anglo-American jurisprudence to the European criminal legal system in the reverse direction or to the British colonies.

Further elaborations of the conceptual framework for studies of legal transplants are underway. In this context much depends on the degree of communicability of the transplanted institutions and recipient constructions, their ability to "speak" in life in a comprehensible language to the host legal culture. If a dialogue with the legal culture of the recipient system and a "permanent residence" therein cannot be achieved, the legal transplant can at least find a doctrinal grounding and an instrumental practice in the specific internal culture of national lawyers and jurists (lawyers' legal culture). There should be a feedback loop in which those who perform legal transplantation, even if there is no reverse implantation, have to reflect on their own law and legal traditions (Bowring, 2021, p. 297).

Let us conclude by quoting Jonathan Wiener's curious metaphor about "legal transplants:" we take some regulatory DNA from national law, insert it into the embryo of international law and hope that this new legal hybrid will grow into a healthy offspring (Wiener, 2001, p. 1296).

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Information about the Authors

Elena N. Trikoz, Cand. Sci. (Law), Associate Professor, Department of Theory of Law and Comparative Law, International Law Faculty, Moscow State Institute of International Relations (University) of the Ministry of Foreign Affairs of the Russian Federation; Associate Professor, International Law Department, Diplomatic Academy of the Ministry of Foreign Affairs of the Russian Federation; Associate Professor of the Public Policy and History of State and Law Department, Law Institute, RUDN University, Moscow, Russian Federation

alena_trikoz@mail.ru
ORCID: 0000-0001-7331-480X
Scopus Author ID: 56815174000
Researcher ID (WoS): A-7996-2018

Elena E. Gulyaeva, Cand. Sci. (Law), Associate Professor, International Law Department, Diplomatic Academy of the Ministry of Foreign Affairs of the Russian Federation, Moscow, Russian Federation

gulya-eva@yandex.ru
ORCID: 0000-0 001-8376-7212