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LEGAL TRANSPLANTS THROUGH THE PRISM OF LEGAL POSITIVISM

Abstract. *The article provides a theoretical and methodological analysis of the relationship between the legal transplants approach and the tradition of legal positivism within the context of contemporary comparative law. The relevance of the study is due to the intensive processes of legal globalization, which contribute to the active borrowing of legal norms, institutions and ideas between national legal systems, and also exacerbate discussions about the nature of law, the mechanisms of its development, and the role of the socio-cultural context in legal changes.*

At the centre of the analysis is the concept of legal transplants formulated by A. Watson, which proceeds from the assumption of the relative autonomy of law and the possibility of transferring legal norms between different legal systems without substantial transformation of their content. The article demonstrates that this position has clear points of convergence with legal positivism, in particular through its norm-centred approach, disregard for extra-normative factors, and emphasis on the formal determinacy of law. At the same time, it is argued that reducing the legal transplants approach to a positivist paradigm is methodologically simplistic and does not reflect the full complexity of this phenomenon.

Special attention is paid to the scholarly debate between proponents and critics of legal transplants, including an analysis of the arguments advanced by P. Legrand, who identifies this approach with legal positivism and criticizes it for ignoring the cultural dimension of law, as well as the position of M. Graziadei, who rejects such identification and emphasizes the supra-positivist character of legal borrowings. The article substantiates the claim that legal transplants encompass not only formally enacted norms, but also doctrinal ideas, styles of legal thinking, and interpretative practices that extend beyond the boundaries of classical positivism.

The results of the analysis demonstrate that the legal transplants approach cannot be unequivocally interpreted within the framework of any single classical theory of law. It combines elements of normative analysis with the recognition of complex processes of semantic transformation of law, which allows it to be regarded as an autonomous methodological direction in comparative law. The conclusions drawn are significant for the further development of legal theory, the methodology of comparative legal research, and the understanding of legal reforms in the context of Ukraine's European integration.

Key words: *legal transplantation, legal positivism, law, legal understanding, methodology of law, legal development, legal globalization, legal system, comparative law.*

Сапарова Анастасія. Правові трансплантанти крізь призму юридичного позитивізму

Анотація. *У статті здійснюється теоретико-методологічний аналіз співвідношення підходу правових трансплантантів і традиції юридичного позитивізму в контексті сучасного порівняльного правознавства. Актуальність дослідження зумовлена інтенсивними процесами правової глобалізації, які сприяють активному запозиченню правових норм, інститутів та ідей між національними правопорядками, а також загострюють дискусії щодо природи права, механізмів його розвитку та ролі соціокультурного контексту у правових змінах.*

У центрі уваги перебуває концепція правових трансплантантів, сформульована А. Ватсоном, яка виходить із припущення про відносну автономію права та можливість перенесення правових норм між різними правовими системами без істотної трансформації їх змісту. У статті показано, що така позиція має очевидні точки дотику з юридичним позитивізмом, зокрема через нормоцентричний підхід, ігнорування позанормативних чинників та акцент на формальній визначеності права. Водночас доводиться, що зведення підходу правових трансплантантів до позитивістської парадигми є методологічно спрощеним і не відображає всієї складності цього феномену.

Особливу увагу приділено науковій дискусії між прихильниками та критиками правових трансплантантів, зокрема аналізу аргументів П. Леграна, який ототожнює цей підхід із юридичним позитивізмом і піддає його критиці за ігнорування культурного виміру права, а також позиції М. Гражде, який заперечує таке ототожнення і наголошує на надпозитивістському характері правових запозичень. У статті обґрунтовується, що правові трансплантанти охоплюють не лише формально закріплені норми, але і доктринальні ідеї, стилі правового мислення та інтерпретаційні практики, що виходять за межі класичного позитивізму.

Результати аналізу засвідчують, зо підхід правових трансплантантів не може бути однозначно інтерпретований у межах жодної з класичних теорій права. Він поєднує елементи нормативного аналізу з визнанням складних процесів смислової трансформації права, що дозволяє розглядати його як самостійний методологічний напрям у порівняльному правознавстві.

Зроблені висновки мають значення для подальшого розвитку теорії права, методології порівняльно-правових досліджень та осмислення правових реформ в умовах європейської інтеграції України.

Ключові слова: *правова трансплантація, юридичний позитивізм, право, праворозуміння, методологія права, правовий розвиток, правова глобалізація, правова система, порівняльне правознавство.*

Introduction. Comparative law during the second half of the twentieth and the beginning of the twenty-first century has undergone substantial transformation, driven both by processes of globalization and by the intensification of methodological debates concerning the nature of law, its development and change.

In the last decades, economic, political, cultural, and legal globalization have prompted significant shifts in legal theory. New rights and new subjects of rights, new legal and political-institutional arrangements, as well as the increasing legal relations between the most diverse nations worldwide, have driven the fertile development of comparative law [1].

Comparative law has assumed a significant political and scientific relevance in recent decades. Economic, political, cultural and legal globalisation, in parallel with the broadening of legal sources in the most diverse "formants", has triggered the recognition of comparative law not only as a "method", or mere "academic" discipline, but also as an available instrument to be used by policymakers and legal professionals in everyday practice. In this scenario, a revision of the classical methods of comparative law – functionalism and structuralism – is taking place due to the increasing interaction between diverse legal systems, driving the circulation, diffusion, and legal borrowings [2, p. 77–78].

One of the most influential and at the same time controversial concepts in this field has been the legal transplants approach proposed in the 1970s by the Scottish comparatist Alan Watson. From its inception to the present day, this approach has remained at the centre of scholarly debate, serving as a point of convergence for key issues in comparative law.

The legal transplants approach did not only offer an alternative vision of the mechanisms of legal development, but also challenged entrenched assumptions regarding the determination of law by social, cultural, and economic factors. For this reason, it has been subjected to criticism from representatives of various theoretical approaches to law, particularly supporters of culturalist and anti-positivist approaches. At the same time, the question of the relationship between the legal transplants approach and legal positivism as one of dominant traditions of legal understanding deserves particular attention.

Materials and methods. The empirical basis of the study consists of works by classical and contemporary representatives of comparative law and legal theory addressing issues of legal transplants, legal positivism, and legal understanding in general. The normative component of the materials includes examples of national legislation and legal institutions used to illustrate processes of legal borrowing, in particular the reception of foreign models of private law and the implementation of European legal standards in national legal systems. The methodological framework of the article is formed by a combination of general scientific and special legal methods of cognition. The dialectical method serves as the basic method, enabling an examination of the legal transplants approach and legal positivism in their interrelation, internal contradictions and dynamics of development.

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The formal-legal method is employed to analyse legal norms and concepts as normative constructions relatively autonomous from the social and cultural environment, which is characteristic of the positivist tradition. The comparative legal method is used to compare different legal systems and doctrinal approaches to explaining the mechanisms of legal change.

A systemic-structural approach allows law to be viewed as a complex multi-level system within which legal borrowings appear not as mechanical transfers of norms, but as elements of internal transformation of the legal order. The combination of these materials and methods ensures the comprehensive character of the study and substantiates the conclusion regarding the methodological autonomy of the legal transplants approach and its limited compatibility with classical legal positivism.

The aim of the article is to conduct a theoretical and methodological analysis of the relationship between the legal transplants approach and the tradition of legal positivism, as well as to identify the limits of applicability of the positivist paradigm in explaining the phenomenon of legal borrowing in comparative law.

Discussion. The concept of the "legal transplant" was systematically introduced into scholarly discourse by A. Watson in his work "Legal Transplants: An Approach to Comparative Law", which later acquired classical status in comparative law [3]. The author's central thesis is that most significant legal changes in various legal systems occur not as a result of internal social transformations, but through the borrowing of legal norms, institutions, and concepts from other legal systems.

The quintessence of the legal transplants approach lies in the rejection of the traditional research scheme "law – society – law", which presupposes analysis of legal change through the prism of social context. Instead, Watson proposes the scheme "one's own law – foreign law", within which legal systems are regarded as relatively autonomous formations interacting with one another without the obligatory mediation of social factors.

Thus, a key feature of the legal transplants approach is its emphasis on the autonomy of law. Law is viewed as a relatively closed system capable of self-development and self-reproduction, while the borrowing of legal norms from other systems appears not as an exception, but as a typical mechanism of such development.

Alan Watson insists that social context does not play a decisive role in understanding legal change. According to his position, legal norms may be successfully transferred from one legal system to another regardless of differences in culture, language, or socio-economic structure [3].

The basic component of the idea of legal transplants in comparative jurisprudence is an assumption that when a rule moves from one legal system to another it remains itself identical, without changing in the process and as a result of such movement. We agree that this means in principle the coordination of a classical understanding of legal transplantation proposed by Watson with a positivist understanding of law, according to which the last is reduced to legal norms. The migratory nature of legal norms is regarded as the basic argument denying the close link between the law and cultural context. Law is postulated to be independent from any social, historical, or cultural foundation of a specific society [4, p. 97].

Such approach radically opposes sociological and cultural theories of law, which regard law as a product of specific social environment.

Within this logic, the comparatist should focus exclusively on the analysis of legal texts, their structure, and content, rather than on the practice of their application. Comparative legal studies, according to A. Watson, should primarily be studies of legal transplants as normative phenomena detached from social reality.

A. Watson points to the absence of an abstract philosophy of law concerning "what ought to be" that would enable an understanding of the relationship between law and society. Consequently, law and legal change, in this aspect, can be studied only within the interaction of concrete legal systems with one another, rather than through reference to some meta-legal sphere viewed as the place of localization of universal legal meanings. Legal transplantation thus refers both to the process of transferring legal norms

and to the consequences of such transfer, namely the universalization of law [5, p. 174].

One of the most consistent critics of the legal transplants approach is the French comparatist Pierre Legrand. In his works, he unequivocally identifies this approach with legal positivism and sometimes even characterizes it as a form of "dreary positivism, which relegates comparative legal studies to a technical exercise whose output is deeply flawed and which, on this account, remains largely irrelevant to the matter of understanding alterity in the law" [6, p. 277].

Legal positivism is one of the main types of legal understanding, which reduces the multifaceted legal reality to positive, i.e. established law. Thus, it denies the existence of any extranormative phenomena. It proceeds from the position that law is determined only by social facts (the will of the legislator, the normative order) and the thesis about the conceptual separation of law and morality [7].

According to P. Legrand, the main flaw of the legal transplant approach is ignoring the cultural dimension of law. Analyzing the example given by A. Watson regarding the transfer of ownership and risk during the purchase and sale, P. Legrand draws attention to the fact that the norms of Roman, French and Prussian law, despite their formal similarity, function in fundamentally different cultural and historical contexts.

He emphasizes that "the fact is that the Roman rules Watsons refers to were written in Latin and purported to regulate the dealings of citizens in six-century Constantinople. The French rules mentioned by Watson were written in French and intended to govern citizens in pre-revolutionary France. And the Prussian rules addressed by Watson were written in German and were concerned with legal relationship in what remained feudal Prussia" [6, p. 277].

Under such conditions, it is possible to speak about the identity of legal norms only at the level of "empty verbal form", but not at the level of their legal meaning.

P. Legrand's criticism allows us to outline those features of approach of legal transplants that really bring it closer to legal positivism. First of all, it's about normocentrism – focusing exclusively on legal norms as the main object of analysis. This approach correlates with classical positivist ideas about law as a system of formally defined norms, separated from morality, culture and social context.

In addition, ignoring the issue of the operation of norms in society and refusing to analyze their interpretation in a specific cultural environment are also characteristic features of the positivist tradition. These elements allow P. Legrand to qualify the approach of legal transplants as a type of legal positivism.

In contrast to P. Legrand, the Italian comparatist M. Graziadei firmly rejects the identification of the legal transplants approach with legal positivism. In his view, "the recognition of legal transplants and receptions as proper objects of study has been hindered by adherence to legal positivism. Legal transplants and receptions challenge the notion that sovereign power determines legal change in all respects" [8, p. 463].

M. Graziadei emphasizes that legal positivism proceeds from the assumption of the decisive role of sovereign authority in shaping the content of law. Legal transplants, however, often arise outside consciously formulated and rationally justified legislative decisions. They may result from intellectual fashion, professional contacts, academic influence, or even recognition of one's own legal weakness.

Moreover, legal transplants "concern not only rules enacted by the sovereign but also ideas and modes of thought that are highly influential without being formally sanctioned" [8, p. 464].

From M. Graziadei's perspective, the approach of legal transplants not only goes beyond the boundaries of legal positivism, but actually contradicts it. If positivism requires a clear connection between law and the will of the sovereign, then the phenomenon of legal transplants demonstrates the limitations of such a view.

Legal borrowings often occur without a full understanding of their origins and possible alternatives. This calls into question the thesis of the omnipotence of the legislator and the possibility of complete control over the content of the law. "Reality is less coherent and more dynamic. Perhaps the limits of cultural transmission are ultimately only those set by our genes" [8, p. 473].

Let's focus on the modern approach – integrative legal understanding. The integrative approach in legal understanding is based on overcoming the opposition between the positivist and natural law vision of law. Within the framework of comparative law, this means recognizing the simultaneous normative certainty and contextual conditionality of law.

Legal borrowings in the integrative perspective appear not as transplantation of ready-made norms, but as a process of translation and transformation of legal meaning, which changes both the borrowed element and the receiving legal system. A key element of the integrative approach is the emphasis on the transformation of legal meaning, which is especially clearly traced in the practice of reception and adaptation of legal institutions in national legal systems. The borrowed legal text or institution does not retain its "original" meaning, but acquires a new semantic content under the influence of the legal culture, judicial practice, doctrine and institutional architecture of receiving state.

A striking example is the reception of German civil law (BGB) in Japan in the late 19th and early 20th centuries. The Japanese legislator consciously oriented himself to the German model of private law, but the adaptation of the relevant institutions took place taking into account local social and cultural characteristics. As a result, a normative construction was created that was formally based on European doctrine, but functioned in a different social context. In the scientific literature, this process is characterized not as transplantation, but as legal translation.

The Ukrainian legal order is also characterized by active processes of legal borrowing. The adaptation of European human rights standards, the practice of the European Court of Human Rights, and the implementation of the acquis communautaire within the framework of Ukraine's European integration course are examples of legal borrowing that change national law not by directly copying norms, but by rethinking them in the context of the domestic legal system.

Thus, the practical experience of various legal systems confirms that legal borrowings should be considered as a dynamic process of semantic transformation, and not as a static transplantation of normative material.

The legal transplant approach raises issues that are fundamentally incompatible with the positivist model of legal understanding. Therefore, an analysis of the relationship between the legal transplant approach and legal positivism shows that this approach cannot be unambiguously reduced to any of the classical theories of law. It combines elements of normative analysis with the recognition of complex, often unconscious mechanisms of legal development.

This, in turn, testifies to the scientific independence of comparative law as a discipline that requires its own methodological tools, different from both positivism and sociological or cultural approaches.

Conclusions. The current stage of development of legal science is characterized by an intensive search for new methodological approaches to understanding the nature of law in the context of globalization. Comparative law, which increasingly goes beyond the purely descriptive comparison of legal systems and addresses fundamental issues of legal understanding, acquires particular importance in this context. One of the most debatable phenomena within this discipline is legal transplantation – the borrowing of norms, institutions and legal ideas between national legal orders.

The conducted analysis demonstrates the complexity and multidimensionality of the question of the relationship between the legal transplant approach and legal positivism. Although individual elements of this approach can be interpreted in a positivist way, its overall meaning goes beyond the classical positivist assumptions.

The legal transplant approach allows us to rethink the nature of legal change and challenges traditional notions of the role of sovereign power and social context in the formation of law. Further research in this area may not only deepen our understanding of the mechanisms of legal development, but also contribute to the establishment of comparative law as an independent discipline.

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