

On the Path of Legal Transplantation in the Era of Legal Interpretation

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Abstract: *The flexibility and applicability of the law have become the core standards of the modernization of the current legal system, and the legal interpretation has become an important way to govern the modernization beyond legislation. As a traditional way of law generation, legal transplantation has some problems such as conflict of perspective, confusion of definition, and lack of agreement with the above path. Based on the principle of legal unity, China's legal transplantation should follow the principle of moderate foresight and innovation, scientific principle, economic principle, and the principle of equal emphasis on ideas and systems, and use the "screening method" to conduct comparative legal research, Fully absorb the legal system beneficial to our country and pay attention to its localization research, so as to realize the rule of law and modernization of governance.*

Keywords: *Legal Interpretation; Legal Transplantation; Modernization of the Rule of Law*

1. Introduction

Legal interpretation is the vitality of the application of law and plays an increasingly critical role in the real legal world^[1]. The Supreme People's Court (hereinafter referred to as the Supreme Court) has issued more than three hundred judicial interpretations (from the official website of the Supreme People's Court) in recent years, and at the same time, the number of legislative interpretations of the Supreme Court each year. It is also increasing year by year. Compared with ten years ago, the role of legal interpretation in improving our national laws and judicial system, safeguarding our social order, protecting the legitimate rights and interests of citizens, and other aspects has far exceeded the practical value of legislation. Therefore, more and more domestic scholars believe that China has entered the "era of legal interpretation".

The background of this era has had a fundamental impact on the emergence and application of traditional law, and requires legal interpretation to fully adapt to this traditional legal reform. Inevitably, the main generation mode of China's legal system is legal transplantation. Under this background, China's current legal transplantation as a generation mode also needs further innovation and keeps pace with the times.

2. Overview of Current Law Transplantation

Legal transplantation refers to a country's absorption and reference of other countries' legal systems. Its basic meaning is to introduce, absorb, adopt, assimilate and assimilate foreign laws (including legal concepts, technologies, norms, principles, systems and legal concepts) on the basis of identification, identification, adjustment and integration, so as to make them an integral part of the domestic legal system for domestic use. The term "transplantation" was first applied to botany from the perspective of etymology, meaning to move plants to other places for planting, and then extended to the medical concept of organs that transfer life or parts of life. The current general theory generally believes that legal transplantation includes the following two aspects: on the one hand, legal transplantation is simply the transplantation of legal articles, which mostly does not involve the legal culture behind the legal articles and the historical and realistic background of foreign countries, but only the legal articles themselves; In contrast, the other is the comprehensive absorption, integration and utilization of foreign historical society, humanistic thoughts and legal culture. On the one hand, this kind of absorption has greatly avoided the rote application of laws and regulations, and more importantly, it is to "reshape and cultivate the cultural psychology behind the rules"[2].

The original transplantation of legal provisions was only through translation and simple modification of legal provisions in the process of transplantation. The understanding and application of foreign laws were mostly literal, and there was relatively little discussion on the economic, political and legal environment in which foreign laws were generated, developed and applied. The advantages and disadvantages of legal transplantation in this way are also very obvious. On the one hand, it is convenient, fast, and very efficient. The logical idea of this way is just to extract the legal provisions needed in China from the foreign legal system for appropriate embellishment and use.

However, on the other hand, its shortcomings cannot be ignored. The most common and most noticeable disadvantage is that the transplant law does not fully adapt to the local law. For example, Article 6 of the Criminal Law of the People's Republic of China in 1997 stipulates that any crime committed on board a ship or aircraft in the People's Republic of China shall be governed by this Law, which is mainly transplanted from the relevant provisions of the Japanese Criminal Law. Japan is a typical landlocked country with a special geographical location, so there is no regulation or necessity for criminal jurisdiction on transnational land trains. On the contrary, China has a large land area, bordering 14 countries. Therefore, different geographical locations make it necessary for China's Criminal Law to make clear provisions on the jurisdiction of criminal acts on transnational land trains. Subsequently, the Criminal Law of China formulated relevant measures and supplementary programs on this issue in the form of amendments. There is no doubt that this is the disadvantage brought about by the pure transplantation of legal provisions.

There is no denying that the very important form of legal culture is the legal provisions, but the most complete legal provisions, if not supported by the theory, will also become castles in the air, and it is difficult to obtain the actual effect of legal implementation. Based on this, we should pay attention to the comprehensive, wide field and multi-level absorption and application of legal provisions and legal culture when we transplant laws.

The legal transplantation is divided into three levels: first, fully analyze and study the foreign laws to be transplanted; second, analyze the domestic legal system and relevant realities, and summarize the possible problems in the process of transplantation; third, gradually promote the localization of foreign systems through long-term pilot and practice.

To conduct in-depth analysis and research on the laws to be transplanted, it is necessary to deeply analyze their relevant historical and social backgrounds and relevant legal theories, review the history of the construction of China's legal system. From the "revision of laws in the late Qing Dynasty"[3]. to the beginning of the construction of China's socialist legal system, the legal systems of the United States, Japan, the former Soviet Union and other countries have been relatively improved, The legal system and legal culture of countries and regions with relatively developed laws are widely accepted, absorbed and applied. As Hou Liyang said, "The history of China's modern legal system is a history of western legal transplantation". After decades of reform and opening up, China's legal system and legal system are becoming more and more perfect at this stage. As mentioned above, many scholars believe that China has entered the era of legal interpretation. In the current context, large-scale transplantation of foreign laws has achieved little effect and is difficult to carry out. However, targeted learning and transplantation of foreign excellent laws still have great theoretical prospects and practical significance.

To analyze the possible problems of the laws to be transplanted in our country, we should start with our national conditions and legal system, explore the areas that contradict the transplant objects in our legal system, and steadily transplant domestic laws to the transplant objects on this basis. In the process of transplanting foreign laws, the second and third levels can be repeated repeatedly. Problems can be found in continuous analysis and research, and they can be transformed. After the transformation, continue to analyze, cycle and start again and again[4].

3. Challenges in the Current Law Transplantation Mode

3.1. Changes in the Way of Law Formation

In the era when legal interpretation has become a major trend, the way of law generation may change significantly. In response to legislation, legal interpretation will become an important way to produce law. The advantages of producing law by means of legal interpretation are very prominent. On the one hand, it maintains the necessary stability of the law and prevents "changing day after day". On the other hand, it can endow the law with vitality so that it can always be at the forefront of the times and give full play to its role. Based on legal research and legal theory, traditional law transplantation

deconstructs, analyzes and reforms the relevant legal concepts and theories of foreign laws to be transplanted, and finally applies to our legal system through the formation of relevant substantive law and procedural law. In addition, when transplanting legal theories, they should be sorted according to their expected acceptance and expected effects for their own people, and those with excellent expected effects should be transplanted preferentially[5].; However, for the theories and systems that are difficult to accept by the people of our country, we should give more consideration and lower the priority when transplanting, otherwise, even if we transplant them to our country quickly, it will be difficult to achieve significant results. This kind of transplantation may be simpler when the legal system is not relatively perfect, but after the domestic legal system is relatively perfect, legal transplantation will face various difficulties. For example, in China's theoretical research and judicial practice, the "four elements of crime constitution" system transplanted from the former Soviet Union has been in the mainstream.

However, in recent years, the academic and practical circles have encountered many problems that cannot be solved by the four elements system, and many scholars have begun to identify with and apply other theories of crime constitution to solve problems. However, due to the deep-rooted legal ideology of the four elements for many years, Relevant scholars and judicial staff are still often caught in the strange circle of the four elements. After entering the era of legal interpretation, the absorption and application of foreign laws have abandoned the traditional large-scale transplantation and become more sophisticated. Only excellent and valuable foreign laws can be transplanted and applied based on the system and culture. From the quantitative analysis, after China entered the era of legal interpretation, the number of legal transplantation has decreased year by year, but the quality of transplanted laws tends to improve. For example, the increasingly popular "property tax" issue in recent years is a representative.

The property tax system was transplanted from the relevant systems and legal systems in Hong Kong and other regions, mainly to solve the problem of excessive local housing prices. Nowadays, China's housing price policy is basically based on the starting point of maintaining housing prices and preventing housing prices from continuing to rise. The relevant legal research and legal construction on property tax are also on the agenda. The successful experience of the real estate tax system is that based on the profound analysis and research of the relevant provisions and solutions on housing prices in various countries and regions around the world by jurists and legal practitioners, it is found that Hong Kong is faced with situations similar to those in the mainland, the law transplant is highly operational and feasible, the people's acceptance and the possibility of successful implementation are also high, so the law transplant is more targeted[6].

On the other hand, after entering the era of legal interpretation, although less legal transplantation is needed, the difficulty of legal transplantation has greatly increased. This situation is mainly caused by the following two reasons: First, after decades of legal development in China's reform and opening up, the basic legal system has been relatively perfect, and the corresponding legal culture has also become mature, while the transplantation of foreign laws as "foreign matters" is more likely to produce "rejection reaction". Second, due to the maturity of legal interpretation technology and legislative skills, the threshold for transplant objects has been raised a lot.

3.2. Transplantation of Existing Laws is Difficult to Adapt to the Development of the Times

Under the background of the era of legal interpretation, the transplantation of traditional laws cannot adapt to the development of the new era without adjustment and change.

3.2.1. The Inherent Conflict between Legal Transplantation and the Core of Legal Interpretation

The inherent conflict between legal transplantation and the core of legal interpretation. Legal transplantation emphasizes the attitude of criticizing and absorbing foreign advanced legal systems and legal cultures, and its core is to consolidate itself with the help of foreign factors. The legal interpretation mainly focuses on its own shortcomings and problems, and improves and optimizes them. Its core is to solve internal conflicts and further improve them from the internal factors.

3.2.2. The Transplantation of Law does not Fully Conform to the Current Background of the Times

In terms of relevant factors promoting the development of the legal system, legal transplantation is more inclined to the existence of external pressure, and legal interpretation is more inclined to the internal demand[7]. Moreover, when the two improve the legal system, there is a big gap in the content involved. The scope of legal interpretation is generally narrow and only based on the system and rules

in mind, while the content of legal transplantation involves all aspects, including the legal system, legal rules, legal culture, etc. Based on the background of the era of legal interpretation, legal transplantation may be subject to various restrictions and risk challenges in the application process.

4. Practical Problems of Legal Transplantation

4.1. Principles of Legal Transplantation in the Era of Legal Interpretation

4.1.1. Moderate Innovation within a Certain Scope is Conducive to Legal Transplantation

The backwardness of the law itself makes it impossible to transplant the law blindly in the process of legal transplantation. We should fully consider the legal rules and the development status and direction of the legal system, and try to avoid the embarrassing situation that the law cannot be followed or adapt to the current situation when encountering emergency problems in the future. However, the principle of moderation should be followed in the process of innovation. The innovation and foresight of laws beyond a certain range are often more serious than the results brought by the lag of laws[8]. Therefore, we should pay attention to limited innovation when carrying out legal transplantation, and should not be too advanced.

4.1.2. Scientific Principle

After all, the transplant object comes from a foreign legal system. It is inevitable that "rejection reaction" will occur in the process of transplantation. To effectively eliminate this situation, we need to base ourselves on China's basic national conditions, existing legal systems and relevant legal culture, make corresponding research and analysis, fully prepare, consider whether it is suitable to transplant it to China, and finally make a decision. Therefore, the legal transplantation in China should follow the following steps: (1) Study the relevant legal rules, base on our legal system, and analyze whether it is necessary to carry out legal transplantation; (2) Analyze and compare the legal system, legal culture and basic reality of the laws to be transplanted; (3) Analyze whether the legal environment and reality of our country are similar to those of foreign countries, and study the possibility of successful transplantation. Therefore, the scientific principle is the key to legal transplantation.

4.1.3. Economic Principle

In the process of transplanting foreign laws, we should also try to reduce the cost of legal transplantation from an economic perspective, and improve efficiency and economic utilization. This requires the relevant legislative departments to fully understand the foreign national conditions and legal habits, reasonably estimate the cost of transplantation, and try to reduce the cost of legislation and improve the expected benefits before legal transplantation.

4.1.4. Principle of Attaching Equal Importance to Concept and System

The traditional legal transplantation only includes the legal system and ignores the legal culture, which has resulted in many unreasonable or needs to be improved. Therefore, when carrying out the current legal transplantation, we should not only pay attention to the cultivation and construction of the legal system, but also fully understand, analyze and study the legal culture and legal concept as the root of the legal system. Both are like two sides of a coin. They are inseparable. Therefore, before the transplantation of the legal system, it is necessary to deeply analyze the current national and foreign legal culture and legal concepts, and pay equal attention to both concepts and systems. The text must be aligned to the left with single linespace and 10-points font size.

4.2. The Path of Legal Transplantation in the Era of Legal Interpretation

4.2.1. Extensively Carry out Extraterritorial Legal Research and Learn Relevant Experience in Legal Transplantation

"Use the 'screening method' reasonably to screen the world's outstanding laws[9]. " First of all, we should be based on the use of a wide range of unified normative terms, keep consistent with foreign countries, and ensure that the results will not be different because of different legal terms. In addition, when translating foreign legal provisions and related documents, we should examine the context, historical and realistic environment, so that we can be prepared to express the content of the provisions and accurately understand their meanings. Secondly, improve the efficiency of searching for foreign legal provisions and relevant documents, and conduct targeted search and reading to save the cost of

legal transplantation and improve efficiency. Finally, legal transplantation is a difficult and long-term work, which cannot be separated from the tireless efforts of scholars and relevant legal practitioners.

4.2.2. Take the Essence and Discard the Dross

In essence, legal transplantation is the comprehensive absorption and application of foreign cultures. It should also comply with the basic attitude and requirements of China towards foreign cultures, take its essence and discard its dross, absorb the part that is meaningful to our country, and abandon the legal provisions and legal culture that are not good or suitable for our current stage. First, "the process of legal transplantation is faced with the difficult decision of strengthening and transferring national sovereignty [10]." The transplantation of laws should be fully based on the interests of our country and the protection of our national security, practice the core values of socialism with Chinese characteristics in the new era, serve the people, be responsible for the people, and never damage the overall interests of the country and the legitimate rights and interests of the people. Secondly, we should fully consider the democratic and scientific nature of legal transplantation. In essence, legal transplantation is a kind of legislative activity. Scientificity is its first essence, while democracy is what should be included in the topic of ensuring the smooth progress of legislative activities and the effective implementation of laws formulated. In order to ensure the scientific nature of legal transplantation, we should adopt a system that combines expert argumentation with mass hearing. While ensuring the scientific nature of law transplantation, we should fully consider the opinions and suggestions of the masses, so that democracy and science are inclusive.

4.2.3. Based on the Comprehensive Analysis of National Reality

"The evaluation standard for the success of legal transplantation is the localization of law[11]." After determining the necessity and possibility of introducing foreign laws and finally deciding to introduce them, we should adjust foreign laws in a timely manner based on our national conditions and legal system to keep pace with the times, so as to complete the synchronous development with the times. It is also necessary to actively explore the development future of foreign legal provisions and relevant legal culture, explore their prospects, actively follow up the process of foreign legislation, fully learn from experience on the basis of analysis and research, and be brave to abandon inappropriate legal culture, paving the way for future legal transplantation.

5. Conclusions

Stone from other mountains can be used to attack jade. The modernization of China's legal system is far from that of developed countries. In order to become a strong country under the rule of law, it is necessary to reasonably explain and rationally transplant the advanced legal systems of other countries. In addition to the transplantation of relevant laws, we should also introduce corresponding legal concepts and theories, and pay attention to the coordination of the legal system after transplantation. Only by selecting the correct reference, adopting scientific and reasonable transplantation methods, and building a legal system that conforms to China's national conditions, can we achieve the goal of legal transplantation localization and realize the modernization of the legal system. It can be seen from the historical practice of various countries that legal transplantation is a long-term and complex project. It is the duty of every Chinese citizen to strive to expand the scope of its application, deepen its structure, and transform China from a former legal power to a strong country under the rule of law.

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