

Challenges and Solutions For Legal Implantation: A Case Study In Vietnam

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ABSTRACT

In Vietnam, legal transplantation is not entirely a recent problem, because in Vietnamese history, they have partially transplanted Chinese law, French law, and Soviet law. Legal implantation is not an undemanding job. Recognizing the difficulties and challenges in legal transplantation is very meaningful in both theoretical and practical aspects. In this article, the author points out the challenges of legal transplantation, and initially offers practical solutions to improve the effectiveness of legal transplantation in Vietnam in the coming time.

Keywords

Legal transplantation, challenges in law transplantation, foreign law.

Introduction

Just as technology advances, the collective experiences of humanity shape the law. Legal transplantation is a natural process, consistent with the law of change for development, because legislative concepts and experiences are not limited to one country, but are transformed beyond borders, through many ways from the signing of bilateral and multilateral agreements, exchanges between scholars, integration through legal training through international programs, the expansion of the scope of activities of global law firms, overseas research trips, etc.

Legal transplantation often comes from the need to transplant because of the context of integration. When trade, technological development and the movement of labor are increasingly free, the legal framework also needs the integration. Therefore, legal transplantation makes the law compatible and harmonized in the integration process. Looking more broadly, it can be seen that legal transplantation is inevitable, under the laws of development of cultures - the laws of cultural exchange and acculturation. Alan Watson (1933-2018) argued that legal transplantation is "exceptionally common. This is true of both ancient times and the present. Foreign legal transplantation is the most important source of legal development." *The most important changes in legal systems are the products of legal borrowing.* (WATSON A., 1993, p. 95). According to author Nguyen Van Cuong, legal transplantation is only successful when providing appropriate legal solutions. To solve development problems, it must be the product of careful consideration, the product of well-informed choices or decisions (CUONG N.V., 2016, p. 257).

Legal transplantation has many advantages, specifically, legal transplantation helps us receive advanced and modern ideas, philosophies and legal content from the world and abroad. In addition, legal transplantation also helps us find legal solutions in many fields and contents that Vietnam has no precedent or experience with. Technically, legal implantation can take place at many levels of a legal system and for many reasons. It is usually simpler and less

expensive to use an existing rule instead of testing and creating a new one (SMITS J.M., 2006). In international integration and globalization, Vietnamese lawmakers always have a proactive stance and absorb new regulations suitable to Vietnam's socio-economic and political conditions. Therefore, the implantation of quality law is one of the essential requirements for legal reform (NGOC N.T., 2022, p.53). Implanting appropriate laws not only helps to fill legal gaps but also helps Vietnamese law to have legal regulations compatible with international legal standards. Therefore, it is essential to reduce legal barriers, promote free trade between countries, and harmonize laws in the world.

In fact, there are still a lot of difficulties and challenges in legal transplantation. What are they? And how to improve the effectiveness of legal transplantation in Vietnam in the coming time? We will discuss these questions in this article.

Literature Review

The research works on legal transplantation in Vietnam are quite diverse. Among them, notable recent research works in Vietnam include:

Cu V.T.; Quan N.V. (2023) with "Legal transplant in Vietnam"; Cuong N.V. (2017) with "Reception of foreign law: View from Vietnamese practice"; Doan H.V.; Thang M.V (2018) with "The influence of Western law on Japanese law in history and reference values for Vietnam in the current context"; Nghia P.D (2016) with "Looking back at the theory and experience of receiving law"; Quang N.V. with "Comparative jurisprudence and legal transplantation: Methodological issues on reforming Vietnam's legal system".

Internationally, typical works on the legal implementation include: Watson A. (1993) with "Legal Transplants - An Approach to Comparative Law"; Smits J. M. (2006) with "Elgar Encyclopedia of Comparative Law";

Sacco R. and Rossi P. (2017) with “*Einführung in die Rechtsvergleichung (Introduction to Comparative law)*”.

While numerous studies exist on the legal transplantation, their scope has predominantly revolved around its theories, characteristics and benefits. However, specific and comprehensive research on the difficulties and challenges as well as solutions for legal transplantation in Vietnam, has been lacking. As a result, this article builds upon previous studies while filling the gap by conducting assessments of the present state of legal transplantation in Vietnam. Furthermore, it explores the solutions to improve the effectiveness of legal implantation in Vietnam.

Methods

To undertake the research on challenges and solutions for legal implantations in Vietnam, the authors employ various traditional research methods from the social sciences and legal sciences. These methods include dialectical and historical materialism methods, analysis and synthesis method and qualitative research method.

- Dialectical and historical materialism methods: This method is used to clarify basic theoretical and practical issues on the research topic.

- Analysis and synthesis method: The article relies on the collection and analysis of available documents related to: Theories of Legal transplantation; Challenges for the process of harmonizing the law; Harmonization of laws;

- Qualitative Research method: The goal of applying qualitative research is to detect and identify some issues that have not been mentioned in previous studies. This method is used to learn more about the status of legal implantation in Vietnam.

Results and Discussions

Difficulties and challenges in legal transplantation

- Challenges in finding original information

Accurate information is a prerequisite for the success of the transplant. This requires that before implantation, we must grasp the original idea and provide reliable original information. This information may include statutes, specific regulations, judgments, case law, decisions etc (TUNG L.X.; TIEN D.N.M, 2021, p.73). Where did this original information come from? Is that source legitimate, accurate, and trustworthy? For example, studying German law through an English translation, studying Russian law through a French translation, studying Chinese law but in Vietnamese, etc.. Here, the researchers cannot find original information.

It is necessary to understand that "translation" is not the "original". "Translation" is always a more or less version expressed through lenses, ways of thinking, writing, and even expressed in it as prejudice by the translator. Receiving inaccurate translations not only leads to misunderstandings and misperceptions, but also leads to misapplication and incorrect implementation.

- Challenges in finding up-to-date information

Law is a constantly changing phenomenon. Many countries around the world constantly update their laws. Therefore, it is easy to become outdated and unreliable if the information used for reimplantation is not the latest information. When it is not the latest information, the consequence of implantation is that we have chosen an outdated product, sometimes an error version, but mistakenly believe that the foreign law is like that and we are accepting the laws of their country. For example, the book *Commentary on the German Civil Code (BGB)* by famous jurist Palandt (1877 - 1951),¹ recently reprinted to the 82nd edition, continuously updates the judgments, explaining the changes of each case. How are laws on paper perceived, changed and applied? (PALANDT O., 2021; GRUENBERG, 2023) If we read the first commentary in 1938 with the most updated version 82 in 2023, we will see an enormous difference. The German Civil Code has very few changes, but the Court's interpretations in practice have changed and supplemented a lot over time. Based on the old version, without updating the Court's judgments or legal explanations, we may misunderstand and misunderstand the legal provisions. Therefore, if not updated or researched in a one-sided and subjective manner, the harm will be extremely great.

- Challenges in translating and understanding legal terms from foreign languages

If we want to transplant law, we must learn about foreign law. To learn about foreign law, we must access documents, legal documents, and judgments, which contain many complex legal terms. When studying foreign law, scholars often have to look up specialized dictionaries to translate into Vietnamese. However, in reality, there are many legal terms that do not have complete equivalents in the Vietnamese language. When translated into Vietnamese, the original meaning will be different or we cannot find the equivalent words. When there is no such equivalence, scholars often seek to explain these legal terms. The danger lies because this explanation may only help us partly understand the literal meaning of the term, but may ignore or fail to clarify the purpose of that legal term and the history of the term's creation as well as the actual context of that term.

Legal translation is various from translating regular documents, legal translation always has the task of clarifying legal norms. In legal norms, there are always terms expressed in descriptive assumptions, prescriptive assumptions, determined legal consequences or indeterminate legal consequences. These terms are often

¹Otto Palandt (1877 - 1951) was a famous German judge. Since 1938, he has been the author of the commentary on the German Civil Code BGB . This is the most important work in German legal scholarship. This edition was continued by publishing house C.H.Beck after his death. Since 2021, Grüneberg, judge of the German Federal Supreme Court, has followed in Palandt's footsteps, updating this book from the 81st edition.

qualitative and very difficult to understand if not explained, because most of them are abstract and general.

Of course, not to mention mistranslation, an incomplete translation of a term causes the reader to misunderstand, causing many people to misunderstand and then quote it again, continuing to carry that incorrectness further, which is extremely harmful. Mistranslation, under translation, lack of explanation, these actions can lead to misperceptions or can lead to legal implantation failure.

- Challenges in understanding historical roots, ideological roots, cultural and social contexts, and purposes of legal rules

Transplanting the law is not a straightforward job. Legal transplantation is essentially cultural transplantation and legal culture transplantation in particular (CU V.T.; QUAN N.V., 2023, p.47). Montesquieu (1689-1755) in the 18th century wrote: *"Law is regards as a specific product of a community and it is only coincidental that the law of one country suits the needs of another country. Law depends on the cultural characteristics of the country, the climate, terrain and size of the territory, the way of life of the community, the level of freedom recognized by the Constitution, and the religion of the country, their interests, wealth, commercial activities, customs, practices"* (ROBERT L., 2001, p. 22). Ronald Dworkin (1931-2013) is a famous contemporary legal scholar who proposed the Theory of Law as an interpretation. He believes that law is the product of constructive interpretation by judges. Judges interpret or view the law not according to their own ideas, but *"interpret it as a whole, linked to the history, culture, traditions of the nation, as well as precedents"* (DWORKIN R., 2000).

Author Pham Duy Nghia believes that borrowing laws on paper is like buying good plant varieties, but the entire existing social institutions are like incompatible climates that will quickly make that wonderful variety perish (Nghia P.D., 2016, p. 252.). Legal implantation is a legal solution that we find in foreign countries that can work well, but when transplanted into Vietnam, it becomes far from reality, far from Vietnamese culture and traditions. Male. For example, legal transplantation may fail when choosing the law of the transplanting country, choosing countries that do not have similar social characteristics, or countries that have a top level of development, different from our country for transplantation.

Without placing legal regulations in the historical, cultural and social context that formed those regulations, we cannot understand them properly. Therefore, research on the historical circumstances and legal traditions of that country is very necessary. When transplanting law, we do not simply transfer specific legal norms from one country to another, but more importantly, we need to learn the basic concepts and foundations of the legal system, hierarchy of legal sources, legal terms, and concepts. In addition, geographical conditions, climate and natural resources all have a significant influence on a country's legal system. For example, the discovery of oil fields creates the need for legal documents on oil exploitation, and the danger of tsunamis and earthquakes will affect legal regulations on

construction. Religious views play an important role in forming the legal system, e.g., Christian countries find it difficult to accept polygamy, but the opposite is true for Muslim countries (TUNG L.X.; TIEN D.M.N., 2021, p.73).

Even in ASEAN countries, the need to transplant laws and harmonize laws among countries in the ASEAN region is also very necessary, this not only creates conditions for investment and trade exchanges. intra-bloc trade, but also helps connect countries and peoples together. This is even more urgent when the laws of ASEAN countries still have many differences, although ASEAN countries have made many efforts to harmonize laws with each other. Besides certain similarities in the laws of ASEAN member states, each ASEAN country has its own characteristics in terms of history, traditions, geography, population composition, and level of economic development. , politics, religion,... are the foundation that creates the diversity of society and legal system for this area (HUONG T.T.D., 2017, p.13).

- Challenges of simultaneously understanding both the law on paper (law in book) and the law in practice (law in action)

There are cases where a regulation is still officially in effect, but in reality, in that country, people no longer apply it. Without thorough research, often only studying laws on paper causes us and those who learn about the issue later to misunderstand that they are prescribed and applied exactly as stated on paper. It is often difficult to recognize which legal norms are no longer applied in practice. For example, for the death penalty in Sweden, one should not rely solely on the Penal Code, because these provisions do not reflect reality. In the vast majority of cases sentenced to death by the Court, the head of state often commutes the sentence to life imprisonment (TUNG L.X.; TIEN D.N.M., 2021, p.74).

Understanding the law on paper and understanding the law in practice are very different. For example, Germany's Basic Law only has 19 articles, the first of which regulates fundamental rights, which are very brief. However, if we only stop at understanding the literal meaning of these regulations, we are only understanding the law on paper. If we do not link it to the reality of the trial, the Court's interpretation, and the debate of constitutional law professors, we probably can not understand the value and practical meaning of these 19 Articles, i.e. the term "Menschenwürde" (human dignity) specified in Article 1, Clause 1, Sentence 1 of the German Basic Law has had hundreds of cases resolved in the Federal Constitutional Court. This Court has interpreted specific aspect of this term to understand what "human dignity" really means (GROEPL C., 2023, p. 163).

- Challenges of overcoming the problem of "local interests" in legal transplantation

"Local interests" means the benefits of the competent state agencies, organizations, companies, etc. Policy corruption in lawmaking is a problem that has not been raised until now. For the sake of of the drafting agency, lawmakers will ignore and *only focus on introducing the countries' legislative experience in line with the competent state agency's interests*. Doing so makes the results of

foreign legal research not aim and one-sided, and legal transplantation may fail. Whether legal transplantation is successful depends not only on a simple comparison of the law of country A or B with the law of Vietnam, then supplementing what is missing, seeing what is like the direction. The agency submitting the law project thinks it is the best solution, while the experience of many other countries is ignored or researched poorly. It's time to be aware of this danger and have solutions to overcome it.

Solutions to improve the effectiveness of legal implantation

- Clearly define the goals, limits, conditions, and capabilities of legal implantation

Legal transplantation must come from local needs. Therefore, individuals must voluntarily ensure access to legal transplantation, aligning with the aspirations, lifestyle, way of thinking, and feeling of the indigenous people.

Legal transplantation is not for making Vietnam's law similar to the law of any other country. The important thing is that the product of that transplantation continues to "live" and continues to bring effective practical results for the country, for society or not. To do so, you need to pay attention to all three stages: before transplantation, during transplantation and after transplantation. Before and during transplantation, we need to answer questions like what practical problems require legislation. How can we address potential problems by incorporating a foreign regulation into Vietnamese law? What are the effects, costs, benefits, and risks of implant options? Which implant solution is the most optimal?

For transplantation to be effective, it is necessary to set goals, determine possibilities and expect results from transplantation. We find the common denominators of the laws of different countries, the similarities and differences between legal solutions, the advantages and limitations of legal solutions, as well as how to choose legal solutions. Which reason is the most optimal? When transplanting, misidentifying the goal, or researching foreign laws in a prejudicial way will lead to no results or results that deviate from the original goals.

According to authors Sacco and Rossi, clearly defining the scope of the transplant problem is very important. You should not have big ambitions for transplant right away (SACCO R., ROSSI P., 2017, p. 27). In Vietnam, I also agree with author Pham Duy Nghia in saying that before transplanting the law, it is necessary to do an autopsy to identify all the strengths and weaknesses of existing social institutions, measure them, then *choose small reforms* backed by existing institutions. Step by step, the new legal transplant gradually creates a pervasive and successful effect (NGHIA P.D., 2016, p. 252).

- Research fully, comprehensively, deeply, and objectively foreign laws before performing a transplantation

Currently, the 2015 Law on Promulgation of Legal Documents has not overcome the shortcomings of the old Law in stipulating the responsibility to research general legal standards, model laws, foreign legal experience...

relevant agencies of the drafting agency. However, during implementation, relevant agencies of the drafting agency can address this issue (TU N.T., 2015, p.72).

In the process of finding similarities and differences in legal provisions of different legal systems, it is necessary to consider the functions, for cases of occurrence or conflicts that arise that the regulations should study will adjust. Functional unity will create comprehensiveness in legal transplantation.

When researching foreign laws to carry out the transplant process, we also need to pay attention to factors that lead to the origin of differences between countries of different legal systems in the world, such as economic system, political and ideological system, religion and historical and geographical factors, need to update the legal regulations of foreign legal systems, try to understand these legal regulations Based on respect for the legal system of the country being researched, separate from the legal understanding of one's own country, especially for projects researching legal systems with origins different from one's own country.

- Overcoming traditional cultural differences and barriers

Although we know that differences in traditional culture can cause barriers to legal implantation, it does not mean that removing these barriers is impossible. Implanting law in a specific context solves this problem (QUANG N.V., 2016, p. 66). However, a country must make necessary corrections and changes when adopting foreign laws, and cannot simply copy them mechanically. How to change regulations and institutions of "foreign" origin will be determined by the specific conditions of the receiving country. However, before proceeding with adoption, it is important for lawmakers to determine whether the solution is suitable for the legal system and local legal culture (CUONG N.V., 2017, p. 5).

After transplantation, it is necessary to continue to pay attention to ensuring conditions (political, economic, socio-cultural) and influencing factors (legal awareness of the people, officials, civil servants, etc.) local customs and practices, material and technical supporting conditions) to legislative products so that they can come into life easily. Author Watson also warned that one reason leading to the failure of legal transplantation is the lack of supporting institutions to help enforce and spread legal ideas, allowing most of the population to take part more, benefit more and become more empowered by receiving legislation (Watson A., 1993).

- Comprehensively innovate comparative law research and teaching, and continue to research and supplement new knowledge on legal transplantation

Innovating the research and teaching of the Comparative Jurisprudence module is also very necessary today. In fact, the Comparative Jurisprudence curriculum at current law training institutions focuses too much on introducing and describing legal systems around the world. Along with the lack of a thorough introduction to comparative legal methods, the teaching content also lacks

an introduction to legal theories and how to apply theories and methods of transplanting law into law making.

Students will later become officials and legal experts. Dissemination and capacity building, understanding of comparative law and knowledge of legal implantation for this population needs to be emphasized. Understanding of comparative law and international legal standards is essential for successful legal reform.

- Strengthen international cooperation, increase exchanges, and learn from regional and international legislative experiences

In addition, creating favorable conditions for expanding exchange activities and learning from regional and international legislative experiences is also very necessary. Dialogue on law is a necessity and a way for countries to develop their legal systems. These activities need to be substantive, methodical, and synchronous, through the development of research programs, projects, and research topics in a focused manner, avoiding being spread out. In addition, it is also essential to continue to improve the international legal database, so that the data is accurate,

updated, and easily accessible to serve officials, legal experts, as well as interested people

Conclusion

In essence, legal transplantation refers to the practice of adopting legal concepts and solutions from international law or the legal systems of other nations. Currently, the issue of legal transplantation poses challenges in terms of research, determination, and implementation; however, it yields significant practical benefits and contributes to the reform of the national legal system. Law transplantation in Vietnam will be successful if we apply solutions synchronously and comprehensively, such as clearly defining the goals, methods and results of law transplantation; Comprehensive, in-depth and objective research before implantation; overcome traditional cultural differences and barriers; Comprehensively innovate the research and teaching of Comparative Law, introduce knowledge about legal transplantation and strengthen international cooperation, increase exchanges and learn from regional and international legislative experiences.

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