Legal Transplantation in the People's Republic of China:

A Response to Alan Watson

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A. Introduction

To transplant is to remove and reposition, to convey or remove elsewhere, to transport to another country or place of residence. Legal transplantation is "the moving of a rule or a system of law from one country to another, or from one people to another."[1] No matter whether we need legal transplantation or not, no matter whether legal transplantation succeed or not, it is "imposed, planned, unplanned, a deliberate effort or a result of convergence or divergence"[2] that has happened throughout history all over the world.[3] It has become a kind of legal and historical phenomenon existing in history, which we cannot deny.

It has been found that ancient Phoenicia and countries around the Mediterranean had systematically transplanted the *Commercial Code* from Babylonia, which has been proved by massive unearthed legal literature.[4] Afterwards The Phoenician Commercial Code was absorbed by its colony Rhodian, and it became the famous *Rhodian Law*.[5] Then, the *Rhodian Law* was copied to a great extent by Greek Law and Roman Law.[6] Moreover, most western countries' private law was more or less directly from either Roman Civil Law or English Common Law in Middle Ages.[7] Also, most Asian and African countries' laws were transplanted from Mohammedan law. It is obviously that the phenomenon of transplantation is not restricted to the modern world, it happens all the time whenever law exists.

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1 A. Watson, Legal Transplants: An Approach to Comparative Law 21 (1993).

2 D. Nelken, *Towards a Sociology of Legal Adaptation*, *in* D. Nelken & J. Feest (Eds.), Adapting Legal Cultures 22 (2001).

3 Roscoe Pound wrote "History of a system of law is largely a history of borrowings of legal materials from other legal systems and assimilation of materials from outside of the law". It has been asserted by some anthropologists that 'cultures develop mainly through borrowings due to chance contact', R.H. Lowie, Primitive Society 441 (1920).

4 Feng Zhuohui, *Falv Yizhi Wenti Tantao*, *in* He Qinhua (Ed.), Fa de yizhi yu fa de bentuhua 20-21 (2001).

5 We can also find some relevant resources about it in the Rome Digest.

6 Feng Zhuohui, *supra* note 4, at 21.

7 Watson, *supra* note 1, at 22.

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In modern times, this kind of phenomenon occurs on a large-scale, and legal transplantation becomes more common. For example, France transplanted law from Ancient Rome, Germany transplanted law from France,[8] the United States from the United Kingdom,[9] Japan from France and Germany, Asian countries from Japan and western Europe,[10] Japan from the United States after World War, and most developing countries in Africa, Asia and Latin America transplanted their laws from either Common Law or Civil Law country, and so on.[11] There are so some many that I cannot point all of them out.

Concerning the development of the Modern Chinese Legal System, it is during a transitional period (about 100 years) that China learned and transplanted foreign legal system since it amended its law in the Qing Dynasty.[12] It is a fact that the modernization of the Chinese legal system is inseparable from the foreign legal system. There arose many legal concepts such as 'the differentiation of public law and private law', 'principle of institutional settlement', 'equality before the law' and 'judicial independence'; a system that divided the Chinese legal system in constitutional law, administrative law, civil & commercial law, criminal law, procedural law and international law; some principles such as the 'equality principle', 'freedom of contract', *nullum crimen sine lege,* and *nulla poena sine lege* and 'principle of the presumption of innocence'; also, there are some legal terminologies which are transplanted from western countries, which cannot be found in the Chinese traditional society, such as civil code, public law, private law, citizen, rights, natural person, artificial person, written law, personal property, real property, 'unjust enrichment' and 'voluntary service'. Thus we may say that there is no modern Chinese legal system that has not been transplanted from foreign legal systems. Modern Chinese legal system is not based on a traditional Chinese legal system but on foreign legal systems especially from Western countries. Legal transplantation is a common historical phenomenon in the development of China's legal modernization. Thus, legal transplantation is an old topic, which has happened throughout world legal history wherever law has existed.

This article aims to give a comprehensive illustration of legal transplantation in the People's Republic of China (PRC).[13] It will begin with globalization and indigenization. From one point of view, law is "a mirror of society" and "every

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[8] A. Watson, *Legal Transplants and European Private Law*, 4(4) Electronic Journal of Comparative Law (2000), http://www.ejcl.org/44/art44-2.html.

[9] There are many cases about many countries which transplanted their laws from United Kingdom. *See* Gao Hongjun, *Yingguo Fa de Yuwai Yizhi – Jianlun putong faxi xingcheng he fazhan de tedian*, 3 Bijiao Fa Yanjiu, at 65 (1990).

[10] There is detailed analysis about how India transplanted law from Western countries *in* Jiang Han, *Falv wenhua de chongtu he ronghe – Yindu fa xiandaihua de shijian*, 2 Bijiao Fa Yanjiu, at 30 (1987).

[11] More cases can be found in Feng Zhuohui, *supra* note 4, at 18-34.

[12] It is a time that is acknowledged by most scholars as the beginning of Chinese legal modernization.

[13] Legal transplantation is a huge topic, it is impossible to illustrate it in this article or even in a book. In this article I will illustrate my personal view towards legal transplantation in the PRC and minimize the attention to the theory that comes to light.

aspect of the law is molded by economy and society".[14] So, in a world where every aspect of life is flooded with globalization, how can national law survive? I will discuss the relationship between globalization and indigenization, try to figure out why legal transplantation matters so much nowadays, and then give a brief introduction to the theory of legal transplantation from an academic perspective. After that, I will focus on China's current situation and discuss why China needs legal transplantation much more eagerly than before from different perspectives. Further, I will give an example of what the methods are that China is adopting and how they work in China. To conclude, I will draw some conclusions from the experience of the failed case and try to give some advice for legal transplantation in China in the future.

B. Globalization, Indigenization and Transplantation

What is globalization? Actually, globalization is not a new phenomenon, and it is a phenomenon which has existed for a long time in different forms. From the military expansion of the Roman Empire through Genghis Khan, to the so-called capitalism of today, these are all different types of globalization in different times. In other words, all through history globalization has always existed in military, religious and economic form. The word 'globalization' we use refers to an economic, technological and cultural transnational process since World War II, and particularly refers to how this transnational process surmounts national boundaries and becomes a new challenge to national sovereignty.[15]

But, when we regard globalization as economic globalization, does it mean that we have to realize there is a supranational, transnational and globalization power spreading everywhere?[16] It is irrefutable that economic globalization is spreading everywhere across the world, and it has formed as a whole system within countries. Also, we have to acknowledge that economic globalization has an impact on the rule of law. Does this mean that a 'globalization of law'[17] is

[14] *See* W. Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 Am. J. Comp. L. 489 (1995). The basic flavor of a mirror theory is given by a distinguished American legal historian, who says that he conceives of law "not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society. This is the theme of every chapter and verse". *See* L. Friedman, A History of American Law 12, 585 (1985).

[15] There are many different definitions of 'globalization'. Grahame Thompson, Paul Hirst and Linda Weiss hold a negative and suspicious attitude towards globalization and regard the market itself as the only way to solve all problems. Others, such as Anthony Giddens, Ulrich Beck and Roland Robertson regard globalization as a transformative process with a society.

[16] *See* Li Xiaoxia, *Falv Yizhi He Quanqiuhua Beilun*, at http://www.legaltheory.com.cn/info.asp?id=9394.

[17] Western lawyers observed that this is an era of globalization of law that will inevitably accompany the globalization of economy. *See* L. A. Mistelis, *Regulatory Aspects: Globalization, Harmonzation, Legal Transplants, and Law Reform – Some Fundamental Observations*, 34(3) International Lawyer 1059 (2000). Also, he added, Globalization is foremost an economic process. It is also a political event, as evidenced by the spread of democratic principles and human rights

emerging regardless of how this kind of 'globalization of law' is challenged by traditional legal philosophy and political philosophy theories?[18] Some scholars agree that economic globalization can have a huge influence on the law, but they do not agree that it will cause a 'globalization of law'. If we have to describe this situation then it is better to regard it as "law under globalization"[19] Many scholars believe that law belongs to the social will. No matter how much impact and influence is suffered from the outside, such as economic globalization, it cannot finally change the fact of the diversity of legal cultures. The legal culture which is rooted in various social cultures in different nations will inevitably be different because of different choices of political systems, different levels of national economy, different religions, and different traditional customs and historical cultures. In that case, the existence of different legal values (socialism and capitalism), different legal spirits (collectivism and individualism) and different legal systems (common law system and civil law system) will last for a longer period, and all of which will again be the main characters of diversity of legal cultures in the 21st century.

At the same time, although globalization is so universal, conscious resistance to the effects of globalization has never been called off.[20] This conscious resistance is the so-called indigenization.[21] The real purpose of indigenization is to seek maximization of benefits within nations and to protect national sovereignty and the so-called national consciousness or national identity.[22] Nowadays,

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among nations; many human rights violations are no longer treated as domestic affairs. *See also* J. A. Spanogle, Jr., *American Attorneys' Use of International and Comparative Legal Analysis in Everyday Practice*, 28 Wake Forest L. Rev. 1, at 1 (1993); G. Walker & M. Fox, *Globalization: An Analytical Framework*, 3 Ind. J. Global Legal Stud. 375 (1996); J. Delbrück, *Globalization of Law, Politics, and Markets - Implications for Domestic Law: A European Perspective,* 1 Ind. J. Global Legal Stud. 9 (1993).

[18] The so called 'globalization of law' or, more precisely, the 'Americanisation of the transnational rule of law', refers to law being exported together with other cultural goods and services in the wake of economic globalization. *See* W. Heydebrand, From *Globalisation of Law to Law under Globalisation*, *in* D. Nelken & J. Feest (Eds.), Adapting Legal Cultures 117 (2001).

[19] The issue of law under globalization refers to economic globalization and may be seen as having structural consequences that have an impact on the rule of law, regardless of whether it occurs in a national or transnational context. *Id.,* at 117.

[20] Heydebrand believed that the conscious resistance may come from two sources: one source is the interests of "traditional intellectual" elites such as "formal", culturally embedded representatives of law and state, orthodox religious leaders, and traditional segments of the legal profession, especially those not immediately involved in facilitating transnational deals; a second source is "critical public intellectuals" inside and outside universities and think-tanks, as well as the leadership of new global grass-roots movements such as feminist, ecological, ecumenical and religious ones. *Id.*, at 122. *See also* H. Charlesworth, C. Chinkin & S. Wright, *Feminist Approaches to International Law*, *in* R. J. Beck *et al.* (Eds.), International Rules 243 (1996); and K. Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 Michigan Journal of International Law 517 (1992).

[21] In this article, 'indigenization' refers to a process, due to economic or political reasons, where some individuals and groups emphasize the value of national resources and make every effort to absorb different benefits from other nations into their native tradition. *See* Li Xiaoxia, Falv Yizhi He Quanqiuhua Beilun (2001).

[22] Shen Zongling, *Ping Falv Quanqiuhua De Lilun*, *in* Chen'an (Ed.) Guoji Jingji Fa Luncong, Vol. 4, at 22 (2000), 22.

globalization weakens the boundaries between nations, not only the economic but also cultural and our everyday life. In such a situation, indigenization is doing its best to protect the borders and national identity from that influence under the pressure of globalization. In fact, globalization and indigenization have become a kind of positive relation, where they rely on each other to propel the development of economics.

The globalization of law and the indigenization of it are two inalienable elements in contemporary legal development. They do have certain contradictions and conflicts, which are inevitable. The key problem we have to face is how to co-ordinate these conflicts. It has caused big discussions between legal scholars. Legal transplant is introduced by most countries including China to the homogenization of international rules.[23] In other words, legal transplant has become a method used to balance the conflicts between the globalization of law and the indigenization of it. Scholars believe that a positive legal transplant is an effective way for indigenization to resist the globalization of law. And it does make legal traditions continue even under the explosion of globalization. Even more, it does, to some extent, prevent legal colonialism.[24]

Although globalization does exert such a huge influence, indigenization also appears similarly strong. Every nation, acting as a benefit unit or commonwealth, is seeking to gain maximum benefits from the impacts of globalization. In that case, legal transplantation is of course the first and best choice. But what is legal transplant and why do we need it? And how does it work as a balance between the globalization of law and the indigenization of it?

C. What 'Legal Transplants'?

Legal transplantation is a compromise product created during the conflict between globalization and indigenization. Moreover, it is the best way for a nation to gain maximum benefits. So, what is legal transplantation?[25] As Alan Watson described in his book *Legal Transplant*, it is "the moving of a rule or a system of law from one country to another, or from one people to another." Regarding legal transplant, discussion has always continued between legal scholars, the most

[23] *Id.*, at 29.

[24] It is all too obvious that vast parts of Latin America, Africa and Asia are experiencing the consequences of globalization not primarily as a benefit, but as an aggravation of endemic structural inequality and exclusion from capital investment and economic development. In many of these cases, resistance may involve reasserting the relative autonomy of the nation state and not letting its legal system become a 'dependent variable' vis-à-vis political expedience and economic priorities, or preventing law from becoming merely an 'instrument' of societal guidance, social engineering or surface compliance rather that an expression of rights and a predictable restraint on the use of corporate and state power. *See* R. Petrella, *Globalization and Internationalization: The Dynamics of the Emerging World Order*, *in* R. Boyer & D. Drache (Eds.), States against Markets: The Limits of Globalization 132 (1996). *See also* Heydebrand, *supra* note 18, at 123.

[25] In some articles, we can usually find other relevant words used to describe 'transplant', such as drawing on, borrowing, assimilation, imitation, transfer, spread, introducing. The most comparable word used for 'legal transplant' is reception.

representative being the one between two English legal scholars since the 1970s. O. Kahn Freund in his article *On Uses and Misuses of Comparative Law*,[26] quotes some words from Montesquieu who is the first comparative lawyer to give his opinion. In Montesquieu's view it was only in the most exceptional cases that the institutions of one country could serve those of another.[27] He also added that – and these words that have been a warning to all comparative lawyers for two centuries –

> les lois politiques et civiles de chaque nation…doivent être tellement proper au people pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convener à une autre.[28]

In other words, an institution could only be designed to suit one country and it is very difficult to use it to suit another. In brief, legal transplantation is impossible. What are the factors that hinder transplanting laws? O. Kahn Freund explained that there are two main factors: one is known as 'environmental factors' which could include geographical, sociological and economic, and cultural elements;[29] the other one is the so-called 'pure political elements'.[30]

In 1974, Alan Watson in his article *Legal Transplants and Law Reform*[31] refuted O. Kahn Freund's opinion. He argued that firstly, history did not prove that legal transplantation is impossible. He gave some examples in his article, such as the French law serving as the model for the Japanese Penal Code and the Code of Criminal Procedure which were enacted in 1882; and the Civil Code, which was adopted in 1898 after some initial difficulties, contained what was in essence the German law of contract, delict and property;[32] secondly, it did not require any real knowledge of the social, economic, geographical and political context of the origin and growth of the original rule to transplant laws,[33] and what the law reformer should be after in looking at foreign systems could be transformed into part of the law of his country.[34] Moreover, legal rules may be successfully borrowed where the relevant social, economic, geographical and political circumstances of the recipient are very different from those of the donor system;[35] and thirdly, he still had some doubt that environmental factors were now

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[26] O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 20 (1974).
[27] *Id.*, at 6.
[28] Montesquieu, Esprit des Lois, Book I, Chap. 3 (Des lois positives).
[29] For geographical factors, such as "above all the climate", but also "the fertility of the soil", "the size" and "the geographical position of a country"; sociological and economic factors, such as le "genre de vie des people, laboureurs, chasseus ou pasteurs", the wealth of the people, their "number", their trade; and for cultural factors, such as the religion of the people and "leurs inclinations", "leur moeurs", leurs manières. *See* Kahn-Freund, *supra* note 26, at 7.
[30] *Id.*
[31] A. Watson, *Legal Transplants and Law Reform*, 92 Law. Q. Rev. 79 (1976).
[32] *Id.,* at 82.
[33] *Id.*, at 81.
[34] *Id.*, at 79.
[35] *Id.*, at 80.

less important, political factors more important in determining the difficulties for a legal transplant.[36]

The debate about legal transplant is still discussed by legal scholars since it arose in the 1970s. In my opinion, before commenting on what they discussed, it needs to be stressed that they do not arbue whether legal transplantation is possible, but to what degree it should take place.[37] O. Kahn Freund has not actually denied the possibility of legal transplant, what he wants is to try to avoid the misuse of legal transplants. Thus, Alan Watson criticized him for his pessimism about legal transplants.

There is truth in Eric Stein's description of the debate between O. Kahn Freund and Alan Watson.[38] The different perceptions of the ease of transplants are "simply in the eye of the beholder, or if they are due rather to the particular focus of his inquiry."[39] Alan Watson as a historian took a 'macro-legal' view that contemplates the massive transplants that loom as 'milestones' on the large-scale canvas of world history. But in contrast to Alan Waston, O. Kahn Freund, the lawyer-sociologist, took a 'micro-legal' view, and he concentrated primarily on pieces of more or less modern reform legislation in developed countries.[40] Thus, legal transplant is of course possible.

I. Complexity of Legal Transplantation

Legal transplant is possible but it is not an easy process. Rather, it is quite complex, and usually there is much to be discussed, such as the reasons for legal transplant, the effect it will have and the institutions, content and methods we choose. Concerning the institutions and the content we choose, there are some important points to be considered prior to transplanting the institutions. Firstly, do we want to transplant the entire legal system, department laws, and statutes or only the specific legal system, legal rules, legal concepts or legal principles? Secondly, is the law we want to transplant closely linked to politics, the economic system, ideology or value sense? Or is there no relationship between them? Thirdly, does the rule in question have different political purposes or social functions? Last but not least, do we want to transplant international law or specific national and traditional law? It is obvious that what we discussed above is much more closely linked to the possibility of legal transplant and the methods we use.

What are the causes of legal transplant? Two types of law reform can be discerned. One is qualitative law reform and the other one is quantitative law reform.[41] Concerning the sources of law "nor can we trace the cause without

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[36] *Id.*, at 83.
[37] Shen Zongling, *Lun Falv Yizhi yu Bijiao Faxue,* 1 Waiguo Fa Pingyi, at 8 (1995).
[38] E. Stein, *Uses, Misuses and Non-Uses of Comparative Law*, 72 Nw. UL Rev. 198 (1977). Many scholars in China also agree with this opinion. *See* Shen Zongling Lun Falv Yizhi yu Bijiao Faxue, 9 (1995).
[39] Stein, *supra* note 38, at 203.
[40] *Id.*, at 203-204.
[41] *See* Shen Zongling, Lun Falv Yizhi yu Bijiao Faxue 10 (1995).

drawing a basic distinction between an original innovation and its imitation."[42] Moreover, of all the legal changes that occur, perhaps one in a thousand is an original innovation.[43] Rodolef Sacco's valid opinion is that in modern society most legal changes are imitation, in other words, they adopt or transplant institutions from other nations and it is rare that one sees an original innovation. China's 'One Country, Two Systems' would be the best example of an original innovation.

Moreover, according to Rodolef Sacco, imitation has two fundamental causes. The first one is imposition, because every culture tends to spread its own institutions to others.[44] Once it got the power, it would do so. And it was very common in the early 20th century when European countries diffused their legal institutions through their colonies. The second one is prestige, where reception takes place because of the desire to appropriate the work of others, which has a quality that can be described as "prestige".[45] Sometimes, these two causes may be mixed, for example, during Japan's Meiji Restoration and China's Legal Development and Transformation at the end of the Qing Dynasty, which are suffering both from imposition (consular jurisdiction) and prestige (internal intense desire to reform).

Finally, concerning the effects of legal transplant, in most articles on comparative law, the result is usually either success or failure In O. Kahn Freund's article, *Uses, Misuses and Non-uses of Comparative Law*, it also means success or failure. But as we have discussed, legal transplantation is a very complex issue, it is not so easy to say what the standard of a successful legal transplantation is. There are many questions involved, for instance, a drafter drafts a bill, and the rules he uses in the bill may be well know but he does not notice that what he does is transplanting law; and a law may have little effect for quite a long time after its first being transplanted, but as it has the potential to develop in the future, how can we say whether it is successful or not?

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[42] It is an original innovation, for example, when a Scandinavian country institutes the Ombudsman, when Venedicktove explains the enterprise's power over the means of production as *pravo upravlenjia* or right to operational management, when the commission set up by Maria Theresia draws up a civil code in the narrow sense of the word, or when the Lord Chancellor recognizes the trust in courts of equity. *See* R. Sacco, *Legal Formants: a Dynamic Approach to Comparative Law – Part II*, 39 American Journal of Comparative Law 397 (1991).

[43] *Id.*, at 398.

[44] It is fair to say that most legal transplantations before the 1950s took place because of imposition, especially in Turkey, Japan and China. If we claim that the internal cause of reception is a wish to modernize, than this kind of wish in Turkey, Japan or China is directly coming from a series of unequal treaties. Western countries asked to keep some kind of jurisdiction via treaties, and promised that once these countries would meet the standard set by them, they would abandon extraterritoriality. In that case, in order to eliminate these kinds of limits on sovereignty, these three countries had nothing to do but implementing law reform by imitating institutions from Western countries. And because they had an intense desire to reform, they did not have the time to understand foreign institutions well enough, all they can do is to rely on a foreign code. *See* Li Min, *Jindai Zhongguo Minfa Fadianhua de Beijing Fenxi*, at http://www.legal-history.net/go.asp?id=97.

[45] *See* Sacco, *supra* note 42, at 399.

II. The Meaning of Success

How can we measure success? And when are transplants successful as in Poland?; and when do they fail, as in Russia?[46] According to Alan Watson, "a successful legal transplant – like that of a human organ – will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system", and "subsequent development in the host system should not be confused with rejection."[47] But the apparently straightforward idea of success in cases of botanical or medical transplants become much more problematic in the case of adapting legal systems.

So, can we talk about success and what this could mean in the case of legal transplantation? It is, in my opinion, too difficult to measure whether a transferred law fits its new environment or not. Because in most circumstances, societies always have different ideas of what that 'fit' needs to be, success from one point of view does not necessarily entail success from another. And also, time is needed for a transplant to take effect and this depends on their approach of the process by which a cosmopolitan elite transforms its symbolic capital over the generations.[48]

Some scholars try to start the other way round. The likelihood of 'failure' is mobilized as an argument against the credibility of deliberately pursuing legal transfers.[49] But there is some risk of incoherence here. If transplants are 'impossible', why insist on the negative effects of efforts to achieve harmonization? We may be left wondering whether these scholars really do believe that it is impossible to achieve greater harmonization and convergence or whether they fear that it is all too possible but undesirable.

Instead of asking how to measure success, it may be wiser to ask what actually makes a transfer a success. Again, it is difficult to decide what baseline we should use to determine whether a transfer has been successful. Then, is it safe to assume that the goal of legal transplant is to produce greater harmonization of social behaviour and not just harmonization of rules and decisions? Must the rules or institutions transplanted fulfill the same aims and achieve the same results in their society of adoption as in their society of origin?[50]

Thus, it is important to notice that the question of success can arise at more than one stage of the transfer of legal rules and institutions. We may be concerned about how a legal transplantation emerges or the way it exerts its influence. Our

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[46] D. Nelken, *The Meaning of Success in Transnational Legal Transfers*, 19 Windsor Y.B. Access Just. 349, at 361 (2001).

[47] Watson, *supra* note 1, at 27.

[48] The right timing is a context-dependent matter, and is usually known only with the benefit of hindsight. *See* W. Sadurski, *Conclusions: On the Relevance of Institutions and the Centrality of Constitutions in Postcommunist Transition*, *in* J. Zielonka, (Ed.), Democratic Consolidation in Eastern Europe, vol. Institutional Engineering, at 240 (2001).

[49] Nelken, *supra* note 2, at 37.

[50] Friedman argued that "sometimes the success of a transplant may actually depend on its origins being forgetten". *See* L. Friedman, *Some Comments on Cotterrell and Legal Transplants*, *in* D. Nelken & J. Feest (Eds.), Adapting Legal Cultures 142 (2001).

way of explaining the first of these matters may well be different from the second, likewise our assessment of what 'success' means in each case. And the time-frame being used also plays an important role in explaining and judging success.[51]

III. The Necessity of Legal Transplantation

The modern Chinese legal system is based on the transplantation of foreign legal systems, especially from Western countries. After the 1980s, the topic of legal transplantation is seriously discussed by both legal scholars and government. It is believed that, in the last 20 years (after China's opening policy), the world has been integrating rapidly and communication between different countries has become easier and more frequent than before. It is not only possible but also necessary to take advantage of 'good' legal experience of other countries to help building a legal system in the era of economic globalization.

Why is it necessary? The reasons for legal transplantation are the following. First, it needs low experimental costs and can achieve results in a short time. Comparing to original innovation, it is fair to say that legal transplantation require low costs in investigation of problems, research and testing of systems, and drafting bills.[52] Second, it can help to adjust the new social relations evoked by reform and also avoid legal backwardness during the reform.[53] Third, in learning international conventions and universal procedures in various countries, it can ultimately decrease unnecessary transaction costs due to differences between different countries.[54]

Concerning China's situation, it is believed that it is necessary to transplant foreign legal system into China's own legal system. The imbalance of social development and legal development forces China to carry out legal transplantation.[55] The development of different countries during a specific period vary; they either belong to different forms of societies or are at different stages in the same society. Under these circumstance, in order to catch up with the developed countries, it is necessary for developing or undeveloped countries to transplant some 'good' legal institutions from developed countries so that they can promote and safeguard their social developments. And this is exactly what China's current situation in recent years has been. Although China re-built its economic market system and developed it very well, which has even been described as a miracle, we have to realize that the legal system in China is only at the beginning stages and the legal framework is still not perfect. Many problems

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[51] There maybe some matters which are crucial when we focus on shorter periods – such as the legal technicalities of borrowing, or the often highly contingent political circumstances which accompany legal transfers. On the longer view technique may be taken as a constant and the significance of historical contingencies "smoothed out". *See* Nelken, *supra* note 2, at 39.

[52] *See* Wang Chenguang, *Butong guojia falv jian de xianghu jiejian yu xishou*, *in* Shen Zongling (Ed.), Bijiao Faxue de xin dongxiang 220 (1993).

[53] *See* Ma Zhenming, *Cong Fa de jicheng he yizhi kan woguo minfadian de zhiding*, at http://www.law-lib.com/lw/lw_view.asp?no=4830.

[54] *See* Ruan Jingqing, Lun Falv Yizhi, Fudan Xuebao (Shehui kexue ban), Vol. 3, at 97 (1998).

[55] *See* He Qinhua, Fa de yizhi yu fa de bentuhua, China Legal Science, Vol. 3, at 90 (2002).

emerged, especially after joining the WTO organization, such as the protection of intellectual property. The protection of human rights still has a long way to go to reach the level of developed countries.

The objective rules and characteristics of the market economy forces China to continue legal transplantation.[56] Nowadays, the market is one of the main mechanisms controlling the world's economy. Despite the different characteristics of the market economy in different social systems, the basis is still the same, such as value theory, supply and demand theory. According to these basic rules, it is of course impossible for one country to imitate or adopt developed countries' legislative experiences, and use them during the process of constructing its own legal framework.

Economic frictions and loss, and increased transaction costs are caused by increasing legal contradictions and conflicts of different countries. After China joined the WTO, these problems became more serious and China was eager to solve them in an efficient way. And this is exactly what legal transplantation can bring to us, it can reduce the legal contradictions and conflicts between different countries and eventually reduce the legal costs. Moreover, it can build a more stable and effective legal environment for economic co-operation.

Legal transplantation is an important issue in China's Opening policy.[57] At present, each country that seeks development, has to open up. The opening policy is a crucial element and it is urgently required by the increasing demands of the world's economic and political developments, especially for those who are underdeveloped. However, an opening policy is not that simple and it should be omni-directional, not only in economic and technological areas but also in the cultural and political field. At the end of the day, what we want is not only globalization of the economy, but also ensure that other elements are more transnational, such as resources developments, environmental protection, human rights protection, criminal punishment, marital relations and property inheritance, . In this way, the domestic legal institutions will become more international, and will inevitably follow international conventions when dealing with transnational affairs.

Legal transplantation is exactly what legal modernization needs.[58] The differences between legal systems are not only caused by differences in legal methods and legal techniques, but also in legal values and legal mentalities. It is actually the differences in legal spirits and legal values that distinguishes traditional and modern, developed and underdeveloped legal systems. In those legal systems which are still traditional and backward, it is better to transplant some laws and institutions from developed countries, especially those laws or institutions which are well developed and tested, in order to accelerate their legal innovations. Without doing that, they will face an enlarging distance between developed countries and themselves and the delay of their legal modernization. Moreover, they will lose opportunities to modernize their legal systems.

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[56] *See* Zhang Demei, Qianlun Falv yizhi de fangshi, 3 Bijiao Fa Yanjiu 52 (2000).

[57] *See* Gao Jun & Lun Zhongguo, *Fazhi Xiandaihua Jincheng zhong de Falv Yizhi*, at http://www.law-lib.com/lw/lw_view.asp?no=4415.

[58] *See* He Qinhua, Fa de yizhi yu fa de bentuhua 90 (2001).

Legal transplantation is not an easy task, even within similar social systems and legal systems. An example is given by Christoper J. Whelan. He said that despite similar theories of collective bargaining underpinning the United States and United Kingdom systems of industrial relations, in terms of both collective and individual labour laws, the United State and United Kingdom have traditionally been located at opposite ends of the spectrum.[59] Thus, we should realize that legal transplantation could possibly fail if problems are ignored.

D. Legal Transplantation in the PRC

On 14 March 2004, the Chinese Government officially added a provision on the protection of private property rights to the Constitution of the PRC. It is stipulated that "citizens' lawful private property is inviolable."[60] Moreover, "the State, in accordance with law, protects the rights of citizens to private property and to its inheritance",[61] and "the State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and shall make compensation for the private property expropriated or requisitioned."[62] It finally signified the upgrading of the private property rights of Chinese citizens from general civil rights to constitutional rights. The inclusion of this provision into the Constitution is a landmark event of great significance.

Why did this change happen? As mentioned before, the imbalance of social development and legal development forced China to carry out legal transplantation. Since the 1980s, after China set up its socialist market economy, property rights have become increasingly important. Protecting private property rights is a basic rule necessary to build a stable society. Property rights inevitably accompany the development of a market economy and are a basic legal right when constituting market economic orders.[63]

After the completion of the socialist transformation of private ownership, private property of Chinese citizens was limited to the basic means of production. Since the reform and opening-up clauses on the protection of private property were introduced in the Constitution. Amendment Three, added to the Constitution in 1999, stipulated that "[i]ndividual, private and other non-public economies that exist within the limits prescribed by law are major components of the socialist market economy," and that "the State protects the lawful rights and interests of individual and private economies, and guides, supervises and administers individual and private economies."[64] Despite all these stipulations, the range of China's protection of private property rights remained narrow and failed to

[59] C. J. Whelan, *On Uses and Misuses of Comparative Law: A Case Study*, 45 Mod. L. Rev. 300 (1982).
[60] Amendment 22, Constitution of the People's Republic of China.
[61] *Id.*
[62] *Id.*
[63] *See* Gao Jun & Lun Zhongguo, *supra* note 57.
[64] Amendment 16, Constitution of the People's Republic of China.

generate a complete concept of property rights. The protection of property rights still has to be developed further.

China's socialist market economy is not very mature. The ambiguous institutions for the protection of private property do not make it clear what constitutes private property. And this will, to a certain degree, hinder the development of a market economy.[65] Moreover, if we do not give the corresponding legal safeguard to private property, it will eventually affect China's 'rule of law' progress.

Under this pressure, China began to consider amending its laws.[66] The constitutional amendment not only enshrined the protection of private rights; more importantly, it added a damage compensation clause, which we refer to as the law of 'regulatory taking'. If the property rights simply consist of protection clauses and restriction clauses and lack any damage compensation clause, it will inevitably result in a conflict of constitutional rights. If damage to and restriction of property rights are not compensated in practice, existing provisions will be challenged; if they are compensated in practice, there are no clear and direct norms in the constitution to support such compensation. Therefore, adding damage compensation clauses represent a systematic improvement of the provisions on the protection of private property.

The question remains if the principle of the inviolability of citizens' lawful private property is an original innovation created by the Chinese government. The answer is of course "no". This principle can be found in many constitutions. It was first introduced as a basic principle in the 1789 French Revolution. Before that, human rights were described as "life, liberty and the pursuit of happiness" in the American *Declaration of Independence*. The French *Declaration of the Rights of Man and the Citizen* added 'property rights' and described the principle as "liberty, property, security and resistance to oppression",[67] moreover, it stipulated that "property is an inviolable and sacred right."[68]

In modern society most legal changes take plac via imitation, and original innovations are extremely rare. It is fair to say that the protection of private property amendment made by the Chinese government is actually an example of legal imitation; in other words, legal transplantation. But it is very difficult to say where it is exactly coming from because we do not even know the original intention of the drafters.[69] However, after examining the existing constitutions of various countries, some scholars believe that the institutions on protection of private property are akin to the US constitution, and I agree with this opinion.

Concerning the institution itself, the amendment of the Chinese constitution reads "citizens' lawful private property is inviolable" and "the State, in accordance

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[65] *See* Li Shuguang, *Lun xian fa yu si you cai chan quan bao hu*, 1 Bijiao xianfa xue yanjiu 23 (2003).

[66] *See* Lin Laifan, *Mei guo xian fa pan li zhong de cai chan quan bao hu, yi Lucas v. South Carolina Coastal Council wei li*, 5 Zhe jiang she hui ke xue 75 (2003).

[67] Article 2, Declaration of the Rights of Man and the Citizen, Approved by the National Assembly of France, 26 August 1789.

[68] *Id.*, Article 17.

[69] Actually, drafters would never admit that the institution he drafts is a copy of another institution. *See* Zhang Wenxian, *Lun lifa zhong de Falv yizhi*, 1 Fa Xue 7 (1996).

with law, protects the rights of citizens to private property and to its inheritance" and "the State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and shall make compensation for the private property expropriated or requisitioned." Compared to the US Constitution, its Amendment V states that "nor be deprived of life, liberty, or property, without due process of law" and "nor shall private property be taken for public use, without just compensation." It is quite clear that both constitutions stipulate that private property rights are 'inviolable' or 'nor be deprived' and both constitutions have similar compensation clauses.

It may not suffice to only analyze the institution itself. After studying the legal framework of both countries, we can find that, among the existing laws in China, it is only the Constitution that explicitly mentions the protection of private property and not any other laws.[70] In the US the protection of private property rights has also been cited directly from what was stipulated in constitution.[71]

It is therefore fair to say how similar the protection in both countries is. And we have confidence to believe that the drafters have subconsciously replicated the US regarding private property protection institutions when they drafted the constitutional amendments.[72] How has this provision worked since it was amended in the Constitution? Have there been any changes in the practice of private property protection? And can we consider it a successful legal transplantation or not? Has it achieved the same results as the US? Have there been any problems with the implementation and did China encounter the same problems as the US or did these problems only arise after being transplanted into China. Moreover, has it achieved the goals it was expected to by the drafters?

I. Current Problems of Legal Transplantation in the PRC

A series of problems arose soon after the implementation of the Amendment of the Constitution. Although the Chinese government has enshrined the protection of private property in the Constitution, China still has a long way to go before achieving the protection of private property as China is plagued by a whole host of problems.

First of all, on the level of law enforcement, the amended constitution says that "the State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and shall make compensation for the private property expropriated or requisitioned."[73] But, what is the 'public interest'? We

[70] The Property Law (Draft) has been published and is now in public consultation; there are some provisions concerning the protection of private property. However, it is now only a draft and can not be implemented before it has been approved.

[71] The US Constitution does not clearly provide for the protection of property rights; property rights in the constitution are safeguarded indirectly with the expropriation clauses contained in Amendment V to the US Constitution and the "contract clauses" in Section 10, Article 1 of the US Constitution.

[72] *See* Wen Xiaoyong & Shi Ying, *Xian zheng zhi xu shang de zheng zhi lun li: quan li yu quan li de tong yi*, at http://www.pssw.net/essays.asp?id=381.

[73] Amendment 22, Constitution of the People's Republic of China.

could not find any related provisions in relevant laws which define what behaviour falls in the category of 'public interest'. The United States faces a similar problem due to the lack of criteria in defining 'taking'; but the United States is a country where judges can create laws, which is totally different from China. The United States can complete and improve its laws trhhrough jurisprudence. However, in China, if no provisions or criteria can be found in other laws, it will result in difficulty for the judiciary and the court may even refuse to hear the case because there is no basis for a hearing.

Secondly, in terms of the legal framework, China's constitutional system faces an insurmountable hurdle – the issue of constitutional adjudication. The issue of constitutional adjudication constitutes a key problem hampering the implementation of the protection of private property. The success of the United States in building a complete system for the protection of private property is largely attributable to its constitutional system.[74] In China, this issue is manifested in the following areas.

1. Constitutional Litigation

The constitution represents the most direct weapon to protect fundamental rights. The protection of citizens' fundamental rights is possible through the affirmation of the constitution.[75] In China citizens' fundamental rights need to be made concrete with common law provisions and implemented through the enforcement of common laws. The constitution in China does not have any direct legal effect, which means that when a citizen's private property rights are infringed upon, he cannot invoke constitutional provisions and can only rely on other laws to bring general civil or criminal action.[76] The judge, in the process of hearing a case, cannot direct cite the constitution, nor can he issue a guilty verdict on the basis of constitutional norms. However, the reality in China is that all legislation is still in its infancy and many laws are made only after accidents have occurred. In other words, the judge does not prompt the judiciary to make legislation or provide judicial interpretation until he has failed to find related provisions in the current legal provisions during the course of a trial. This obviously creates a factor of uncertainty in the protection of private property. As the constitution finds no place in the judicial process and there is a lack of a corresponding constitutional litigation system, some disputes over rights cannot be effectively settled. This deficiency has greatly undermined the authority of the constitution.

2. Judicial Review

Judicial review is the power to review and determine whether legislation or administrative behaviour has breached the constitution.[77] It is an important

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[74] *See* Lin Laifan, *supra* note 66, at 75.

[75] *See* Guo Qingzhu, *Lun zhong guo si you cai chan quan xian fa bao zhang jia zhi qu xiang zhi ding wei*, at http://www.iolaw.org.cn/gongfa2/shownews.asp?id=18

[76] *See* Tu Shangbiao, *Lun si you cai chan de xian fa bao hu*, 3 Faxue Yanjiu 115 (2003).

[77] *See* Han Tie, *Mei guo fa lv shi yan jiu zhong you guan si ren cai chan quan de jig e wen ti*, 5 Mei guo yan jiu 31 (2004).

method of preventing the abuse of legislative power and administrative power and a crucial manifestation of the system of checks and balances.[78] The lack of a judicial review system in China presents a major problem and impedes the improvement of the protection of private property. It is difficult to ensure that the entity of the state power, during the course of exercising its power, will not engage in any behaviour that might infringe upon citizens' private property rights. Due to the non-existence of judicial review, the citizen will have no access to any remedial actions in such a case.

It is because of these problems that the protection of private property in China was implemented in spirit only, but the regulation fails to exert any practical influence. In other words, it is to some degree, useless.[79] The question is whether similar problems exist in the US. The answer is no.[80] The problems became apparent after the institution was introduced into China's Constitution. It is therefore obvious that they arose when legal transplantation took place. As mentioned before, legal transplantation is a compromise created during the conflict between globalization and indigenization.

After the regulation of protecting private property was introduced, all sorts of problems arose which were obviously due to a lack of managing the legal indigenization properly. On the one hand, the government was keen to solve the current problem that private property was not sufficiently protected due to historical reasons, but they did not analyze the domestic resources well enough before transplanting institutions from developed countries. On the other hand, after transplanting new institutions, the government did not take effective measures to solve the problems which then occurred in the domestic system.

Why did this happen? Is it an individual problem of the protection of private property or is it a common problem which exists in all legal transplantations in the PRC? It is very difficult to give a specific answer, but based on cases which are currently discussed by legal scholars, it seems that there is indeed a common problem facing legal transplantation.[81]

Some of the problems which currently exist are the following.

- transplanting institutions without analyzing the social, economic, geographical and political context of the origin and growth of the original rule to transplant laws will cause problems;[82]
- different countries have different legal cultures, and it is inevitable that there will be conflicts when transplanting institutions from different legal cultures.[83]

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[78] *See* Li Shuguang, *supra* note 66, at 123.
[79] *See* Han Tie, *supra* note 77, at 31.
[80] As mentioned above, the success of the US is largely contributed to its constitutional system; China's constitutional system cannot provide similar protection as the US does. The US has its own problems with respect to the protection of private property, but it is totally different from the problems we mentioned above.
[81] *See* Wang Lijun, *On the Definition of Replanting of Law*, 19 (2) Legal Forum 43 (2002).
[82] *See* Wang Wen, *Law Transplant and Fusion Among Different Legal Systems*, Section of Basic Culture,China Youth College for Political Sciences, Vol. 5, at 83 (2000).
[83] *See* A. Watson, *Aspects of Reception of Law*, 44 Am. J. Comp. L 345-346 (1996).

- Most scholars in China are acknowledging that the Chinese legal system is not well developed and has a long way to go. They urge the Chinese Government to produce more institutions to meet these needs,[84] some of which were transplanted from other countries.
- Most of the transplanted laws were not well analyzed before transplantation.[85] Transplanting institutions simply transplanted an individual clause.[86] It is easy to transplant individual parts of the laws from another legal system. What is difficult, is to implement it better or even similar to the original country. What China currently does is transplant some 'good' institutions from another country by mechanically copying the same clause to its legal system, and without transplanting other corresponding institutions, which the transplanted laws were based on. The reason why certain institutions work well is mainly owing to its specific background such as the legal, political and social background, among which the legal background is of course the most important.[87] Without an integrated legal system, no laws can be implemented well, even those so-called 'good' laws. The current situation of the protection of private property in China is the best example. After transplantation, the Chinese Government did not make any immediate efforts to solve the ensuing problems.

I. The Solutions to Current Problems of Legal Transplantation

So what is an efficient way of solving these problems? Do we start to solve the problem when it arises after every single law is transplanted? This would be a massive and inefficient project. So why not solve the issues properly before we transplant laws? It is believed that there are a lot of problems that can be avoided or be solved before legal transplantation takes place.[88]

The 'Donor', in other words, the choice of transplanted laws is a crucial factor. Although the premise of transplanting laws is that one country's existing legal system is not satisfactory or lacks specific contents, it does not mean that the multitudinous legal systems in the world would be all suitable for the country to transplant.[89] The experience of "moving a rule or a system of law from one country to another" has indicated that the transplanted laws usually cannot achieve the same results and fulfill the same aims in their society of adoption as in their society of origin. This is because the result caused by the law usually is limited to the specific time and place.[90] Moreover, legal transplantation often comes at a certain cost, thus some 'useful' laws would possibly not be transplanted due

[84] It is reported that more than 3000 institutions were produced or amended after the PRC joined the WTO. *See* Li Shuguang, *supra* note 65, at 123.
[85] *See* Zhao Zhiyi, *Sun Shigang, Lun Falv Yizhi*, 1 Dangdai Faxue, at 18 (2002).
[86] *See* Wang Wen, *supra* note 82, at 84.
[87] *See* J.B. White, The Legal Imagination 6-7 (1973).
[88] See Wang Wen, *supra* note 82, at 85.
[89] See D. Nelken, *Changing Legal Cultures*, *in* M. Likosky (Ed.), Transnational Legal Processes: Globalization and Power Disparities 41 (2002).
[90] *See* R. B. Seidman, *Ping Shenzhen yizhi Hong Kong falv jianyi*, Zhao Qingpei (trans.), 3/4 Bijiao Fa Yanjiu, at 4 (1989).

to high cost or high risk. Even during the post-colonial era, when the authorities used high pressure policy to force the colonies to transplant their laws, they did not force colonies to accept their laws as a whole.[91]

When transplanting laws, it is better to transplant those that were shortest within one country but not those so-called 'good' laws. Those legal transplantations that comply with the trend of legal development would possibly not be accepted quickly by society; whereas those that have actual effects would possibly not be those which comply with the trend of legal development.[92] Specifically, transplanting laws which deal with citizens, marriage, family, property, assignment etc., will be extremely difficult, because those laws are based on a country's social values which vary from one country to another. Tansplanting these laws would involve putting different social values together.[93] In most cases conflicts exist between these different values, which makes the implementation difficult. However, transplanting those laws which are dealing with nature relations, social management, maintenance of public security etc., might be easier and more successful. These laws usually come from national rules, and are an accumulation of social experience, for example, environmental protection law and technology law.[94] Moreover, international conventions and international treaties can be transplanted easily, especially those that deal with international trade, because these international conventions and treaties are usually negotiated among many countries and meet their interests.[95]

The 'Acceptor' is another factor. When transplanting laws, one country should not only make some choices according to its actual situation,[96] but also create some corresponding systems to make sure that the transplanted laws can be implemented successfully.[97] It will take some time to be able to assess the result of legal transplantation. The goals of legal transplantation set by the country of adoption should be reasonable, because there would be the same laws or institutions, implemented in the same way, but they could not possibly have the same domestic resources as the donor country. The transplanted laws usually cannot achieve the same results in the country of adoption as in the country of origin. Therefore, legal transplantation is a massive systems engineering project; it is not simply transplanting a single law or institution, but also creating the circumstances and the legal framework to make sure that the transplanted law can perform successfully.

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[91] During the post-colonial era, the United Kingdom used the so-called 'indirect rule' in the colonial state: the local laws could be used as long as they did not conflict with the principles of the law of the UK.

[92] See Wang Lijun, *supra* note 81, at 45.

[93] *See* Cao Xia, *Zuowei "beijing" de quanqiuhua de zai sikao*, at http://www.legaltheory.com.cn/info.asp?id=9370.

[94] *See* Wu Shuchen, *Yizhi he kuwei: geren benwei falvguan zai zhongguo de mingyun*, *in* Lixun (Ed.), Falv shehui xue 246 (1999).

[95] *Id.*, 247.

[96] It is unwise to imitate the laws mechanically.

[97] *See* Bo Yanna, *Falv yizhi yu falv gaige – lun falv yizhi de gongxiao*, *in* Jiang Ping (Ed.), Bijiao fa zai zhongguo 265 (2005).

Moreover, a successful legal transplantation also sets certain requirements on an acceptor's social circumstance.[98] Legal transplantation usually happens on a large-scale as social reform happens. Thus, if one country's social, economic and political situation has seen remarkable changes, and it is changed to have more enlightened social values, then it will inevitably accept legal transplantation more easily.[99] In that case, those countries which have a market economy and democratic political systems will find it easier to transplant laws then those who do not.

Legal culture,[100] in other words how to deal with the relations between different legal cultures, is another factor. As an important part of national culture, legal culture is usually based on social values, local customs and national feelings.[101] When transplanting laws, we should not only have a comprehensive understanding of the legal culture of the country of origin, but also have a scientific appraisal of the compatibility between transplanted laws and local legal culture, after making a rational choice.[102] It is again those laws which deal with citizens, families and marriages that have close relations with domestic culture and are more difficult to be transplanted; those laws which have more technical elements and are commonly used in international trade, such as securities law, patent law and contract law are easier to be transplanted for these laws are less influenced by domestic culture. Thus, legal indigenization is a key point in a successful legal transplantation. It is believed that the law is a mirror of society and it reflects specific national histories, cultures and social values. The legal systems of any two countries cannot be possibly the same. Without legal indigenization, it is difficult to transplant a legal culture to another successfully.[103] And in order to harmonize different legal cultures, it is necessary to pay attention to both external and internal legal cultures, particularly the internal legal culture.[104] By harmonizing the internal legal culture, the external culture will be harmonized as well.

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[98] *See* Wang Lijun, *supra* note 81, at 46.

[99] *See* Bo Yanna, *supra* note 95, at 267.

[100] "Legal culture" is not an easy concept to pin down. It can refer to a variety of types or numbers of units – from the culture of the local courthouse, of specific types of strong and weak "community", to that of the nation State, wider cultural entities such as "Latin legal culture", or even "modern legal culture". It can, with some difficulty, also be applied to so-called "third cultures" of international trade, communication networks or other transactional processes. *See* D. Nelken, *Disclosing/ Invoking Legal Culture*, 4 (4) Social and Legal Studies at 435, Special issue on Legal Culture, Diversity and Globalisation (1995); D. Nelken, Comparing Legal Cultures (1997); R. Cotterrell, *Is There a Logic of Legal Transplants?*, *in* D. Nelken & J. Feest (Eds.), Adapting Legal Cultures (2001); A. Garapon, *French Legal Culture and the Shock of 'Globalization*, *in* 4 (4) Social and Legal Studies at 500, Special issue on Legal Culture, Diversity and Globalisation (1995); V. Gessner, *Global Legal Interaction and Legal Cultures*, 7 Ration Juris 132 (1994).

[101] *See* V. Curran, *Cultural Immersion, Difference and Categories in US. Comparative Law,* 46 American Journal of Comparative Law 56 (1998).

[102] *See* Nelken, *supra* note 89, at 41.

[103] *See* M. A. Glendon, Comparative Legal Traditions 23 (1985).

[104] The external legal culture is the legal culture of the general population; the internal legal culture is the legal culture of those members of society who perform specialized legal tasks. *See* L. Friedman, The Legal System 223 (1975).

Legal culture plays an important role during legal transplantation. As we have discussed in section B, legal transplantation is a product created during the conflict between the globalization of law and indigenization of it. Once a new institution enters in a foreign legal system it will inevitably face intense resistance from the local culture. Thus, it will need some techniques during legal transplantation rather than a mechanical transplant.[105]

So far, we mentioned three elements that we should pay attention to before transplanting laws. It is important to analyze the transplanted laws and understand the legal culture and legal system both of the country of origin and the country of adoption. Only in this way can these achieve the expected results and fulfill the expected aims. In other words, realize a successful legal transplantation. However, there are many other elements that we will come across during legal transplantation, such as cost, political elements, etc.[106] The three elements we discussed above are the basic elements that will come apparent in legal transplantation. There will be other problems that arise in practice. Due to the limit of space, we will not discuss those in detail in this article.

The clause of protecting private property is to some degree a copy of the US regularion. We can of course implement it better by drawing lessons from the US system of protection of private property.[107] Based on our understanding of the problems facing China today, a reform of the existing legal system is required in order for China to build a complete system for the protection of private property. First of all, the quickest approach that can be adopted now to improve the 'vacuum' state following the constitutional amendment is to formulate an ordinance or make a judicial interpretation to define the "needs of public interest."[108] Based on the research of the situation in the United States, the author has the following suggestions: first, circumstances that qualify as "needs of public interest" should be defined by listing applicable circumstances and by stipulating that with the exception of those circumstances provided for by the law, no other circumstances shall constitute rightful grounds for the expropriation of private property. Only in this way can legal presumptions in various circumstances be avoided and can

[105] But there are some special cases in history. In F. P.Walton's paper, he argues "an oriental country with a system of law of great antiquity, and, moreover, a system of law which is closely bound up with the national religion, casting all, or a great, of this old law away, and adopting the law of a Western people, far removed in race, religion, history and culture." And "this has happened in our time in Egypt, in Japan and in Turkey". He also added that "he [Savigny] overestimates the importance of customary law, and the danger of uprooting it. I think it is quite conceivable that in Egypt, in Japan and in Turkey, the foreign law which has so violently introduced will serve the needs of the people just as well as if it had grown out of their legal consciousness"; *see* F. P. Walton, *The Historical School of Jurisprudence and Transplantations of Law*, 9 J. Comp. Legis. & Int'l L. 189, at 192 (1927). However, we have to say that these cases do exist but again theyt are rare, and they can not reflect common principles.

[106] *See* J. C. Reitz, *Systems Mixing and in Transition: Import and Export of Legal Models*, *in* J. W. Bridge (Ed.), Comparative Law Facing the 21st Century 57 (2001).

[107] *See* Lin Laifan, *supra* Mei guo xian fa pan li zhong de cai chan quan bao hu, yi Lucas v. South Carolina Coastal Council wei li, 75.

[108] See Guo Qingzhu, *Lun zhong guo si you cai chan quan xian fa bao zhang jia zhi qu xiang zhi ding wei.*

the state power be stopped from engaging in a flagrant infringement of seizing private property under the pretext of the "needs of public interests". Second, various compensation measures and approaches must be provided for to make clear the method to determine the amount of compensation, the time limit for receiving such compensation and the remedy where compensation is not possible in the event of an infringement of the citizens' private property due to the "needs of public interest". Without such provisions, protection of private property can never be truly implemented and citizens' legitimate rights and interests can never be protected against infringement.[109]

Nevertheless, we can see that this is simply a remedy of the existing problem following the constitutional amendment on the level of law enforcement and it does not constitute a fundamental improvement of the system for the protection of private property. The success of the United States in providing comprehensive protection of private property and becoming a classical example of the protection of private property in the world's legal system, despite the existence of defects, can be attributed to its constitutional system.[110] As pointed out in the preceding analysis of China's existing problems, the constitutional system must be reformed in order to achieve fundamental protection of the Chinese system for the protection of private property; in other words, adjudication of the constitution must be implemented. First, citizens' rights and state power are the most basic content of the relationship between the constitution and laws, whereas the adjustment of citizens' rights and state power by the constitution is mainly reflected in the expectations of safeguarding citizens' rights and the exercise of state power in compliance with the constitution; more importantly, they are the restriction and correction of the exercise of state power in contravention of the constitution.[111] Second, as the constitution is a law, it has the features and functions of a law, such as the state will and state compulsoriness; more importantly, it has the most fundamental function of the law – applicability, which allows to gain direct entry into the judicial process and to serve as the basis of judicial review and judicial ruling. As discussed in the preceeding paragraphs, the constitution is the most direct weapon to protect citizens' fundamental rights; constitutional adjudication can provide the most direct and effective protection of citizens' rights and judicial review can effectively regulate the relationship between the constitution and laws, particularly behaviour in breach of the constitution conducted by the entity of state power, thereby protecting citizens' rights.[112]

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[109] And this is actually what the Chinese Government want to do now to solve the problems.

[110] *See* Lin Laifan, Cai chan quan bao zhang de bi jiao yan jiu, xian zheng lun cong, Zhang Qingfu 63 (1999).

[111] *See* Wen Xiaoyong, *supra* note 72.

[112] See Yang Linhong & Yu Qiang, *Xian fa fa lv guan xi jie du – gong min quan li bao hu shi jiao de si kao*, at http://www.shecan.net/Article_Show.asp?ArticleID=213.

E. Conclusion

So far, we have analyzed the current situation of private property protection, the problems that occur and why these problems exist. In the end, we have given some possible solutions toward them. How should we regard legal transplantation in China? Can we say it fails because of the problems it has or because it has not achieved the same results as it did in the US?

As we have discussed before about measuring success, it is actually very difficult to decide whether it is a success or not. Although it has not gone exactly as anticipated, or in other words, has not achieved the goals expected by the legislators, it does evoke Chinese citizens' consciousness of private property protection. Legally speaking, it did a good job in reminding citizens to pay much attention to private property. And this is an important effect that a successful legal transplantation should have in improving the internal legal culture. The time-frame also plays an important role in judging success., The rivate property regulation was introduced within one year, which is a very short period of time within legal history, and it is not fair to draw a conclusion on whether it is successful or not. The Property Law has been drafted and is now in public consultation. And there are many clauses on protection of private property involved in the bill. It will play a key role in improving the protection clause and we can of course expect a good future for it.

Finally, it is believed that China will develop quickly in the 21st century. In realizing this goal, the development of the legal system is an important part which deserves our attention. However, the development of the 'rule of law' in the PRC still has a long way to go compared to some developed countries. This especially holds true for those laws that deal with the market economy. In that case, China is urged to learn from the experiences of developed countries. In contrast, along with the development of China's economic and legal system, it will also be a good example for other developing countries and underdeveloped countries in building their legal systems.

In conclusion, the topic of legal transplantation will never be out of date. And we should always bear in mind that, as different countries exist with different levels of legal development, legal transplantation will always be unavoidable.