

Legal transplants:

profitable borrowing or harmful dependency? The use of the legal transplant framework for the Adoption of EU law: the case of Croatia

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„Legal transplants,” a term coined by Alan Watson in his well-known book *Legal Transplants: An Approach to Comparative Law*,¹ have become an important matter of research interest in the 1970s, as a consequence the publication of A. Watson. Even if we can agree that it is possible to trace the analysis as far back as to 18th century, when Montesquieu described similarities in law as a pure coincidence, I would be rather doubtful if this were to be perceived as *ius gentium*, described in Justinian’s *Institutions*, as some kind of theoretical reflection in this field, as this has been proposed by some modern researchers.² But the phenomenon it-

self seems to be a deeply rooted, inevitable element of legal development. Despised by some theorist, mostly by Carl von Savigny’s historical school of jurisprudence and their intellectual heirs, the idea of legal transplants was described by Watson himself as „borrowing [that has been] the most fruitful source of legal change.”³

The first thought that comes to our minds when we hear about legal transplants is probably the post-colonial legislation in developing countries, copying entire codes or drafting constitutions based on the ex-metropolitan country’s legal system. Other associations may include, for example, countries with limited sovereignty due to quasi-colonial or dependency relations, e.g. countries of the Eastern Bloc since the end of World War II in 1945 until the collapse of USSR in 1991 (the example of Constitution of People’s Republic of Poland of 1952, described later in the typology of transplants, is very typical).

However, we should keep in mind that legal transplants are not just embodiments of mostly malicious dependency, but also examples of reverence for well-developed legal solutions that are worthy of being introduced in another country. No wonder that it was Watson, a Roman law specialist, who felt inspired to describe this phenomenon thanks to his examination of reception of *Corpus Juris Civilis* (collection of codes and jurisprudential works issued from 529 to 534 AC by the order of emperor Justinian, abbreviated as CJC) in several countries through many centuries. Although even today’s civil codifications share some of the basic rules and systematics with Justinian’s codification, we can point at some 19th century codifications that actually contained many elements transplanted directly from CJC, such as *Allgemeines Bürgerliches*

¹ Watson 1974.

² Chenguang Wang 2011.

³ Watson 1974: 95.

Gesetzbuch (Austrian civil code, abbreviated as ABGB).⁴ Fun- nily enough, abiding interest in several features of Roman law led to transplanting ancient Roman law of slavery into Louisiana, both during French (17-18th century) and American period (since 1803). Louisiana's law of slavery was very different from regulations in other American states, mostly due to long-lasting French domination, and its peculiarities are certainly derived from Roman tradition.⁵ Moreover, transplanting another country's codifications or constitutional solutions does not have to be connected with post-colonial dominance. For instance, Code civil des français (better known as the Napoleonic code) was a strong inspiration for later Romanian codification (1864) that remained in power until 2011, although Romania has never been a French colony.⁶ Also the Bürgerliches Gesetzbuch (German civil code, abbreviated as BGB) formed a basis for several further codifications, including civil codes of Brazil (1916), Peru (1936) or China (1929).⁷

The social and legal reality has changed significantly since the publication of Watson's book in 1974. The term "harmonization of law" appeared in the context of the European Union, but it could also apply to unification of legal regulations between countries in some areas as a part of increased global economic and legal integration. From the Convention on the Elimination of all Forms of Discrimination against Women to health and safety regulations, convergence of legal norms is a fact. In the 2000s, a few interesting attempts at analyzing, classifying and assessing legal transplants were made. I chose two of them, one more theoretical and rooted in socio-legal sciences, while the other more empirical, making use of the tools provided by law and economics. Although they are useful for further research, their understanding of legal transplants is somehow obsolete. This is why after theoretical introduction I am going to take a closer look at the case of a modern legal transplant – adoption of the EU law by a candidate state as one

of membership requirements. Using the case of Croatia, mostly because of its recent relevance, I will try to draw some more general conclusions about the usefulness of theoretical tools outlined in this article.

MILLER'S TYPOLOGY OF LEGAL TRANSPLANTS

Although a comprehensive classification of legal transplants introduced in different parts of the world probably cannot be proposed, an interesting attempt to apply sociological tools for a useful typology was made by Jonathan M. Miller.⁸ Examining motivations on which a given legal transplant is founded, he identifies four types of transplants, indicating that a vast majority of examples represent a blend of more than one type. According to Miller's typology, the most important types are: 1) the Cost-Saving Transplant; 2) the Externally-Dictated Transplant; 3) the Entrepreneurial Transplant; 4) the Legitimacy-Generating Transplant.

For the purpose of analyzing advantages and disadvantages of such a typology, as well as its usefulness in legal and sociological research, I will describe each of the types briefly. Examining some of the examples referred to by Miller, as well as some similar ones from my own research, I will try to present some possible challenges that may occur as a result of using this typology for analytical purposes in lawmaking processes.

The Cost-Saving Transplant is a type of regulation that is borrowed from another country's legal system primarily to avoid an expensive process of developing an original solution. Miller points out that developing countries rarely make up their own regulations in terms of environmental law or health and safety provisions, mostly due to the lack of financial resources.⁹ It is possible, however, to cast doubt on this assumption, as many national environmental law regulations are virtually no more than implementing acts of some previous supranational

⁴ Sójka-Zielińska 2000: 238.

⁵ Vetter 2005.

⁶ Sójka-Zielińska 2000: 241.

⁷ Sójka-Zielińska 2000: 246.

⁸ Miller 2003: 842.

⁹ Miller 2003: 846.

or international resolutions, which actually makes them similar to the Externally-Dictated Transplants.

Although it is the way of perceiving ‘cost-saving’ by Miller,¹⁰ it is crucial to emphasize that a much broader understanding of the type of transplant can be applied in a research, making the term encapsulate several legal transplants that would not be included according to the simplest definition. It means that not only saving money at the very moment of introducing legislation is important, but also possible future financial advantages for the national budget. Virtually any regulation that facilitates entrepreneurship, investment and simplifies tax procedures, can be perceived as an example of the Cost-Saving Transplant. China’s foreign investment law is cited as an example by Chenguang Wang.¹¹

The already mentioned Externally-Dictated Transplant is probably the most common motivation for implementation of foreign legal regulations throughout the history. It can easily be assumed that it can be dated back to the first moment when one tribe conquered another, inevitable leading to imposing some of its norms on the defeated enemy. But it is not as straightforward as it seems to be – introducing an entirely new legal system through military conquest is just one of the various forms of legal transplants that can be classified as Externally-Dictated Transplants. Probably due to this wide interpretation, this type of transplant can be easily mistaken with any of the other types. Or to be more precise – it easily blends with those other types. For example, if International Monetary Fund makes financial help conditional on necessary free-market and democratic reforms, it is definitely an example of the Externally-Dictated transplant. However, we can also easily notice that in most cases applying certain well-developed procedures from other countries or bodies (like the IMF) can just be cost-effective in comparison with equally acceptable procedures that are entirely made-up in the receiving country.

¹⁰ Miller 2003: 845.

¹¹ Chenguang Wang 2011.

What we have to agree with, however, is the fact that the common feature of Externally-Dictated Transplants is an actual relation of dependency between the donor and the recipient. This relation can take many forms, including, but not limited to: (1) relation between winners and losers of a military conflict; (2) relation between more and less powerful members of a political or military organization, or an area of one country’s political or military impact; (3) relation between a member state of an international or supranational organization and this organization itself; (4) relation between a provider and a receiver of financial support.

As for the forms (1) and (2), we can easily find examples from constitutional law. The Japanese post-World War II constitution, dictated by General Douglas McArthur,¹² can be an excellent example of legal changes that are forced on the defeated side of a military conflict by its winner. On the other hand, the façade Constitution of the People’s Republic of Poland, passed on in 1952, was personally corrected by Joseph Stalin and later translated from Russian to Polish.¹³ The final project was prepared by Bolesław Bierut, the first president of communist Poland, well-known for receiving directives from Moscow. Although USSR did not conquer Poland (these two countries were theoretically allies during World War II), the latter was definitely in Soviet orbit of military and political influence at that time. Therefore, we can classify this dependency, slightly less obvious than the previous one, as form (2).

Forms (3) and (4) are not strictly connected with relations between different countries; they are, however, indicators of country’s position within the frameworks of international organizations (such as the United Nations, Organization of Security and Cooperation in Europe, Organization for Economic Co-operation and Development) and supranational organizations (like the European Union), as well as in relation with specialized bodies founded by such organizations (IMF, World Bank). “Harmonization of law” is a key phrase for legal changes

¹² Miller 2003: 847.

¹³ Polskie Radio 2012.

introduced in some areas, such as human rights, intellectual property protection or free-market economy. It is mostly due to the fact that either some more important members of international organizations condition their support on the introduction of some reforms by the candidate country, or the organization itself imposes such conditions. For example, Turkey, as a country applying for EU accession, decided to change the controversial Article 301 of its penal code. Prior to the changes, the article, introduced in 2005, made it a crime to “insult Turkishness,” which was punishable by imprisonment from 6 months to 3 years. However, several controversial suits, mostly filed by a Turkish lawyer Kemal Kerinçsiz and directed towards popular writers (the most notable one being Orhan Pamuk, a Nobel Prize laureate) and journalists, made the law to be a source of conflict between Turkey and EU, eventually leading to a reform of the article in 2008.¹⁴

The third type – and the one most thoroughly described by Miller¹⁵ – is the Entrepreneurial Transplant. The theory about a class of transplants that appear due to effort of individuals or groups (mostly NGOs, but also companies) to introduce and encourage some foreign regulations, was adapted by Miller from Yves M. Dezalay and Bryant Garth.¹⁶ These individuals or groups can be people from developing countries who obtained their degrees abroad and later came back to their homeland. They are perceived as experts and as such, they can therefore influence legal changes, in spite of the fact that they do not possess any formal power. Their incentive might be very different – from a very sincere conviction that some legal solutions adopted from abroad are necessary for better development of the country, to the less disinterested ones, such as creating a niche – a branch of law in which there will be very few educated lawyers at the time of its introduction. If this branch is entirely adopted from another country’s legal system, in which the ‘entrepreneur’ was educated, it gives him an edge over competitors.

14 Today’s Zaman 2008.

15 Miller 2003: 849-854.

16 Dezalay, Garth 2002.

The Legitimacy-Generating Transplant is described by Miller as a separate type and probably most of researchers would agree on the existence of such a category. There are, however, theorists of law and economics, like Ugo Mattei,¹⁷ that disagree on the prestige of a legal system as a category separated from the system’s economic efficacy. However, the situation we encounter in most cases is a transplant from a developed country to a developing one, sometimes even one with rudimentary legal institutions. Mattei lists several examples of influence between legal systems of developed countries, asking about a criterion for choosing a donor country, taking into account that there are several equally prestigious legal cultures.¹⁸

But, as Miller points out, Mattei’s theory could be plausible if there were proofs of existence of a free flow of legal norms, a specific sort of market of legal solutions, from which any country could choose the most economically efficient measures. Moreover, predictions of economic efficiency of a certain model cannot be based only on another country’s experience, as legal solutions that lack their foundations in a given society or given country’s legal culture, prove to be less effective in a recipient country than in donor country. We are going to discuss this issue in the next section of this article.

BERKOWITZ, PISTOR AND RICHARD’S ATTEMPTS AT ANALYZING EFFICIENCY OF LEGAL TRANSPLANTS

Although most scientific analysis of legal transplant focuses on motivations for their introduction, there are some examples of research focusing on economic efficiency of such borrowing. Using methods provided by law and economics, Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard¹⁹ conducted an analysis of 49 legal systems, 10 of them being so-called “origins” (i.e. they developed internally, which

17 Mattei 1994.

18 Mattei 1994: 7.

19 Berkowitz, Pistor, Richard 2003.

can be measured either by their idiosyncratic features or by their ability to found a new legal family) and the other 39 being “transplants” (i.e. they were borrowed from another legal systems, belonging to one of the most prominent legal families).²⁰ Legal families included in the research were as follows: the English legal family (common law), the German legal family (civil law), the French legal family (civil law), and the Scandinavian legal family (civil law).

Their choice of legal families to be analyzed was determined by a previous research done by La Porta, Lopez-de-Silanes et al., which helped them to make some general assumptions about the efficiency of different legal families in terms of attracting investors. The English legal family turned out to be the most successful both in terms of friendliness toward investors and regarding the enforcement of law. The Scandinavian legal family, whereas being nearly equally successful in enforcing law, came second after the English when it comes to the presence of investor-friendly regulations. German and French legal families were placed on the other side of the scale, not only providing prospective investors with an unfriendly legal environment, but also – probably as a result of the former – being unable to enforce these regulations. What is important about the previous research by La Porta, Lopez-de-Silanes et al.²¹ is the fact that it did not attempt to differentiate “origins” from “transplants,” somehow assuming that the way of acquiring certain legal environment, rooted in a given legal culture, is not important for its economic effectiveness. Berkowitz, Pistor and Richard were therefore encouraged to transform the research in order to answer two questions: 1) do legal transplants always work? and 2) if sometimes they work and sometimes they do not, what is the factor that makes the difference between these two cases?

In fact, it would be possible to classify any existing legal system as a legal transplant (e.g. most of European legal systems share some major features of private law with Roman tra-

ditions), but what the authors of the study focused on was the transplantation that happened in 19th or 20th century, taking into account that three legal families – English, German and French – were the ones that dominated implementation of entire codifications in other countries. Another important factor that was taken into account was the fact that transplants can be classified as receptive or unreceptive transplants.²² The classification can be presented as a scale, on which more receptive transplants are characterized by two features: adaptation and familiarity.

Adaptation can be measured as a degree to which social idiosyncrasies of the receiving country were taken into account in the process of implementing foreign legal regulations. Colombia, blindly transplanting the Spanish commercial code of 1829, can be cited as an example of an unadapted transplant, while Japan, where introduction of German-based codes were preceded by lengthy debates about the advantages and disadvantages of other models, took on mostly English and French codes.²³ Thoughtful adaptation requires legislators not only to contemplate about the choice of model, but also about possible changes to some regulations or about introducing exemptions in order to mirror the needs of a given society.

Familiarity is strictly connected with taking into account the legal heritage of a country. Of course, virtually all European legal systems can be traced back to ancient Roman law, just as the Middle Eastern legal tradition is deeply rooted in sharia law, but this kind of historical analysis does not provide us with extensive data, as the entire world can be divided into very few big legal families, but it is a matter of common knowledge that most of the modern solutions in different branches of law (commercial, constitutional) are borrowed from Western legal family, having its deepest roots in ancient Rome. It is far more important, however, to notice, that a former French colony, with a considerable number of regulations rooted in French legal culture, lacks familiarity with German tradition.

²⁰ Berkowitz, Pistor, Richard 2003: 171-172.

²¹ La Porta, Lopez-de-Silanes 1998, 1999.

²² Berkowitz, Pistor, Richard 2003: 179-183.

²³ Berkowitz, Pistor, Richard 2003: 179-180.

LESSONS FOR THE FUTURE

Although my brief summary of two independent pieces of research might not seem very innovative, I believe that this combination and comparison is crucial for providing us with some novel ideas for the future. Two attempts at analyzing and understanding legal transplants that happened in the past give us a different perspective. The first one, derived from Miller's typology of legal transplants, is mostly theoretical. It exposes the use of sociological methods and is entirely focused on motivation for legal transplant. The second one, proposed by Berkowitz, Pistor and Richard, makes use of tools provided by law and economics, to come up with conclusions about implications of legal transplants, but with strong connection with the analysis of their sources and the ways of introducing transplant regulations in certain countries. This thorough examination, however, lacks any reference to the typology proposed by Miller. The aim of my reflection is to fill the void by combining results of these efforts.

Although both pieces of research discuss sources and causes of legal transplants, they differ substantially in methodology. More empirical analysis by Berkowitz, Pistor and Richard take into account several objective factors, such as: a legal culture from which a transplant is taken, legal heritage of a recipient, or general efficiency of a model. On the other hand, Miller's analysis is much more subjective, focusing on motivation. Probably it could serve as a sufficient explanation of why the two scientific approaches, both published in the same year, have not been combined in a comprehensive research until now. Another justification can be derived from the fact that Miller's analysis is rather general, using examples from different times and branches of law, supported by a more detailed analysis of Argentinian examples (I purposefully avoided referring to them in my summary, replacing them with other cases to show the universal value of Miller's reflections), while the second analysis is based on efficiency of transplanting foreign codifications, mostly in terms of commercial and civil codes

Therefore, introducing a single codification transplanted from Germany will be characterized with little receptiveness. Moreover, former colonies and dependent territories can be divided to "settled" and "conquered." The former were intended to be inhabited by the population of metropolis, while the latter were meant to be controlled by the metropolitan state, but without the purpose of extensive settlement. Therefore "settled" territories were inhabited by people with a previous intuitive understanding of the metropolis' legal culture, and therefore an increased familiarity with norms transplanted from the metropolis' legal system.²⁴

The conclusions of the aforesaid research strongly support initial hypothesis that the way of acquiring regulations coming from a certain legal family is much more important than the choice of the donor legal culture itself. Although previous assumptions about lower efficiency of regulations rooted in French legal culture turned out to be true, differences between countries with receptive and unreceptive transplants were definitely bigger than between the least efficient legal culture (French) and the most efficient one (English). A comparison of receptive transplants with "origins" proves that there is no considerable difference in efficiency of a given legal culture. We can therefore claim that a well-prepared, thoughtful transplantation of less efficient legal solutions, done with respect for previous social conditions and legal heritage, as well as supplemented with sufficient education of lawyers, other experts and citizens in general – will be actually more beneficial than naive, blind promulgation of solutions based in a more efficient legal culture.

The experiences of countries, in which legal transplants proved to be economically and legally inefficient, authors of the article labeled as "the Transplant Effect" - the lack of socio-legal order provided by regulations and of good prospects for socio-economic growth within the framework of the transplanted provisions.

²⁴ Berkowitz, Pistor, Richard 2003: 181-182.

and their reception in a receiving country. Moreover, by focusing on economically measured efficiency, Berkowitz, Pistor and Richard seem to assume that all transplants – at least all of those found worthy of analysis by them – are the Cost-Saving Transplants, according to Miller’s typology. Even if we accepted such an assumption about the examples discussed in their research, it does not mean that their conclusions cannot be applied to other types of legal transplantations throughout the history, including the ones that are yet to happen. Last but not least, the phenomenon of “harmonization of laws,” mostly dictated by international and supranational organizations, does not fit the traditional understanding of a legal transplant as a promulgation of codification or particular solutions created in a given legal culture (e.g. French, German, English) to another country’s reality.

I would like my paper to be a useful contribution both to the theory of legal transplants and – what seems to be more important – to its applications in the world of converging legal systems and harmonizing regulations. To achieve this aim, it is important to acknowledge that the very traditional perspective presented in the basic assumptions made by Berkowitz, Pistor and Richard already seems to be a relic of the past. Although analysis of transplanted codifications from one country to another and its further consequences can be beneficial for historical clarity, the vast majority of examples we are dealing with today have entirely different construction. To avoid further generalities, I will discuss the entire process in which a new member state of the EU receives legal transplants based on European legislation. To make my case-study analysis up-to-date, I will outline current EU Enlargement Policy (as of the beginning of 2014) and provide examples based on experiences of the newest EU member state, Croatia, which eventually joined the EU in July 2013.

A MODERN LEGAL TRANSPLANT CASE-STUDY: CROATIA’S PATH TO THE EU

The European Union, which can be perceived as the most prominent supranational organization, has developed its own accumulated legislation, called the *acquis communautaire* (shortened as “the *acquis*”) and now requires achieving certain level of conformity of the legal system of a candidate country to the *acquis*. Contrary to a popular belief that once admitted to the EU, a member state suddenly becomes obliged to accept all the previous and future legislation enacted by EU institutions, the process begins much earlier, as “adoption of the entire body of European legislation and its effective implementation through appropriate administrative and judicial structures”²⁵ is one of four major requirements for accession to the EU, the other three being economic and political criteria, as well as country’s capacity to take on the obligations of a member. Currently, the *acquis* is divided into 35 chapters, covering different branches of law, from free movement of goods and intellectual property law, through energy and fisheries regulations, to education and culture or science and research.²⁶

Croatia’s process of joining the EU started in 2001, when the Stabilization and Association Agreement was signed. This document provided the first framework for examining the *acquis*.²⁷ After Croatia’s application for membership in 2003, a positive opinion was issued by the European Commission, leading to acceptance of Croatia as a candidate country in 2004. In 2005, the Stabilization and Association Agreement came into force and the negotiations were to start on 17 March 2005, but they were postponed upon the previous condition that the negotiation process will not begin without Croatia’s full commitment to collaborate with the International Criminal Tribunal for the former Yugoslavia (ICTY). A Negotiation Framework, however, was accepted by the EU, and the negotiation process finally began in October 2005.²⁸

25 European Commission 2007b: 6.

26 European Commission 2007b: 10.

27 Council of the EU, 2004: 7.

28 Delhrv.ec.europa.eu.

The negotiation process begins with Screening, which is followed by Screening Reports, consisting of separate reports on each of the chapters of the *acquis*. The Negotiating Team is later asked to demonstrate that their country has either already adopted EU regulations in a given area or is willing and able to translate them to the national legal system within a declared time. On the other hand, a candidate country is provided with necessary financial resources by the European Union that have since 2007 been integrated in one program, called the Instrument for Pre-accession Assistance (IPA).²⁹

At this point I will stop the descriptive part and ponder for a moment over theoretical framework in which the pre-accession negotiation process between a country and the EU can be placed. From the point of view of Miller's typology, translation of the *acquis* to the national legal system can be primarily described as the Externally-Dictated Transplant. The most important point to be made is that the label "negotiations" is delusive, as the adoption of the *acquis* is not negotiable.³⁰ The only thing that is subject to negotiations, is the schedule of translation. For example, in the Screening Report issued on 1 February 2007 on the translation of Chapter 27 of the *acquis*, "Environment," the Croatian declaration to ratify the Kyoto Protocol in the first half of 2007 was confirmed.³¹ However, although at the beginning of the negotiations, the reason for implementation was an external obligation, there were certainly several other motivations to take on the transplant, which can be derived from Croatia's motivation to join the European Union. In most cases, countries want to become member states of the EU in order to facilitate their economic development and increase their international importance through development of intensive cooperation with other European countries within the EU. The process of adoption of the *acquis* can be therefore characterized by some features of the Cost-Saving Transplant and the Legitimacy-Generating Transplant.

²⁹ Delhrv.ec.europa.eu.

³⁰ European Commission 2007b: 9.

³¹ European Commission 2007a: 4.

The cost-saving effect comes from introduction of several well-developed regulations that facilitate free trade and that proved to be efficient in current member states. Legitimacy of regulations and, as a result, increased prestige of the country, come from the fact that the EU is a reputable union of developed states. At this point Ugo Mattei would probably argue that "prestige" is actually synonymous with "economic efficiency." I will not, however, further elaborate on this issue. In terms of facilitation of free trade within the EU, the accession process is in most cases strongly supported by private businesses, which consider the EU free market regulations to be profitable for export. It was certainly the case of Croatia, as the trade exchange with the EU made up 62% of Croatia's external trade in 2012.³² This fact supports the thesis that Croatia's adoption of the *acquis* had also some features of the Entrepreneurial Transplant.

Back to the facts, negotiations between the EU and Croatia were successfully closed on 30 June 2011,³³ which finally led, through signing the Accession Treaty and its ratification by Croatia and the 27 member states, to the full membership of Croatia in the European Union that started on 1 July 2013.³⁴ I will now make use of the measures provided by Berkowitz, Pistor and Richard in their research to determine the nature of Croatian legal transplant, i.e. translation of the *acquis* to the national legal system, and subsequently predict the success or failure of prospective, continuous harmonization of laws between Croatia and the EU.

As I mentioned before, Berkowitz, Pistor and Richard proposed division of transplants to receptive and unreceptive ones. The receptiveness should be measured by two factors: adaptation and familiarity. At the moment of accession, the level of adaptation of the *acquis* to the reality and needs of the candidate country is extremely low, as the provisions of the *acquis* are not negotiable. This level increases significantly after joining the EU, as the country is entitled to take part in lawma-

³² European Commission 2013.

³³ European Commission 2011.

³⁴ Delhrv.ec.europa.eu.

king procedures. The burden of accepting unmodified *acquis* at the moment of accession should not, however, be underestimated, as the *acquis* amounted to 90.000 pages, as of 2007.³⁵ It obviously indicates that the process of adoption of the *acquis* does not meet the criterion of adaptation. Although the word “adaptation” is widely used in the context of EU enlargement, but it has quite the opposite meaning – the EU provides the candidate country with time and necessary financial and institutional resources in order to adapt national law to the *acquis*, which is the process of introducing the transplant itself, but not of adaptation of the transplanted provisions to the country’s social reality.

When it comes to familiarity, the issue becomes much more complex. Although I previously labeled 2001 as the beginning of the candidacy and accession process, the Ministry of European Integration was formed in Croatian government as early as in 1998 when Ljerka Mintas Hodak was appointed to the office,³⁶ which means that even before the very first agreements were made between Croatia and the EU, the internal part of preparation for prospective integration had already started. The entire process of negotiations (and gradual introduction of the *acquis*) took many years, which allowed both the policymakers and the society as a whole to become more familiar about the nature of the EU. The *acquis*, consisting of both primary and secondary sources, constitutes a very complex legal reality. Although it is rooted in common European legal traditions, which can be traced back to Roman law, it is a blend of different smaller traditions, mostly from civil law culture, but with strong influence of Anglo-Saxon common law. Therefore, it is hard to determine how different the *acquis* is from the previous Croatian legal reality. But what seems to be crucial is the fact that there was no definite moment in which all the 90.000 pages of the *acquis* were transplanted to Croatian legal system. From this point of view, the EU enlargement procedure is an excellent example of gradual increase of the familiarity with EU legal reality so that the day

³⁵ European Commission 2007b: 9.

³⁶ Vecernji.hr.

of accession and formal beginning of a fully harmonized legal system would cause no major disturbance in the national economy and social reality.

Croatian GDP per capita nearly doubled between 2000 and 2010³⁷ and we can assume that the subjective prestige of the country – if we refuse to accept Mattei’s theory – has risen since the first milestone which started with the negotiations in 2005 and will continue to rise as a result of Croatia accession to the EU in 2013. Thanks to the familiarity with the EU that was gained by Croatian society during the negotiation period, Croatia should not experience “the Transplant Effect” and any disturbances that might be caused by an unreceptive transplant.

CONCLUSIONS

Alan Watson published *Legal Transplants* in 1974, when there were three separate European Communities instead of the European Union, common law countries (United Kingdom, Ireland) have just joined the ECs, there was no elected European Parliament, and nobody would even come up with an insane idea that countries like Croatia, Latvia or Slovakia could become member states, mostly because none of them existed at the time. In today’s reflection on his theory, deeply rooted in European history, we seem to focus on transplants that occur in different parts of the world, explaining them according to post-colonialism and convergence, but we certainly believe that European countries ceased to experience major legal transplants ages ago. Although my primary aim is not to overestimate the importance of the European Union as a mechanism of continuous legal transplantation, I believe that what happens in the EU will soon emerge in other parts of the world. Despite all the complaints about inefficiency of EU institutions, they are incomparably more operative than UN agencies. Although we can see several Externally-Dictated Transplants coming from UN agencies, their efficiency, especially in countries with

³⁷ European Commission 2011: 66.

a non-Western legal culture, is not satisfactory. The answer for the problem can be found in a study by Berkowitz, Pistor and Richard, but while the perspective of the paper is useful for historical purposes, it has already proved to be defunct. The importance of separate European legal families (French, German etc.) has probably decreased, although general prevalence of Western legal culture has increased, mostly through domination of Western ideas in international organizations. On the other hand, the acknowledgment of existence and comparable status of sharia as a legal culture is higher than ever.

Miller's typology of legal transplants remains as useful as his own remark that virtually all transplants are actually blends of more than one type. Motivation for legal transplants is ever harder to explain, mostly because some degree of harmonization became *conditio sine qua non* of being a member state of international and supranational organizations. The methodological approach developed by Berkowitz, Pistor and Richard is extremely valuable for the purpose of further research, in spite of the fact that differences between legal families in European civil law culture become less distinct than they used to be, and mutual interference between them and Anglo-Saxon common law has become much more evident.

As the summarizing paragraph, I will attempt at answering the question included in the title of this paper, which I purposefully did not refer to before. From today's perspective, legal transplants are neither "profitable borrowing," nor "harmful dependency." It is because the word "borrowing" presupposes that a transplant is an independent decision to transplant a given foreign legal act to national legal system, while most transplants occur in a much different way. That level of consciousness in adopting foreign regulations took place in China in the 1980s in terms of foreign investment laws³⁸ but since then the vast majority of transplants has not been characterized by similar independence. Therefore, we have to accept that countries negotiating accession to the EU, just as those wishing for financial help from the IMF, or post-Soviet states

³⁸ Chenguang Wang 2011.

in early 1990s – partly lose their independence, even though they did not relinquish it to a foreign government. In terms of imposing new legal regulations, 'invaders' were replaced by 'international officers,' 'independent experts' and other sources of new legal order, making an impression that all transplants are Entrepreneurial ones, which is not true. But hopefully, modern legal transplants will prove to be efficient, which requires them to be well-prepared, receptive transplants according to the theory by Berkowitz, Pistor and Richard.

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