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Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law

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Abstract

Borrowing laws and legal institutions from one country to another is used as a way to improve a legal system. The problem is that transplanting foreign laws or legal institutions does not take place in a legal cultural vacuum. Transplanting difficulties are obvious when borrowing takes place in the form of wholesale absorption, but even selective borrowing has its own obstacles. This article discusses the significance of the so-called path dependence for legal transplantation. The aim is to highlight transplantation difficulties from the point of view of legal history. The significance of path dependence is addressed as a way of illustrating the importance of the law's past to the transplantation of the rule of law. The analysis is based on the distinction between a formalist and a substantive notion of the rule of law, and it discusses two illustrative cases: China and Poland.

Introduction

Comparative law has traditionally been deemed a particularly useful practice for legal systems in transition. As opposed to the academic field of comparative legal studies, practical comparative law refers to a utilitarian practice that may provide technical assistance for developing a legal system. Notably, practical comparative law may be especially beneficial for transitional systems where foreign models are used as a means of developing one's own law with the intention of legal modernization or institutional reform. In essence,

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borrowing laws and legal institutions from another country is used as a way to improve one's own legal system.[1]

The problem, however, is that transplanting foreign laws or legal institutions does not take place in a legal cultural vacuum. The long-lasting debate on legal transplants illustrates that the difficulties associated with developing a legal system through the use of foreign models are to be taken seriously. There are virtually endless debates on the benefits, conditions, effects, functions, implementation, and compatibility of legal transplants.[2] Difficulties associated with transplanting are obvious when borrowing takes place in the form of wholesale absorption, but even selective borrowing has its own obstacles. When legal historical trajectories are taken into account, we can begin to comprehend what the root causes for these difficulties are. This article discusses the significance of so-called path dependence for legal transplantation concerning the rule of law. The aim is to highlight transplantation difficulties from the point of view of legal history, especially in the situation of a legal system in transition.

In essence, path dependence is the idea that decisions we make depend on past decisions made and issues that have occurred well before the present day. Path dependence limits the choices of today. In the case of the rule of law, path dependence is of particular importance. For example, transplantation between common law and civil law or between religious law and secular law are more difficult than transplantation between systems belonging to a similar type of legal culture. Legal systems, broadly understood, have been built in the past, which means that the past limits the range of realistic transplanting options for the present legal reforms. Most importantly, path dependence has consequences even though the past circumstances may no longer be relevant. Accordingly, transplanting the rule of law is an especially precarious endeavour. Moreover, the rule of law is a demanding thing to transplant because it is multi-faceted and it can be conceived in various ways. In any case, for the discussion on the possibility of developing a legal system by using legal transplants, the rule of law is an important one. As Thomas Carothers says, '[o]ne cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles'.[3]

Undoubtedly, the rule of law is a widely used, but also remarkably divergent, notion.[4] The discussion in this article is based on the separation between two

1 The concept of 'legal engineering' has been used in this context; see Eleanor Cashin Ritaine, 'Legal Engineering in Comparative Law' in E Cashin Ritaine, L Frank and S Lalani (eds), *L'ingénierie juridique ete le droit comparé* (ISDC 2008) 9.

2 See eg Esin Örücü, 'Law as Transposition' (2002) 51 ICLQ 205; M Langer, 'From Legal Transplants to Legal Translations' (2004) 45 HILJ 1; Zhangrun Xu, 'Western Law in China: Transplantation or Transformation' (2004) 25 Social Sciences in China 3; and Mindy Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation of a Working Misunderstanding' (2013) 62 ICLQ 1.

3 Thomas Carothers, 'The Rule of Law Revival in Promoting the Rule of Law Abroad' in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie 2006) 12, 13.

4 Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 3 ('an exceedingly elusive notion', 'vague or sharply contrasting understandings').

different notions of the rule of law. These can be described as thin and thick notions.[5] In essence, the thin conception typically consists of instrumental or formal aspects. It does not pay attention to the political ideology, the level of democracy or lack thereof, or the level of liberalism or lack thereof. The thin rule of law essentially restrains State actors, provides procedural rules for law-making, and requires consistency and stability, with laws being enforced and, by and large, accepted by the populace.[6] In contrast, the thick (or substantive) notion on the rule of law is conceived as a part of a political and social philosophy that addresses issues that go far beyond mere restraint, procedures, enforcing, consistency, and stability.[7] It typically includes broader ideas in regard to certain kinds of economic systems, forms of government, and conceptions of human rights.[8] In essence, the thick notion binds political morality and law together, whereas the thin notion seeks to hold them separate.

Without doubt, the separation between thin and thick notions on rule of law can be criticized.[9] Indeed, it is far from perfect. Notwithstanding, these notions are sufficient for the discussion on path dependence and the limits of legal transplantation. Moreover, if we are dealing with systems that may be described, at least in part, as authoritarian, the distinction between thin and thick conceptions is useful.[10] In particular, for the analysis in this article, the difference in attitude towards political morality (thick notion) as separated from legal formalism (thin notion) is valuable.

This article discusses the role of path dependence by using differing notions of the rule of law as a way of illustrating the importance of the law's past route of development and transformation. The core idea is to address legal history-related factors that have significance when legal systems in transition are developed by using legal transplants. The analysis is based on the distinction between a formalist and a substantive notion of the rule of law.[11] Even though this distinction relies on simplification and exaggeration, it provides an adequate basis for a general argument, which builds on a comparative discussion and is supported by examples. Discussion in this article seeks to elaborate on the relationship between path dependence and legal transplants. It is assumed here that this relationship is more complex than normally imagined and that path dependence is a factor that needs to be taken into account when it comes to legal transplanting. In what follows, I am less concerned

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5 Ibid 91 ('formal versions', 'substantive versions').

6 Randall Peerenboom, *China's Long March toward Rule of Law* (CUP 2002) 65.

7 Ibid 71. Especially within the European Union, the thick notion on the rule of law is largely assumed. See eg Juha Raitio, 'Does the Concept of Rule of Law Have Any Material Content?' (2017) 24 Maastricht J Eur & Comp L 774.

8 Peerenboom (n 6) 3.

9 See eg Peter Rijpkema, 'The Rule of Law beyond Thick and Thin' (2013) 32 L & Philosophy 793.

10 Cf Albert Chen, 'China's Long March towards Rule of Law or China's Turn against Law?' (2016) 4 CJCL 1, 10–11.

11 These notions are derived from the so-called thin and thick understanding of the rule of law. See eg Jørgen Møller and Svend-Erik Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Causes* (Palgrave 2014) 13–27; Rijpkema (n 9).

with the debate on the notions of legal transplant and path dependence than addressing path dependence-related issues concerning copying or borrowing from the other systems.

Comparative law, legal history, and legal transplants

Before it is possible to discuss path dependence and transplanting the rule of law, we need to address briefly the discussion on legal transplants. The point is to highlight the key issues for the analysis of the present theme and not simply to rehearse some of the issues that arise. There is also an underlying academic debate on the convergence among legal systems that is related to the discussion on legal transplants. This is, nonetheless, an extremely broad theme, and it cannot be discussed in this article.[12]

Path dependence is about legal history, whereas legal transplants are about comparative law.

The study of legal transplants (transfers, transpositions, translations) and the copying of ideas or legal colonization is a research field where the connection between legal history and comparative law is clearly visible. But what kind of relationship is this? According to Mathias Reimann, '[i]t is by now a banality that comparative law and legal history are closely related'.[13] This close relationship, however, depends on what kind of comparative law we are dealing with. For the black-letter-oriented comparatist, legal history is of very modest relevance. Nevertheless, as soon as the comparatist exceeds the narrow limits of black-letter law, historical context(s) become highly relevant. There are two places where legal history actually comes to play. First, understanding the sources is easier if there is knowledge of the legal historical context of those sources. Second, legal historical knowledge is of quintessential significance since it is virtually impossible to explain observations without knowledge of legal history. We need to look at the research process of comparative law in order to get a clearer picture concerning where to place legal historical knowledge in comparative law.

Legal history and the research process in comparative law

Rather than trying to describe comparative law as a discipline, it is better to look at the research process in the comparative study of law in order to see

[12] The convergence discussion highlights similar legal cultural factors as the legal transplants discussion and sometimes it connects to path dependence. See eg E Micheler, 'Doctrinal Path Dependence and Functional Convergence: The Case of Investment Securities' <https://ssrn.com/abstract=880110> or < http://dx.doi.org/10.2139/ssrn.880110> accessed 24 August 2018. Micheler argues that legal systems are restricted by legal doctrine whereas, in this article, the role of external forces for legal culture are underlined rather than internal doctrinal factors.

[13] Mathias Reimann, 'Comparative Law and Neighbouring Disciplines' in M Bussani (ed), *The Cambridge Companion to Comparative Law* (CUP 2012) 13, 22.

how legal historical knowledge is connected to comparative law.[14] For Konrad Zweigert and Hein Kötz, the underlying methodological idea was to try to reach a comparability of legal rules and institutions by studying them as a part of the larger socio-legal context and by placing them in an external comparative framework.[15] For example, one could ask how to get out of an interpersonal union (what we normally call marriage) that grants the participating parties legal rights and responsibilities. The next phase would be to present the compared systems and their ways of solving the problem. There may be different approaches for solving the problem. For instance, in some systems divorce may be very difficult, if not impossible. In other systems, it may be that no-fault divorce is possible only with the consent of the husband. A wife seeking divorce may need evidence of ill treatment, an inability to sustain her financially, and so on. Certain systems may allow the couple to file for no-fault divorce together or alone, but normally there is a required contemplation period ranging from a few months to longer periods.[16]

After an analytical description of differences and similarities, the comparatist is supposed to adopt a new point of view from which to consider explanations of differences and similarities. It should go without saying that the actual point here is not about marriage but, rather, about understanding and explaining; one needs a broader understanding of marriage, of the role of families, and of the general attitude to divorce.[17] In addition, these normally require information about things like the role of religion and other such things that become understandable through historical information. Importantly, all human beings normally have many loyalties because they belong to multiple communities, and this brings an interesting twist to the comparative study of divorce law where religion and secular law come across one another.[18] That is to say, against the backdrop of historical development, the legal institution of marriage becomes understandable when we see the historical development—that is, path. Of course, other kinds of knowledge are also relevant and useful—for instance, sociological information. In any case, explaining differences only becomes possible with contextual knowledge, and often a key part of that knowledge comes from history and especially from the legal history.

[14] For a description of this kind of comparative law approach, see John Reitz, 'How to Do Comparative Law' (1998) 46 AJCL 617.

[15] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, translated by Tony Weir (3rd edn, OUP 1998) A.3.

[16] A good example of this kind of a comparative approach to marriage is Dominik Lasok, 'A Legal Concept of Marriage and Divorce: A Comparative Study in Polish and Western Family Law' (1960) 9 ICLQ 53.

[17] The need to know the context becomes virtually imperative when legal–cultural understandings collide. See eg Lucy Carroll, 'Muslim Women and "Islamic Divorce" in England' (2007) 17 J Muslim Minority Affairs 97.

[18] See for a more detailed discussion, Lynn Wardle, 'Marriage and Religious Liberty: Problems and Conflict of Laws Solutions' (2010) 12 JL & Family Studies 315 (the focus is on conflicts between religious liberty and state marriage regulations).

Finally, after the preceding stages of research there is normally some kind of critical evaluation of findings.[19]

Of course, the above-described mainstream view of the research process is a limited view, but, all the same, it is relatively largely accepted and a somewhat coherent view. One key issue concerns the comparatist and his or her relation to legal historical knowledge. Essentially, taking legal historical knowledge into account does not transform the comparatist into a legal historian, but it does make the comparatist someone who needs to be satisfactorily familiar with legal history.[20] In essence, the comparatist does not need to have a deeply passionate interest in historical primary sources, but a decent knowledge of relevant legal historical literature (that is, secondary sources) is needed, especially if the comparatist seeks to explain findings. Now, how can we place legal transplants in the equation of comparative law and legal history?

Transplants and irritants

Scottish legal historian and comparatist Alan Watson, in his classic work *Legal Transplants*, which was published in 1974, introduced the concept of a legal transplant.[21] In Watson's theory, it is important for a legal transplant to have a historical connection between systems or, more precisely, between formal laws of the systems. In other words, it is not a question of a reception where what has been adopted from the foreign law could be specifically indicated, when the adoption took place, and how the moving actually happened. What is essential is only the 'relationship of one legal system and its rules with another'.[22] By the process of moving, Watson simply meant the moving of a rule or a system of law (mainly Roman) from one country to another. Now, we do not need to accept Watson's narrow view, but, for the discussion on legal transplants and path dependence, it is an important view. Yet Watson's view is particularly relevant for this article because he underlined the role of legal transplants in developing legal systems.[23] Rule-of-law reforms have been, by and large, about developing a legal system.

It is useful to keep in mind that in the original theory of legal transplants the question was expressly one of adoption of the central idea and not necessarily of word-to-word copying. When based on a foreign model, a corresponding construction of one's own law is moulded, and so it is possible to say that the

[19] See Jaakko Husa, *A New Introduction to Comparative Law* (Hart 2015).

[20] These issues are dealt with in a new field labelled as comparative legal history, which is outside the scope of this article. For a detailed discussion, see Thomas Duve, 'Global Legal History: A Methodological Approach' in *Oxford Handbooks Online – Law* (OUP 2017), doi: 10.1093/oxfordhb/9780199935352.013.25.

[21] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993).

[22] Ibid 6.

[23] Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 LQ Rev 79. For a more detailed discussion on legislative drafting and the use of legal transplants, see Helen Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 Intl & Comp LQ 659.

foreign law has been borrowed and the legal culture of the receiving country has been affected. What takes place is a movement of law (broadly understood) between States.[24] In this way, the law of the USA has had a significant impact on European systems in the legal fields related to commercial activity from the mid-twentieth century (for example, leasing, factoring, and franchising).[25] Legal borrowing or copying is of particular interest for comparative law. The study of borrowings and legal transplants breaks the idea of the nationality of law and its bond to a particular system by pointing out the reciprocal relations that cross these national restrictions. Even though transplantation is a field filled with problems and paradoxes, it is something that takes place in the real life of the living and breathing legal systems of today.

However, engaging in a study like that is not a particularly easy task for lawyers. For example, the criticism of the transplant theory was severe from the very beginning.[26] Otto Kahn-Freund presented an early criticism that turned out to be quite influential.[27] He justified his criticism with the significance of the social context of law. According to him, the whole concept of transplant was out of place in the world of law, although it was possible to, understandably, compare it to a surgical operation in which a kidney of one individual is transplanted to another person. According to the core of Kahn-Freund's argument, 'we cannot take for granted that rules or institutions are transplantable'.[28] Now, if one looks at the idea of transplantation, something seems to be rather evident. It would be essential to observe the societal context of law, or the result could be transplant rejection in the new system. In the case of a legal transplant, influence normally takes place in a mutated form. Notwithstanding, a mutated transplant is still a transplant although in some respect it is a transplant gone wrong. It makes sense to notice, nevertheless, that the success of a transplant is not the same thing as making a transplant as such because one can certainly copy a rule or an institution from another country.[29]

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24 Cf Ritaine (n 1) 22.

25 For a broader discussion, see Mark Van Hoecke, 'Legal Culture and Legal Transplants' in R Nobles and D Schiff (eds), *Law, Society and Community* (Routledge 2016) 273. For an example on practical problems related to transplanting with an aim to attract and sustain international trade and investment, see John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Routledge 2006).

26 For a detailed analysis of the forty years of history of Legal Transplants, tracing reactions to it, and how it became a classic of comparative law, see John W Cairns, 'Watson, Walton, and the History of Legal Transplants' (2013) 41 Georgia J Intl & Comp L 637.

27 See Otto Kahn-Freund, 'On Use and Misuse of Comparative Law' (1974) 37 MLR 1 ('its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context', 27).

28 Ibid 9.

29 There are many examples of failed legal transplants. Here are a couple of interesting examples: Philip Nichols, 'The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code' (1997) 18 U Pennsylvania J Intl L 1235; Ahmad Alshorbagy, 'On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law' (2012) 22 Indiana Intl & Comp L Rev 237.

Later the transplant criticism became radicalized: in the 1990s, critical comparatist Pierre Legrand presented his relativistic view of the sheer absurdity of (mainly private law) legal transplants.[30] A Watson versus Legrand discussion is certainly not the only debate on legal transplants, but its overtly sharp tone highlights clearly that the notions on comparative law and legal culture are distinctly different between a legal positivist (Watson) and a culturally more sensitive contextual approach (Legrand).[31] At present, concepts like legal translation, legal transformation, and legal transposition are also used.[32] The great majority of comparatists continue to use legal transplant either solely or in parallel with other conceptualizations. Notwithstanding, it would seem that Watson's original concept has become rooted to the theory and terminology of comparative law—in spite of its problematic nature.

Discussion has continued and various replacements have been proposed for the concept of legal transplant, with one of the best known being the proposal in 1998 by Gunther Teubner. He emphasized the fact that the result of transplantation can be anything. Therefore, we should not speak of a legal transplant but of a legal irritant.[33] Teubner's key idea in this respect is related to the nature of the transplant because in Watson's thinking the transplant appeared to be something that can be controlled and somehow predicted. Teubner denied this and stressed that when something is transferred from one foreign legal culture to another, something happens but not what is expected; it is not transplanted into another organism but, rather, works as a fundamental irritation that triggers a whole series of new and unexpected events. In other words, what follows transplantation is an evolutionary legal dynamic, the consequences of which are very difficult, if not impossible, to predict. Through Teubner, we can see how legal transplants are connected to systems theory according to which social systems are structurally coupled—that is, bound together. The notion of structural coupling maintains that there is a relationship between systems and their environment. Legal systems, understood as one of the social systems, are structurally coupled to their environment. For example, economic systems and legal systems are coupled together through sales contracts, or law in general is coupled together with the political system through a constitution.[34]

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30 See P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht J Eur & Comp L 111. See also Legrand, 'Legal Transplant' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 55.

31 For a balanced account, see George Mousorakis, 'Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach' (2013) 54 Hungarian JL Studies 219.

32 See note 2 above.

33 See Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 MLR 11: '[I]t works as a fundamental irritation which triggers a whole series of new and unexpected events.'

34 Essentially, this is what Niklas Luhmann's systems theory argues. For an overview, see Mathias Albert, 'Luhmann and Systems Theory' *Oxford Research Encyclopedia of Politics* (2016) <http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-7> (accessed 24 August 2018).

Importantly for the present discussion, path dependence is one of the key factors that leads to structural coupling. However, the focus of this article is not on the systems theory—hence, it suffices to point out that path dependence and the possibility for successful legal transplanting are connected, as we will see in the following section.

Independent of the type of conceptualization that is selected, legal borrowing has continued to increase with internationalization, globalization, and European integration.[35] To be sure, legal diffusion, borrowing, copying, or transplanting does take place—however, how well it actually works and whether or not it leads to the desired results are different questions altogether. Therefore, it may be that Ralf Michaels has a fair point when he says that 'we may grudgingly have to admit that Alan Watson is not, in the end, as uninteresting as we make him to be'.[36] Whatever criticism we may pose, it remains a fact that the migration of law is taking place everywhere, or as one scholar puts it: 'Legal rules are extracted from one context, transferred and implanted in another context, or migrate across sometimes fluid borders and so on.'[37] Moreover, it seems that the belief in successful legal transplants is still a part of comparative law scholarship and, more importantly, part of national legal practices, and there are scholars trying to outline a methodology for successful legal transplants.[38]

In sum, it is clear that comparative law and legal history are closely connected. This is one of the most fruitful ideas of Watson's theory. It is evident that as a theoretical notion legal transplant is a problematic concept even though it describes generally rather well a broad phenomenon of copying legal ideas (rules, institutions) between systems. Moreover, it is pretty much evident that legal transplanting is an area of scholarship where comparative and historical legal views on law fuse together. Nevertheless, there has been very little, if any, discussion on the connection between legal transplants and so-called path dependence. The following chapter discusses path dependence from the point of view of comparative law and legal history within the ambit of transplanting the rule of law.

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35 There are, nevertheless, different forms of legal transplants between states. See Jonathan Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentinian Examples to Explain the Transplant Process' (2003) 51 AJCL 839 (cost-saving form, externally-dictated form, entrepreneurial form, legitimacy-generating form). For a broader typology of legal transplants, see William Twining, 'Diffusion of Law: A Global Perspective' (2005) 49 J Legal Pluralism 1, 17, Table 1: Diffusion of Law: A Standard Case and Some Variants Standard Case.

36 Ralf Michaels, 'One Size Can Fit All' in G Frankenberg (ed), *Order from Transfer: Studies in Comparative Constitutional Law* (Elgar 2013) 56, 78.

37 Timo Tohipur, 'Comparative Constitutional Studies and the Discourse of Legal Transfer' in Günter Frankenberg (ed), *Order from Transfer* (Edward Elgar 2013) 29, 33.

38 See Randall Peerenbom, 'Toward a methodology for successful legal transplants' (2013) 1 CJCL 4.

Path dependence

As such, the notion of path makes a good legal historical conceptualization because it refers to a route along which something moves; it is a track beaten by the feet of persons during a certain period of time. Importantly, the metaphor of path contains movement between one place and another and an idea of direction in which something moves. In essence, path dependence scholarship extends and refines this basic conceptualization of historical evolution.

Path dependence discussions

The idea of path dependence has been discussed widely in economics, political science, and historical sociology. These strands of discussions deal with the same theme, but they also differ in certain respects. In economics, various strands of path dependence seem to be rather mathematical as to their nature. Broadly speaking, in the sphere of economics, path dependence is typically associated with questions like the choice of products and how certain decisions are 'locked in by historical events' even though—at that time—these events may have appeared insignificant. Often, economic theorists identify and discuss different forms of path dependence.[39] However, the quest for differentiation between types of path dependence is typical for all kinds of path dependence scholarship, which seems to be annoyed by the almost metaphorical usage of the notion.[40] Essentially, path dependence is deemed important in economics because it underlines the importance of history and elevates its role as a method of explanation.[41] The underlying idea is, nevertheless, very simple and basically argues that 'some things people do have durable consequences'.[42] For the most part it is about economic outcomes on the path of earlier outcomes.

In historical sociology, the basic idea of path dependence is very similar, yet less mathematical or formalist, to that of economics. It suggests that many central social phenomena can be properly explained in terms of path dependence. In a non-subtle, rude formulation, it is simply argued that 'history matters'.[43] Like economists, historical sociologists also distinguish different forms of path dependence by seeking to separate, for instance, self-enforcing sequences and study of reactive sequences. In any case, the quintessential idea is that past events influence future events.[44] James Mahoney separates utilitarian, functional, power-related, and legitimation-related types of path-dependent forms

[39] See eg Stan Liebowitz and Stephen Margolis, 'Path Dependence, Lock-in, and History' (1995) 11 JL Economics & Organization 205.
[40] Scott Page, 'Path Dependence' (2006) 1 QJ Political Science 87, 87–8.
[41] Liebowitz and Margolis (n 39) 222.
[42] Ibid 223.
[43] J Mahoney, 'Path Dependence in Historical Sociology' (2000) 29 Theory & Society 507.
[44] Ibid 508–10.

of explanation.[45] Of these forms, for example, the functional variant explains that only a small initial difference between China and Europe had such consequences that they led to very different development trajectories. It is also pointed out that path dependence is not an easy way of explaining historical developments sociologically because even if one would have knowledge of a certain historical breakpoint that launched creative sequences, 'analysts may have difficulty predicting or explaining the final outcome of the sequence'.[46] To put it otherwise, even with extensive knowledge, it is arduous to predict social outcomes. In essence, the historical sociologist may underline that path dependence takes place 'when a contingent historical event triggers a subsequent sequence that follows a relatively deterministic pattern'.[47] One example is how the birth of the global capitalist economy grew out of small European agricultural peculiarities.

In political theory, path dependence scholarship concentrates on institutional development and creation of generalizable explanation models that can take into account both continuity and change of time. Like in economics and historical sociology, the aim has been to develop arguments on path dependence going beyond the simple notion of 'history matters'. Yet, for political scientists, the real interest lies in an attempt to use path dependence models to explain patterns of continuity and change in political institutions.[48] Notably, political theorists may underline the role of history because there may be cases in which some institutional patterns can become 'locked in'—hence, making it very difficult to abolish these institutional and behavioural patterns later. Besides 'lock-in', layering is also recognized as an important mechanism in path dependence. What happens in the process of layering is that an institution changes incrementally because additional rules and institutional structures are added on top of the already existing institution. Consequently, each new added layer brings about a small change to the institution. However, when this process cumulates it may lead to an eventual total transformation of the original institution.[49] This kind of path dependence scholarship comes close to an idea according to which institutions change substantially through incremental evolution.[50] Essentially, path dependence theorists assume that history matters in the sense that '[h]istorical forces constrain laws to be similar to past laws'.[51]

[45] Ibid 517.
[46] Ibid 528.
[47] Ibid 535–6.
[48] Taylor Boas, 'Conceptualizing Continuity and Change: The Composite-Standard Model of Path Dependence' (2007) 19 J Theoretical Politics 33.
[49] Ibid 47.
[50] Ibid 52.
[51] Page (n 40) 88.

Path dependence and the rule of law

Path dependence connects to the law quite naturally as a kind of continuation of political science's interest in institutional development. Especially in the field of law and development, an explanative model that stresses the role of historical path and deals with the transformation of political or legal institutions is undoubtedly relevant. Mariana Prado and Michael Trebilcock have dealt with path dependence and legal reforms, and they argue that path dependence is able to shed light on past failures of legal reform and provide some guidance concerning future legal reforms.[52] This is also where the question of legal transplantation becomes relevant.

Their analysis starts from a certain kind of 'euphoria' that seems to surround institutional reforms and related scholarship in the 1990s and early 2000s. From the viewpoint of law, the main focus has been on the rule of law in the sense that many institutions in developing countries were reformed as a way to enhance and strengthen the rule of law; albeit, the problem has been that legal development assistance has been operating on a thin base of knowledge concerning the actual functioning of developing countries. Accordingly, there has been very little information on how to really develop poorly performing institutions relevant to the development of the rule of law, as understood in a thick sense. Prado and Trebilcock underline the role of 'critical juncture', which comes from the path dependence scholarship. These kinds of junctures are critical because they have an instrumental role on particular paths, which become later very difficult to alter. In other words, certain choices become 'locked in'. The problem with critical juncture is that it is a rather deterministic explanation due to the fact that it does not predict these junctures but only looks back in time in order to find them.[53] In addition, there is a profound problem with predicting or creating a critical juncture and this notion alone is unable to do either of these. In a practical tone, Prado and Trebilcock point out at the same token that deterministic critical junctures are probably too elusive in order to be helpful for reformers.[54] However, for our discussion here, the notion of a critical juncture is less relevant simply because both early and recent cultural factors refer to a relatively long period of development than to a juncture that signifies a particular point in time (see the following section).

If we follow this line of argument, then, path dependence literature is valuable because it provides information on historical factors that legal reformers—who may rely on legal transplants—need to take seriously. In other words, because particular institutions are embedded over time, anyone who seeks to reform or change the system needs to be aware of institutional interdependences. Yet we can see that the rule of law-focused reforms in developing

[52] Mariana Prado and Michael Trebilcock, 'Path Dependence, Development, and the Dynamics of Institutional Reform' (2009) 59 UTLJ 341.

[53] Ibid 355–7.

[54] See Prado and Trebilcock (n 52).

countries have failed because they have ignored path-dependent, self-reinforcing mechanisms.[55] The embedded legal cultural problem is that belief systems and patterns of behaviour are adjusted to the established arrangements and, thus, will not easily transform the way that the new regime would want them to change. Accordingly, if the rule of law-focused reforms seek to become successful, they need to take into account the legal cultural adaptive behaviour.[56]

In sum, '[l]ocal conditions matter and solutions need to be tailored to these conditions'.[57] This means that a one-size-fits-all type of blueprint for the rule of law reform should not be used because it fails to consider path-dependent factors. However, even though path dependence scholarship is enlightening it needs to be discussed against the backdrop of concrete illustrations in relation to the rule of law, which the following section seeks to do.

Illustrating path dependence difficulties with the rule of law

Even though we would not engage in a scholarly debate on path dependence as such, it is useful to distinguish between early and recent path dependence. This is because some legal reform or the success of legal transplanting does not depend on the entire legal historical path of a legal institution or a fundamental historical legal cultural pattern. In other words, it is not enough to say that legal history matters; rather, it should be said what periods and what parts in particular matter. Some reforms can depend on a historically recent path rather than on an early path. It may be the case that the idea of recent path dependence is problematic for a common conception on path dependence that normally stresses the significance of early decisions.[58] Notwithstanding, both of these notions include a role for legal culture as one possible mechanism for path dependence in the field of law. This is because, as Scott Page says, '[o]ne can easily find evidence that institutional choices depend in some way on a society's culture (broadly defined) and that culture is deeply rooted in the past'.[59] In the case of legal transplants, the role of legal culture is crucial. Legal culture refers to a system-specific manner in which values, practices and legal institutions are integrated into the functioning of a legal system.[60]

[55] One important reason for failures concerning the transplantation of the rule of law is the fact that too little attention has been paid to societal and cultural contexts of law. See Brian Tamanaha, 'The Primacy of Society and the Failures of Law and Development' (2011) 44 Cornell Intl LJ 209 (arguing that the rule of law alone does not have a special ability to deliver desired goals for development).

[56] Prado and Trebilcock (n 52) 358–64.

[57] Ibid 366.

[58] Cf Page (n 40) 103–4.

[59] Ibid 113.

[60] Husa (n 19) 3–4.

In addition, legal culture is a flexible characterization that describes stable patterns of legally (in a broad sense) oriented attitudes and behaviour.[61]

The idea of incremental evolution is very relevant for the discussion on legal transplanting and path dependence.[62] Importantly, the significance of the time becomes visible since the past is the point of departure for the present, and the present is the point of departure for the future. As pointed out by Oona Hathaway, 'the historical path leading to each new outcome or decision directly shapes that outcome in specific and systematic ways'.[63] Consequently, the idea of transplanting the rule of law into a new context is bound to face difficulties. The following sections discuss first the early path dependence of Imperial China and then the recent path dependence in Poland.

Early cultural structures: China

It is rather obvious that Chinese law is difficult to grasp for a Western legal scholar. This is not only because of linguistic difficulties but also because of the Chinese legal tradition.[64] Legal history does matter. When we speak of early Chinese law there are also obstacles typical of legal historiography; all the same, China makes an interesting case for demonstrating what early path dependence is all about. The starting point for looking at the critical juncture is the present thin Chinese notion on the rule of law—that is, the rule of law with Chinese characteristics.[65]

In this case, 'early' refers to a time very long ago in history when Imperial China took shape before the Common Era (BCE). Now, one of the most interesting analyses on path dependence is John Haley's study that looks at the political foundations of law.[66] His comparative and historical account concentrates on the birth of legal regimes in Asia, Europe, and Latin America. Haley uses geography and early agriculture as key factors that locked in certain legal cultural basic features that later became decisive for the development of legal and political systems. His discussion is based on path-dependent assumptions, according to which path dependence is as 'fundamental to the narratives of how legal systems develop as it is to the trajectories of political and economic change'.[67] I will follow Haley's analysis on the birth of the legal system in

[61] David Nelken, 'Using the Concept of Legal Culture' (2004) 29 Australian J Legal Phil 1.

[62] As Tamanaha (n 55) points out, the objectives one can reach by transplanting such a thing like the rule of law 'can better be advanced if activists work directly on behalf of each objective rather than pinning their hopes on the magical power of the rule of law' (246).

[63] Oona Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 Iowa L Rev 601, 659.

[64] Cf Junwei Fu, 'China' in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Elgar 2012) 137.

[65] See, eg, *White Paper: China's Efforts and Achievements in Promoting the Rule of Law* (2008) <http://www.china.org.cn/government/news/2008-02/28/content_11025486.htm> (accessed 24 August 2018). See also Chen (n 10) 27–35.

[66] John Haley, *Law's Political Foundations: Rivers, Rifles, Rice, and Religion* (Elgar 2016).

[67] Haley (n 66) x.

early China in order to provide an illustration of the significance of early path dependence in relation to preference for the thin notion on the rule of law.[68]

The relationship between formal legality and broader political morality plays a crucial role here. Those who stress the substantive or thick definition tend to connect an element of morality to their view on the rule of law. In contrast, those who underline the instrumental or formal aspects of the rule of law hope to separate the realms of political morality and law, stressing the technical and procedural dimensions of law. Haley's account shows how early Chinese evolution in legal thinking ended up considering law and morality as separate. This, thus, provided a different legal historical path for law than the one in Europe. In practice, this evolution led to a legal culture in which law became 'a positivist tool for governance separate from morality'.[69] It is commonplace for comparatists and other legal scholars to explain this distinction in the terms of *li* (禮) and *fa* (法), but Haley's account relies on path dependence and not on theoretical and conceptual analysis.[70]

According to Haley's account, Chinese law remained almost immutable from the inception of unitary controlled authority in the third century BCE. The form and substance of law were grounded in the principles first introduced by the Legalists; law was conceived in a rather—if we use modern conceptualization—positivistic manner. Principles defining legal rules and their aims were instrumentalist, and, importantly, they were regarded as emanating from the emperor—that is, the State. These rules were designed in such a manner that they served and reflected State interests, including such things as the welfare of the people and the common good. Notably, legal rules also had an important didactic dimension, meaning that laws were not only enforced but also disseminated widely so that they would be respected and compliance would be voluntary as to its nature.[71] The legalist school had different views on the relationship between law and society promoting the use of law as a means of moral correction; yet, it also had an impact on how the ruling of the country took place.[72] Regardless, Haley's findings make it possible to speak of a Confucian form of constitutionalism.[73]

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[68] Of course, Chinese discussion on the rule of law in contemporary China is much more nuanced and subtle than explained here. This paper concentrates on path dependence and legal transplanting, and does not reflect the complexity of present discussions. For a deeper analysis see Samuli Seppänen, *Ideological Conflict and the Rule of Law in Contemporary China* (CUP 2016), which discusses paradoxes, contradictions, and conflicts in today's Chinese rule of law discussion.

[69] Haley (n 66) 60.

[70] See, eg, Patrick Glenn, *Legal Traditions of the World* (4th edn, OUP 2010) 321–9. For an example of mainstream short comparative law description see Gilles Cuniberti, *Grands systèmes de droit contemporains: introduction au droit comparé* (3rd edn, LGDJ 2015) 169–70. See even Husa (n 19) 158.

[71] Haley (n 66) 88.

[72] Clearly, legalism and the model of Confucian constitutionalism are related. See eg Haiwen Zhou, 'Confucianism and the Legalism: A Model of the National Strategy of Governance in Ancient China' (2011) 6 Frontiers of Economics in China 616.

[73] See Son Ngoc Bui, 'Confucian Constitutionalism: Classical Foundations' (2012) 37 Australian J Legal Phil 61 (regards *li* as a variant of unwritten constitution).

Importantly, a system was developing based on the adherence of the rule by law. It would not be quite right to argue that early Imperial China followed the rule of law as it is understood today especially in its thick form, but public law produced by the state had a role and was adhered to. When it comes to the formation of legal culture, these developmental tendencies had at least one crucial outcome, according to Haley: 'The domain of morality and law in China were completely separate.' The State, embodied by the emperor, was governed by a natural moral order rather than a legal one. However, law was not meaningless because the legal rules and principles of public law were at least some kind of an alternative constraint against the arbitrary exercise of political power. In other words, as Haley claims, the historical record overwhelms an argument against the 'rule by law' in China. In sum, law had an important role as an instrument of State control.[74] In more philosophical language, we can see that the elements of political order associated with the Confucian view are different from the legal order created by positive laws.[75]

For the purpose of the present discussion, there is no need to go into the historical details except to notice the fact that law became and remained a public form of ordering—that is, it played a small role in private disputes even though law remained a secondary form of social control.[76] To simplify a great deal, political authority was, for a very long time, based on the quality of governance for what was deemed as promotion of common welfare and public good. Patrick Glenn speaks of Confucian ways that led law towards penal and administrative forms of law with an absence of formal private law.[77] Law's role was instrumental in the system in which there was a 'carefully crafted and articulated set of rules made and enforced consistently through prescribed procedures by a corps of officials whose status was based on education and merit'.[78]

Haley's analysis, when looked against the backdrop of path dependence, claims that the strict separation between political morality and law/legality became locked in the Chinese legal culture. Accordingly, it is possible to see certain path-dependent reasons as to why the mainstream Chinese view on the rule of law is thin and does not favour a more substantive thick view on the rule of law. Simply, if political morality and legality are separated at a critical historical juncture (the formation of the Imperial China), then the

[74] Haley (n 66) 90–2.

[75] Again, this this is about the basic difference between rule by etiquette and the ceremonial—that is, *lizhi* (禮治) and rule by the penal and administrative—that is, *fazhi* (法治). See Randall Peerenboom, 'Law and Ritual in Chinese Philosophy' in *Routledge Encyclopedia of Philosophy* (Routledge 1998). doi: 10.4324/9780415249126-G013-1.

[76] As Haley (n 66) describes (in comparison to medieval Europe): 'emphasis on administrative regulation with an expansion of criminal law and ruler-controlled prosecution—in other words, a progression toward a public law system similar to that in Imperial China' (151).

[77] Glenn (n 70) 326–7.

[78] Haley (n 66) 95–6.

separation becomes locked in and historical forces constrain the present legal-cultural world view. The specific path-dependent nature of this legal-cultural world view is openly visible in the relationship between China and its Special Administrative Region of Hong Kong that has a different (much later and colonial) path-dependent, legal-cultural world view based on common law's thick notion on the rule of law.[79]

In the language of path dependence, separation between morality and law became an established institutional pattern even though it was, as such, an outcome of a contingent series of historical developments in early China. The fortuitous interaction between legalist administration and Confucian ideology meant that not only was a certain kind of legal-cultural world view produced but an exceptionally stable political system was also created that lasted over a millennium.[80] During this millennium, path-dependent route, Chinese legal culture assumed qualities that last to the present time. Overall, this can be labelled as early path dependence influencing the manner by which the notion of rule is conceived even in today's China. To conclude this section, if we go beyond Haley's analysis, we can note that the legalist tradition also had considerable significance to the tradition of 'the rule by law'. However, it is not necessary to juxtapose Confucianism and legalism here because Chinese legalism can also be interpreted in a way that highlights its internal moral dimensions.[81] In any case, we can trace the legal-ideological roots of the rule by law much further back than we can with Poland.

Recent cultural structures: Poland

Poland provides a good illustration of the significance of recent path dependence, especially because it seems to have difficulty accepting the thick rule of the notion of the European Union (EU). Poland has been a Member State of the EU since 2004, but the actual process of integrating Poland into the EU began in 1994 with Poland's application for membership.[82] As a part of the political accession criteria, the new Member States, of which Poland was one, had to abide by strict conditions that required new Member States:

> to ensure the stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities; these requirements are enshrined as constitutional principles in the Treaty on

[79] Of this rule-of-law based collision, see Jaakko Husa, "Accurately, Completely, and Solemnly": One Country, Two Systems and an Uneven Constitutional Equilibrium' (2017) 5(2) CJCL 231.

[80] Hayden Windrow, 'A Short History of Law, Norms, and Social Control in Imperial China' (2006) 7 Asian-Pacific L & Policy J 244, 299.

[81] See Kenneth Winston, 'The Internal Morality of Chinese Legalism' [2005) Singapore J Legal Studies 313.

[82] European Parliament Legislative Resolution on the Application by the Republic of Poland to Become a Member of the European Union [2003] OJ L236.

European Union and have been emphasised in the Charter of Fundamental Rights of the European Union.[83]

In practice, this means that new Member States committed themselves to a thick EU style notion on the rule of law. The thick notion of the rule of law is derived from many legal sources mentioned above. It is easy to see what kind of rule of law conception is meant in these documents. For instance, the preamble to the Charter of Fundamental Rights of the European Union says that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law'.[84] The Charter also provides certain rules concerning the nature of judicial power in Article 47: 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.'

From the viewpoint of rule of law, an 'independent and impartial tribunal' clearly speaks for a certain kind of separation of powers related to the constitutional structure that underlines the independence and impartiality of judges and the functioning of the courts. Nevertheless, in December 2017, the Commission of the European Union, after almost two years of efforts, decided to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework.[85] This was because the Commission concluded that there was a clear risk of a serious breach of the rule of law in Poland. The Commission specifically pointed out that '[j]udicial reforms in Poland mean that the country's judiciary is now under the political control of the ruling majority' and that led to 'the absence of judicial independence'.[86] In other words, the understanding of the notion on rule of law is different between the EU and Poland, which is one of the EU's Member States. The fact that there really are serious differences between the present Polish view and that of the Union cannot be denied, or as Laurent Pech and Kim Scheppele describe the situation: '

The situation in Poland has gone from bad to worse since and the multiple rule of law recommendations made by the Commission have not only been ignored but also openly and rudely dismissed by Polish authorities.'[87]

For the discussion in this article, we can note two relevant dimensions. First, the thick rule of law notion is basically a legal transplant from Western

[83] Commission Opinion on the Applications for Accession to the European Union by the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic (19 February 2003) art 3.

[84] Charter of Fundamental Rights of the European Union [2000] OJ C364/01.

[85] For a detailed account of the happenings that lead to this action, see Commission Action on the Rule of Law in Poland: Questions and Answers, Doc MEMO/17/5368 (20 December 2017).

[86] See European Commission, 'Rule of Law: European Commission Acts to Defend Judicial Independence in Poland' Press Release no IP/17/5367 (20 December 2017).

[87] Laurent Pech and Kim Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' [2017] Cambridge YB Eur Legal Studies 1, 3.

Europe that is in a former socialist country. Second, difficulties with this legal transplant are best explained by recent path dependence. Recent path dependence refers, unlike early path dependence, to rather late occurrences that seem to have relatively durable consequences for the legal culture. Accordingly, in Poland's case, we do not need to go as far back in history as in the above illustration concerning China.

In the first decades of the twentieth century, Poland followed general continental legal culture that was heavily influenced by the German legal science of the nineteenth century. Moreover, Polish law evolved within the mainstream of European legal tradition with ingredients from Germanic but also from Canon law and Roman law. In general, Polish law was, for a long time, heavily influenced by German and French law.[88] That was to change radically in the 1940s when Poland became part of the socialist law. From the point of view of path dependence, this happening became a critical juncture in regard to what kind of an understanding of the rule of law Poland assumed in a legal cultural sense.

The new legal culture and socialist law was the result of the country's political subjection to the Soviet Union. In practice, this led to significant changes in culture, society, politics, economy, and law. The Soviet influence started from 1944, but the extensive Sovietization of law took place a little later between 1948 and 1951. Some of the key consequences were judges resorting openly to ideological and political arguments and the creation of new de facto legal rules under the banner of the 'principles of social intercourse', which, was a new general clause introduced in 1950.[89]

When it comes to the present differences between conceiving the rule of law, an important feature of the former socialist legal culture was the so-called 'hyperpositivism' that insisted on a preference for logical and linguistic interpretation, which heavily underlined the literal way of interpreting legal rules. This legal cultural feature was a key dimension of the style of judicial argumentation that stressed purely procedural formalism and relied overtly on the formalities of law.[90] This kind of European socialist law is now officially non-existent, but if path dependence and legal culture are taken into account, then the picture is different.

In the 1990s, comparative law scholars regarded the socialist law in Europe as an extinct form of law. However, if we take legal culture into account our conception of extinct socialist law seems premature. Of course, socialist law in Europe as a form of formally valid law is non-existent in the 2010s. However, the idea that European socialist law is dead and buried is less convincing if we look at legal culture and recent path dependence. Rafal Mańko rightly points out that the dissolution of the socialist legal family cannot be identified with the disappearance of the socialist legal culture. Accordingly,

[88] Michael Gondek, 'Poland' in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Elgar 2012) 681.

[89] Rafal Mańko, 'Survival of the Socialist Legal Tradition?' (2013) 4 Comp L Rev 1, 8.

[90] Ibid 6.

'[t]he Socialist Legal Family may well be dead and buried, but the same cannot be said of the Socialist Legal Tradition'.[91] It is no surprise, then, that there are comparatists who regard the former socialist law countries to form a specific Central European legal family that is based on the legal cultural vitality of socialist law and that is more legal positivistic and formalist than Western European systems. Another scholar underlines that socialist legal culture simply refuses to fade away; according to him, 'two decades after the beginning of the "transition", some features of the "old" tradition have proven to be surprisingly resilient and unaffected by change'.[92] The main dividing factor between Western European legal culture and transformed socialist European legal culture is, according to these analyses, the instrumentalist approach to law, which is upheld by elites who are accustomed to using legal processes, and law in general, as a tool for protecting their own interests. The manner in which Poland chooses to view the notion of the rule of law seems to confirm these views.

In path-dependent terms, we can argue that the critical juncture for Polish legal culture took place in the 1940s and 1950s when the basic features of legal culture were transformed and Poland's legal mentality transformed from a clearly continental European one into a Soviet-style socialist legal culture. When Poland became a Member State of the EU at the beginning of the 2000s, it had already changed its formal laws and made various legal and political reforms in order to fulfil the accession criteria of the Union. But as the difficulties and differences between the Union's view and Poland's view on the rule of law show, the recent path dependence based on former legal culture affects how the notion of rule of law is regarded. In the Union's view, the rule of law is understood in a thick substantive manner, whereas Poland's present view sees the rule of law as a formality and a procedural thing. In short, to explain the difference we need to consider the recent path dependence of the Polish legal culture, which clearly favours a thin notion on the rule of law.

An important point has to be made before the conclusion. Poland was explained in more concrete terms and by reference to a clear difference of view (between Poland and the EU) of very recent origins; in China's case, a much stronger and longer-lasting instance of path dependency was argued, going back to the remote historical origins of Chinese law. This may seem like a shortcoming; however, none of this is to argue that China's high-socialist period (1949–79) would be less relevant than that of Poland (1944–89) in determining the rule of law outcome, or that Poland's remoter history would less relevant than China's. The point is simply to argue that there are at least two kinds of path dependencies that are relevant when we are dealing with such a complex and multifaceted thing as the thick rule of law. What is more, in practice, both ancient and recent path-dependent factors are most likely fused together. Yet, for the discussion on developing a legal system with the help of legal transplants, separating these forms of path dependence makes sense

[91] Ibid 1.

[92] A Uzelac, 'Survival of the Third Legal Tradition?' (2010) 49 Supreme Court L Rev 377.

because it brings subtlety to the blunt argument according to which 'history matters'.

Conclusion

As was noted in the introduction, the notion on the rule of law largely depends on legal culture. In turn, the nature of legal culture depends much on legal history. Accordingly, when trying to transplant such a divergent and multi-faceted thing as the rule of law, the path of the legal evolution of a legal culture defines what the limits of a successful legal transplantation are.[93] Deeply embedded belief systems and established patterns of law-related behaviour are difficult to transform if and when they are locked into a critical legal cultural juncture that took place during a longer period. The above analyses describe two different forms of legal-cultural path dependences, using Imperial China and contemporary Poland as illustrative examples.

In China's case the preference for a thin notion on the rule of law may be explained by early path dependence starting from the third century BCE, whereas in Poland's case the critical juncture can be placed in the 1940s and 1950s. Even though the above analysis concentrates on early Chinese development, we need to bear in mind that when it comes to today's legal culture in China, it is beyond any doubt that Soviet laws had a profound influence on legal thinking just as they did in Poland. Moreover, it is important to note that neither China nor Poland have a unified monolithic notion of the rule of law, and there are domestic differences and subtleties that the above path-dependence-based analysis does not take into account. However, when talking about legal transplanting of the rule of law, it is crucial to look at the realistic possibilities of comparative law-based legal engineering. In short, path dependence shows what kind of legal reforms are likely to be successful and what kind of legal reforms are less likely to be successful. Studying path dependence of a system provides information on the limits of legal transplantation. Even though path-dependent explanations seem rather deterministic, they do not exclude the use of transplants as a means of legal reform. Here we need to return to the idea of layering that was addressed above.

Path dependence does not prevent using comparative law-based legal engineering, but it does tell about the limits concerning the particular manner of how to use legal transplantation as a tool for legal reform. The process of layering underlines that an institution changes incrementally because new rules or institutional structures are added on top of those that already exist. Consequently, path dependence speaks for development through incremental

[93] In other words, '[n]o impact is likely to be imminent, dramatic or predictable. That is to say, changing culture, however conceived, may present at least as formidable a set of challenges as changing laws and legal institutions if the purpose is to change human behaviour'. Michael Trebilcock and Mariana Prado, *Advanced Introduction to Law and Development* (Edward Elgar 2014) 57–8.

evolution. In China's case, this observation seems to support the idea of a long march towards the rule of law. In Poland's case, path dependence seems to imply that legal reforms that took place in the formal law were not enough for assuming a thick notion on the rule of law and that the EU should have given more time to Poland to gradually develop its legal culture towards a thicker conception on the rule of law. However, as Poland has been a full member of the Union since 2004, its membership limits what the Union can do with Poland concerning different views on the rule of law. Importantly, this does not mean that the rule of law would not matter in these countries. The argument maintains that historical path matters when we are dealing with such a complicated and unambiguous notion as the rule of law.

While this article does not offer a conclusive answer to the question of developing legal system with the help of legal transplants, it does, however, show that path dependence has a great role when it comes to transplanting such a legal culturally sensitive idea as the rule of law. Yet, there are limitations too. One key issue concerns the role of path dependence and different cases than those of China and Poland. For example, we may ask why Estonia has been able to shake off much of its socialist legal past, unlike Poland, or why the development of the rule of law is different in Taiwan, although the early cultural structures are similar with the mainland China. Obviously, there could be more objections to the analysis in this article, but they could not be pursued here. Instead, these kinds of questions set an agenda for further research on the role of path dependence, legal transplanting, and the rule of law against the backdrop of developing a legal system. To be sure, path dependence provides relevant information on the limits of legal transplantation, but it is not a panacea for legal reformers or comparative law scholars. Finally, it provides a useful way to conceptualize and discuss the possibilities of comparative law-based legal engineering.