LEGAL TRANSPLANTS AND COMPARATIVE LAW

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SUMMARY

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ABSTRACT / *RESUMEN*

The current trends in modern comparative law are not limited to the traditional studies of the legal families. Nowadays, a more comprehensive approach is taken where new terms such as 'legal culture', 'cross-fertilization' and legal transplantation are studied with great interest by the modern comparatists. In this article the relationship between comparative law, the reasoning behind the existence of legal transplants and the influence of legal culture are presented in order to achieve a more in-dept knowledge of the ideological background of law and legal practice in the modern world.

Las actuales tendencias en el derecho comparado moderno no se limitan al tradicional estudio de los distintos sistemas jurídicos. En la actualidad, un enfoque más moderno es desarrollado teniendo en cuenta nuevos conceptos tales como 'cultura legal', 'fertilización cruzada' y trasplante legal cuyo estudio está siendo desarrollado con gran interés por los modernos comparatistas. En este ensayo la relación entre derecho comparado, las razones que justifican la existencia de los trasplantes legales y la influencia de la cultura legal son presentados con el objeto de alcanzar un mayor conocimiento de los antecedentes ideológicos del derecho y la práctica legal en el mundo moderno.

1. INTRODUCTION

Comparative law research can not be reduced to the mere study of the statutory and case law of traditional legal systems (e.g. Common law and civil law). As it will be developed further in this article, for a more comprehensive research, (i) the influence of 'legal culture', (ii) the mix of legal systems 'cross-fertilization' and (iii) the legal transplantation process need to be taken into account.

This article will be based on the affirmation that legal transplants occur so they are possible[1] . From this perspective the main aim is to provide a description of the phenomena of legal transplants and its relationship with comparative law mainly from a tax and private law perspective.

Accordingly, various theories of legal scholars will be mentioned that justify why legal transplants take place and the reasoning behind choosing legal institutions to be effectively transplanted.

Moreover, and given that the title of this article is legal transplants and comparative law, the relationship between legal transplants and comparative law will be explained from the perspective of 'legal culture' and legal systems. Finally in addition to the study of the legal families a two-step approach will be proposed towards a more comprehensive comparative research.

2. LEGAL TRANSPLANTS

2.1. WHAT ARE LEGAL TRANSPLANTS?

In order to describe how legal transplants are developed, it is relevant to provide an explanatory definition. For these purposes, we refer to WATSON who describes legal transplants[2]

1 Leaving outside LEGRAND's arguments with regard to the impossibility of legal transplants. See LEGRAND, P., *European legal systems are not converging. International and Comparative Law Quarterly*, January 1996. p. 79.

2 Although this definition has been followed by other comparative legal scholars a different name has been given to legal transplants. Among them, ÖRÜCÜ "legal transposition", GROSHEIDE "legal borrowing", SACCO "imitation".

"As the moving of a rule or a system of law from one country to another, of from one people to another"[3].

For WATSON the object of legal transplants are:

"Rules-not just statutory rules- institutions, legal concepts and structures that are borrowed, not the spirit of the legal system"[4].

2.2. WHY DO LEGAL TRANSPLANTS TAKE PLACE?

Globalization[5] is often seen as the main reason to explain the growth of legal transplants in the world economy. Accordingly, globalization:

"(…) Brings laws and legal cultures into more direct, frequent, intimate, and often complicated and stressed contact. It influences what legal professionals want and need to know about foreign law, how they transfer, acquire and process information, and how decisions are made. We might expect the field of comparative law, therefore, to be (*full*) with efforts to comprehend globalization and its impacts on law and to develop strategies for dealing with them"[6].

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3 WATSON argues that the legal transplants phenomena have been common since the earlier recorded history and offers some examples. WATSON, ALAN, *Legal transplants*, 1974, Edinburgh. Scottish Academic Press Ltd. p. 21.

4 WATSON, ALAN. *Legal transplants and European Private Law. Ius Commune Lectures on European Private Law*, 2 (electronic version). Dutch Institute of Comparative Law.

5 "This phenomena creates that (a) "as a result of the increasing cultural contact a number of traditional practices, whole ways of life and worldviews disappear and (b) at the same time globality leads to the emergence of new cultural forms…everywhere cultural traditions mix and create new practices and worldviews". BREIDENBARCH, JOANA, *The Dynamics of Cultural Globalisation. The myths of cultural globalisation*.

6 GERBER, DAVID J., "Globalisation and legal knowledge: Implications for Comparative Law", *Tulane Law Review*, Vol. 75. p. 950.

2.3. How legal transplants are developed?

The following reasons are suggested by legal scholars as the predominant factor in determining which laws are transplanted. Accordingly, legal transplantation takes place due to (i) authority, (ii) prestige and imposition, (iii) chance and necessity, (iv) expected efficacy of the law, and (v) political, economic and reputational incentives from the countries and third parties.

i. Authority in the field of private law

The explanation of the development of legal transplants lies according to Watson in the need for authority. Watson[7] refers that:

> "In the absence of legislation, which typically has been scarce for private law, law making is left to subordinates –judges and jurists– who, however, are not given power to make law. They must justify their opinion. It will not do to say 'This is my decision because I like the result'. They must seek authority"[8].

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7 Furthermore with the aim to understand Watson's approach of authority and the relationship between legal profession and law making it is necessary to refer to the 'Transplant Bias' as his main argument. Accordingly, Grosheide states that "…the approach suggested by Watson is based on the 'Transplant Bias', i.e. a legal system's receptiveness to a particular foreign system of law. And since such borrowing presupposes knowledge of the foreign legal system, and since it is lawyers who predominately have knowledge of it, the 'Transplant Bias' is very much involved with the legal profession. Since the legal profession has its own preoccupations with respect to law and legal change, 'legal borrowing' that is the outcome of the 'Transplant Bias' is most often not the outcome of a thorough estimation of the donor system: 'the judges or jurists who do the taking often do not choose the best solution to their legal problem" Grosheide F.W. Grosheide, F.W. "Legal borrowing and drafting international commercial contracts" in *Some methodological reflections: comparability and evaluation essays on comparative law, private international law and international commercial arbitration in honour of Dimitra Kokkini-Iatridou*. K. Boele-Woelki (Ed.). TMC *Asser Instituut*, p. 71.

8 "…The prevalence of legal transplants, the main method of legal development, is in large part duet o the need for authority". Watson, Alan, "Legal culture v. Legal tradition", paper presented at the Conference of Epistemology and Methodology of Comparative Law in the Light of European Integration, Brussels, October 24-26th 2002, p. 2.

In this regard, legal transplants are regarded as authority.

ii. Prestige and imposition

This theory is developed by SACCO when he refers that:

> "There are two fundamental causes of imitation *(i.e. legal transplantation)*: imposition and prestige. Every culture that has faith in itself tends to spread its own institutions. Anyone with the power to do so tends to impose his own upon others. Receptions due to pure force, however, are reversible and end when the force is removed" [9].

Moreover, imitation can also take place:

> "Because of the desire to appropriate the work of others. The desire arises because this work has a quality one can only describe as prestige"[10].

In the field of private law it is submitted that for some civil law countries (e.g. Latin American countries) the importance to follow the French private law guidelines may be justified based on the prestige that this legal system achieved as a result of the reception in those countries of the Code of Napoleon.

iii. Chance and necessity

As explained by ÖRÜCÜ[11] the borrowing takes place not as a matter of choice but as a matter of chance or necessity. This approach is further developed by ÖRÜCÜ[12] with main reference to the criteria

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9 SACCO, R., *Legal formants: A dynamic approach to comparative law (II)* 39 Am J. Comp. L (1991) p. 398.

10 SACCO, R., Idem.

11 ÖRÜCÜ, E., "Family Trees for Legal Systems: Towards a Contemporary Approach", paper presented at the Conference of Epistemology and Methodology of Comparative Law in the Light of European Integration, Brussels, October 24-26th 2002. p. 9.

12 "What actually happens in such movements, however, is often not a matter of choice but a matter of chance, if not necessity and urgency. The Eastern European

that the Eastern European systems need to meet in order to join the European Union.

For instance in the field of private law as explained by Örücü the impact of the New Dutch Civil Code in the former Communist countries in Central and Eastern Europe is due to its attraction as an ideal model for the reforms that are taken place in those countries.

Following this approach, Smits[13] refers to the reasoning behind the adoption of the Dutch code among them:

(i) the mixture of a market economy and the idea of social *Rechtsstaat*;
(ii) the Dutch experience as an importing country and;
(iii) the influence by German, French and English Law what makes the Dutch Code an outcome of thorough comparative studies.

iv. Expected efficacy of the law

This theory follows the research conducted by Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard on cross-national legal transplants. Their conclusion was as detailed by Walsh that:

> "The way in which a formal legal order incubated in Europe was transplanted into other countries was a far more important predictor of the effectiveness of legal institutions than the association of that transplant with any particular legal family…The quality of transplantation process counted far more than the content of the transplant effect" [14].

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systems, some poised to join the EU, must somehow prepare themselves to undergo change in the 'desired direction', this desire not necessarily being one of the bottom but of the top, the elite, in any of its connotations, and of outside forces" Örücü, E., "Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition", *Electronic Journal of Comparative Law*.

13 Smits, J., *A European Private Law as a Mixed System*, (1998) 5 *MJ*, 328, p. 63 in Örücü, E., idem.

14 Berkowitz, Daniel et al, "Economic Development, Legality and the Transplant Effect", Centre for International Development, Harvard University. Unpublished working draft paper dated April 2001, p. 2 in Walsh, Catherine, *The 'law' in Law and Development. Law in transition: advancing legal reform*, Autumn 2000 p. 10.

For illustration purposes and following BERKOWITZ in the field of private law, Colombia (a civil law country) presents an unreceptive transplant of French legal code given that at the time of reception, "Colombia voluntarily, but almost blindly…"[15] transplanted the French Code. Additionally, "...the laws were chosen and adopted without even considering their contents"[16]. In consequence, the transplantation rather than a consciously adaptation of the institution to the local conditions results in the transplantation of less effective institutions than origin countries.

v. Political, economic and reputational incentives

SCHAUER's developed his main idea following the hypothesis that:

> "…The transnational and cross-border spread of law and legal ideas is not, as it may be for scientific, technical, and economic ideas, largely a matter of the power and value of the ideas themselves, but may instead be substantially dependent, both on the supply side and on the demand side, on political and symbolic factors that may have more explanatory power in determining how law migrates than do factors that relate to the intrinsic or instrumental value of the migrating law itself"[17].

In this regard, the economic relations may constitute a factor of influence of transplantation for example the United States given the Americanization of international contract law have influenced the countries to incorporate American concepts such as leasing, factoring and franchising in their legal systems[18].

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15 BERKOWITZ, DANIEL. p. 7.

16 BERKOWITZ, DANIEL. p. 7.

17 SCHAUER, FREDERICK, *The politics and incentives of legal transplantation*, Electronic version, p. 2.

18 GROSHEIDE, F.W., *Legal borrowing and drafting international commercial contracts in Comparability and Evaluation Essays in honour of Dimitra Kokkini-Iatridou*, Boele-Woelki K. (ed) et al., The Hague: Martinus Nijhoff Publishers, 1994.

Additional commentary

a. Combination of one or more reasoning for legal transplants

The above-mentioned reasoning can not be seen as exclusive. For example, as formulated by AJANI with regard to the study of legal transplants in Russia and Eastern Europe

> "Offer and demand of legal models is ruled not only by the techniques of legal expertise but also by the political and economical decisions that govern international relations" [19].

Therefore, AJANI presents a mixed reasoning of authority, efficiency and political influence regarding the development of legal transplants in Russia and Eastern Europe.

b. Differences between developing and developed countries

Furthermore, it is necessary to take into account that the application and importance of these reasons may also differ with regard to the distinction[20] between developing and developed countries.

In this regard, MATTEI stated that:

> "…Recognized pattern of weakness of professional law in developing and transitional countries of Africa, Latin America and Eastern Europe means that the professional law can not be considered the hegemonic pattern of social rule making in these legal systems. In the pattern called rule of political law the legal process is often determined by political relationships. In those social contexts we can not consider a sporadic pathological distortion that the outcome of litigation depends on "who is who" in the political world. This is particularly the case when the clash occurs between the government and individual rights. The very notion of limiting powers by formal law is

19 AJANI, GIANMARIA, *By change and prestige: Legal transplants in Russia and Eastern Europe*. A.J. Comp. Law 43, 1992, p. 97.

20 Following the parameters and classification of the Organization for Economic Cooperation and Development (OECD).

> completely inconsistent with the philosophy of rule making in those countries"[21].

c. Legal transplant reasoning applicable to taxation

For tax purposes, however, and especially with regard to Corporate Income Tax it is submitted that the above-mentioned political considerations are not decisive for the design of tax law. Perhaps only political reasoning is applied with regard to the instruments to (i) reduce harmful tax competition or, (ii) to justify the existence of a VAT regime with differentiated tax rate, or (iii) to justify the importance of protecting an open/closed economy.

Conversely, the design of tax law and the legal transplantation of instruments take place mainly with the main aim to raise revenue. For example, in Colombia, as of 1 January 2002 a new tax on financial transactions already applicable in Brazil was transplanted to the Colombian tax system to "make up for revenues lost by lowering the valued-add tax rate"[22].

3. COMPARATIVE LAW

3.1. COMPARATIVE LAW: LEGAL TRANSPLANTS

The role that legal transplantation plays when carrying out comparative research is explained by WATSON when he states that:

> "As a practical subject Comparative law is a study of the legal borrowings or transplants that can and should be made; … an investigation into the legal transplants that have occurred: how, when, why and from which systems

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21 MATTEI, UGO, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, p. 28.

22 TANZI, VITO, "Taxation in Latin America in the Last Decade. Center for Research on Economic Development and Policy Reform", *Working Paper*, n° 76, Standford University, December 2000.

have they been made, the new circumstances in which they have succeeded and failed and the impact on them of their new environment"[23].

3.2. Comparative law: 'legal culture'

Following the development of legal transplant's theory Watson states the relationship between legal tradition and legal culture for legal transplants. He states that:

"The answers for understanding the nature of law and its place in society can only be found in the legal tradition and 'legal culture'"[24].

In order to provide a definition of 'legal culture', we refer to Blankenburg who argues that 'legal culture' can be explained in the following terms:

"A complex interrelationship on four levels:

- The level of values, beliefs and attitudes towards law.
- Patterns of behavior.
- Institutional features.
- The body of substantive as well as procedural law"[25].

Furthermore, Peter and Schwenke refer to the importance of the study of 'legal culture' when carrying out comparative law research even though no definition of legal culture is provided by them.

Peter and Schwenke referred to their approach to the study of comparative law as follows:

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23 Furthermore, Watson states that "…this approach needs to be focused on the fact that foreign systems are treated by lawmakers as very valuable tools for changing their own system. Ewald, William, *Comparative jurisprudence (II) The Logic of legal transplants*, Am. J. Comp. L. 43, 1995, p. 309.

24 Watson, Alan, Legal culture v. Legal Tradition. See supra note 9 p. 4.

25 Blankenburg, E., Dutch legal culture is changing. Personal manuscript. p. 8. For a comprehensive overview of the concept of "legal culture" in The Netherlands see Blankenburg E. and Bruinsma, F., *Dutch legal culture*, 2 edition, Deventer, Kluwer, 1994.

> "At all stages of comparative research (data acquisition, analysis and interpretation of the data, and actual in-depth comparison and eventual evaluation), the real problems are …the lack of full knowledge and understanding of foreign legal rules and cultures… They (*comparatists)* must know something about the historical, social, economic, political, cultural and psychological context which has made a rule or proposition what it is… we must look not only at rules but at legal cultures, traditions, ideals, ideologies, identities, and entire legal discourses…"[26].

3.3. COMPARATIVE LAW: LEGAL SYSTEMS

The study of the legal systems may start, in principle, following the traditional approach of RENÉ DAVID[27] regarding mainly the division (i.e. Common law, civil law and socialist law) proposed by him among the legal systems of the world.

"Cross-fertilization"

Further to the traditional division proposed by DAVID[28], it is also necessary as suggested by ÖRÜCÜ to make use for the study of the legal systems of the concept of 'cross-fertilization' (i.e. the legal systems interaction).

This 'cross-fertilization' process is described by ÖRÜCÜ stating that:

> "… All legal systems contain ideas, concepts, structures and rules born in other legal soils, moving and cross-fertilizing. All systems are mixed in the sense that even when the nation state is regarded as the only source of law, systems have mixed sources, that is, the elements that combine to form a

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26 PETER, ANNE and SCHWENKE, HEINER, "Comparative law beyond post-modernism", *International and Comparative Law Quarterly*, Vol 49, October 2000, p. 832.

27 DAVID, RENÉ and BRIERLEY, JOHN E.C., *Major legal systems in the world today*, 3 ed., Stevens & Sons, London, 1985, pp. 22-25.

28 For further research regarding the study of the legal systems refer to SACCO, R. *Legal formants*. Supra note 10, SAMUEL, G., *Comparative Law and Jurisprudence. International and Comparative Law Quarterly*, Vol. 47, October 1998, pp. 817-836.

system are from different legal sources…These differing normative systems may also reflect differing socio-cultures…"[29].

Further to the cross-fertilization ÖRÜCÜ draws the attention to the 'local tuning'[30] affecting the legal transplantation given the influence in the process of transplantation of each country's legal, cultural, accounting, technological, political and economical circumstances resulting in a different transplant effect from the country of origin once the instrument has been incorporated by a country's legal system.

For example, the term leasing has been transplanted into France, through a decision of the judiciary dated 29 November 1973 changing the term of leasing to *credit bail*, a French word, given the rejection to the use of American terms, even if in this case, *credit bail* will only describe one type of leasing: financial leasing, different from leasing that includes both financial and operational leasing.

4. CONCLUSION

In this article the relationship between legal transplants and comparative law has been detailed with regard to the definition of

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29 ÖRÜCÜ E., *Mixed and mixing systems: A conceptual search*, studies in legal systems, p. 432.

30 ÖRÜCÜ states that "…it is worthwhile remembering, however, that between any two things there are always both differences and similarities, unless they are identical. In law we know that there are no identicals, since even after very successful transplants, an evolutionary dynamism emerges and systems go their own way. The incoming concepts or institutions now living in a different environment begin to change; an internal 'contamination' occurs. Two things either both belong to a previously established category, or one belongs to it and the other does not. A comparatist has to note both the similarities and the differences and try to explain the reasons for the findings. This is the most important and rewarding task of comparative law".

ÖRÜCÜ, E., *Critical Comparative Law*, See supra note 13.

legal transplants, its development and its influence in the study of legal culture and legal systems.

Nowadays given the enormous amount of copying and borrowing[31] in the legal field the comparative research requires a more comprehensive approach that includes also the study of legal transplants and 'legal culture'.

Therefore, for a more comprehensive comparative research in addition to the study of the legal systems it is proposed the following two-steps approach:

a. In the light of the different legal cultures comparative research should be carried out regarding the way that the legal institution has been transplanted in the recipient legal systems. Taking into account that the transplantation process may vary based on social, legal economic, fiscal, financial and technical circumstances prevailing in each country's "legal culture" and legal system.

b. Additionally, it is submitted the importance of finding out why, if 'cross-fertilisation' occurs; use was made of legal transplantation? Moreover, it is submitted to be object of research the reasoning behind the choice of transplantation by each selected country e.g. authority, prestige, efficiency, economical and political incentives, etc.

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31 WATSON, ALAN, *Legal transplants and European Private Law*. See supra note 5.

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