LEGAL TRANSPLANTS IN LEGISLATION: DEFUSING THE TRAP

Legislative drafters borrow institutions, policy or legal solutions and legislative texts from foreign jurisdictions (national, EU and international) as a means of promoting and developing legislation quickly and effectively.[1] Nonetheless, little attention is paid to established theories of comparative law on the legitimacy of legal transplants and the constraints for drafters' choices.[2] This creates problems of inapplicability of the transplanted law within the receiving national legal context. In turn, inapplicability leads to failure of the purpose of the transplanted law. Failure of purpose signifies not only collapse of the intended regulation but also wastage of resources in legislating and enforcing an inevitably failing legislation and, perhaps more importantly, the negligent creation of the false or fraudulent impression that the problem is adequately addressed.

This article applies the prevailing theories of comparative law to legislative drafting. The aim is to alert drafters to best practice in legal transplants and to provide guidelines on constraints for drafters, thus contributing to effective legislation in developing economies.

I. WHEN DOES A DRAFTER USE COMPARATIVE RESEARCH?

Comparison is an instrument used to falsify or verify the relationship between two phenomena. Within the realm of comparative study in the legislative process, when drafting legislation, the policy maker and the drafting team utilize foreign experiences as a means of falsifying or verifying the relationship between the policy choice under consideration and the results of the application of that policy choice elsewhere.[3] Objectives of such an exercise include law harmonization, law reform, promotion of economic and social change, search for solutions to specific problems in domestic law, bridging differences between legal systems in conflict areas, or the quest for perspectives on domestic law and theoretical norms.[4] In their quest for the best policy choice to counteract congestion in inner cities, drafting teams abroad consider the London Congestion Charge and utilize the British experience in the results produced by the application of the congestion zone in London. Their aim is to verify or falsify their initial assessment that the introduction of congestion charges eases congestion in inner cities. Verification of this assessment may lead to the transplant of congestion-charging

[1] 'Borrowing from another legal system is the most common form of legal change': see A Watson, *Legal Origins and Legal Change* (Hambledon Press, London, 1991) 73; also see J Fedtke, 'Legal Transplants' in J Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing, Cheltenham, 2006) 434.

[2] Some view engagement in comparative research as 'causing an undesired slowing down of the legislative process'; see W Duk, *Wetgeving en rechtsvergelijking, Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking, no. 34* (Kluwer Law International, The Hague, 1984) 130–1.

[3] See JHM van Erp, 'The Use of Comparative Law in the Legislative Process' in *Netherlands Reports to the 15th International Congress of Comparative Law* (Bristol, 1998) 36, available online at <http://www.library.uu.nl/publarchief/jb/congres/01809180/n15/b3.pdf>.

[4] See S Corcoran, 'Comparative Corporate Law Research Methodology' (1996) 3 Canberra Law Review 54, 56.

[*ICLQ* vol 57, July 2008 pp 659–673] doi:10.1017/S0020589308000456

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

zones as a policy choice, which in turn may lead to the transplant of the concept and the relevant UK legislation abroad.

In order to proceed with this transplant foreign drafting teams formulate a comparative research question which may be called a Transplant Question, by use of a comparative concept (the Transplant Concept) and a comparative research design (the Transplant Research Design).

II. THE FORMULATION OF THE TRANSPLANT QUESTION: WHICH LEGAL SYSTEMS CAN BE USED AS SOURCES?

In current Western legislative practice, when faced with drafting instructions for new legislation, drafting teams tend to turn to countries whose legal system, language and legal tradition is familiar to their own, mainly as a means of assessing harmonization of the chosen solutions with international practice.[5] Thus, Western developed countries tend to opt for Miller's entrepreneurial or legitimacy-generating transplants.[6] In current developing countries, drafting teams tend to receive with great gratitude legislation offered (some would say imposed)[7] by foreign donors.[8] In other words they tend to opt either for Miller's cost-saving or for Miller's externally dictated transplants.[9] Leaving questions of ethics aside, one wonders how far away a drafting team can reach in order to trace a policy choice, a concept or a legislation that can be transplanted in part or in whole in the national legal order. Although the question relates mainly to drafting teams in the developing world as a means of stopping reception of inappropriate donor legislation often resulting from ad hoc consultancies, drafting teams in the developed world may benefit enormously from an understanding of transplanting mechanisms as a means of opening horizons to ignored legal systems within the current legal environment of increasing legal convergence.[10]

A response to this question can be traced in the theories of comparative law, which, however, fail to provide a definite answer. Watson, the guru of transplants,[11] claims that legal rules are equally at home in many places, that 'whatever their historical origins may have been, rules of private law can survive without any close connection to any particular people, any particular period of time or any particular place'.[12]

[5] See van Erp (n 3) 36–37.

[6] See JM Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 AJCL 842, 849 and 854.

[7] See EA Hoebel, *The Law of Primitive Man* (Harvard University Press, Harvard, 1954) 10.

[8] See E Örücü, 'Law as Transposition' (2000) 52 ICLQ 205, 219.

[9] See Miller (n 6) 845 and 847.

[10] See P de Cruz, *Comparative Law in a Changing World* (Routledge-Cavendish, London and New York, 2007) 513–14; also see E Örücü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2000) 4 Electronic Journal of Comparative Law, available online at <http://www.ejcl.org/ejcl/41/art41-1.html>.

[11] For an analysis of the term see E Öcürü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (1999) 59 Nederlandse Vereniging voor Rechtsvergelijking; also see Öcürü (n 8) 206.

[12] See A Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79, 80; also see A Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, Edinburgh, 1974); A Watson, 'Legal transplants and European Private Law' in *Ius Commune Lectures on European Private Law, no 2* (Unigraphic, Maastricht, 2000).

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

Legrand,[13] Kahn Freund[14] and the Seidmans[15] object rather radically to the utility of legal transplants altogether.

Similarly, some comparatists argue that only convergent or similar systems can benefit from each others' experience. Like must be compared with like.[16] Like is defined as countries in the same evolutionary stage.[17] A larger group of contemporary comparatists support the view that only differences enhance our understanding of law in a given society.[18]

Taking the middle ground on this debate Schlesinger points out that 'to compare means to observe and to explain similarities as well as differences'. Thus, emphasis can be placed both on differences and on similarities. Periods of contractive comparison with emphasis on differences alternate with periods of integrative comparison with emphasis on similarities. Schlesinger concludes that the future belongs to integrative comparative law and puts forward the EU's *ius commune* as an example of integration of similar and different legal systems.[19]

Jhering, Zweigert and Kötz[20] view the question of comparability through the relative prism of functionality.[21] 'The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden'.[22]

It is the theory of functionality that seems to serve drafting teams in the current period of integrative legal globalization, although currently the use of social analysis in legislation is minimal.[23] In an era of tight parliamentary schedule where drafters are asked to produce bills at unprecedented speed, drafting teams must be afforded the luxury of seeking ready solutions with proven results elsewhere, in similar and

[13] See P Legrand, 'The Impossibility of Legal Transplants' [1997] Maastricht Journal of European and Comparative Law 111.

[14] See O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1, 7.

[15] See A and R Seidman, *State and Law in the Developing Process: Problem Solving and Institutional Change in the Developing World* (Macmillan Publishers, Basingstoke, 1994) 44–46.

[16] See H Gutteridge, *Comparative Law* (CUP, Cambridge, 1949) 73; also see WW Buckland and AD McNair, *Roman Law and Common Law* (CUP, Cambridge, 1936).

[17] C Schmidthoff, 'The Science of Comparative Law' [1939] Cambridge Law Journal 94, 96.

[18] See F Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Wends Up in New Divergences' (1998) 61 MLR 11; also see JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Clarendon Press, Oxford, 1996) 16.

[19] See RB Schlesinger "The Common Core of Legal Systems: An Emerging Subject of Comparative Study' in K Nadelmann, A von Mehren and J Hazard (eds), *XXth Century Comparative and Conflicts Law, Legal Essays in Honour of Hessel E Yntema* (AW Sythoff, Leiden, 1961); also see RB Schlesinger, 'Research on the General Principles of Law Recognised by Civilised Nations' (1957) 51 AJIL 734.

[20] See K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung*, 3. neubearbeitete Auflage (JCB Mohr, Tübingen, 1996).

[21] See K Zweigert and K Sier, 'Jhering's Influence on the Development of Comparative Legal Method' (1971) 19 AJCL 215–31.

[22] See K Jhering, *Geist des römischen Rechts*, Volume 1 (1955) 8–9.

[23] See J Brown, A Kudan and K McGeeney, 'Improving Legislation through Social Analysis: A Case Study in Methodology from the Water Sector in Uzbekistan' (2005) 5 Sustainable Development Law and Policy 49, 49.

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

different legal systems. In the current era of integrative legal globalization,[24] characterized by transnational problems requesting urgent transnational solutions, integrative transnational approaches seem to be no longer a luxury but a realistic response. Trade in human organs, organized crime, terrorism and paedophilia cross national borders and therefore require a-national solutions. Borrowing methods applied elsewhere simply offers the drafting team the opportunity to propose and apply policy and legislative responses with unprecedented insight to the results produced. Does it really matter from where these responses are borrowed?

Not in principle. However, a qualifier to Watson's liberal approach can be introduced via Zweigert and Kotz's functionality theory. What matters when selecting a legal system for comparative examination in the process of legal transplantation is not the similarity of its characteristics with that of the receiving legal order, but the functionality of the proposal. If the policy, concept or legislation of a foreign legal system can serve the receiving system well, then the origin of the transplant is irrelevant to its success.[25] As long as the transplant can serve the social need to be addressed, the transplant can work well in the new legal ground. In fact, it is this transfer of the transplant to national contexts that promotes indigenization of positive transplants as a block to indiscrete globalization and modern legal colonialism.[26]

Far from resolving the drafting team's problems, the qualifier of functionality demands an answer to a rather difficult question: what is the social need that the draft law addresses? In an ideal legislative process, which involves drafting instructions with the identification of the social problem to be addressed and a discussion of various solutions,[27] the drafting team can immediately link the phenomenon to be addressed with the selected solution. In cases where the purpose of the original law is clearly explained in explanatory materials, the issue of functionality as a qualifier for compatibility can be easily resolved. However, legislative practice is not necessarily ideal. Often drafting instructions refer to the solution opted by policy makers rather than to the social need to be addressed. More often than not, the social need to be addressed is hidden and may only appear in explanatory materials, whose use is by no means wide.[28] Under such circumstances the task of the drafting team to identify the underlying social need and to use it as a criterion of comparability and a safeguard for transplants seems rather intricate, especially if one takes into account the dominance of pure lawyers in drafting teams.[29]

[24] See LA Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform— Some Fundamental Observations' (2000) 34 International Lawyer 1059.

[25] See S Zhuang, 'Legal Transplantation in the People's Republic of China: A Response to Alan Watson' [2006] European Journal of Law Reform 215, 223.

[26] See R Petrella, 'Globalization and Internationalization: The Dynamics of the Emerging World Order' in R Boyer and D Drache (eds), *States against Markets: the Limits of Globalization* (Routledge, London and New York, 1996) 132.

[27] DE Elliott, 'Getting Better Instructions for Legislative Drafting' (Just Language Conference, 21 October 1992, Victoria, British Columbia) available online at <http://www.davidelliott.ca/papers/getting.htm#8>.

[28] G Bowmann, 'Legislation and Explanation' [2000] Loophole, available online at <www.opc.gov.au/calc/docs/calc-june/audience.htm>.

[29] For an analysis of causality in sociological research see C Ragin and D Zaret, 'Theory and Method in Comparative Research: Two Strategies' (1983) 61 Social Forces 731–54.

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

III. THE FORMULATION OF THE TRANSPLANT CONCEPT

During the legislative process drafting teams can transplant policy options, concepts or legal texts. One would expect that the formulation of the Transplant Concept would only come into play in transplants of concepts. In other words, a legal system lacking legislation on money laundering or corruption may decide to borrow the concept from other legal systems, thus receiving the concept of money laundering or corruption from them. In this case the formulation of the Transplant Concept takes place when the exact details of the definition of each of the two offences/concepts are agreed upon by members of the drafting team. However, formulation of Transplant Concepts takes place in each and every type of transplant. Ultimately, in the process of borrowing from foreign legal systems drafted in foreign languages, the drafting team makes choices and decisions of inclusion or exclusion of foreign terms. This involves the intellectual process of selecting terms and concepts utilized elsewhere in the transplant process. The decision on whether the German legislation of Diebstahl is to be taken into account when drafting the English Theft Statute is such a choice. The aim of this choice is to create a generic comparative concept that the drafting team can utilize in order to conduct meaningful comparative analysis.

The first issue that one must address concerns the timing of the formulation of a Transplant Concept. There is a controversy between the well-known comparatists Constantinesco and Kokkini with regards to the timing of the use of comparison. Constantinesco states that common elements are present within several legal systems: these provide a common comparative denominator.[30] In his opinion one can start to compare as many legal rules as one desires since sufficient relationships govern the selected rules of different legal systems. Constantinesco claims that legal rules provide their own comparability, at least in the initial phase of comparative research. According to Constantinesco, comparative concepts are useless in the initial phase of research.[31]

Contrary to the views expressed by Constantinesco, Kokkini postulates the suitability of comparative concepts for direct use in the initial phase of comparative research. Comparative concepts are important since they prevent a waste of time in a later phase of research. Testing the comparability assumption must take place as soon as possible to exclude disappointments after visiting many libraries in different countries in order to study information which proves to be irrelevant because of the absence of comparability. According to Kokkini, comparative concepts serve as unequivocal starting points, which must be upheld in later phases of comparison.[32]

The truth of the matter, at least from the point of view of the legislative drafter, lies with both views. A transplant concept is necessary in the initial stages of research when the initial selection of policy choices, concepts or laws is being made. Kokkini's arguments on the utility of comparative concepts from the very first stages of legislative research are persuasive and indeed reflect reality in modern legislative processes.

[30] L-J Constantinesco, *Traité de droit comparé, Tome II: La méthode comparative* (Librairie générale de droit et de jurisprudence, Paris, 1974).

[31] See Constantinesco, ibid 23–24, 36–37 and 67 fnn 38, 78–79, 88, 123 and 318.

[32] See D Kokkini-Iatridou et al, *Een inleiding tot het rechtsvergelijkende onderzoek* (Kluwer, Deventer, 1998) 131–32; also see D Kokkini-Iatridou, 'The Tertium Comparationis in the Micro-Comparative Research' in *Law in East and West: On the Occasion of the 30th Anniversary of the Institute of Comparative Law, Waseda University* (Waseda University, Tokyo, 1988) 235–36.

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

Kokkini is also right to state that comparative concepts are not completely formed at the initial stages of research. The formulation of the transplant concept continues in all stages of the drafting process.

Thornton[33] distinguishes five stages in the process of drafting:

(1) Understanding the proposal.
(2) Analysing the proposal.
(3) Designing the law.
(4) Composing and developing the draft.
(5) Verifying the draft.

The formulation of the Transplant concept begins with stage 2 and the analysis of the legislative proposal. It must be noted that the proposal or drafting instructions of stage 1 sent to the drafting team may include comparative analysis of policy choices, thus making initial preliminary assessments on possible concepts. However, comparative transplant concepts are truly formed from the drafting team. The latter makes choices of law rather than policy. These choices are revisited at each of the last four stages in the legislative process, with emphasis in stages 2 and 3. It is at these points in the legislative process that the drafting team attempts to formulate a generic legal concept which includes at least the minimum elements required for its semantic field. The application of Kokkini's theory is completed in the last stage of the process when the drafting team verifies that the choices made were indeed correct.

However, the formulation of a Transplant Concept requires complete research on the matter to be addressed and on the elements of the comparative concept to be used. It would be impossible for the drafting team to have this knowledge amassed before stage 4 of the legislative process. Thus, Constantinesco is also proven right, especially if one takes into account the necessity of detailed analysis not only in the laws of systems of origin but also in their jurisprudence, judicial and legal practices. These require time, comparative research of a high standard and also the compilation of all constituting parts of concepts of origin. Surely this cannot be part of the initial stages of the process.

Where does this leave the modern drafter? The formulation of the Generic Transplant Concept takes place in Kokkini's initial stages of the legislative process. The Generic Transplant Concept is formulated by juxtaposing all foreign national concepts considered relevant by the drafting team. There the drafting team attempts to agree on a concept which is general enough to include exclusively the elements *sine qua non* of the transplant concept. This involves an initial selection of relevant concepts from comparable legal systems, their intellectual analysis with reference to their legal and enforcement environment, and the classification of necessary and optional elements. On the basis of the necessary elements, a Generic Transplant Concept is formed. This is used in the legislative process as the basis for discussion. One could not conceive the generic concept of taking away life without actual loss of life. Note that the generic concept avoids reference to either murder or manslaughter.

In the process of drafting, however, a Concrete Transplant Concept is formed in the later stages. Research on the laws of origin allows the drafter to form a concrete idea on the elements of the national concepts of origin that are useful and appropriate for the

[33] See G Thornton, *Legislative Drafting* (4th edn, Butterworths, London, 1996) 128.

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

national context of receipt. These are added to the Generic Transplant Concept. This leads to the completion of the transplant as a reception of foreign concepts to the national legal system of receipt.[34] This is the stage where intent may be added in the generic concept of taking away life. This is where taking one's own life may be excluded. Inclusion or exclusion of foreign optional elements takes place on the basis of legal, political, cultural, historical and of course economic intricacies of the country of reception.

Having concluded that Transplant Concepts are formed as generic in the initial stages of the drafting process and as Concrete in the later stages of the process, we can now look at the types of Transplant Concepts that can be formed. Van Laer comes to the rescue with his three forms of comparative concepts: extensional concepts, functional concepts and immanent concepts.[35]

The formation of extensional concepts is the listing of common elements which may be present in several legal systems.[36] Extensional concepts include common elements which can be traced in legal texts as applied in their legal, jurisprudential and constitutional environment at the national, regional and international levels. Extensional concepts refer to legal terms and their definition via subjective and objective elements, such as intent or factual elements. In order to demonstrate his thesis Van Laer uses as examples the German 'Diebstahl' and English 'theft': 'Whoever takes moveable property not his own from another with the intention of unlawfully appropriating it to himself shall be punished . . .'.[37] 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.' The first rule has been identified by the German legal term 'Diebstahl' and the second one by the term 'theft' in the English Theft Acts. Their subjective and objective common elements are identified through the juxtaposition of these rules. Thus, 'property' and 'appropriation' are common elements. 'Unlawfully' and 'dishonestly' are not common and are therefore excluded from the list of necessary elements for the extensional concept. What is the result of the comparative analysis of Diebstahl and theft? First, on the basis of their many common characteristics these are two concepts that refer to the same offence and can therefore be used in the analysis of the drafting team. Secondly, non-common elements can be excluded from the Transplant Concept under formulation as unnecessary. Thirdly, common elements are necessary elements in the Transplant Concept, unless proven otherwise.

From the description of extensional concepts it is evident that this type is ideal for the formulation of Generic Transplant Concepts that are formed in the initial stages of the legislative process. However, extensional concepts can be useful to the drafting team in the later stages of the drafting process for the formulation of the Concrete Transplant Concept: when discarding non-common elements of the concept, drafters

[34] See de Cruz (n 10) 512.

[35] See C Van Laer, *Het nut van comparatieve begrippen, Ius Commune Europaeum 20* (diss) (Intersentia, Antwerpen/Groningen, 1997).

[36] See C Van Laer, 'The Applicability of Comparative Concepts' (1998) 2 Electronic Journal of Comparative Law, available online at <http://www.ejcl.org/22/art22-1.html>.

[37] 'Wer eine fremde bewegliche Sache einem anderen in der Absicht wegnimmt, dieselbe sich rechtswidrig zuzueignen, wird . . . bestraft.': Article 242 Strafgezetzbuch; see <http://sunsite.informatik.rwth-aachen.de/germlaws/stgb/p242.html>.

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

acquire a list of optional elements which can be discussed, adopted or rejected in the formation of the Concrete Transplant Concept on the basis of legal and non-legal intricacies of the country of reception. Moreover, any legal system can be utilized in the comparison as the aim of the drafting team is to ensure that the Generic Transplant Concept used in their analysis includes the absolutely necessary elements. There is therefore an argument for the selection of prima facie different legal systems as a means of ensuring that elements identified as common are there due to their necessity in the concept as opposed to their commonness in familiar legal systems and contexts.

Van Laer relates the formation of functional concepts to social problems to which legal rules are a solution.[38] Thus, the starting point for comparison lies not in legal rules and legal terms but in the sociological cause of the phenomenon to be addressed. Van Laer uses the examples of 'full adoption' and 'limited adoption' as functional concepts addressing the problems of neglected children. The roots of this category of concepts lies with Zweigert and Kötz, who regard a social function as the common perspective the researcher needs.[39] They state that rules of different legal systems can be compared if they serve the same function.

Functional concepts bring us back to the issue of comparability of legal rules by revisiting the qualifier of the same social need. In other words, legal systems can borrow from one another irrespective of national intricacies, as long as they aim to address the same social problem. This perspective is external to the legal systems under comparison. Correspondingly, complete abstraction from national concepts must be achieved.[40] Within the realm of interpretative[41] functional concepts one can therefore address national intricacies via nationally devised innovative legal rules: in this case a transplant is considered counterproductive. However, regional or indeed international social phenomena can be successfully addressed by reference to foreign transplants either at the regional or the international level. This theory seems to support current legislative practice where legal solutions are sought, almost automatically, by reference to regional and international instruments. Thus, when exploring the introduction of money-laundering legislation in Greece, Greek drafting teams turned immediately to EU and UN instruments as a means of seeking inspiration for common solutions put forward. The other side of the coin when it comes to functional concepts refers to the rejection of ad hoc consultancies through the imposition of foreign legislation from donor organizations, a common occurrence in the developing world and a practice widely criticized as wrong and counterproductive.[42] There is little doubt that functional concepts present advantages.[43] First, they look at the route of the regulation issue by

[38] See CJP van Laer, 'Comparative Concepts and Connective Integration' (Fifth Benelux-Scandinavian Conference on Legal Theory: European Legal Integration and Analytical Legal Theory, Maastricht, 28–29 October 2002).

[39] See Zweigert and Kötz (n 20) 11.

[40] See U Drobnig, 'Rechtsvergleichung und Rechtssoziologie' [1953] RabelsZ 295–308.

[41] See O Pfersmann, 'Le droit comparé comme interpretation et comme théorie du droit' [2001] Revue internationale de droit compare 275–88; also see A Peters and H Schwenke, 'Comparative Law beyond Post-Modernism' (2000) 49 ICLQ 800, 833.

[42] See R Mkuye, 'Controls and Safeguards of Delegated Legislation: a Case Study of Tanzania' [2007] European Journal of Law Reform 205–42.

[43] See J Reitz, 'How to Do Comparative Law' (1998) 46 AJCL 620, 617; M Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2003) 50 AJCL 671; M Ancel, 'Le problème de la comparabilité et la méthode fonctionnelle en droit comparé' in RH Graveson et I Zajtay (eds), *Festschrift für Imre Zajtay* (Mohr, Tübingen, 1982)

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

addressing the problem that lies at the source of the request for national legislation. Secondly, they encourage the survey of all possible policy and legislative options for addressing the problem, ridding the drafter from prejudices of familiarity and convenience. Thus, they enable innovative choices of policy and law. Thirdly, they promote ideal legislative processes by ensuring that drafting instructions identify the social problem to be addressed, leaving the drafter to deal with the formulation of legal concepts. This last point leads us to the timing of functional concepts as ideal for the first stage of the legislative drafting process where policy makers draft drafting instructions.

There are drawbacks to functional concepts too. According to Constantinesco, Zweigert and Kötz, functional concepts are too broad and ill-defined as they refer to the hidden causal relation between legal rules and the resolution of a social problem: the social effect of legal rules is difficult to determine, however, so in most cases Zweigert and Kötz's functional concepts have no empirical use. There is an element of truth in Constantinesco's approach. Indeed, functional concepts require identification of the social need to be addressed and analysis of possible legal and non-legal solutions. Both elements refer to causation[44] and, in view of their correlational and probabilistic elements,[45] they are impossible for a legal expert to address. Thus, functional concepts in the hands of lawyers/legislative drafters are indeed useless or even dangerous;[46] hence the rarity of current examples in the drafting process per se.[47] The question is whether functional concepts are indeed made for the exclusive use of legal experts. My view is that this is not the case. Functional concepts address the underlying social phenomenon as identified by policy makers whose task, supported by their multi-disciplinary qualifications, is to find answers to society's or the electorate's needs. As a result, in the first stage of the drafting process, and much more so in the first stages of the policy process, functional concepts have an important role to play. After all, law reform is not exclusively in the hands of lawyers: far from it; modern legal drafting requires multi-disciplinarity of approach as a means of ensuring that society's demands are addressed,[48] where possible, without resource to legislation. In fact, the use of

1–6; H Collins, 'Methods and Aims of Comparative Contract Law' (1989) 11 OJLS 396, 399; H Kötz, 'Comparative Law in Germany Today' (1999) 51 Revue internationale de droit comparé 753, 755; PG Monateri, 'Critique et différence: Le droit comparé en Italie' (1999) 51 Revue internationale de droit comparé 989, 991.

[44] See J Gerring, 'Causation: A Unified Framework to Social Sciences' (2005) 17 Journal of Theoretical Politics 163–98.

[45] See A George and A Bennett, *Case Studies and Theories of Development in the Social Sciences* (MIT Press, Cambridge Mass, 2005) 39.

[46] See M Martinek, 'Wissenschaftsgeschichte der Rechtsvergleichung und des Internationalen Privatrechts in der Bundesrepublik Deutschland' in D Simon (ed), *Rechtswissenschaft in der Bonner Republik* (Suhrkamp, Frankfurt a M, 1994) 529–619.

[47] See M Graziadei, 'The Functional Heritage' in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP, Cambridge, 2003) 100; also see V Valentine Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2004) 4 GlobalJurist Frontiers 24, available online at <http://www.bepress.com/gj/frontiers/vol4/iss2/art1>.

[48] See JJ Kingsley, 'Legal Transplantation: is this what the Doctor Ordered and Are the Blood Types Compatible? The Application of Interdisciplinary Research to Law Reform in the Developing World—A Case Study of Corporate Governance in Indonesia' (2004) 21 Arizona Journal of International and Comparative Law 493–534; also see WJ Wagner, 'Team Work Planning of a Comparative Law Research Project' (1967–68) 17 Buffalo Law Review 349, 349.

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

functional concepts in modern legislative practice has led to the realisation of Law Reform Commissions around the world that employment of non-lawyers benefits the Commission markedly. One could argue therefore that the transplant process begins with the formation of a functional transplant concept which is then transplanted by drafters to a Generic and later Concrete Extensional Concept. This seems to reflect the current practice of the Parliamentary Counsel's Office in Whitehall, which does not accept legal drafts and applies pressure on client departments to identify the reason for requesting a legislative response and its possible solutions. In fact, it is on the basis of this short analysis that requests from government departments are prioritized by the Cabinet Office in the UK.

Eltzbacher's immanent concepts occur as a result of generic legal concepts, as the concept of adoption. They are purely non-functional concepts without reference to social problems.[49] They refer to a comparison between elements of legal definitions. They are non-extensional as the criterion for the classification of an element as necessary is undertaken on the basis of its national character. As a result, immanent concepts can only serve transplants if they are set against a familiar environment of common concepts and elements. Immanent concepts could theoretically work well within the EU in fields where initial harmonization has already taken place. Through the deduction of national intricacies from the equation the generic immanent concept can be formed.

Immanent concepts can be used instead of extensional concepts if transplants from legal systems with common characteristics are under consideration. They present the same characteristics as extensional concepts and are therefore useful in the later stages of the legislative process. They are often used when time is of essence but they deprive the drafting team of the wealth of innovative solutions that can be identified through analysis of legal systems further afield. However, they can be ideal if the generic functional concept led to national concepts of similar legal systems with minor differences in elements and application. In fact, they are ideal in demonstrating the state of harmonization in the legal systems of a region or an international organization.

It is therefore suggested that functional concepts must be used as Generic Transplant Concepts in the initial stages of the policy and drafting processes, followed by intentional or immanent Concrete Concepts at later stages. Functional concepts present inherent problems of terminology building[50] and are therefore unsuitable for the later stage of analysis. The choice between extensional and immanent concept is undertaken on the basis of the extent of innovation sought in the selected solutions and on the basis of the level of harmonization and similarity of the legal systems under comparison.

However, one must not ignore the issue of concept choices when it comes to the selection of the term to be used for Transplant Concepts. Sartori's ten commandments for concept analysis can be utilized here.[51]

[49] See P Eltzbacher, *Über Rechtsbegriffe* (J Guttentag, Berlin, 1900) 47 and 51.

[50] See U Drobnig, 'Methodenfragen der Rechtsvergleichung im Lichte der International Encyclopedia of Comparative Law' [1969] Ius Privatum Gentium—Festschrift Rheinstein 221, 228–33.

[51] G Sartori, *Social Science Concepts: A Systematic Analysis* (Sage Publications, London, 1984).

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

Sartori's Ten Commandments for Concept Analysis

Rule 1	Of any empirical concept always, and separately, check (1) whether it is ambiguous, that is, how the meaning relates to the term; and (2) whether it is vague, that is, how the meaning relates to the referent.
Rule 2	Always check (1) whether the key terms (the designator of the concept and the entailed terms) are defined; (2) whether the meaning declared by their definition is unambiguous; and (3) whether the declared meaning remains, throughout the argument, unchanged, (ie, consistent).
Rule 3	Always check whether the key terms are used univocally and consistently in the declared meaning.
Rule 4a	Awaiting contrary proof, no word should be used as a synonym for another word.
Rule 4b	With respect to stipulating synonyms, the burden of proof is reserved: what requires demonstration is that by attributing different meanings to different words we create a distinction of no consequence.
Rule 5	In reconstructing a concept, first collect a representative set of definitions; second, extract their characteristics; and third, construct matrixes that organize such characteristics meaningfully.
Rule 6	With respect to the extension of a concept, always assess (1) its degree of boundlessness, and (2) its degree of denotative discrimination vis-à-vis its membership.
Rule 7	The boundlessness of a concept is remedied by increasing the number of its properties; and its discriminating adequacy is improved as additional properties are entered.
Rule 8	In selecting the term that designates the concept, always relate to a control with the semantic field to which the term belongs (i.e. the set of neighbouring words).
Rule 9	If the term that designates the concepts unsettles the semantic field (to which the term belongs), then justify your selection by showing that (1) no field meaning is lost, and that (2) ambiguity is not increased.
Rule 10	Make sure that the definition of a concept is adequate and parsimonious: adequate in that it contains enough characteristics to identify the referents and their boundaries; parsimonious in that no accompanying property is included among the necessary, defining properties.

Sartori's work has been criticized as traditional and therefore strictly bound to conventional conceptual thinking.[52] However, his ten commandments can serve as a good, albeit at times fuzzy, guide to drafters in the formulation of the Transplant Concept. It is not surprising to note that Sartori's calls for unambiguity and precision can be traced

[52] See D Collier and JE Mahon, Jr, 'Conceptual "Stretching" Revisited: Adapting Categories in Comparative Analysis' (1993) 87 The American Political Science Review 845, 845.

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

in modern legislative drafting theory, albeit at the stage of drafting (in its narrow sense) rather than conceptualizing.[53]

IV. THE FORMULATION OF A TRANSPLANT COMPARATIVE RESEARCH DESIGN

Having established comparability between the legal systems chosen for analysis, and having selected the Transplant Concept and the Transplant Term, the drafting team is ready to proceed with the formulation of a Transplant Comparative Research Design.

A Research Design implies the proper choice of cases, the types of indicators and the mode of analysis that is needed to provide a proper answer to the Research Question asked. In order to achieve this, the Research Design must be externally and internally valid.[54] Internal validity concerns the question whether the facts used in a given research project are properly, correctly optionalized within the framework of the research in question. Thus, when comparing the benefits for the unemployed in three different countries, it is important to compare countries with similar welfare systems. Otherwise, any results produced would be internally invalid (if one country offers free housing and another does not, this difference should be taken into account when evaluating the unemployment benefits in these countries). External validity presupposes that the concepts used in a given research and the relevant outcomes apply not only to the cases under review but to all similar cases that satisfy the conditions set in the Transplant Research Question and related Transplant Research Design. Thus, the results of a project on the causes of increased crime within urban areas must apply not only to the countries analysed in the research but also to all similar areas. Internal and external validity are interrelated. They must be seen as a goal which, however, is rarely achieved in practice.

External and internal validity is the main guarantee for a Research Design which is valid, reliable and plausible. This is what comparative research method aims to achieve. But how? The main tool for comparative analysis is the use of case studies.[55] To conduct a case study is to investigate something which has significance beyond its boundaries. In contrast to cases, which have significance within their own legal system only, case studies can be used as the basis of an argument or conclusion which may apply in more than one legal system.[56] Thus, using the Child Support Agency as a case study involves examining an institution which, due to its originality, may be the source of action in other jurisdictions.[57]

[53] See P Butt, 'Modern Drafting' (2002) 23 Statute Law Review 12, 23; see contra G Fraser, 'In Support of Ambiguity' [2000] Policy Options 21–26.

[54] See D Campbell and J Stanley, *Experimental and Quasi-Experimental Designs for Research* (Rand-McNally, Chicago, 1963); also see TD Cook and DT Campbell, *Quasi-Experimentation: Design and Analysis Issues for Field Settings* (Houghton Mifflin Company, Boston, 1979).

[55] See RK Yin, *Case Study Research: Design and Methods* (Sage, Newbury Park, CA, 1994).

[56] See J Gerring, 'What Is a Case Study and What Is It Good for?' (2004) 98 American Political Science Review 341–54.

[57] See H Xanthaki, 'The Judiciary-Based System of Child Support in Germany, France and Greece: An Effective Suggestion?' (2000) 22 Journal of Social Welfare and Family Law 295–311.

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

There are five types of case studies: representative, prototypical, deviant, crucial and archetypal.[58] Representative is the most common form of case study and they involve the examination of a typical and standard example of a wider category. Thus, the status of measures wrongfully un-notified to the Commission can be viewed as a representative case study for judicial activism in the 1990s.[59] Representative cases are often used to collect information on the level of harmonization of the national laws of the Member States.[60]

Prototypical are cases which are expected to become representative: many EU lawyers study the development of the Federal Court of the US as a means of interpreting the activism of the European Court of Justice.[61] Prototypical cases are often used as a means of foreseeing how another phenomenon may evolve. However, they are rather risky as other parameters may not allow a development similar to the prototype. Although this mistake in research could be catastrophic for the researcher, lessons can be learnt from other researchers who may even attempt to understand which factor(s) led to the variation in the result of the initial research.

Deviant cases involve the examination of the exceptional and untypical. Thus, it is interesting to examine the administrative courts of France, Italy and Greece as a means of identifying possible additional hurdles and advantages for the protection of individuals seeking damages for State liability.[62] Deviant cases often lead to conclusions on why the deviation exists and on the possibility of transplantation of this deviant phenomenon in other legal systems.

Crucial cases are used in order to verify whether a theory is valid when conditions are least favourable to validity.[63] It is rarely used in law, but it may occur when, for example, a researcher wishes to verify that the theory of legislative State liability is indeed gaining ground by analysing the receding resistance of the notoriously defiant Greek Council of the State and the Italian Cassation Court.[64]

Archetypal cases involve the examination of cases which, although they were initially considered representative, develop as a leader in their category. The French Civil Code was initially seen as one of the codes in civil law countries. However, having been copied by a number of civilian legal systems (such as the Italian and the

[58] See R Hague, M Harrop and S Breslin, *Comparative Government and Politics: And Introduction* (MacMillan, Basingstoke, 1998).

[59] See S Weatherill, 'A Case Study in Judicial Activism in the 1990s: The Status Before National Courts of Measures Wrongfully Un-Notified to the Commission' in D O'Keefe and A Bavasso (eds), *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International, The Hague, 2000) 481–503.

[60] See, eg, a brief survey of small claims procedures as a means of identifying a minimum common denominator in JP Cortes Dieguez, 'Does the Proposed European Procedure Enhance the Resolution of Small Claims?' (2008) 27 Civil Justice Quarterly 83–97.

[61] See M Lasser, 'Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court' (Jean Monnet Working Paper 1/03, NYU School of Law).

[62] See H Xanthaki, *Expanding Your Company in France, Italy and Greece: Problems and EC Law Solutions* (Sakkoulas/Giuffrè, Athens/Komotini/Milan, 2002) 180–207.

[63] See H Eckstein, 'Case Study and Theory in Political Science' in FI Greenstein and NW Polsby (eds), *The Handbook of Political Science* (Addison-Wesley, Reading, 1975) 127.

[64] See M-P F Granger, 'National Applications of Francovich and the Construction of a European Administrative Ius Commune' (2007) 32 European Law Review 157–92.

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

Greek systems), it has become archetypal.[65] What is important to remember about archetypal cases is that they can be used as a point of reference for the interpretation of the phenomena which they bear, but they cannot be used as a means of testing a theory.

How can the drafting team ensure that the correct type of case study has been selected? It must be accepted that the classification of phenomena under one type of case study or another is primarily a subjective choice of the team. Whether it is the French or German Civil Codes that one can use as a representative case study of civil law jurisdiction in private law, must be decided internally in the drafting team. Thus, the use of case studies carries an inherent danger of subjectivity. Similarly, whether the French Civil Code is a representative or prototypical case study is a matter of opinion within the drafting team whose assessment is mainly subjective. Nonetheless, the level of expertise in national and foreign laws within the drafting team can guarantee some degree of objectivity in inevitably unilateral assessments.

What is crucially important for the drafter at this stage is to ensure that each case study selected is used to draw appropriate conclusions. Thus, case studies in the legislative drafting process can only be undertaken via Flyvbjerg's information-oriented selection.[66] Representative case studies are the most common forms used and they may lead to legitimate conclusions on solutions offered[67] by a large group of legal systems represented by the case study. Thus, one can assume that gender equality in family law and succession to the extent offered by the French Civil Code prevails in most civil law European jurisdictions. Thus, the choice to award similar levels of equality domestically would be rather wise. Archetypal case studies can offer the drafting team a higher level of security in the soundness of the solutions borrowed, as their choice has been followed by the leader in the group and has been established in the group to which they belong. Prototypical case studies involve an extra element of subjectivism as their evolution to case studies prevalent in their group lies with the future. Here assistance from multidisciplinary sources is of immense assistance when securing that choices and solutions borrowed by that case study will fall in line with others in the group in the future. Irrespective of the classification of a case study as representative, archetypal or prototypical, at the end of the day what matters is their common utility to drafters: they can serve as sources of policy choices, concepts and legislative options. They can be used freely as models,[68] in varying degrees, provided of course that they belong in the same group as the receiving country.

In contrast to them, deviant and crucial case studies must be used with extreme caution. They are there to offer the drafter a contrast for analysis as a possible means of verifying initial conclusions. Deviant case studies can be extremely helpful when the drafting team is faced with a problem where the current domestic solution in not working: by looking at deviant case studies drafters can acquire new, innovative, often

[65] G Alpa, 'The Italian Interpretation of the Code Civil and French Proposals for Recodification' (2006) 17 European Business Law Review 1505–33.

[66] See B Flyvbjerg, 'Five Misunderstandings About Case-Study Research' in C Seale, G Gobo, JF Gubrium and D Silverman (eds), *Qualitative Research Practice* (Sage, London and Thousand Oaks, CA, 2004) 420–34.

[67] See BG Peters, *Comparative Politics: Theories and Methods* (New York University Press, New York, 1998).

[68] See R Rose, 'Comparing Forms of Comparative Analysis' (1991) 39 Political Studies 446, 459.

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press

extreme ideas about possible fresh solutions. Moreover, deviant case studies offer welcome confidence to the initial conclusions.[69]

Crucial case studies tend to be difficult to use in the context of legislative drafting. Since the aim of the team is to regulate, testing the selected regulation option against the worst possible scenario can only be perceived when the worst possible scenario can be so detrimental that it has to be considered in detail.

V. CONCLUSIONS

The current trend of legal globalization at the regional and international levels creates fertile ground for transplants from legal systems not only within the region of the country of reception but also further afield. Comparability can and should no longer be synonymous with convenience or familiarity, much less so if this refers to familiarity at random based on experience of the particular members of each drafting team. Policy choices, concepts, terms and legislative solutions can be borrowed from other legal systems, both neighbouring and further afield. The criterion of comparability is now that of functionality.

For the completion of a transplant, the introduction of a Transplant Concept is necessary. This can be functional in the first stages of the drafting process as a Generic Transplant Concept, or it can be extensional or immanent in the later stages of the drafting process as a Concrete Transplant Concept. Immanent concepts are best suited when the transplant stems from a similar legal system. A Transplant Term reflects the concept chose by balancing ambiguity and precision.

For the completion of the transplant, the use of foreign policies, concepts and legislative choices must be undertaken with the context of a suitable case study. Representative, archetypal and prototypical case studies can serve as models for transplants. Deviant case studies may serve as fresh fountains of innovative ideas. Crucial case studies may serve as a control mechanism for extreme phenomena within the phenomenon under analysis.

I disagree with the view that the comparative endeavour suffers from loss of purpose.[70] This could not be further from the truth. The comparative endeavour is gaining ground in a new area—that of legislative drafting. And this is undertaken at such high speed and frequency, that boundaries and rules must be set as a matter of extreme priority.

HELEN XANTHAKI*

[69] See A Kazancigil, 'The Deviant Case in Comparative Analysis: High Stateness in Comparative Analsysis' in M Dogan and A Kazancigil, *Comparing Nations: Concepts, Strategies, Substance* (Blackwell, London, 1994) 214.

[70] See G Sartori, 'Comparing and Miscomparing' [1991] 3 Journal of Theoretical Politics 243, 243.

* Dr H Xanthaki (LLB, Athens; M Jur; PhD, Dunelm) is a Senior Lecturer at the Institute of Advanced Legal Studies, School of Advanced Study, University of London; and Academic Director, Sir William Dale Centre for Legislative Studies, Institute of Advanced Legal Studies.

https://doi.org/10.1017/S0020589308000456 Published online by Cambridge University Press