NOT FOR SALE
SÁCH KHÔNG BÁN

Office of National Assembly
Văn phòng Quốc hội
Address: 22 Hung Vuong Str., Ba Dinh Dist., Ha Noi
Địa chỉ: 22 Hùng Vương, Ba Đình, Hà Nội

THỰC TIỄN VÀ THÁCH THỨC TRONG CHUYỂN HÓA PHÁP LUẬT TẠI VIỆT NAM: CHIA SẺ KINH NGHIỆM CỦA LIÊN MINH CHÂU ÂU
CHALLENGES AND PRACTICES OF LEGAL TRANSPLANTS IN VIETNAM: SHARING EUROPEAN EXPERIENCES

VĂN PHÒNG QUỐC HỘI
OFFICE OF NATIONAL ASSEMBLY

THỰC TIỄN VÀ THÁCH THỨC TRONG CHUYỂN HÓA PHÁP LUẬT TẠI VIỆT NAM: CHIA SẺ KINH NGHIỆM CỦA LIÊN MINH CHÂU ÂU

CHALLENGES AND PRACTICES OF LEGAL TRANSPLANTS IN VIETNAM: SHARING EUROPEAN EXPERIENCES

NHÀ XUẤT BẢN HỒNG ĐỨC

Ấn phẩm này thể hiện quan điểm của các tác giả và dưới bất kỳ phương thức nào, những nội dung này cũng không được xem là phản ánh quan điểm của Phái đoàn Liên minh châu Âu tại Việt Nam.

Disclaimer: This publication represents the views of the authors and does not reflect the position of the Delegation of the European Union to Viet Nam.

Ấn phẩm này được xuất bản bởi Chương trình Hỗ trợ Đối thoại Chiến lược Việt Nam – EU do Liên minh châu Âu tài trợ.

Published with support of EU-Viet Nam Strategic Dialogue Facility funded by the European Union.

VĂN PHÒNG QUỐC HỘI
OFFICE OF NATIONAL ASSEMBLY

THỰC TIỄN VÀ THÁCH THỨC TRONG CHUYỂN HÓA PHÁP LUẬT TẠI VIỆT NAM: CHIA SẺ KINH NGHIỆM CỦA LIÊN MINH CHÂU ÂU

CHALLENGES AND PRACTICES OF LEGAL TRANSPLANTS IN VIETNAM: SHARING EUROPEAN EXPERIENCES

KỶ YẾU HỘI THẢO QUỐC TẾ DO VĂN PHÒNG QUỐC HỘI
TỔ CHỨC VỚI SỰ HỖ TRỢ CỦA LIÊN MINH CHÂU ÂU

PROCEEDINGS OF THE INTERNATIONAL SEMINAR ORGANISED BY
THE OFFICE OF THE NATIONAL ASSEMBLY OF VIETNAM
WITH THE SUPPORT OF THE EUROPEAN UNION

Hà Nội, 2016

LỜI MỞ ĐẦU

Tham khảo, tiếp nhận kinh nghiệm xây dựng và thực thi pháp luật của quốc gia khác phục vụ công tác xây dựng và thực thi pháp luật của quốc gia mình là hiện tượng phổ biến ở nhiều quốc gia trên thế giới. Mô tả hiện tượng này, các học giả (nhất là các học giả về luật so sánh) sử dụng nhiều thuật ngữ khác nhau như "tiếp nhận pháp luật nước ngoài" (reception of law), "chuyển giao pháp luật" (legal transfer), hoặc "khuếch tán pháp luật" (legal diffusion). Tuy nhiên, thuật ngữ "chuyển hóa pháp luật" (legal transplant) (hay còn gọi là "cấy ghép pháp luật") được sử dụng thông dụng nhất.

Ở nước ta, tham khảo, tiếp nhận, chuyển hóa pháp luật của quốc gia khác phục vụ việc quản trị quốc gia cũng là hiện tượng không mới. Các tài liệu lịch sử còn truyền lại cho thấy từ thời phong kiến, nhiều Bộ luật quan trọng của nước ta đã được xây dựng với sự tham khảo kinh nghiệm của quốc gia khác. Trong bối cảnh toàn cầu hóa, hội nhập mà Việt Nam đang tham gia một cách tích cực và chủ động, khi Việt Nam còn thiếu nhiều kinh nghiệm trong việc xây dựng nền kinh tế thị trường dưới sự quản lý của nhà nước pháp quyền XHCN, việc tham khảo kinh nghiệm pháp luật nước ngoài cho phù hợp với điều kiện, thực tiễn Việt Nam để không mò mẫm, phát minh lại những điều đã biết là điều bình thường. Điều đó cũng là chọn lựa phù hợp khi nguồn lực đầu tư cho công tác nghiên cứu, xây dựng pháp luật ở Việt Nam còn khá hạn chế. Mặt khác, việc tham khảo kinh nghiệm nước ngoài ở Việt Nam sao cho thực sự có tính chọn lọc, tránh rơi vào thái cực sao chép máy móc, thiếu cân nhắc kinh nghiệm nước ngoài cũng là điều mà thực tiễn đang đòi hỏi được giải quyết.

Cho tới nay bản chất, ý nghĩa thực sự của hiện tượng "chuyển hóa pháp luật", thêm vào đó là những câu hỏi rất thực tiễn như loại quy phạm như thế nào thì có thể chuyển hóa thành công từ pháp luật nước này vào pháp luật nước khác, những yếu tố nào chi phối khả năng tiếp nhận kinh nghiệm nước ngoài của một quốc gia vẫn là những chủ điểm gây nhiều tranh luận. Để tạo diễn đàn để các học giả, các nhà hoạt động thực tiễn ở Việt Nam và một số học giả quốc tế trao đổi, nhìn nhận lại hiện tượng này, góp phần chia sẻ những kinh nghiệm tốt của quốc tế phục vụ cho thực tiễn cải cách pháp luật hiện nay ở Việt Nam, ngày 5 và 6 tháng 2 năm 2015, Văn phòng Quốc hội với sự hỗ trợ của Phái đoàn Liên minh Châu Âu ở Việt Nam đã tổ chức Hội thảo **"Chuyển hóa pháp luật ở Việt Nam: Chia sẻ kinh nghiệm ở Châu Âu."** Chúng tôi xin trân trọng giới thiệu các bài tham luận tại Hội thảo quan trọng này.

PREFACE

Looking to other countries for lessons in formulation and implementation of laws is a pervasive phenomenon in the world. To describe this phenomenon, legal scholars (especially in comparative laws) utilize various terms such as “reception of foreign law”, “legal transfer”, or “legal diffusion”. However, the term “legal transplant” seems to be more widely used.

In Vietnam, legal transplant is not a new phenomenon. Documents from feudal times show that even in those days, important legal codes in Vietnam were drafted with reference to foreign legal experiences. In the context of globalization and integration in which Vietnam is actively participating, when Vietnam still lacks experiences in building a market economy under the management of rule of law based state, referring to foreign legal experiences to draw necessary lessons to solve practical problems in Vietnam to avoid the possibility of reinventing what already known is a reasonable choice. This is also suitable for Vietnam due to its shortage of resources for conducting good researches and formulation of laws. On the other hand, how to conduct a proper legal transplant in Vietnam to avoid the extreme side of mechanically copying foreign experiences is a pressuring problem in need of resolution.

Until now, the nature and significance of legal transplant together with various relevant questions such as what kinds of legal rules can be transplanted, which factors determine the successes of legal transplants remain topics of heated debate. In order to create a forum for scholars and legal practitioners in Vietnam and a number of international scholars to exchange their views and reexamine the phenomenon of legal transplant, sharing good practices from abroad to conduct Vietnam law reform, on 5- 6 February 2015, the Office of the National Assembly of Vietnam with support of the European Union Delegation in Vietnam organized the international seminar **“The Challenges and Practices of Legal Transplant in Vietnam: Sharing European Experiences”.** We are pleased to introduce you the proceedings of this important seminar.

LỜI GIỚI THIỆU

Trong lịch sử hình thành và phát triển của Nhà nước và pháp luật Việt Nam, hiện tượng chuyển hoá pháp luật tức là tiếp nhận những yếu tố pháp luật của một nền văn hoá cho việc hoàn thiện pháp luật Việt Nam đã thành một phần trong đời sống pháp lý của Việt Nam từ xa xưa. Tuy nhiên, cho tới nay, nhận thức cũng như lý luận về hiện tượng chuyển hoá pháp luật ở Việt Nam vẫn còn nhiều khoảng trống.

Hiện nay, Việt Nam đang bước vào giai đoạn hội nhập sâu hơn và rộng hơn với sự tham gia những hiệp định thương mại tự do thế hệ mới như Hiệp định đối tác xuyên Thái Bình Dương (TPP) hay tham gia Cộng đồng kinh tế ASEAN (AEC). Một trong những đòi hỏi quan trọng xuất phát từ thực tiễn đó là việc nghiên cứu về vấn đề hội nhập pháp lý. Vấn đề này càng trở nên cấp thiết và có ý nghĩa khi Việt Nam đang triển khai Nghị quyết số 48-NQ/TW của Ban chấp hành Trung ương về Chiến lược xây dựng và hoàn thiện hệ thống pháp luật Việt Nam đến năm 2010, định hướng đến năm 2020.

Từ nhận thức đó, Văn phòng Quốc hội với sự hỗ trợ kỹ thuật của Phái đoàn Liên minh Châu Âu tại Việt Nam đã tổ chức Hội thảo quốc tế với chủ đề ***"Thực tiễn và thách thức trong chuyển hóa pháp luật tại Việt Nam: chia sẻ kinh nghiệm của Liên minh Châu Âu".***

Trên cơ sở sự thành công của Hội thảo, nhằm chia sẻ một cách rộng rãi thông tin tham khảo về chuyển hóa pháp luật tới các độc giả, Văn phòng Quốc hội đã tiếp tục phối hợp với Phái đoàn Liên minh Châu Âu tại Việt Nam tổ chức biên tập và xuất bản Kỷ yếu của Hội thảo này.

Có thể nói, cuốn Kỷ yếu là tập hợp các bài viết có chất lượng, có chiều sâu và sát với thực tiễn của những chuyên gia hàng đầu của Châu Âu và Việt Nam hiện nay. Với cuốn Kỷ yếu này, độc giả được cung cấp những vấn đề lý luận về chuyển hóa pháp luật, kinh nghiệm của châu Âu và một số nước Châu Á; thực tiễn và những khuyến nghị dành cho Việt Nam. Cuốn Kỷ yếu này được kỳ vọng sẽ là một tài liệu tham khảo hữu ích dành cho đại biểu Quốc hội, các cơ quan của Quốc hội, các bộ, ban, ngành hữu quan, các nhà nghiên cứu khoa học chính trị - pháp lý trong công việc của mình.

Ngoài ra, ấn phẩm này cũng là minh chứng cho sự hợp tác hiệu quả trong đối thoại giữa Việt Nam và Liên minh châu Âu (EU) nhằm hướng tới sự phát triển toàn diện và có chiến lược của mối quan hệ Việt Nam – EU theo tinh thần của Hiệp định đối tác và Hợp tác toàn diện (PCA).

Văn phòng Quốc hội xin trân trọng giới thiệu tới các Quý độc giả và rất mong nhận được các ý kiến đóng góp để có thể nâng cao chất lượng ấn phẩm trong những lần tái bản tiếp theo.

Hà Nội, tháng 3, năm 2016

Văn phòng Quốc hội

FOREWORD

In the history of the establishment and development of the State and the legal system of Vietnam, legal transplant as the reception of legal factors from other cultures has become part of Vietnam's legal practices for a long time. However, there remains gaps in the understanding and theories on legal transplant in Vietnam.

In the current context, Vietnam is in a stage of more intensive integration with new generation free trade agreements such as the Trans-Pacific Partnership (TPP) or the establishment of the ASEAN Economic Community (AEC). An urgent need drawing from practices is the study of legal integration. This demand has become even more necessary and significant in the implementation of Resolution 48-NQ/TW of the Party's Central Committee on the Strategy for building and improving Vietnam's legal system by 2010 and vision to 2020.

Within that perception, the Office of the National Assembly with technical support from the European Union Delegation to Vietnam organized a seminar "***The Challenges and Practices of Legal Transplant in Viet Nam: Sharing European Experiences".***

On the basis of the seminar's success and aiming at widely disseminate knowlegde about legal transplantation, the Office of the National Assembly in further cooperation with the European Union Delegation to Vietnam edited and published the Proceedings of the seminar.

It suffices to say that the Proceedings are a collection of quality, in-depth and practical papers by current leading European and Vietnamese experts in the field. These Proceedings shall provide readers with theoretical issues on legal transplant, experience from Europe and some Asian countries as well as practices and recommendations for Vietnam. This book is expected to be a useful source of reference for National Assembly Deputies, National Assembly organs, related ministries and authorities and political-legal researchers.

In addition, this publication is a manifestation for the effective cooperation between Vietnam and the EU toward a comprehensive strategic development of the Vietnam – EU relationship under the Framework of the Partnership and Cooperation Agreement (PCA).

The Office of the National Assembly would like to introduce this book to the readers and look forward to receiving feedbacks for higher quality editions in the future.

Hanoi, March 2016

The Office of The National Assembly

LỜI GIỚI THIỆU

Ấn bản này là Kỷ yếu của Hội thảo quốc tế "***Thực tiễn và thách thức trong chuyển hóa pháp luật tại Việt Nam: chia sẻ kinh nghiệm của Liên minh châu Âu",*** đánh dấu một bước quan trọng trong sự hợp tác giữa Phái đoàn Liên minh châu ÂU (EU) và Văn phòng Quốc hội Việt Nam. Chúng tôi hy vọng ấn phẩm này – một phần trong sự hỗ trợ của Phái đoàn EU dành cho Văn phòng Quốc hội trong năm 2015 – sẽ đóng góp vào việc chia sẻ kinh nghiệm và những cách làm tốt nhất với các đối tác Việt Nam, tất cả là nhằm mục đích tạo lập sự hiểu biết chung tốt hơn giữa hai bên chúng ta. Quan trọng hơn, chúng tôi cũng hy vọng rằng ấn bản này sẽ góp phần vào công tác lập pháp quan trọng của Quốc hội Việt Nam. Liên minh châu Âu coi Quốc hội Việt Nam là một trong những cơ quan chủ chốt định hướng cho quá trình hiện đại hóa của Việt Nam. Những đạo luật quan trọng sẽ được thông qua trong năm 2015 và 2016 như Luật Báo chí, Luật về Hội hay Bộ luật Hình sự sẽ đóng vai trò căn bản trong việc củng cố con đường của Việt Nam tiến tới thịnh vượng, tự do và sự tôn trọng quyền con người được nêu trong Hiến pháp và cũng là cơ sở cho mối quan hệ Liên minh châu Âu – Việt Nam.

Chuyển hóa pháp luật là một chủ đề lý thú và là nguồn của những cuộc tranh luận không ngừng giữa các học giả và giữa các nhà lập pháp. Chuyển hóa pháp luật đã trở thành một nguồn cho những thay đổi trong pháp luật, dù chính thức hay không chính thức kể từ thời kỳ ra đời những bộ luật cổ xưa như Luật La Mã. Hệ thống pháp luật của EU và hệ thống pháp luật của các nước thành viên Liên minh phải thích nghi với bản chất luôn thay đổi của xã hội và do đó luôn ở trong tình trạng thay đổi để phát triển.

Liên minh châu Âu, được đặc trưng bởi một hệ thống xây dựng pháp luật độc đáo, đã chứng tỏ là một nguồn pháp luật dồi dào, tạo nên môi trường pháp lý năng động ở châu Âu, trong đó việc hài hòa hóa pháp luật – một hình thức của chuyển hóa pháp luật – đã trở thành một thực tiễn phổ biến.

Quá trình hài hòa hóa pháp luật của châu Âu với việc đưa ra một bộ chuẩn mực chung để bảo đảm tính nhất quán của các luật, tiêu chuẩn và cách làm tại Thị trường chung châu Âu có thể được trích dẫn như một ví dụ thành công về các chủ đề sẽ được thảo luận trong cuốn sách này.

Chúng tôi tin rằng chia sẻ kinh nghiệm của châu Âu về vấn đề này có thể mang lại giá trị ý nghĩa cho các nhà lập pháp Việt Nam, đặc biệt trong bối cảnh thi hành Hiến pháp mới năm 2013 và nhu cầu thích nghi của hệ thống pháp luật Việt Nam với Hiến pháp mới và cũng là thích nghi với quy trình lập pháp khi Hiến pháp có hiệu lực và với Hiệp định thương mại tự do EU – Việt Nam và Hiệp định Đối tác và Hợp tác EU – Việt Nam.

Chúng tôi tin tưởng rằng với chương trình nghị sự và tham vọng chung này giữa EU và Việt Nam, chúng ta có thể chắc chắn rằng ấn bản này sẽ đóng góp hữu ích cho công tác lập pháp quan trọng của Quốc hội Việt Nam.

Hà Nội, tháng 3, năm 2016

Phái đoàn Liên minh Châu Âu tại Việt Nam

Foreword

This publication presented as the proceedings of the international seminar on "Legal Transplant: Integrating international law and legislation into national law – Sharing European experiences" marks an important step in the EU Delegation's cooperation with the Office of the National Assembly of Vietnam.

We hope that this publication as part of the EUD's support to the Office of the National Assembly in 2015 will contribute to sharing European experiences and best practices with Vietnamese partners; all with the aim to create a mutual and better understanding beside our two sides. More importantly, we also hope that this publication will contribute to the important legislative work carried out by the National Assembly.

The European Union considers the National Assembly as one of the key institutions that is steering Vietnam's process of modernization. The important laws that will be approved in the 2015 and 2016 period, like the Press Law, Associations Law, or the Penal Code, will be fundamental to consolidate the path of Vietnam towards the prosperity, freedom and respect from human rights that are established in the Constitution, and that are also the base of EU-Vietnam relations.

The issue of legal transplant is an interesting topic and a source of continuous debate among scholars and legislators. Legal transplant has been a source of legislation, formal or informal, since the days of the ancient legal codes, like the Roman Law. The EU legal system and the legal systems of its Member States have to adapt to the ever-changing nature of society and are therefore in a constantly evolving state.

The EU, which is characterized by a unique law-making system, has proved to be an rich source of legislation, giving rise to a dynamic legal context in Europe, in which the harmonization of legal codes and, as a consequence, some form of legal transplant, has become a common practice.

The European process of Legal Harmonization that provides a common set of standards to ensure consistency of laws, standards and practices in the European Common Market could be cited as a successful example of the topics that will be discussed here today.

We believe that sharing European experience in this issue can be of great value to Vietnamese legislators, especially in the context created by the new Constitution of 2013 and the need to adapt Vietnamese Legislation to the new Charter but similarly also to adapt to the legislative processes, when in force, to the agreement of the EU-Vietnam Free Trade Agreement and the EU-Vietnam Partnership Cooperation Agreement.

We believe that with this shared agenda and ambition between the EU and Vietnam, we are certain that this publication will be an active useful contribution to the important legislative work carried out by the National Assembly.

Hanoi, March 2016

The Delegation of European Union to Viet Nam

LỜI CẢM ƠN

Kỷ yếu này là sản phẩm hợp tác chung giữa Văn phòng Quốc hội Việt Nam với Phái Đoàn Liên minh châu Âu tại Việt Nam. Trước hết, chúng tôi xin trân trọng cảm ơn các đại biểu Quốc hội, các chuyên gia pháp lý, các nhà khoa học, nhà hoạt động thực tiễn của Châu Âu, Nhật Bản và Việt Nam đã tích cực đóng góp những nguồn tri thức quý báu và bổ ích cho ấn phẩm Kỷ yếu này.

Đặc biệt, Văn phòng Quốc hội xin trân trọng cảm ơn Phái đoàn Liên minh Châu Âu tại Việt Nam đã dành sự hợp tác chặt chẽ, hỗ trợ hiệu quả cho Văn phòng Quốc hội trong thời gian qua.

Chúng tôi cũng trân trọng cảm ơn TS. Nguyễn Văn Cương, Phó Viện trưởng Viện Khoa học pháp lý, Bộ Tư pháp đã rất tâm huyết và dày công biên tập bản thảo của ấn phẩm này nhằm bảo đảm nội dung truyền tải nguyên vẹn với từ ngữ trau chuốt và cách trình bày, sắp xếp hợp lý.

Cuối cùng, chúng tôi xin gửi lời cảm ơn chân thành tới các lãnh đạo đơn vị, các cán bộ trực tiếp phụ trách của Vụ Lễ tân, Thư viện Quốc hội và đối tác là Chương trình hỗ trợ đối thoại chiến lược Việt Nam-EU đã phối hợp hiệu quả trong việc tổ chức Hội thảo và biên soạn Kỷ yếu.

ACKNOWLEDGMENT

This publication is a product of the joint collaboration between the Office of the National Assembly of Vietnam and the Delegation of the European Union to Vietnam. First of all, we would like to express great gratitude to National Assembly deputies, experts, scholars and practitioners from Europe, Japan and Vietnam who participated, presented their research papers and shared their valuable knowledge at the Workshop and contributed to this publication.

Especially, we highly appreciate the Delegation of the European Union to Vietnam close cooperation and effective assistance to the Office of Vietnam's National Assembly so far.

We also would like to express kindly thanks to Dr. Nguyen Van Cuong, Deputy Director of Institute of Legal Science, Ministry of Justice of Vietnam for preparing and editing the draft of this publication and making sure that the contents of the proceedings are kept but refined.

Finally, we also would like to sincerely thank leaders and officers at the Department of Protocol, the National Assembly Library and the Vietnam-EU Strategic Dialogue Facility for effective cooperation in organizing the seminar and preparing this publication.

DANH SÁCH CÁC TÁC GIẢ
LIST OF CONTRIBUTORS

Giáo sư, Tiến sĩ Trần Ngọc Đường/Prof. Dr. Tran Ngoc Duong
Nguyên Phó Chủ nhiệm Văn phòng Quốc hội

Giáo sư, Tiến sĩ Norbert Reich/Prof. Dr. Norbert Reich
Đại học Bremen, Cộng hòa Liên bang Đức
University of Bremen Law Faculty, Germany

Giáo sư, Tiến sĩ Helen Xanthaki/Prof. Dr. Helen Xanthaki
Viện nghiên cứu pháp lý cao cấp – Đại học London
Institute of Advance Legal Studies, University of London

Giáo sư Higuchi Yoichi/Prof. Higuchi Yoichi
Khoa Luật, Đại học Waseda; Thành viên Viện Hàn lâm Nhật Bản
Faculty of Law, Waseda University; Member of the Japan Academy

Giáo sư, Tiến sĩ khoa học Đào Trí Úc/Prof. Dr. Dao Tri Uc
Khoa Luật, Đại học quốc gia Hà Nội
Faculty of Law, Hanoi National University

Phó Giáo sư, Tiến sĩ Nguyễn Như Phát/Assoc. Prof. Dr. Nguyen Nhu Phat
Viện trưởng, Viện Nhà nước Pháp Luật
Director, Institute of State and Law

Phó Giáo sư, Tiến sĩ Phạm Duy Nghĩa/Assoc. Prof. Dr. Pham Duy Nghia

Khoa luật, Đại học kinh tế thành phố Hồ Chí Minh

Faculty of Law, University of Economics - Ho Chi Minh City

Phó Giáo sư, Tiến sĩ Nguyễn Ngọc Điện/Assoc. Prof. Dr. Nguyen Ngoc Dien Vice Rector/ Phó Hiệu trưởng

Đại học kinh tế - luật thành phố Hồ Chí Minh

Ho Chi Minh City University of Economics and Law

Tiến sĩ Nguyễn Văn Cương/Dr. Nguyen Van Cuong

Phó Viện trưởng Viện Khoa học pháp lý, Bộ Tư pháp

Deputy Director of Institute of Legal Science, Ministry of Justice of Vietnam

Tiến sĩ Bùi Ngọc Sơn/Dr. Bui Ngoc Son

Khoa Luật - Đại học Quốc gia Singapore

Faculty of Law - National University of Singapore

MỤC LỤC

TABLE OF CONTENT

MỘT SỐ HÌNH ẢNH VỀ HỘI THẢO CHUYỂN HÓA PHÁP LUẬT TẠI VIỆT NAM NGÀY 5-6 THÁNG 2 NĂM 2015

Hội thảo Chuyển hóa pháp luật ở Việt Nam 5-6 Tháng 2 năm 2015

Giáo sư, Tiến sỹ Phan Trung Lý, Chủ nhiệm Ủy ban Pháp luật của Quốc hội

Bà Delphine Malard, Trưởng ban Chính trị, Báo chí và Thông tin, Phái đoàn Liên minh châu Âu

Giáo sư, Tiến sỹ Phạm Duy Nghĩa, Đại học Kinh tế - Luật Thành phố Hồ Chí Minh

Giáo sư, Tiến sĩ Norbert Reich Đại học Bremen, Cộng hòa Liên bang Đức

Giáo sư, Tiến sỹ Trần Ngọc Đường, Chuyên gia Pháp lý cao cấp

Tiến sỹ Nguyễn Sỹ Dũng, Phó Chủ nhiệm Văn phòng Quốc hội

Tiến sĩ Helen Xanthaki, Viện nghiên cứu pháp lý cao cấp, Đại học London

PGS.TS. Nguyễn Ngọc Điện, Trường Đại học Kinh tế - Luật TP. Hồ Chí Minh

Tiến sỹ. Hoàng Minh Hiếu, Giám đốc Thư viện Quốc hội - Văn phòng Quốc hội

Tiến sỹ. Nguyễn Văn Cương, Phó Viện trưởng Viện khoa học Pháp lý, Bộ Tư pháp

Tiến sỹ, Luật sư Lê Thành Vinh, Phó Tổng giám đốc Công ty Luật SMIC

.....

.....

.....

.....

.....

.....

PHẦN 1
CHUYỂN HÓA PHÁP LUẬT: NHỮNG KHÍA CẠNH LÝ LUẬN

PART 1
LEGAL TRANSPLANTS: THEORECTICAL ISSUES

THEORETICAL ISSUES ON LEGAL TRANSPLANTS: THEORIES, PHENOMENA, TRENDS AND RELEVANT FACTORS

Norbert Reich

The topic about which I'm supposed to talk is a huge and at the same time controversial one. The 2010 International Congress of Comparative Law held in Washington /DC consists of 36 national reports (Vietnam is only mentioned in the context of the Japanese report, Kaneko 2012, 565-573!) with a comprehensive conclusion by Prof. Sanchez-Cordero (2012) from Mexico. The Oxford Handbook of Comparative Law of 2008 contains a long paper by Graziadei (2008) which gives a very good overview of the different concepts, trends, and problems of legal concepts. The general debate is still divided between the more optimistic/instrumentalist approach of Watson (1993) taking a positive and rather pragmatic view, and the legal-cultural critique of Legrand (1997) and Teubner (1998) insisting on the embeddedness of law in a specific legal culture which cannot simply be transferred from one order to another without causing irritations and distortions. Other researchers find in certain instances an "overfitting" of transplants (Siems 2014) or on the other hand a "mixture of norms and principles" (Graziadei, p. 453; Bussani & Werro 2009 for Europe; Yamamoto 2013 for Japan) which develop over time.

How are we going to solve this dilemma? I will prefer a pragmatic and differentiated approach looking at legal history and legal sociology in a specific environment. Legal transplants in this view are a rather common, almost normal phenomenon. In the evolution of law, in particular civil

or private law which is most familiar to me (contracts, torts, companies, secured interests, less family and succession law), transplants are a factor of learning and change. Many international bodies are active in creating model laws, soft laws, or draft conventions etc. which are proposed for take-over by national legislators or other competent institutions (overview Sanchez-Cordero at pp. 14-15). Even in EU law under the doctrines of supremacy and direct effect, a great number of "soft-law", "optional codes", "frames of reference", recommendations etc. exist – sometimes giving raise to great controversies like the - now withdrawn - proposal on an optional "Common European Sales Law" (Reich 2014, Chap. VI; 2014a). Some international organisations like UNCITRAL and UNIDROIT have their task to draft and "market" legal transplants, especially in the sphere of commercial relations; Basedow (2013) talks of a "Law of Open societies" which could not function without legal transplants.

I can start with a first preliminary observation: The problem of legal evolution in the differentiated jurisdictions (states, international organisations, self-governing bodies etc.) is not the existence of transplants as such, but how they fit into a given legal order. This statement merits some further considerations on the legitimacy, successes and potential failures to which I will turn now. But I have to add a caveat: the topic is extremely complex, and I can only give an overview based on a generally positive, supportive approach to legal transplants. I will also use my personal experience as being involved in drafting legislation especially in transition countries, eg with regard to codification, contract law, trade practices, and consumer protection.

1. A preliminary definition: transplants as voluntary take-over by the receiving jurisdiction

The first and perhaps most important qualification to legal transplants consists in their voluntary take-over by the receiving jurisdiction, mostly (but not exclusively) states. This contrasts to some extent the analysis of legal changes by Graziadei (2008, 456-461) who found 3 types of "factors of change" leading to legal transplants:

- Imposition
- Prestige
- Economic performance

While I agree with the second and third factor, the first one is more problematic. Of course, legal changes were imposed by conquests, colonialisation, force etc., but I still would hesitate to include this in my analysis. In all these cases, the transformation has been done without consent of and legitimation by the receiving entity - it is just a matter of power and control and may simply be abandoned once the external source - the conqueror, the colonialisator - is gone. Take the imposition of socialist law in Eastern Europe and related countries due to the dominance of the Soviet Union. After the fall of socialism, most of these countries changed their laws in direction to more market economic patterns like freedom of contract, free use of private property and freedom to found and manage companies, and did so by voluntary taking over elements of foreign laws, whether of common or civil law origin; legal transplants played an important role in this process which - and that is very important - was not an imposed but a voluntary one. It seems that Vietnam is part of this process, as documented by the very topic of the conference (see Kaneko, 2012, pp. 564-567).

On the other hand, some qualifications are necessary to understand this process of legal change. As will be remembered, the imposition of the French Civil Code was part of the Napoleonic conquests after its adoption in 1804, and many parts of Europe like the left Rhein part of Germany, some provinces in Italy, the territories of the Netherlands etc. had to take over the Code civil and other parts of Napoleonic legislation. After the fall of the Napoleon dominance, the Code civil did not immediately lose its legal value but continued quite successfully in many (no all!) territories. It became amalgamated to the local "culture" and existed in many parts of Germany till the introduction of the BGB in 1900 and even later, with a rich case law and doctrinal writing having more or less left its origin as imposed law. Belgium still has the Code civil, while Dutch law first followed the French model in the 19th century and only after the Second World War was completely modernised and re-codified.

A “reverse” transplantation process happened between Germany and France: When Germany under Bismarck annexed Alsace-Lorraine in 1871 the BGB was introduced there in 1900. When these territories came back to France after the Versailles Treaty in 1918, the BGB was not automatically abolished but remained in force in many areas, in particular in real property law. A special Cour d’Appel in Colmar hears cases on “German-French” law which seems to function to the satisfaction of its citizens even before the EU, and there is no intention to abolish it, perhaps to only to modify to fit better into the general French legal system.

International law may impose legal change upon receiving jurisdictions. Of course the element of voluntary take-over is met by the process of ratification. The CISG is an international Treaty defining rules of cross-border commercial sales contracts; once ratified parties are able to use this instrument for their transactions by a so-called opt-out mechanism. It is even open to non-ratifying jurisdictions by an opt-in mechanism. Even more so, it can also serve as a legal transplant for local law if its concepts like “conformity” and “fundamental breach of contract” are also applied for sales transactions in general without any cross border dimension. This happened in Germany with the reform of the BGB in 2002 and in the former socialist Baltic countries Estonia and Lithuania when they codified their civil law (Reich in Bussani/Werro 2009). Even though the EU is not part of the CISG it used some of its concepts when drafting and adopting the Consumer Sales Directive 1999/44/EC.

Somewhat different is the case of German re-unification: The relevant Constitutional Treaty between at that time the Federal Republic of (West) Germany and the still existing DDR more or less imposed the take-over of “West”-German law to the DDR, in particular by abolishing the socialist ZGB and re-introducing the BGB. This Treaty was ratified by the then still existing Parliament of the DDR. Can this be called a “legal transplant”? I do not think so: it was really a sort of re-enactment of the former legal unity in Germany; it was nothing foreign to the people of the DDR, but a document of the newly won national unity after 40 years of artificial separation.

2. Legal transplants and “modernisation” of law

My insistence on the voluntary character of transplants by the receiving country does not explain why this consent was given. One of the most frequent reasons has been the use of law as an instrument of modernisation of society. This is of course a highly sensitive topic, and I will limit myself to civil and commercial law. The issues of constitutional law, in particular transplants of fundamental rights and constitutional adjudication, are much more complex and will only be treated briefly in the last section of this presentation. The next presentation concerns practical examples in three big Asian jurisdictions, namely Japan, India and China.

The best known example is the take-over of the Swiss Civil Code in the process of laicisation of Turkey (Atamer, 2008). This process was done by an “acte de force” of the Atatürk government of the twenties with a Minister of Justice trained in Switzerland which wanted to lead Turkey uno actu into a more modern society beyond feudalism and Islamic sharia. There is still is debate whether this was a successful or failed process; I’m not an expert on this, but it seems it has worked quite well so far which does not exclude some necessary reforms and adaptations. Atamer informs in detail about the different drafts for modification and amendment of 1971 and 1984 which became part of the new Turkish ZGB (Zivilgesetzbuch – Civil Code) of 22.11.2001, to enter in force on 1.1.2002. The modifications concerned mostly family law and related issues.

In this context, the US-American “law and development movement” is well known which wanted to bring the benefits of modern legal thinking to South America in the sixties and seventies. The movement sponsored by US development agencies and supported by elite law schools like Yale and Columbia (Trubek, 2004; Trubek & Santos, 2006; Dezelay & Garth, 2002; an assessment is given by Sachnez-Cordero, 2012 at p. 17) was however less concerned with legislation – most South American states had already adopted French like Civil and Commercial Codes – but with a more aggressive style of legal work and critical thinking. The raise of dictatorships in many countries like Brasil, Argentine, Chile, Peru and Colombia somewhat later seemed to give the death blow

to this movement and demonstrated its inherent contradiction: liberal economic conceptions were placed into authoritarian regimes of state power – this seems to be a misfit distorting the very idea of successful legal transplants demanding a government of laws and independence of the judiciary.

Dramatic take-overs happened in the former socialist countries where competing transplants inspired by the continental codification tradition, in particular the newly adopted Dutch Civil Code but also the BGB and the French Code civil, competed with US-American concepts of economic law based on liberal market philosophy; this process was strongly supported by either EU, national (German/French) or US development agencies. In all cases, these transplants in areas like commercial contracts, secured interests in movables, company law, financial services became part of a "transition package" towards market economies but also led to mismatches in particular between the law in the books and the law in action: the existing legal institutions like courts, lawyers etc. were not immediately able and not easily ready to take over the transplants which were put over their head by some foreign experts (see the self-assessment by Knieper, 2008). The chaotic Russian change-over from socialism to a so-called "market economy" in the nineties is a good - or rather bad - example showing the distortions which can be caused by transplants not adapted to the economic and social environment of the receiving country, despite its consent to a take-over (see the contributions in Bussani, 2009).

3. Legal transplants as "legal irritations"?

These observations lead us to the most controversial topic in the debate on the pros and cons of legal transplants: their embeddedness - or rather disembeddedness – in the culture of the receiving country. Some authors have become prominent on insisting on the impossibility of legal transplants in playing a major role in producing legal change. The French legal sociologist Legrand (1997) has become a well-known author to challenge legal transplants as positive contribution to legal change and reform. For him, law is bound to language and culture which produce indigenous systems of meaning. A mere change of rules or norms does not change culture. If comparative law ignores the significance of cultural diversity and difference, it can only approach the matter in a bookish or technical fashion – a critique in particular voiced against Watson to which we will refer later.

"At best, what can be displaced from one jurisdiction to another is, literally, a meaningless form of words. To claim more is to claim too much. In any meaning-ful sense of the term, 'legal transplants', therefore cannot happen" (at p. 120; italics author).

In the European context, Legrand (1996) has in particular challenged theories of legal convergence between common and civil law as supported by EU institutional drive towards law harmonisation. Common law as being embedded in the special status of English judges and lawyers with their method of precedent cannot be merged with the continental type of law application by judges as state functionaries and lawyers as agents of the judiciary using the method of textual-systematic interpretation of codified law.

"Common lawyers and civilians continue (despite EU law, NR) to take a different view of what it is to have knowledge of the law, and what counts as legal knowledge" (p. 79).

Teubner, a German/English legal sociologist following the teaching of Luhmann, has more or less taken over the critical view of Legrand in his well-known and frequently cited paper on "legal irritants" (1998). He takes as his starting point the concept of "good faith" well familiar to continental but not to common lawyers which had been introduced into EU law by the so-called Unfair Terms in Consumer Contracts Directive 93/13/EEC. English law had to implement this directive and did so by a specific legal instrument, but it remained foreign to the liberal concepts of contracting which is typical to commercial law where each party has to take full responsibility of its dealings in law and does not deserve special protection by a good-faith defence. In my view – and this is meant as a critique - Teubner is not really advancing a legal theory but more or less the traditional English opposition against transplants of continental origin which may be foreign to the legal elite, but which does not consider possible needs for change this time imposed by

EU law. English law over time has been able to accommodate itself with the concept of good-faith, maybe somewhat differently than continental law limited to consumer transactions without extending it to commercial contracts (Reich, 2014, Chapter VII). Case law of a unifying jurisdiction like the European Court of Justice (ECJ) may help to implement this process of change and adaptation which cannot be achieved simply by the law in the books but should not be principally ruled out because of irritant parts which may exist only temporarily.

4. Legal transplants and the process of "acculturation"

In his general report to the Washington conference of 2010, Sanchez-Cardero (2012) develops the concept of "culture" as the deciding element in understanding and studying legal transplants. He writes:

"Legal acculturation shares distinct traits with social acculturation. Within the social acculturation processes, it is possible to identify different variants of legal acculturation, in which the terminology arises as one of the substantive elements of analysis" (p. 6).

He then distinguishes between "imposed" and "spontaneous" acculturation, legal acculturation by integration, legal assimilation, or legal hybridisation. He is critical of mere technocratic and formalistic approaches as advanced in particular by the US-American law and economics/finance movement:

"From this perspective, legal rules, institutions and practices are essentially a form of technology, propagating metaphors such as importation, exportation, invention, adaptation, transfer, imitation, engineering, legal hardware and legal software" (p. 19).

I do not deny the justification of this critique, but it should be addressed to the dominant, not the receiving society. In a process of modernisation, the receiving country may have to use transplants fit for that purpose. This may amount to a mere technological process which should be evaluated on its own merits. This rhetoric does not necessarily lead to a "de-culturalisation" of the law of the receiving country.

In my opinion, the culturalist approach as advanced by Sanchez-Cordero and going back to such prominent authors like Montesquieu (translation 1914 cited at the end of the next presentation) amounts to a fiction rather than to social reality. It may lead to ideological thinking hostile to legal change.

Graziadei correctly points out:

"After Montesquieu..., the idea of an organic connection between law and the particular character of the people gained immense popularity. It became standard fare of European legal thought. Incredibly, this idea won recognition when the world was experiencing waves of legal transplants on an immense scale – without the paradox being noticed" (p. 465)

This critique of the inherent contradiction between the cultural approach opposing transplants and the reality evidencing them as a common phenomenon, can also be turned against Sanchez-Cordero by taking seriously his statement that "legal culture" ... is the "sediment of the historical memory and traditions" (p. 27). What does this revival of the concept of legal culture mean: doesn't it overstate the historical element of law which cannot be denied by looking at such different legal systems like common law, codified law, but seems to put on halt legal reforms going beyond acclaimed traditions? It comes close to the critique against transplants as advanced by Legrand and Teubner. It may be abused by conservative trends against legal change and adaptation by imposing historical limitations..

Even more, such a theory of "legal acculturation" seems to neglect the very fundamental statement of the US-American legal theorist and Supreme Court Justice O.W. Holmes that "the life of the law has not been logic but experience" (cited in Reich, 1966, p.45). This is a critique not only against the reference to codified law, but also to such theories of law as "Volksgeist" in the sense of Savigny, "culture" in an anthropological understanding. "Experience" is a much broader concept which does not exclude cultural elements but does not posit them as central and exclusive. In this context, law is certainly not devoid of traditions but is characterised by an experimental element of learning, change and modification. Legal transplants are part of it.

5. Legal transplants - a modern instrumentalist approach (Watson revisited)

In the second edition of his seminal book on legal transplants, Watson (1993) found that "the transplant of legal rules is socially easy" (p. 95). His instrumentalist view postulated that no inherent link existed between law and the society in which it operates. Law is largely autonomous. He based his theory on the history of the reception of Roman law in medieval Europe and in the later stages of enlightenment and developing market economies, and in the success of the Common law beyond England. There seemed to be no close relationship between culture and law, rejecting contrasting views of Montesquieu, but rather elements of choice and discretion, depending on the receiving jurisdiction. Legal transplants are a more or less common phenomenon in the evolution of law in particular private law, and will be accommodated to the surrounding environment by pragmatic choice and preference. This conjunction of legal borrowing and the need for authority results in legal tradition.

Watson formulates 13 "general reflections" the most important ones which I will cite:

- Transplanting of individual rules or of a large part of a legal system is extremely common.
- Transplanting is, in fact, the most fertile source of development. Most changes in most systems are the result of borrowing.
- Legal rules move easily and accepted into a system without too great difficulty.
- Legal rules are not particularly devised for a particular society in which they now operate and also that this is not a matter for great concern.
- A voluntary reception or transplant almost always involves a change in the law.
- No area of private law can be designated as being extremely resistant to change as a result of foreign influence.

- Reception is possible and still easy when the receiving society is much less advanced materially and culturally.
- Law like technology is very much the fruit of human experience (pp. 95-101).

Obviously Watson has been subject to critique, in particular by legal sociologists like Friedmann and Kahn-Freund (Sanchez-Cordero at p.21). This critique is however subject to the concept of legal culture which I view with scepticism because of its ideological character. I think that Watson gives quite a realistic view of the commonality of legal transplants which makes his theory attractive today, especially for countries in verge of development like Vietnam. This says of course nothing what parts of law should be transplanted, whether transplants will successful or a failure depending on the institutions of the receiving country, how transplants will change and become accommodated in the host jurisdiction (in a similar sense see the paper by Rehm, 2008).

For my own research this statement became important when studying Soviet Civil law and its first "socialist" codification in 1922. I could show that this law which in Soviet doctrine was highlighted as the "first and original source of an autonomous socialist civil law" really had its sources in draft codifications which were undertaken in the prior Tsarist period and which again had been strongly influenced by the German BGB and by the Pandect doctrine (Reich, 1972, pp. 155-156). However, later development of Soviet law tried to deny these transplants from "bourgeois legal theory" and postulate an autonomous characteristic of the Civil Code of 1922 - this was more propaganda than good theory.

Lawyers should therefore be very sceptical towards the theory - I would call it an ideology - of a complete autonomy of law without the need to take recourse to transplants.

6. Legal transplants and constitutional values

The link between legal transplants and constitutional values of the receiving country unfortunately has not found much attention among researchers of comparative law. In my theory, this link is already

established concerning the process of adaption as such: it must be legitimated by the constitutional order of the receiving country or other jurisdiction, eg one created by international law. I exclude the much debated cases of so-called "optional laws" which function under principles party choice and regulatory competition (Basedow 2013 at pp. 97-117); even in such a case the transplant does not receive its legitimacy by an act of party autonomy but by making this reference possible in the transplanted legislation like in CISG.

Siems (2014 at p. 145) list five categories for a successful transplant which should be respected by law-makers:

- A policy which is particularly favourable to the political, cultural or socio-economic conditions of the transplant country
- A particularly favourable mix between old and new law
- An additional purpose that the transplant fulfils in the transplant country
- Legal rules and institutions which are more durable in the transplant than in the origin country
- Ideas about legal reform which have been adopted abroad but not in their countries of origin.

On the other hand, it seems to me that under international and constitutional standards, any transplant regarding civil and in particular contract law should respect the following four substantive general principles which I have developed with particular reference to EU civil law (Reich, 2014) but which can easily be generalised for a jurisdiction like Vietnam which is developing in the direction of a market economy:

- "Framed autonomy", meaning that parties in civil transactions (contracts, secured interests, companies, financial services, conflict of laws) should be granted a wide autonomy of action, but limited by considerations of public policy to be determined by the receiving jurisdiction in its Constitution without abolishing the "essence of autonomy".
- Protection of weaker parties, in particular consumers but also clients of essential services like energy, water, and communication.

- Non-discrimination in civil law relations, in particular with regard to gender and sex, but also concerning race and ethnic origin, disability and sexual orientation, the latter perhaps limited to employment relations.
- The requirement of good faith in civil transactions, mostly with regard to consumer and less in commercial relations.

I have summarised these principles the above mentioned book with the following words (p. 16):

- The principles on "framed autonomy", on protection of the weaker party and on non-discrimination are part of substantive EU law, mainly contract law. They may to some extent contradict and may need to be balanced against each other, notably the concept of autonomy vs. the need to protect the weaker party and to avoid discrimination in contracting. They may serve as a theoretical and constitutional transplant for other jurisdictions.
- The principle of "good faith" may only be an emerging principle. But there are already, in my opinion, elements to it that may one day develop into a more coherent principle, depending on the further development of EU civil law, in particular the case law of the ECJ. This principle could and should to a certain extent also serve as a transplant to other jurisdictions, at least insofar as they are closer to the civil than to the common law tradition. It is particularly important in transition systems where sometimes a "wild capitalism" is evolving like in Russia in the years after the fall of socialism, as I could witness myself.

EUROPEAN COUNTRIES' POLICIES ON LEGAL TRANSPLANTS

Helen Xanthaki[14]

1. A cursory definition of legal transplants

The term "legal transplant" is loosely used to express the process and product of transfer of a policy concept, a legal notion, or a legislative solution from one jurisdiction to another. It is highly popular process of successful law reform both within Europe but also internationally. It carries enormous benefits but must be undertaken with care.

The aim of this presentation is to provide an overview on legal transplants with specific focus on Europe. Europe is a prime model for legal transplants at two levels: cross-jurisdictional (namely from one European country to another) but also vertically (from the EU to its Member States). In view of the diversity of legal systems, legal languages, and legal mentalities and cultures within Europe, the success and volume of legal transplants in Europe constitutes evidence of the utility of legal transplants as a tool of law reform and legislative regulation.

Why do it?

- Studying foreign policies and legislative solutions is highly rewarding intellectually.
- Studying cross-national foreign policy and legislation make us less ethno-centric. It broadens our horizons and make us, potentially, more enlightened.
- Wise is one who learns from the experience of others.

---

14 Professor Dr Helen Xanthaki is Professor of Law and Legislative Drafting and Director of the Sir William Dale Centre for Legislative Studies at the Institute of Advanced Legal Studies, School of Advanced Study, University of London.

- To save cost: instead of making own laws, let's buy ready-made laws from elsewhere
- To generate legitimacy by borrowing laws considered prestigious [modern, well made etc.]
- To enhance cooperation between the lending and borrowing jurisdictions through harmonisation of legislation [this can promote trade].

2. Which legal systems can we compare?

There is a division of belief among comparatists. One belief is that **only convergent or similar** systems can benefit from each others' experience; hence the attempts to enlarge the catchment area of systems covered by the "new ius commune"within the context of a wider Europe. However, many systems in transition look at and are inspired by jurisdictions whose legal systems are different from their own. How can this be explained? Can such diverse models really help? What about the ensuing mismatch between model and recipient?

Watson, the guru of transplants, 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". Sir Basil Markesinis urges jurisdictions to increase intellectual interaction and borrowing. Thus, one **does not need to bother with the debate** between differents and similar: one can borrow anyting from anywhere.

Others support the view that only **differences** teach us lessons: differences enhance our understanding of law in a given society.

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. He talks of periods of **"contractive" comparison** with the emphasis on differences, alternating with periods of what might be called **"integrative" comparison**, i.e., comparison placing the main accents on similarities. Thus Schlesinger contrasts "integrative comparative law" with "contractive or contrastive comparative law". His conclusion is that the future belongs to "integrative comparative law". Within Europe the *"ius commune seekers",* trying to integrate legal systems, are looking at a legal world which includes similars, i.e. the UK and Ireland.

On the other extreme lies Legard who fails to see the utility of legal transplants altogether: since law is made and functions within the legal, cultural and social environment of the jurisdiction of origin, it can never function equally well in a different environment.

Zweigert and Kötz point out that Rudolf Jhering gave the conclusive answer to those who object to the foreignness of importations when he said: "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." So, reduced to the common law/civil law divergence question and claims as to the futility of integration, it must be assumed that **the real questions** cannot be about refusing quinine, but how one takes it. With water? With another juice? In a thimble? A cup? Chewed? Swallowed whole? Thus, the obstacle of *mentalité* must be to the structure of what is accepted and the technique of **how it is accepted**, rather than to the principle of the acceptance of a rule or solution on which, on the whole, there is no room for negotiation, such as in the case of putting into practice an EU directive.

And so one can conclude that legal transplants can be exceptionally beneficial both for the borrower but also for the lender. For the borrower in specific they offer a unique insight in the results produced by the transplant at the country of origin, thus affording the opportunity to fine tune as needed. But the success of transplants really depends on the manner in which they are selected and received by the borrowing legal system. As Kahn-Freund warns, transplants may be successfully injected or they can simply fail. Usefulness and need are central qualifiers in what can be borrowed and if it will be successful. Although Arvind is right in stating that no legal system is entirely a prisoner of its own traditions, successfully "nationalised" transplants can work wonders With a caveat: transplants do not necessarily lead

to a complete erasure of national eccentricities and national identities; **the future lies in "unity in diversity" rather than "unity through uniformity and standardisation".**

3. What type of help do we derive from legal transplants?

For researchers adopting a normative perspective, the study of foreign policies and laws have served as **a tool for developing classifications of legal phenomena** and for establishing whether shared phenomena can be explained by the same causes.

For many lawyers comparisons have provided an **analytical framework** for examining (and explaining) legal differences and specificity.

More recently cross-national comparisons have served increasingly as a **means of gaining a better understanding** of different legal systems, their structures and institutions.

The development of this third approach has coincided with the growth in interdisciplinary and international collaboration and networking in the social sciences, which has been encouraged since the 1970s by a number of European-wide initiatives. The European Commission has established several large-scale programmes, and observatories and networks have been set up to monitor and report on legal, social and economic developments in member states. At the same time, government departments and research funding bodies have shown a growing interest in international comparisons, often as a means of evaluating the solutions adopted for dealing with common problems or to assess the transferability of solutions between member states.

4. What is the process of comparing the foreign and home policies or laws in order to understand it and ultimately transplant it?

The descriptive or survey method, which will usually result in a state of the art review, is generally the first stage in any large-scale international comparative project, such as those carried out by the European observatories and networks. A **juxtaposition approach** is often adopted at this stage: data gathered by individuals or teams, according to agreed criteria, and derived either from existing materials or new empirical work, are presented side by side frequently without being systematically compared. Some large-scale projects are intended to be explanatory from the outset and therefore focus on the degree of variability observed from one national sample to another.

Such projects may draw on several methods: the **inductive method**, starting from loosely defined hypotheses and moving towards their verification; the **deductive method**, applying a general theory to a specific case in order to interpret certain aspects; and the **demonstrative method**, designed to confirm and refine a theory. Rather than each researcher or group of researchers investigating their own national context and then pooling information, a single researcher or single-nation team of researchers using the **"safari" approach** ¬ may formulate the problem and research hypotheses and carry out studies in more than one country, using replication of the experimental design, generally to collect and analyse new data. The method is often adopted when a smaller number of countries is involved and for more qualitative studies, where researchers are looking at a well-defined issue in two or more national contexts and are required to have intimate knowledge of all the countries under study. The approach may combine surveys, secondary analysis of national data, and also personal observation and an interpretation of the findings in relation to their wider social contexts.

5. How do I identify transplantable concepts? Examples of transpants

There are three forms of transplantable concepts: **extensional concepts, functional concepts and immanent concepts.**

The formation of **extensional concepts** is the **listing of common elements** that are present in the policies or laws under study. These common elements are to be found at the intersection of different sets of legal rules, or parts of rules, belonging to different systems. In this view, the national sets of rules could be identified by means of legal terms,

e.g. the German “Wohnungseigentum” and the French “copropriété des immeubles bâtis”. Without choosing any intension for the comparative concept, the extensional concept of “apartment ownership” refers to the common elements at the intersection. The following example will illustrate the formation of extensional concepts. The comparatist may juxtapose the following rules of German “Diebstahl” and of English “theft”, respectively: “Whoever takes moveable property not his own from another with the intention of unlawfully appropriating it to himself shall be punished ...”, and: “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. `The common elements have to be found at the intersection of these rules. The comparatist may decide that “property” and “appropriation” are common elements, intuitively excluding “unlawfully” and “dishonestly”. One may conclude that the German “Diebstahl” and the English “theft” are comparable since extensional concepts result from the listing of common elements.

The formation of **functional concepts** occurs in relation to **social problems** to which legal rules are a solution. In this view, the starting point for comparison is not to be found in law itself but in social problems. For instance, different rules of “full adoption” and of “limited adoption” will be regarded as a means of solving the problems of neglected children. Functional concepts arise from the perspective of social science. This perspective is external to the legal systems under comparison. Correspondingly, the complete abstraction from national concepts must be achieved. Functional concepts are expected to refer to legal rules although functional concepts should be completely independent of legal concepts. Functional concepts are related to factual needs or problems of different societies. In this view, the legal rules of different systems would produce social effects on human behaviour which, in its turn, is expected to meet the needs of societies. Correspondingly, the comparatist has to identify common needs or common problems and has to determine which legal rules are solutions to these common problems. Legal rules considered to be solutions justify the formation of the functional concept. These premises underlying the functional approach lead to the starting point for comparison: the functional concept, e.g. “apartment ownership”, permits the comparison of rules of different legal systems in respect of similar needs or problems such as housing shortage. According to **Zweigert and Kötz**, a **social function is the common perspective** the researcher needs. They state that rules of different legal systems can be compared if they serve the same function. In their view, the legal rules of every society essentially face the same problems. Thus instead of asking, “What formal requirements are there for sales contracts in foreign law?”, they prefer to ask “How does foreign law protect parties from surprise?”. Constantinesco rejects the standpoint held by Zweigert and Kötz. According to Constantinesco, Zweigert and Kötz’s functional concepts are too broad and ill-defined. In order to test the comparability assumption containing the functional concept, the causal relation between legal rules and the resolution of a social problem needs to be established. 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. A further explanation will be given to clarify these additional arguments. The formation of functional concepts occurs in relation to social problems such as housing shortage, to which, for instance, the rules of “apartment ownership” are solutions assuming that the legislator cares about the building of apartments. Consequently, the comparatist has to investigate the societal impact of different sets of rules of “apartment ownership”. Specifically, one has to investigate every desirable or undesirable effect of the legal rules of “apartment ownership”. Such rules may promote the conforming behaviour of investors in one society, but may not have the same positive consequences in a different society because of impediments to the law’s effective functioning. Illustrating one of the most important impediments, some ignorance of the law may intervene between the promulgation of the law and the behaviour of potential investors. The rate of conforming behaviour may vary greatly in the societies under investigation; this circumstance turns the formation of functional concepts into an almost arbitrary decision. Besides, the comparatist is not limited to those rules legally defined as rules of “apartment ownership” since, according to Zweigert and Kötz, the starting point of

comparison should not be found in law itself. If different rules may solve the social problem of housing shortage, the comparatist has to expand his research to functional equivalents such as building regulations. Comparative investigation of the effects of legislative attempts to use law to solve a social problem requires research in various societies. This complex research must show complete conformity to the rules of law in order to establish that different legal systems can be compared since they serve the same function. As intimated earlier, the social consequences of legal rules are difficult to determine. Zweigert and Kötz"s functional concepts have their drawbacks since their functional approach rests upon several simplifying assumptions concerning the relationship between needs or problems of different societies on the one hand, and rules of different legal systems on the other.

The formation of **immanent concepts** occurs as a result of **simplifying national legal concepts.** Immanent concepts are only criteria for the common characteristics shared by the national concepts being compared. An example of an immanent concept is "adoption", a concept which exclusively contains the shared characteristics of "full" and "limited" adoption. Immanent concepts are criteria for common characteristics by abstracting from national characteristics which do not have counterparts in the other legal system under investigation. Specific sanctions connected to violations of legal rules are examples of such national characteristics. It should be pointed out here that immanent concepts are non-functional concepts. The formation of immanent concepts does not require complete abstraction from national concepts. In this view, the starting point for comparison should be found in law itself, not in social problems. Immanent concepts are neither functional concepts nor extensional concepts. As regards the second distinction, the formation of immanent concepts is not the listing of common elements to be found at the intersection of different sets of legal rules. Immanent concepts do not result from common elements but from criteria commonly used by national concepts. The sameness of intension of immanent concepts entails the comparability of legal rules belonging to different systems. Eltzbacher's immanent concepts are purely non-functional concepts without reference to social problems. Eltzbacher does not require the complete abstraction from national concepts. He prefers to look for common characteristics by abstracting from those national characteristics which do not have counterparts in the other legal system under investigation. Preferring this partial abstraction, Eltzbacher bases the formation of immanent concepts on common features within the legal regulation of different legal systems. Preparing an empirical investigation concerning "adoption", the French researcher, for example, has to recognize the distinction between the national concepts "adoption plénière" and "adoption simple" in order to determine the respect in which he wants to compare different legal systems. This distinction must be made since the comparative concept of full adoption does not refer to foreign legal rules corresponding to the French "adoption simple" or limited adoption. Juxtaposing articles 356 and 364 of the French Civil Code may help the comparatist to find the intension for this distinction: "Adoption confers on the child a filiation which substitutes for its original filiation; the adopted child ceases to belong to its family of blood, ..."; and: "An adopted child remains in his family of origin and conserves all its rights therein, ...". The first sentence refers to the effects of full adoption, the second one concerns limited adoption. Different legal effects establish the distinction between full adoption and limited adoption within the French system. These national concepts have different intensions. Choosing the intension of full adoption, the researcher will exclude those forms of adoption which do not terminate all legal ties between the child and his biological family. The two intensions of full and of limited adoption are immanent concepts applicable to foreign rules. Further, the comparability assumption has to be tested since specific effects connected to legal rules could be national characteristics without counterparts in the other legal system under investigation. The absence of legislative definitions makes it difficult to choose an immanent concept in order to determine the respect in which the researcher can compare different legal systems. In a case of absence of these definitions, the formation of immanent concepts depends on the structure of the conceptual systems in which these concepts have been embedded. If these systems show almost the same structures, there is an indication that immanent concepts can be found. However, immanent concepts are of no empirical use if the hierarchies of legal

systems are too divergent conceptually. Comparing the positions of concepts within their respective hierarchies is important to determine the relationship of these concepts but similar positions do not guarantee any conceptual correspondence fixing the comparability of the rules of different legal systems. A common characteristic cannot be found if branches of law do not show sufficient correspondence at higher and lower levels. E.g. “real property” in English law and “biens immeubles” in French law are branches of law missing a common characteristic at a higher, more general, level: while “real property” looks to procedure, “biens immeubles” looks to substance. This fact impedes the comparatist in his search for a shared characteristic at a lower, more specific, level in the conceptual hierarchies of the respective legal systems. A common characteristic cannot be found for the English concept of “chattel mortgage” on the one hand, and the French concept of “hypothèque mobilière” on the other. The researcher is confronted with a gap when looking for a conceptual equivalent since the English “chattel mortgage” and the French “hypothèque mobilière” belong to different branches of law. The lack of a common characteristic at a higher, more general, level makes the structure of the conceptual systems being compared too divergent. This fact implies that immanent concepts are of no empirical use in this case. Exceptionally, the researcher could prefer functional concepts.

6. How can I use foreign transplants?

Transplants are used as case-studies. 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 systems. Thus, using the CSA as a case-study involves examining an institution which due to its originality may be the source of action in other jurisdictions.

There are five types of case-studies: **representative, prototypical, deviant, crucial** and **archetypal**.

Representative are the most common form of case study and they involve the examination of a **typical and standard example of a wider category:** such as the study of the French Court of First Instance. Representative cases are often used to collect information on the level of harmonisation of the national laws of the Member States.

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 ECJ. Prototypical cases are often used as a means o 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. 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. It is rarely used in law, but it may occur when for example a researcher wishes to verify if the theory of the activism of the ECJ is valid even in the notoriously minimalist area of CFSP.

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 (like the Italian and the Greek), it has become archetypal. 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.

And so the researcher needs to identify what type of case study the transplant is. And then draw conclusions on that basis.

7. Problems encountered by researchers of legal transplants

- *Choice of countries:* The shift in orientation towards a more interpretative, culture-bound approach means that **linguistic** and **cultural** factors, together with **differences in research traditions** and **administrative structures** cannot be ignored. If these problems remain unresolved, they are likely to affect the quality of the results of the whole project, since the researcher runs the risk of losing control over the construction and analysis of key variables.

- *Access to data:* Data collection is strongly influenced by national conventions. Their source, the purpose for which they were gathered, the criteria used and the method of collection may vary considerably from one country to another, and the criteria adopted for coding data may change over time. In some areas, national records may be non-existent or may not go back very far. For certain topics, information may be routinely collected in tailor-made surveys in a number of the participating countries, whereas in others it may be more limited because the topic has attracted less attention among policy-makers. Official statistics may be produced in too highly aggregated a form and may not have been collected systematically over time. In many multinational studies, much time and effort is expended on trying to reduce classifications to a common base.

- *Concepts and research parameters:* Despite considerable progress in the development of large-scale harmonised international databases, such as Eurostat, which tend to give the impression that quantitative comparisons are unproblematic, attempts at cross-national comparisons are still too often rendered ineffectual by the lack of a common understanding of central concepts and the societal contexts within which phenomena are located. Agreement is therefore difficult to reach over research parameters and units of comparison. Language can present a major obstacle to effective international collaboration, since it is not simply a medium for conveying concepts, but part of the conceptual system, reflecting institutions, thought processes, values and ideology, and implying that the approach to a topic and interpretations of it will differ according to the language of expression. Although defining a time span may appear to be a simple matter for a longitudinal study, innumerable problems can arise when national datasets are being used. These problems are compounded when comparisons are based on secondary analysis of existing national datasets, since it may not always be possible to apply agreed criteria uniformly.

Although the obstacles to successful cross-national comparisons and legal transplants may be considerable, so are the benefits:

- Comparisons can lead to fresh, exciting insights and a deeper understanding of issues that are of central concern in different countries. They can lead to the identification of gaps in knowledge and may point to possible directions that could be followed and about which the researcher may not previously have been aware. They may also help to sharpen the focus of analysis of the subject under study by suggesting new perspectives.
- Cross-national projects give researchers a means of confronting findings in an attempt to identify and illuminate similarities and differences, not only in the observed characteristics of particular institutions, systems or practices, but also in the search for possible explanations in terms of national likeness and unlikeness. Cross-national comparativists are forced to attempt to adopt a different cultural perspective, to learn to understand the thought processes of another culture and to see it from the native's viewpoint, while also reconsidering their own country from the perspective of a skilled, external observer.

8. To conclude

- Legal transplants is the process and product of borrowing concepts, solutions, and laws from foreign jurisdictions.
- They are very common, especially within Europe but also outside of Europe.
- Jurisdictions may borrow from any country and any legal system,

provided that they share the same need and usefulness: in other words, provided that the two jurisdictions are attempting to address the same social phenomenon and that the solutions reached by a lending system are equally useful in the borrowing system.

- Legal transplants are difficult to research, identify, and transplant.
- But the benefit of borrowing a policy or legislative solution with real evidence of how it has worked in practice is really exceptional.
- As a result, legal transplants are at the forefront of law reform worldwide.
- The EU has immense experience in legal transplants and constitutes an excellent model of successful cross-border and vertical borrowing.

LESSON-DRAWING FROM LEGAL TRANSPLANTS ACTIVITIES IN EUROPE

Helen Xanthaki[1]

Legislative drafters borrow institutions, legal solutions and legislative texts from foreign jurisdictions [national, EU and international] as a means of promoting and developing legislation quickly and effectively. Nonetheless, little attention is paid to established theories of comparative law on the legitimacy of legal transplants and the constraints for drafters' choices. This report 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.

1. When are transplants used in the legislative process?

When drafting legislation, the policy maker and the drafting team utilise 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.[2] Objectives of such an exercise include law harmonisation, law reform, promotion of economic and social change, search for solutions to specific problems in domestic law, bridging differences between legal systems in conflict

1 Professor Dr Helen Xanthaki is Professor of Law and Legislative Drafting and Director of the Sir William Dale Centre for Legislative Studies at the Institute of Advanced Legal Studies, School of Advanced Study, University of London.

2 See J.H.M. van Erp, "The use of comparative law in the legislative process", Netherlands Reports to the 15th International Congress of Comparative Law, Bristol 1998, http://www.library.uu.nl/publarchief/jb/congres/01809180/ n15/b3.pdf , p36.

areas, or the quest for perspectives on domestic law and theoretical norms.[3] In their quest for the best policy choice to counteract congestion in inner cities, drafting teams abroad consider the London Congestion Charge and utilise 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 zones as a policy choice, which in turn may lead to the transplant of the concept and the relevant UK legislation abroad.

2. Which legal systems can be used as sources of legislative transplants?

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 harmonisation of the chosen solutions with international practice.[4] Thus, Western developed countries tend to opt for Miller's entrepreneurial or legitimacy generating transplants.[5] In current developing countries, drafting teams tend to receive with great gratitude legislation offered by foreign donors.[6] In other words they tend to opt either for Miller's cost saving or for Miller's externally dictated transplants.[7] 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.

3 See S. Corcoran, "Comparative Corporate Law Research Methodology" [1996] 3 Canberra Law Review, pp. 54-61, at 56.

4 See J.H.M. van Erp, "The use of comparative law in the legislative process", http://www.library.uu.nl/publarchief/jb/congres/01809180/15/b3.pdf, pp.36-37.

5 See J. M. Miller, "A typology of legal transplants: using sociology, legal history and argentine examples to explain the transplant process" [2003] 51 *American Journal of Comparative Law*, pp.842-885, at 849 and 854.

6 See E. Örücü, Law as transposition" [2000] 52 *International and Comparative Law Quarterly*, pp.205-223, at 219.

7 See J. M. Miller, op.cit., pp.845 and 847.

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[8], 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".[9] Legrand,[10] Kahn Freund[11] and the Seidmans[12] 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.[13] Like is defined as countries in the same evolutionary stage.[14] A larger group of contemporary comparatists support the view that only differences enhance our understanding of law in a given society,[15]

8 For an analysis of the term see E. Öcürü, "Critical Comparative Law: considering paradoxes for legal systems in transition" in [1999] 59 *Nederlandse Vereniging voor Rechtsvergelijking*; also see E. Öcürü, "Law as Transposition" [2002] 51 *ICLQ* 205-223, p.206.

9 See A. Watson, "Legal Transplants and Law Reform" 92 [1976] *LQR* 79, at 80; also see A. Watson, *Legal Transplants: An Approach to Comparative Law (*1974, Scottish Academic Press, Edinburgh); Alan Watson, "Legal transplants and European private law", Ius Commune Lectures on European Private Law, no 2.

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

11 See O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 [1974] *Mod. L. Rev.* 1, at 7.

12 See A. and R. Seidman, *State and Law in the Developing Process: Problem Solving and Institutional Change in the Developing World* (1994, Macmillan Publishers, UK), pp.44-46.

13 See H. Gutteridge, *Comparative Law* (1949, Cambridge University Press, Cambridge), p.73; also see Buckland and McNair, *Roman Law and Common Law* (1936, Cambridge University Press, Cambridge).

14 C. Schmidthoff, "The Science of Comparative Law" [1939] *Cambridge Law Journal* p.94, at 96.

15 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 (1996, Clarendon Press, Oxford), p.16.

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.[16]

Jhering, Zweigert and Kötz[17] view the question of comparability through the relative prism of functionality.[18] "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".[19]

It is the theory of functionality that seems to serve drafting teams in the current period of integrative legal globalisation, although currently the use of social analysis in legislation is minimal.[20] 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 different legal systems. The current era of integrative legal

16 See 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* (1961); also see Schlesinger "Research on the general principles of law recognised by civilised nations" [1957] 51 *Am.J.Int.L.* 734.

17 See Zweigert, K. und H. Kötz, *Einführung in die Rechtsvergleichung*, 3. neubearbeitete Auflage (1996, J.C.B. Mohr, Tübingen).

18 See K. Zweigert and K. Sier, "Jhering's influence on the development of comparative legal method" [1971] 19 *Am.J.Comp.Law* 215-231.

19 See K. Jhering, *Geist des römischen Rechts* (1955, Volume 1), pp.8-9.

20 See J. Brown, A. Kudan and K. McGeeney, "Improving legislation through social analysis: a case study in methodology from the water sector in Uzbekistan" 5 [2005] *Sustainable Development Law and Policy* 49-57, at 49.

globalisation,[21] characterised 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, organised crime, terrorism, 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 where these responses are borrowed from?

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.[22] 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 globalisation and modern legal colonialism.[23]

Far from resolving the drafting team's problems, the qualifier of functionality demands an answer to a rather difficult question: which is 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

21 See L. A. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations" 34 [2000] 3 International Lawyer 1059.

22 See S. Zhuang, "Legal Transplantation in the People's Republic of China: A Response to Alan Watson" [2006] *European Journal of Law Reform*, pp. 215-236, at 223.

23 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* (1996, Routledge, London and New York), p.132.

solutions,[24] 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.[25] 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.[26]

3. How are transplantable legislative solutions identified?

During the legislative process drafting teams can transplant policy options, concepts or legal texts. 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 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 utilised 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 utilise in order to conduct meaningful comparative analysis.

4. How can I borrow definitions or concepts?

Definitions or concepts are borrowed by means of a juxtaposition between the foreign legal order and the own one. This identifies what the elements of the foreign legal concept are, and how they can be received.

One way, via an extensional concept, is the listing of common elements which may be present in several legal systems.[27] Take the 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 ...".[28] "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 refer to the same offence: a transplant may not be necessary as the same concept exists in both jurisdictions. But fine tuning of the national legislation may be required for the purposes ting the uncommon elements.

24 D. E.Elliott, "Getting better instructions for legislative drafting", Just Language Conference, 21 October 1992, Victoria, British Columbia, http://www.davidelliott.ca/papers/getting.htm#8.

25 G. Bowmann, "Legislation and Explanation" [2000] Loophole, www.opc.gov.au/calc/docs/calc-june/audience.htm.

26 For an analysis of causality in sociological research see C. Ragin and D. Zaret, "Theory and method in comparative research: two strategies" 61 [1983] *Social Forces* 731-754.

27 See C. Van Laer, "The applicability of comparative concepts" 2 [1998] EJCL, http://www.ejcl.org/22/art22-1.html.

28 "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.

Another manner of assessing a transplant is via the identification of the social problems to which legal rules are a solution.[29] 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 regards a social function as the common perspective the researcher needs.[30] 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.[31] Within the realm of interpretative[32] 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,

29 See C.J.P. van Laer, "Comparative Concepts and connective integration", Fifth Benelux-Scandinavian Conference on Legal Theory: European Legal Integration and Analytical Legal Theory, Maastricht, 28-29.10.2002.

30 See K. Zweigert and H. Kötz, Einführung in die Rechtsvergleichung (1996, J.C.B. Mohr, Tübingen), p. 11.

31 See Drobnig, "Rechtsvergleichung und Rechtssoziologie" *RabelsZ* [1953] 295-308.

32 See O. Pfersmann, "Le droit comparé comme interpretation et comme théorie du droit" [2001] Rev. int. dr.
comp., pp. 275-288; also see A. Peters and H. Schwenke, "Comparative Law beyond Post-Modernism" [2000] 49
ICLQ 800, at 833.

Greek drafting teams turned immediately to EU and UN instruments as a means of seeking inspiration for common solutions put forward. There is little doubt that functional concepts present advantages.[33] First, they look at the route of the regulation issue by addressing the problem that lies at the source of the request for national legislation. Second, 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. Third, they promote ideal legislative processes by ensuring that drafting instructions identify the social problem to be addressed and 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's 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. 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 needs.

5. Transplants as case studies

The success of the transplant also relates to their classification and consequent correct use as representative, prototypical, deviant,

33 See J. Reitz, "How to do Comparative Law" [1998] 46 Am. J. Comp. L. 620-623, at 617; M. Reimann, "The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century" [2003] 50 Am. J. Comp. L. 671; M. Ancel, "Le problème de la comparabilité et la méthode fonctionnelle en droit comparé" in R. H. Graveson et I. Zajtay (eds.), Festschrift für Imre Zajtay (1982, Mohr, Switzerland), at pp.1-6; H. Collins, "Methods and Aims of Comparative Contract Law" [1989] 11 OJLS 396, at 399; H. Kötz, "Comparative Law in Germany Today" [1999] 51 Rev. int. dr. comp. 753, at 755; P. G. Monateri, "Critique et différence: Le droit comparé en Italie" [1999] 51 Rev. int dr. comp. 989, at 991.

crucial or archetypal case studies. **Representative** foreign solutions are examples of prevalent trends internationally and can be used for the purposes of harmonising the law with that of most foreign jurisdictions: this promotes cooperation, and trade. **Prototypical** foreign solutions are expected to become representative and are useful when the borrowing legal system needs to legislate right now for the purposes of regulating not only now but in the near future when international laws are about to change. **Deviant** foreign solutions are excellent if a national eccentricity prevents the adoption of a representative foreign solution, but also as an example of innovation elsewhere. **Archetypal** foreign solutions offer the opportunity to adopt the future's leading solution but they carry dangers of false calculations: for example deciding what type of telephony must be introduced carries the danger of being proven wrong by future events.

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 a 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.[34] Representative case studies are the most common forms used and they may lead to

34 See B. Flyvbjerg, "Five Misunderstandings About Case-Study Research" in C. Seale, G. Gobo, J. F. Gubrium and D. Silverman (eds.), *Qualitative Research Practice* (2004, Sage, London and Thousand Oaks, CA.), 420-434.

legitimate conclusions on solutions offered[35] 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 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,[36] 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 tram 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 extreme ideas about possible fresh solutions. Moreover, deviant case-studies offer welcome confidence to the initial conclusions.[37]

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

35 See B. G. Peters, *Comparative Politics: Theories and Methods* (1998, New York University Press).

36 See R. Rose, "Comparing Forms of Comparative Analysis" [1991] 39 *Political Studies*, pp.446-462, at 49.

37 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* (1994, Blackwell, London), pp. 213-38, at 214.

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.

6. Conclusions

The current trend of legal globalisation 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 to 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, neighbouring and further afar. The criterion of comparability now is that of functionality.

Transplant concepts 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. Immanent concepts are best suited when the transplant stems from a similar legal system.

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.[38] 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.

38 See G. Sartori, "Comparing and Miscomparing" [1991] 3 *Journal of Theoretical Politics*, pp. 243-257, at 243.

PRACTICES ON LEGAL TRANSPLANTATION IN SOME ASIAN COUNTRIES: PHENOMENON, ARISING ISSUES, DIFFICULTIES AND TREND FOR DELOPMENT

Norbert Reich

This presentation is devoted to Asian countries. This is particularly difficult for me. I'm neither an expert on Asia or rather the many very different countries of the Asian continent, nor on the many languages - unless English, German or French are used, nor on the rather dramatic political, social and economic changes which happened in this region. So I had to restrict my topic territorially, with regard to subject matters and time.

The development of Japan is close to me and to Germany because of many legal-scientific and personal contacts to which I will turn later. The next candidate is India where I had the chance to do an intense study on the state of consumer law and practice (Reich, 2014a). Finally, China has been close to me due to a number of visits and other contacts. The areas of law which I'm mostly concerned with are, of course general civil law like contracts and torts, but also such specific topics like trade practices regulation (advertising, marketing practices, not anti-trust law) and product liability – both areas very important for emerging market economies where especially the law of the EU has played a remarkable role and serviced in many of the jurisdictions mentioned here as a model for legal transplants. But I cannot go into details due to time and space restrictions.

Legal transplants in the jurisdictions mentioned are a rather common phenomenon and they confirm more or less what I said in the previous presentation quoting Watson: law moves quite easily from jurisdiction to jurisdiction, and with the exception of such traditional areas like family law the receiving country has available a number of choices which may fit more or less to its legal-policy objectives, especially modernisation of its law or/and its adaptation to the requirements of modern market economies. This of course does not exclude tensions, mismatches, "reform of reform"-needs etc. Law has always been a learning process, and the Asian countries which I could study are no exception. There is never a "best and ideal" solution, but always an element of experimentation, of trial and error, or adaptation, re-adaptation, de-adaptation. To quote again the US-American Supreme Court Justice Oliver Holmes: *the life of law had not been logic – it has been experience*. More recently the expertise of prominent lawyers and law professors from foreign countries – mostly Europe and the US – had been deliberately used in the process of modernising and drafting new legislation in civil law matters, not so much by "legal transplantation", but by merging the experiences in modern jurisdictions with the ongoing reform work in the home legislation. China is a particularly good example for that "hybridisation" of legal transplants.

1. Japan: The implant of the German Civil Code and its later "Japanisation"

The well-known Japanese civil law professor and member of the actual reform commission of the Japanese Civil Code, Prof. Yamamoto (2013) has evaluated the development in his country with regard to legal transplants in a paper presented at the German comparative law meeting of 2013:

"It is well known that a reception of Western law took place in Japan in the 19th and 20th century but that nevertheless a communitarian "indigenous law" remained effective in Japanese society as "living law". However, it is controversial how this "indigenous law" of Japan is to be understood, and indeed whether it is to be regarded as pre-modern law or – with regard to the theories of evolution and culture – as natural law, or whether it is to be explained as result of differences in institutional conditions or rather has universal meaning as "living law".

As a result, it can be said that the reception of Western law has been successful in Japan because this "living law" worked effectively, the received law included certain mechanisms with which the "living law" could be absorbed, and finally because various forms of soft law are applied. In the 1990s and the first years of the new millennium Japan experienced a profound economic crisis so that a series of neoliberal reforms have been carried out. Since the previously existing protected spaces of the "living law" were destroyed, the task now is to create a legal system again in which it is possible for the "living law" to coexist".

It is also known that, after the *Meiji* government came to power after the fall of the *Tokugawa-Shogunat* in 1868, an intense reform and modernisation process occurred in Japan, based on transplants from Western civil law. At first the French Code civil – then the most modern legislation in the world – served as a model. Prof. Gustave Emile Boissonade was invited in 1873 to create a modern civil law, restricted to economic related matters. Boissonade referred not only to French law but also to civil legislation of other countries and ideas of his own. His draft civil law was finished in 1890; it is called "the old civil law" (*kyû-minpô*).

This draft which was supposed to enter into force in 1893 was subject to heavy critique based on political and ideological reasons. Heavy differences existed between the French and the Common Law school, as well as between adherents of the historical and the natural law schools. As a result of these conflicts, the draft had to be withdrawn - it did not enter into force.

In 1893 a new Commission was established to draft a Civil law. The old draft was taken as a basis, but the recent draft of the German BGB was widely used. The Pandect system with five books – general part, property law, law of obligations, family law, law of succession – was taken over. 1896 the first three books were published, in 1898 the last two ones. All parts of the Civil Code entered into force in 1898 (two years before the BGB entered into force on 1 Jan. 1900).

There is a debate in Japanese legal theory how far the ZGB of 1898 is a simple transplant of the BGB. According to Yamamoto this is not the case because many provisions from French law were taken over. Others came from different legal orders, not necessarily German law. The Japanese Civil Code must be regarded as result of a mixed reception, whereby French and German law take a central position. After the publication of the Civil Code the majority of Japanese authors insisted on interpreting it according to its alleged German sources; the original mixed transplant was modified by a pure German theoretical interpretation. The relationship to its original sources was lost, as Yamamoto (2013a) explained with regard to the law of breach of contract. Only later Japanese scholars and judges developed an interest for local law. Interest focused also on the specifics of Japanese "living law" ("lebendes Recht" in the sense of legal sociology) which was said to be much less formal and "legalised" than the European or US-American examples (Baum/Bälz 2011 at p. 18 et seq.).

In the meantime legal litigation and "lawyering" has gained more importance in Japan, which is probably a result of the export orientation of its economy and the need to adapt legal practice to modern international transactions, notably with the US and the EU. A number of reforms were enacted; a total new civil codification is planned was has not yet been achieved because of contrasting views in Japanese society.

Under the impact of the international consumer movement, a Consumer Contract Law was enacted on 12 May 20000. It is – loosely following EU precedents – concerned with a right to cancellation of contracts after having been concluded on grounds of dissimulation, and the invalidity of certain pre-formulated clauses, particularly exemption clauses. It is at the moment in a process of change, in order to improve the legal position of the consumer by giving him/her a general right of withdrawal in certain types of transactions, and to tighten the provisions on unfair contract terms by putting them into a so-called "black list", thus following the German model.

It is a controversial question in Japanese law not yet decided by the legislator on whether to integrate consumer contract law into a reformed Civil Code like in the German BGB reform of 2002, or to separate its provisions into a special "Code de la consummation" like the French model.

2. India - mismatches between common law and transplants in consumer law

Indian law fits in our discussion of legal transplants only with great difficulty. The British colonial offices never tried to impose common law provisions upon the many indigenous jurisdictions in India, nor did they propose any type of codification like in the continental law tradition. They simply set up a review system of law in India, ending at the Privy Council which was bound by the general concept of *"justice, equity and good conscience*". In 1947 the British Parliament passed the Indian Independence Act by which India was declared to be a separate and independent Dominion. This however did not mean that common laws lost immediately its relevance in areas previously covered by it like commercial transactions. Quite to the contrary, Indian judges continually make references to English case law either to interpret the Indian statues, or as a residuary source of law wherever need has been felt to decide a case according to *"justice, equity and good conscience"* as the main reference point. But there is a judicial tendency to strike a new line with this approach. There have been quite a few cases where the Supreme Court of India has dissented from the English approach and from time to time Indian courts also refer to cases from other jurisdictions (Cyril Mathias Vincent 2012 at pp. 465-466).

This approach is not based on a theory of "legal transplant", but rather on the integration of seemingly "foreign" (i.e. English) law into the local legal culture, at least in certain areas relating to commercial transactions: It was felt however that this approach didn't fit at all with the growing relevance of the consumer movement supported by international agreements and programmes. Reform was necessary here by reconsidering the state of the existing law under legal-policy objectives and by developing new substantive and procedural mechanisms for effectively protecting (Indian) consumers beyond

the state of existing common law under the "justice, equity and good conscience" doctrine.

The Indian Consumer Protection Act of 1986 (in the following: CPA) therefore must be seen as an expression of the growing importance of the consumer protection movement worldwide at the time of its adoption. According to a remark by Nayak (1987 at p. 423) written shortly after the adoption of the CPA, "(i)n India, consumerism is yet to become a people's movement… The Act is a positive step towards achieving this."

The most important document of the time to take reference from had been the UN Guidelines for Consumer Protection which found a sympathetic assessment in a paper by the Australian law professor David Harland (1987). The Guidelines – which had no binding legal force and were addressed to UN members – contained seven areas for further action. In the context of this study, two sets of Guidelines are of interest:

- *Promotion and protection of consumers' economic interests (paras 13-23): promotional marketing and sales practices should be guided by the principles of "fair treatment of consumers"; misleading marketing practices should be banned, information for consumers improved (Harland at pp. 253-254).*
- *Measures enabling consumers to obtain redress (paras 28-30): this stresses the importance of access to law, implying that access to the normal courts is not a realistic option for most consumers. "Accordingly, Governments should establish or maintain legal and/or administrative measures to enable consumers or, where appropriate relevant organisations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive, and accessible (Harland at p. 256)."*

The main focus of the CPA was the establishment of a parallel system of resolving consumer complaints outside the regular court system. This is quite a radical move but follows clearly the "philosophy" of the UN Guidelines. It is also the result of a widespread critique of the functioning of the judicial system in India which was said to deny access to law to "normal", in particular poor consumers. Incremental reforms like undertaken in many other common law jurisdictions were regarded as insufficient. The CPA therefore established a completely new quasi-judicial system, consisting of three tiers, namely

- District Consumer Redressal Fora
- 35 State Commissions
- One National Commission.

The CPA of 1986 with its reform of 2002 also brought a new substantive concept into contract and trade practice law taken over from the US Federal Trade Commission (Reich 2002), namely that of an Unfair Trade Practice (UTP). This concept was not only used for preventive justice against deceptive advertising or other unfair selling methods on the market, but also as a remedy for consumer compensation beyond the existing common law and equitable remedies. Under Sec. 12 (1) CPA compensation is possible before a District Forum in relation to "any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided…" This definition does however not cover the pre-contractual phase of an UTP. The concept of consumer under Sec. 2 (d) CPA means any person who

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised , or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale

(ii) (hire-purchase)

The problem of this definition of a UTP which has been taken over from comparative law, in particular US and EU models and has been studied in a different context (Reich, 2014a), shows the misunderstandings inherent in the policy of legal transplants itself. It was originally developed to regulate trade practices on the market in order to combat them *before* they reach the individual consumer. In the context of the CPA, they are used for an individual remedy to compensate the consumer *after* having been injured by unfair contracting. They are meant to substitute the traditional common law remedies which are

regarded to be insufficient for consumer transactions, but do so at the price of lacking clarity which results in a surprising discretion of proceedings before the bodies hearing a consumer case. This again provokes intolerably lengthy proceedings, as had been shown in many studies criticising the approach of the CPA. Transplants of substantive character – the concept of UTP as basis for a consumer remedy - therefore must match with the procedural enforcement mechanism – the newly created consumer redressal system - which does not seem to be the case in India. This author has made a number of proposal for improvement (Reich 2014a, pp. 669-672) which however cannot be discussed in the context of this study.

3. China - the ambivalence of legal transplants

The process of economic modernisation of the People's Republic of China (PRCh) is better known to the participants of this seminar than to me, and therefore I need not comment on it. What about the legal system or, more specifically, "Chinese Civil Law" where we have a comprehensive volume of studies by mostly Chinese authors (Bu 2013; Chen 2008)? Legal transplants are a common phenomenon and have been part of a modernisation strategy of China, at least in areas which relate to economic relations like contracts and torts. Other areas like property of land are still characterised by a dominance of socialist or post-socialist conceptions which are not part of this study. But the concept of "transplant" has changed, as we will develop later.

Unlike other civil law jurisdictions, the PRCh has not yet enacted a comprehensive modern civil code despite many attempts in this direction (see the detailed analysis by J. Chen, 2008, pp. 331-340). There had been several projects on drafting such a code already in socialist times of the planned economy, but they resulted only in "General Principles of Civil Law" (GPCL) enacted on 12 April 1986 showing already some signs of liberalisation. In 2002, a draft civil code was prepared consisting of nine parts, namely

- General provisions.
- Law of real rights.
- Law of contract.
- Law of personality rights.
- Law of marriage.
- Law of adoption.
- Law of succession.
- Law of tort liability.
- Private international law.

However, instead of adopting a comprehensive Civil Code, the Chinese legislator decided to enact special legislation namely on:

- Contract law (CL) of 15 March 1999, effective from 1 October 1999.
- Real rights law of 16 March 2007/1 October 2007.
- Security law of 30 June 1995/1 October 1995.
- Law on Tort liability of 26 December 2009/1 July 2010.
- Succession law of 4 October 1985/1 October 1985.
- Marriage law of 10 September/1 January 1981.
- Adoption law of 29 December 1991/1 April 1992.

In the context of our study on legal transplants, we are only interested in contract and tort legislation. The general principles of freedom of contract, equality of civil rights, and good faith can already be found in Art. 3 and 4 of the GPCL, however more indirectly and not as overarching general principles. A modern contract law had to be set up after the old socialist type of contract law legislation of 1985-1987 enacted in the context of a planned economy and following the Soviet model (Reich, 1972) lost its relevance during the reform process. The Chinese legislature decided in the beginning of the nineties to adopt a coherent contract law. The Commission for legal affairs of the SCNPC (Standing Committee of the National People's Congress) began to prepare a uniform contract act in October 1993. Legal scholars and experts from prominent law school were invited to participate in the legislation work program in order to formulate an advisory draft of the

contract law. This draft would constitute the basis for the final version of the contract law passed. In 1998 the draft was presented to the SCNPC and published for public comments. An intense public debate resulted, including many proposals for change which were more or less introduced into the final text of the CL adopted on 15 March 1999. It replaced the original 3 contract laws of 1985-1987. Dr. Chen (2008, p.458), Professor of Chinese law at La Trobe University/Australia comments this law as follows:

"There is no doubt that the making of the 1999 Contract Law is a far-teaching effort to wrestle with China's rapidly developing 'socialist market economy', as well as to ensure that China's approach to contracts corresponds more closely to international norms. It is not simply an attempt to reorganise China's range of contract legislation, but a systematic redesigning of the form and context of the whole body of Chinese contract law...It also seems to be a sound decision to model uniform contract law on the UNIDROIT Principles of International Commercial Contracts ...It is however difficult to understand the reluctance of the Chinese law-makers to explicitly provide the principle of freedom of contract. This reluctance is particularly at odds with the frequent assertion that a market economy is fundamentally based on freedom of contract and economic equality."

Dr. Funing Huang (2013, p. 34), Member of the Chinese Banking Regulatory Commission, comments the new CL with the following somewhat more optimistic words:

"...the process of drafting several versions of the CL caused heated debates. ..The CL abolishes the differential treatment not only between civil and commercial contracts, but also between domestic and foreign contracts. ... The CL also eliminates differences between previous contract laws and sets out coherent rules, including the concept of a contract, the formal requirements of a contract, the performance of a contract, and the liability rule for a breach of a contract. Managing the balance between contractual freedom and government intervention was another issue. With the purpose of bolstering a market-oriented economy, the CL reaffirms and strengthens the principle of freedom of contract. The CL insists that contract parties enjoy equal legal standing in which neither party may impose its will on the other party. ..According to the CL, contracting parties have the right to enter into a contract, to select the contracting party, to determine the content of a contract, and to amend or terminate a contract. The CL removes the provisions about contract administration and no longer authorizes government agencies to promulgate rules of implementation. The CL also narrows the scope of invalid contracts....The question was raised as how to make the rules of contract law more practical and scientific...(Finally), the CL adopted a number of legal concepts and doctrines from foreign legal systems or international conventions, including pre-contractual liabilities, incidental obligations, rules on the transfer of ownership, and risk of goods, in order to modernise contract law in China."

The process of adoption of a new Law on Tort Liability (LTL) took much longer and ended only on 26 December 2009 with its adoption by the SCNPC. A first draft was presented in 2002 as part of the then planned comprehensive civil law codification but had to be dropped due to the failure of the codification project. Deliberations were postponed to await the adoption of the real property law in 2007. A new official draft was finalised in December 2008 und published in 2009 to solicit public opinions. A German colleague of my Bremen law faculty, Prof. Brüggemeier, presented a draft which was considered but not adhered to by the legislator (Brüggemeier and Yan, 2009). The text of the new law is printed in Brüggemeier (2011, pp. 167-181). Art. 1 sets out the objectives of the new Act:

In order to protect the legitimate rights and interests of civil subjects, clarify tort liability, prevent and punish tortious conduct and promote social harmony and stability, this Law is formulated.

Brüggemeier characterised the LTL with the following words (pp. 195-196):

"The LTL shows that it remains free of doctrinal matters of controversy. These are left to the academics not the legislature...The constructive logic of the European models of reform of liability law ... are purposely not followed. The terminology ('delict/tort') also occasionally gives rise to criticism. The Chinese legislature wanted first and foremost to provide pragmatic solutions for the pressing problems of today's socialist (?NR) market society in the PRC. For all the openness to

modern European legal developments, first of all it considered whether existing Chinese law was a good fit, particularly the GPCL and the related Guidances of the Highest People's Court. The resulting rules have both their good and their bad points. The detailed provisions on product liability and the innovative regulation of medical liability are to be commended... Environmental liability remains rudimentary in this Act. The law of damages is incomplete. Limitation periods for liability claims are absent..."

It is still an open question among Chinese legal scholars whether the new wave of civil legislation follows more or less the German model (see Bu, 2012, pp.7-11) or whether it must be called a mixture between civil and common law traditions (Shijian Mo, 2012, pp. 214-219) . I tend to follow the second author who talks of a "convergence of civil law and common law since 1978" – quite in contrast to the theory of Legrand (1996) mentioned above. The civil law – especially German law – tradition persists due to historical reasons but seems to have lost influence. The insistence on codification in China – even though in the end not successful – is owed to the civil law tradition. The same is true with the use of many concepts from civil law. On the other hand, many common law principles can be found in Chinese law, eg on contract law, consumer protection, and product liability. But in the end, "China is largely a Civil law country" (Shijian Mo at p. 219).

4. Conclusion: from transplants to critical and pragmatic use of comparative law - Montesquieu revisited

What is the result of this short and to some extent rather superficial overview of three great and complex jurisdictions with regard to their modernisation of civil law, namely Japan, India and China? The most obvious result is the great difference in their approach to law reform. While Japan is about to adapt its original transplant of the 19th century legislation to modern requirements which therefore loses its original character as a "transplant" *strictu sensu*, India and China have gone completely different ways. India has substituted the original common law approach to contracting under the doctrine of *"justice, equity and good conscience"* by a new parallel system of substantive remedies and procedures for consumers; however, this leads to a mismatch between the transplanted concept (the UTP) and its inability to attain speedy consumer justice. China finally had to completely rebuild its civil law system which it did not by following the continental codification tradition but by creating a number of legislative acts attached to the problem to be regulated in a transition society and legal system. This approach combines the results of comparative law studies with the specific needs of the country in a given time and economic-political situation. It is too early to judge on the results of this change.

The study of the three countries undertaken in this context clearly shows that the ideas of Watson and his followers as well as his critiques have to some extent lost their significance. The simple take-over of a body of laws or even only some legal concepts by the receiving jurisdiction has been overcome by a more complex, less straightforward process of adaptation, information, implementation and merger of different national and foreign law "bits and pieces". A certain *"hybridisation" of law reform and legal change* is the result. Its outcome, not its origin is decisive.

Maybe, in the end Montesquieu (1914) wasn't so wrong in his analysis of 1748:

"The political and civil laws of each nation should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit each other. They should be in relation to the nature and principle of each government, whether they form it, as may be said of public laws; or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives...they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclination, riches, numbers, commerce, manner and customs. As the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law".

SELECTED BIBLIOGRAPHY

Adams, M. & Heirbaut, D. (eds.) (2014): The Method and Culture of Comparative Law – Essays in Honour of M. v. Hoecke.

Basedow, J. (2013): The Law of Open Societies – Private Ordering and Public Regulation of International Relations – General Course on Private International Law of the Hague Academy of Int. Law, Vol. 360.

Baum/Bälz (Hrsg. 2011): Handbuch Japanisches Handels- und Wirtschaftsrecht.

Berkowitz, D.; Pistor, K. & Richard, J.-Fr. (2003): The Transplant Effect, 51 AmJCompLaw 163.

Brüggemeier, G. (2011): Modernising Civil Liability Law in Europe, China, Brazil and Russia.

Brüggemeier, G. & Yan, Z. (2009): Entwurf für ein chinesisches Haftungsgesetz

Bu, Y. (ed. 2012): Deutsche und europäische Elemente des chinesischen Rechts.

Bu, Y. (2012): Einführung in das chinesische Recht.

Bu, Y. (ed. 2013): Chinese Civil Law.

Bussani, M. & Werro. Fr. (eds. 2009): European Private Law – A Handbook.

Chen, J. (2008): Chinese Law – Context and Transformation.

Chen, Z. (ed. 2009): Contemporary Chinese Law.

Cyrill Mathias Vincent, J. (2012): Legal Culture and Legal Transplants – the evolution of the Indian legal system, in: Sanchez-Cordero (2012), 401-478.

Dezelay, Y. & Garth, B. (2002): The Internationalisation of Palace Wars. Lawyers, Economists, and the Contest to Transform Latin America.

Fedke, J. (2012): Legal Transplants, in: Smits (2012), pp. 550-554

Ginsburg, T. & al. (2014): Classics in Comparative Law, Vol. I: Methodology.

Graziadei, M (2008): Comparative Law as the Study of Transplants and Receptions, in: Reimann, M. & Zimmermann, R. (eds.), The Oxford Handbook of Comparative Law, 441-475

Harland, D. (1987): the UN Guidelines for Consumer Protection, JCP 1987, 245-266

Henning-Bodewig, F. (ed. 2013): International Handbook of Unfair Competition Law.

Kahn-Freund, O. (1974): On Use and Misuse of Comparative Law, 37 Modern Law Review 1. Also in: Ginsburg (2014), pp. 55-81.

Kaneko, Y. (2012): Accompanying Legal Transformation: Japanese Involvement in Legal and Judicial Reforms in Asia, in: Int. Congress (2010), 563.

Kitagawa, Z. (1970): Rezeption und Fortbildung des Europäischen Rechts in Japan.

Legrand, P. (1997): The Impossibility of Legal Transplants, 4 Maastricht Journal of European and Comparative Law, 111. Also published in: Ginsburg (2014) pp. 121-134.

Legrand, P. (1996): European Legal Systems are not Converging, 45 Int. & Comp.LQu. 52-81. Also published in: Ginsburg (2014) pp. 312-344

Montesquieu, B. De (1914): De l'esprit des lois - The spirit of laws - 1748, Translated by Th. Nugent, J. V. Richard (eds.)

Nayak, R.K. (1987): Consumer Protection Act 1986: Law and Policy in India, JCP 1987, 417

Neelken, D. & Feest, J. (eds. 2001): Adapting Legal Culture.

Reich, N. (2014): General Principles of EU Civil Law, 2014.

Reich, N. (2014a): Reflections on Hans Micklitz' Plea of a Movable System' (of Consumer Law) – Anything to Learn from the Experiences of Indian Consumer Law, in: Purnhagen/Rott (eds.), Varieties of European Economic Law and Regulation, Liber amicorum Hans Micklitz, 2014, 651-674.

Reich, N. (2013): ‚Reflexive Contract Governance' – David Trubek's Contribution to a More Focused Approach to EU Contract Legislation, in: de Burca et al (eds.), Global Governance in a Critical Perspective - Liber amicorum David Trubek, Hart 2013, 273-294.

Reich, N. (2002): The US-American Federal Trade Commission (FTC) – A Model for Effective Consumer Protection in a Unifying European market? In: H.-W. Micklitz/Jürgen Keßler (eds.), Marketing Practices Regulation and Consumer Protection in the EC Member States and the US, 2002, 417-444.

Reich, N. (1972): Sozialismus und Zivilrecht.

Reich, N. (1966): Sociological Jurisprudence and Legal Realism im Rechtsdenken Amerikas.

Sacco, R. (1992): La circulation des modèles juridiques, in : Rapport généraux au XIII Congrès International du droit comparé 1990, 1

Sanchez-Cordero, J. (ed. 2012). The Process of Legal Acculturation – A Mexican Perspective, in : Legal Culture and Legal Transplants – International Congress of Comparative Law, Washington/DC 2010, 1-59.

Shijian Mo, J. (2012): Legal Culture and Legal Transplants – Convergence of Civil Law and Coimmon Law Traditions of Chinese Privat Law, in: Sanchez-Cordero, 205-221.

Siems, M. (2014): The Curious Case of Overfitting Legal Transplants, in: Adams & Heirbaut (2014), 133-146.

Singh, A (2005): Law of Consumer Protection in India.

Smits, J. (2012): Elgar Encyclopedia of Comparative Law, 2nd ed.

Teubner, G. (1998): Legal Irritants – Good Faith in British Law, or: How Unifying Law Ends Up in New Divergencies, 61 Modern Law Review, 11

Trubek, D. & Santos, A. (eds. 2006): The New Law and Economic Development. A Critical Appraisal.

Trubek, D. (2004): Law and Development, in: Int. Encyclopedia of the Social and Behavioural Sciences, 8443

Watson, A. (1993); Legal Transplants – An Approach to Comparative Law, 2nd ed.

Xanthaki, H. (2008), Legal Transplants in Legislation: Defusing the Trap, 57 Int.Comp.LQ 659.

v. Mehren, A. (1963): Law in Japan – The Legal Order in a Changing Society.

Yamamoto, K. (2013): Rechtswissenschaft und Rechtsvergleichung – Die Erfahrungen der Rechtswissenschaft und Rechtspraxis in Japan, in: Grundmann, St. (ed. 2015): Tagung für Rechtsvergleichung in Marburg 2013.

Yamamoto, K. (2013a): Die Entwicklung des Leistungsstörungsrechts seit 1900 – die japanischen Erfahrungen, Zeitschrift für japanisches Recht – Sonderheft 7.

A BRIEF COMMENT ON THE POSSIBILITY AND THE DIFFICULTIES OF TRANSPLANTATION OF LEGAL CULTURE

HIGUCHI Yoichi

Before discussing our subject "Transplantation of law", it would be appropriate, even necessary, to clarify one thing. The law contains two aspects: technological element, more specifically as a tool to operate a society in a rational way and cultural elements, namely idea according to which each society should continue its path to the happiness of the people all together.

Therefore, it is necessary to control this technological element of law for which we Japanese are happy to be going to continue to cooperate with you in your ambitious reform of institutions.

Meanwhile, legal culture poses a problem, since it turns to something universal on one hand, and we must reconcile this universality with the identity of each culture, in other hand. Thus it imposes a series of inter-cultural dialogue, and that's what I want to start today.

1. Brief outline of the development of legal culture, especially the Occidental Origin through the World

FOUR EIGHTY-NINE

In democracy, the right is no longer a mandatory unilaterally imposed from the above. The right consists either standards legislated by an elected assembly that gives legal status to various subordinate rules or contracts between individuals and approbated by the judge.

This whole system of law in a State must be ordered by a fundamental law, that means a constitution. It is in this sense, we can imagine that the Constitution is on the top of pyramid.

This is why I speak today constitutional culture essentially.

What is the "constitutional culture"? I give here an answer that is seemingly mundane but effective enough: this is the definition of "constitution" made in Article 16 of the Declaration of Human and of Civic Rights of 1789 that is saying: "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no *Constitution*."

How this constitutional culture was spread? Allow me to answer this question by referring to the formula of "four Eighty-nine" that outlines a series of "transplants" of the constitutional idea.

What is it?

Firstly, in 1789 the famous Declaration formulated the principle using the excellence of modern constitutional culture: the unified and indivisible nation with sovereignty, on the one hand, and the individual released from all feudal constraints, as the bearer of human rights, on the other hand.

Just a century before, namely in 1689, the English Bill of Rights inaugurated the modern constitutional history, while invoking, unlike 1789, the medieval tradition of constitutionalism dating back to the Magna Carta of 1215.

Then comes the third eighty-nine. In 1889, a country having the culture of extra-Western origin adopts a Constitution as a tool for its modernization. It is the Japanese Imperial Constitution, promulgated in 1889 and implemented in 1890.

Finally 1989. The destruction of the Berlin Wall symbolizes the beginning of democratization beyond the boundaries between the world of the West and the East, as well as between the North and the South. Here in Vietnam, you are yourself now in this great historical current.

Through these four Eighty-nine we see the process of global expanding and entrenchment of constitutional culture. This process was accompanied, however many detours and difficulties, even in the nations which gave the birth of constitutional culture. If we draw

a lesson from this process and get a perspective for the future, my opinion is that the goal of our joint efforts on the experience of the Japanese society would have something productive.

It is all the more likely, Japan continues its path of modernization, since the second half of 19th century, by transplanting of the legal system of Western origin, and that it shows as well, sometimes success and sometimes failure.

2. Constitutional Culture: The "State" of Right

It is now necessary to clarify a little more the content of what I call "constitutional culture". You hear perhaps the two key words used synonymously by the EU: Etat de droit in French state of law, and rule of law in English.

If we talk about *the state of law*, we have to talk about *state* first. While stressing that it is inevitable and desirable that the cross-border flow of political and cultural ideas will intensify, it is necessary to confirm that it is vital that a public body of a nation, *res publica*, remains as a unit of the autonomy group of men and women. In addition, most important of these jurisdictions is called the state.

Indeed, we continue to entrust the government of the difficult task of containing the forces that are likely to be overflowing: the regulation of the economy against the omnipotence of money, secularism or tolerance system against domination of religion on politics, a series of measures to protect minorities against the inter-ethnic antagonism, etc.

I can only abstain voluntarily to make concrete order of comments regarding what you need to do for having a state that is both democratic and governable. Let me, instead, make a finding of general application. We must begin by accepting a truth: it is impossible that each ethnic unit has a state, given that there will be necessarily always an ethnic minority within the minority that will be able to have its own state. To get out of this circle that may be infernal, we must admit that the state is something built on the basis of a rational consent, not a natural given from the ethnic identity that could and should develop fully in various cultural fields.

3. Constitutional Culture: The State of "Right"

That was the STATE, the first element forming the concept of the rule of law.

Now here is the other component: the right.

In the 1990s I had the opportunity to cooperate with the so-called Venice Commission organized under the auspices of the Council of Europe to support the institutional development of the countries of Eastern Europe following the demolition of the Berlin Wall. This commission is officially called the Commission for democracy through law and human rights.

The rule of law is therefore defined as the democracy combined with the respect of the law and of human rights. Democracy is, plainly speaking, less difficult to acquire than the observation of the law and human rights.

The modern history of Japan is an example. At the beginning of its modernization in the second half of the 19th century, Japan has conducted a series of transplantation of Western origins laws, mostly European-continental type.

In the constitutional field, the text of 1889 has not been ratified neither by a constituent assembly, nor by a referendum but granted in the name of the Sovereign Emperor. However, it must be noted the importance of democratic movements that have arisen around 1880, claimed the establishment of an elected parliament. The parliament inaugurated by the Constitution of 1889 does not betray the aspirations of democratic movements preceding the grant of the basic Imperial law, and will weigh more and more heavily in the country's political life. In 1924-25, the two essential factors for the functioning of democracy become realities; the practice, the written rule in other word, of the government being responsible to parliament and the universal male suffrage.

What was then the situation of the other branch of government? The judiciary has had occasion, in 1891, i.e. only one year after the entry into force of the Constitution, to demonstrate actually the logic of law against the reason of State. In confrontation with a shocking case in which a police officer charged with escorting the Russian Prince Dauphin had done an injury to the future Emperor Nicolas II. The Japanese government has openly exerted a strong pressure on the Chairman of the Supreme Court in order to obtain the capital punishment, unfolding of the section of the Penal Code according to which the maximum penalty was, in this case, the indefinite prison term. The government feared reprisals from the powerful Russian Empire and wanted at all costs to appease its reaction. Finally, the President of the Supreme Court resisted to the end, and the Independence of Justice got away unharmed.

However, despite the increase in the strength of the elected parliament and the glorious episode of the independence of justice, the democracy has not been able to prevent the rise of a chauvinistic militarism and a series of attacks on Chinese mainland that will lead a whole Japan to a total war against the Allies.

To understand why an advanced, compelling at first view, democracy was eventually evaporated, it is indispensable to reread a masterpiece written by one of masters to think of freedom movement and the right of the people before the granting of the Constitution of 1889. This is NAKAE Chomin, said Rousseau in Asia.

The writing of Chomin, "A Discourse by Three Drunkards on Govemment" was published in 1887, waiting for the granting of the Constitution that will not be satisfactory to the author's eyes. Chomin has expressed by the dean of the three "drunkards", certainly the alter ego of the author himself, to distinguish two ways of acquiring the rights of the people; rights restored by the efforts of the citizens themselves, and rights granted came from above as a gift of monarch. It continued all the same: "the rights granted, although their number is limited, are not so different, in their essence of restituted rights. Thus enriching these rights granted with the tremendous influence of moral principles and the leaning as nutritious liquid. Then, our granted rights will grow up extensively and in substance with the progress of time and the march of history, to join the democratic rights of nations. This is the bona fide evolutionary logic. "

The «Real evolutionary logic» should be realized by the «influence of moral principles» and the «leaning as nutritious liquid».

The course of history will demonstrate both foresight and weakness of the forecast given by Chomin. Foresight: because of his optimism announced in advance, the success of the «learning democracy» up to the early 1930s. Weakness: because the force of «moral principles» and the accumulation of «the learning » were ultimately not able to resist the tsunami of counter-current that will carry everything away.

Why this weakness? Chomin has dared to minimize, probably quite consciously, the difference in “its essence” between the rights restored from below by the people themselves and the rights granted from above, and this is for having an encouraging perspective for the future of the granted rights. A crucial question is imposed, yet: by the argument on the «number», the quantitative sum, of rights, can we effectively reach to «joining the rights of the democratic nations»?

To answer this question essentially at the beginning of the re-democratization of the country 60 years later, it had to have a change not only in quantitative «number», but mainly qualitative in «the essence». During the re-democratization following the defeat in 1945, it should not only reconstruct democracy, but above all to proclaim the inalienable rights of man and introduce constitutional justice.

We are in fact in front of a certain difference of the degree of «transplantable» of constitutional culture depending on fields.

The rules, written or unwritten, on the distribution of powers between the political organs are relatively easily assimilated. But the situation for the rule of law and human rights is not the same. It is not only about rules on the distribution of power in the narrow sense of the word, i.e. rules of procedures. It is also and above all rules on the merits, that is to say on the value.

In other words, it is not only the problem of the container, but also the contents. To be exact on the latter, it is each culture. We are thus facing with a possible tension between the universality of the constitutional culture and plurality of cultures in general.

4. University of Constitutional Culture and Cultural Diversity in General for Critical Universalism

We must avoid two pitfalls: the absolute cultural relativism which, in the name of national or ethnic identity, often play an oppressive role in borders on the one hand, the risk of being naive universalism in any ethnocide way in the other hand.

The first pitfall is also used to cause a contradiction: it invokes a certain cultural relativism to deny constitutional culture describing themselves as universal, while prohibiting any relativistic thinking within the meaning of the empire of his own philosophy. The Constitutional culture in its turn, in its past of great shadow, in the sense that, in spite of its great cause as universalist, it applied only in the metropolis and the vast colonial empire had nothing to do with the rights of man.

If we are not able to join neither the absolute relativism, nor naive universalism, there remains the critical universalism. Critique in the sense that not only put in doubt of possible deviations, but also some principles of this constitutional culture.

I say possible deviations, to designate the gap between principle and reality of the constitutional culture. You are yourself the best witness in this meaning since your 1945 Declaration of Independence cited the two statements of 1776 of America and 1789 of France that are embodying the idea of the constitutional culture. Yet, paradoxically, you had the object to oppose courageously to counter just these two countries by the War of Independence.

I say the issue of principle as well.

One of the pillars of the idea of human rights was the belief in the ability of each and everyone to decide. Now, in facing the results of a series of decisions of the massive destruction of the environment in bioethics, we are less sure of this human capacity. How to get out of this redoubtable skepticism? By clinging to the universal value of the constitutional culture, old and new democracies must work all together to seek an answer.