

THE INSTITUTIONAL ASPECTS OF COMPARATIVE LAW

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*This Article discusses the practice of comparative law from an institutional perspective—rather than asking whether importing doctrines and concepts from foreign law is a desirable practice, it asks how they are imported, why, and by whom. In this context, it also calls for a more nuanced analysis of the controversy over the use of comparative law, since the forms and the implications of using comparative law change according to the institution involved in the practice. The Article begins by referring to the United States Supreme Court case *Eldred v. Ashcroft*,¹ which shows that judges may hail or question the legislature's use of comparative law, just as the judges' use of comparative law may be a source of controversy in other contexts. After closely examining the use of comparative law by various institutional players—Constitution drafters, legislatures, courts, and administrators—it calls for a reconsideration of the controversy over the uses of comparative law through the opening of a broader debate that would also include the institutional dimension.*

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¹ 537 U.S. 186 (2003).

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I. INTRODUCTION: MANY ROADS LEAD TO TRANSPANTATION

Learning from other legal systems has always been a major technique in the development of law.² It is also known as “legal transplantation.”³ The classic literature concerning this practice used to focus on its desirability (or alternatively, its shortcomings).⁴ This Article pursues a different course. Rather than asking whether importing doctrines and concepts from foreign law is a desirable practice, it asks how they are imported, why, and by whom. In other words, it scrutinizes the legal institutions and procedures involved in the implementation of transplantation.⁵ Transplants can be introduced by all branches of government—legislatures, courts, or administrators—and they are also used at the constitutional level, by Constitution drafters.⁶ The practical and normative implications of the choice between these alternative institutional routes of transplantation, however, have rarely been taken

² This statement should obviously be qualified—some systems are relatively open to the idea of foreign influence, whereas others (most notably the United States) view it with suspicion and animosity. See, e.g., Vernon Valentine Palmer, *Insularity and Leadership in American Comparative Law: The Past One Hundred Years*, 75 TUL. L. REV. 1093, 1093–97 (2001). These differences prevail despite the growing openness to an international marketplace of ideas in an era of globalization, and affect the various institutional agents operating in the system. Note that resistance to the import of legal concepts is not necessarily correlated with a tendency to refrain from exporting legal institutions and norms. Indeed, American law has extensively influenced other systems.

³ See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

⁴ See, e.g., Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198 (1977).

⁵ This new focus on the different institutions of comparative law, however, may prove significant for the normative evaluation of comparative practices. See *infra* Part VI.

⁶ Finding inspiration in ideas prevalent in other systems is a practice which is also popular among such actors as human rights activists and commercial lawyers. Transplantation is not unique to state institutions. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 239–40 (2004); H. Patrick Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977 (2001). Although the current Article is limited to the analysis of comparative law as used by state institutions, the realization that other legal actors also rely on comparative law lends support to my present focus on its institutional aspects.

into account in the existing scholarship on comparative law. This Article departs from this tradition by placing them at the center of the discussion.

To illustrate the contribution of the institutional dimension of comparative law, my analysis begins with the United States Supreme Court's decision in *Eldred v. Ashcroft*.⁷ This famous decision, which discussed the constitutionality of the Copyright Term Extension Act (CTEA),⁸ is interesting not only because of its subject matter (the appropriate boundaries of the protection granted by intellectual property law), but also because it tells a story of legal transplantation. The process of transplantation began in the legislative arena, as Congressmen drew inspiration for the amendment from a 1993 European Union directive.⁹ As Congresswoman Sheila Jackson-Lee explained: "The enactment of this legislation will bring United States copyright creators and owners into full citizenship with respect to the international community and finally permit us to enjoy the full and appropriate term that European copyright owners have enjoyed for some time now."¹⁰

The story unfolded further when the majority opinion in the Supreme Court backed this transplantation decision. In contrast, Justice Breyer argued vehemently against drawing inspiration from the European model. In his dissenting opinion, Justice Breyer declared:

Unlike the Copyright Act of 1976, this statute does not constitute part of an American effort to conform to an important international treaty. . . . Nor does European acceptance of the longer term seem to reflect more than special European institutional considerations, i.e., the needs of . . . the development of the European Union. . . . European and American copyright law have long coexisted despite important differences . . . the partial, future uniformity that the 1998 Act promises cannot reasonably be said to justify extension of the copyright term.¹¹

Justice Breyer's view in this matter is especially interesting because he is usually viewed as championing the Court's use of comparative law. As he wrote in *Knigh v. Florida*: "[T]his Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own

⁷ 537 U.S. 186 (2003).

⁸ Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827-29 (1998). Prior to the enactment of the CTEA, the copyright protection provided by the 1976 Copyright Act was terminated fifty years after the author's death. The CTEA extended it for another twenty years, ensuring authors' copyright protection for seventy years after their deaths.

⁹ Five years before the enactment of the CTEA, EU Member States were required to amend their copyright laws so as to establish a copyright protection term lasting for the duration of the creator's life plus seventy years. See Council Directive 93/98/EEC, Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9. The directive denied extended copyright to protected works originating in non-EU countries failing to offer the same duration of copyright protection benefits. See *Eldred v. Ashcroft*, 537 U.S. 186, 205 (2003).

¹⁰ 144 CONG. REC. H9949 (daily ed. Oct. 7, 1998). See also Christina N. Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 387-88 (2000).

¹¹ *Eldred v. Ashcroft*, 537 U.S. 186, 259-60 (2003) (Breyer, J., dissenting); see also William Patry, *The United States and International Copyright Law: From Berne to Eldred*, 40 HOUS. L. REV. 749, 760 (2003).

constitutional standards.”¹² Justice Breyer’s diverging stances on comparative law illustrate the significance of institutional analysis in the study of comparative law’s uses.

The Article opens with a review and a description of how various institutional agents—Constitution drafters, legislatures, courts, and administrators—use comparative law.¹³ It then evaluates the reasons for the growing concern with the judiciary’s uses of comparative law,¹⁴ while criticizing the tendency to narrow down the discussion of comparative law to its solely judiciary-related uses. Ultimately, this Article calls for a novel understanding of the excessive emphasis on the judicial perspective.

II. TRANSPLANTATION THROUGH CONSTITUTION-MAKING

A natural starting point for this analysis is the use of transplantation in the creation of the basic norm of the legal system—the Constitution. Indeed, all modern Constitutions have gathered ideas from foreign sources, most famously the United States Constitution, which has served as a model in a number of legal systems across the world.¹⁵ Constitutions, however, differ from one another in their manner of, and attitude toward, borrowing.¹⁶ Constitutional transplantation has involved a detailed and evaluative learning process in some countries and a largely uncritical one in others. The tendency to borrow and even copy has been most significant in times of general transition in the legal system,¹⁷ typically under the shade of a major political change (such as the end of World War II¹⁸ or the collapse of the Communist regimes of Eastern Europe¹⁹). In these instances, the most significant influence has come

¹² 528 U.S. 990, 997 (1999) (Breyer, J., dissenting).

¹³ The present discussion follows my analysis in an earlier essay, which also called for greater concern for the institutional aspects of comparative law, but confined the discussion to transplantation in legislation. See Daphne Barak-Erez, *An International Community of Legislatures?*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 532 (Richard W. Bauman & Tsvi Kahana eds., 2006).

¹⁴ On the judiciary’s engagement in the practice of comparative law, see, among others, Basil Markesinis & Jörg Fedtke, *The Judge as Comparativist*, 80 *TUL. L. REV.* 11 (2005); Anne-Marie Slaughter, *A Global Community of Courts*, 44 *HARV. INT’L L.J.* 191 (2003).

¹⁵ See generally LOUIS HENKIN & ALBERT J. ROSENTHAL, *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (1990).

¹⁶ See, e.g., David Fontana, *Refined Comparativism in Constitutional Law*, 49 *UCLA L. REV.* 539 (2001) (discussing possible uses of comparative constitutional law in American constitutional interpretation). The appropriateness of using a comparative analysis at the Constitution-drafting stage has been acknowledged even by Justice Scalia, who opposes it in constitutional interpretation, as discussed *infra*. See, e.g., *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (in which Scalia argues that “[c]omparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one”).

¹⁷ On the concept of transition, see RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

¹⁸ After the war, both Germany and Japan accepted new constitutions that were drafted with the assistance and under the influence of the winning powers, mainly the United States. See, e.g., Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 *U. PA. J. CONST. L.* 415 (1998).

¹⁹ See Joan Davison, *America’s Impact on Constitutional Change in Eastern Europe*, 55 *ALB. L. REV.* 793 (1992).

from the hegemonic power of the modern world, the United States,²⁰ which also happens to have one of the oldest Constitutions in modern history.

The drafting phase of a new Constitution is especially susceptible to outside influences. This is presumably due to the eagerness, in such times, to desert norms identified with deposed political regimes or a disappointing constitutional past. As an alternative to this unwanted past, the most convenient source of inspiration often lies in the use of transplants acquired through “shopping” and borrowing from other Constitutions. This practice has the advantage of opening a new, clean page, but it comes at a price. The adoption of foreign models at such a formative stage may be entirely uncritical, leading to the endorsement of norms foreign to the culture and the history of the borrowing country.

A recent and special example has been the preparation of the 2004 Treaty Establishing a Constitution for Europe,²¹ for which drafters were inspired by concepts prevalent in the constitutional systems of the EU Member States.²²

III. TRANSPLANTATION THROUGH LEGISLATION

Legislation offers the broadest opportunities for transplants, due to the legislature’s almost unlimited power to introduce legal reforms and the scope of the issues it covers. Historically, legislatures have, as a matter of fact, been the main route to legal transplantation.

The most dramatic uses of comparative law in legislation concern transitional phases of national history. At such times, legal systems undergo transformation and the most effective tool for general change is legislation. This was most evident in the colonial era, when the rulers enacted statutes in their colonies which resembled those of their respective homelands, or at least were inspired by them.²³ Similarly, the large scale use of transplantation through legislation has been an essential aspect of the process of opening up toward the West, which has transformed several legal systems after the 1850s, for instance in Japan and in the Ottoman Empire.²⁴ In later periods, large scale transplantation through legislation became part of the new

²⁰ The agents of influence are, most often, professional foreign advisors to countries which are in a Constitution-writing phase. See, e.g., Louis Aucoin, *The Role of International Experts in Constitution-Making: Myth and Reality*, 5 GEO. J. INT’L AFF. 89, 94 (2004) (recounting the story of four States on their way to establishing new constitutions).

²¹ Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310) 1 (rejected 2005).

²² See generally Jacques Ziller, *National Constitutional Concepts in the New Constitution for Europe*, 1 EUR. CONST. L. REV. 247 (2005).

²³ See generally John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26 LAW & SOC. INQRY 305 (2001). For an analysis of the Israeli case, see Uriel Procaccia, *Designing a New Corporate Code for Israel*, 35 AM. J. COMP. L. 581, 581–82 (1987) (discussing the transplantation of British corporate legislation in the local legislation of Mandatory Palestine in 1929 and describing it as part of a larger process: “Many such British Ordinances drew heavily from statutory sources within the mother country; as it turned out, the Companies Ordinance of 1929 [implemented in Palestine’s legislation] is an almost verbatim copy of the British Companies Act of the same year.”).

²⁴ See Eric Seizelet, *European Law and Tradition in Japan during the Meiji Era, 1868–1912*, in EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPEAN AND INDIGENOUS LAW IN 19TH- AND 20TH-CENTURY AFRICA AND ASIA 59, 67–72 (Wolfgang J. Mommsen & Jaap de Moor eds., 1992); Esin Örucü, *The Impact of European Law on the Ottoman Empire and Turkey*, in *id.* at 39, 44–51.

beginnings of legal systems, such as the changes introduced by countries liberated from colonialism²⁵ and from Communist regimes.²⁶

Far from being limited to regime transitions, transplantation through legislation is currently part of the daily reality in modern legislatures. The tendency to draw inspiration from other legal systems, however, still varies depending on the local cultural norms and the political context and is influenced by many factors, such as the subject matter of the legislation at hand. Among the factors affecting the use of comparative law by legislatures around the world are the following.

A. Technological Innovations and Moral Dilemmas

Areas in which the legal system faces challenges for which no prior relevant experience is available locally are generally thought to require the guidance of foreign examples. This applies to innovations brought about by new technologies, as well as to those resulting from social and cultural revolutions. Technological innovations that prompt legislators to search for new models include computer-related issues and new reproduction technologies (such as surrogacy and human cloning). In an entirely different context, but with similar results, legislatures usually need “precedents” when asked to affirm social behaviors previously deemed immoral or unacceptable. A relatively recent example in this respect is the inclination (or lack thereof) of legislatures to consult the legal arrangements

²⁵ Many of these States wanted to celebrate their independence by establishing new legal systems, and used legislation imported from other countries for this purpose. This pattern can be illustrated by the codes which were enacted in Latin America in the nineteenth century, based on the French *Code civil*. See Matthew C. Mirow, *The Power of Codification in Latin America: Simón Bolívar and the Code Napoléon*, 8 TUL. J. INT'L & COMP. L. 83 (2000); Matthew C. Mirow, *Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoléon in Drafting the Chilean Civil Code*, 61 LA. L. REV. 291 (2001). The 1960s were marked by a tendency for Western legal systems to offer models of legislation to countries liberated from colonialism, which is commonly referred to as the “law and development movement of the 1960s.” At the time, this movement was considered as a Western contribution to the successful development of former colonies in Africa and Latin America. To date, however, it has been largely criticized as a diversion from these countries’ real problems. See, e.g., JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980); Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974).

²⁶ After the collapse of the Communist regimes in Eastern Europe, States in the Eastern block completely transformed their legal systems. Reforms responded both to the need for new constitutions, as discussed above, and for new schemes of commercial law that could serve as the basis for market economies. See generally Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995). In China too, a new wave of legislation was enacted in the past twenty years, with the aim of creating appropriate tools for the country’s developing economy, with significant influence from foreign experts, but without an equivalent constitutional reform. See Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1 (1996). These processes, often known as “the second law and development movement,” have been criticized in terms similar to those condemning the first, namely, as imperialist and inattentive to the conditions of the receiving legal systems. See, e.g., Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); see also Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999).

prevalent in other countries concerning the acceptance of same-sex marriages or registered partnerships.²⁷

B. Competition between States and Economic Incentives

Inspiration from foreign legislation is sometimes the result of competition, usually economic competition, between countries.²⁸ States vie with one another for investments and new economic initiatives.²⁹ Hence, lenient tax legislation or laws facilitating commercial activity and incremented profits are of immediate concern for competing countries.³⁰ The swift adoption of Westernized commercial laws in Eastern Europe can partly be explained as a response to economic incentives and competition. Eastern European jurisdictions thus illustrate the effort to capitalize on investors' preference for familiar laws. The downside is that this sensitivity to the economic attractiveness of legal rules can result in a race to the bottom with regard to welfare legislation and labor protection schemes.³¹ In the United States, a well-known example can be found in the success of the corporate legislation which has been enacted in Delaware to encourage companies to charter in that state. Nearly half of the corporations listed in the New York Stock Exchange are incorporated in Delaware, and many other states have partially adopted the Delaware model of legislation.³² In other contexts, the economic aspect of the transplanted statute is premised on the idea that, in order to reap the specific benefits of a given foreign statute, it is necessary to enact a similar regime (as was the case with the Copyright Term Extension Act, enacted in response to the reciprocity principle stipulated in European law).³³

²⁷ On the use of comparative law with the goal of "overcoming 'taboo' subjects," see Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 387–89 (1998).

²⁸ For a more general discussion of the phenomenon of "regulatory competition," see Filomena Chirico & Pierre Larouche, *Conceptual Divergence, Functionalism and the Economics of Convergence*, in THE COHERENCE OF EU LAW 463, 488–93 (Sacha Prechal ed., 2007).

²⁹ For instance, it has been argued that one of the goals of the European directives regarding genetically modified organisms was to "promote the safe development of biotechnology in order to increase the competitiveness of European industry, particularly in relation to the United States and Japan." See Claus-Joerg Ruetsch & Terry R. Broderick, *New Biotechnology Legislation in the European Community and Federal Republic of Germany*, 18 INT'L BUS. L. 408 (1990).

³⁰ See, e.g., Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000).

³¹ See David Chamy, *Regulatory Competition and the Global Coordination of Labor Standards*, 3 J. INT'L ECON. L. 281, 283–85 (2000); Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 992–94 (1995). For a case study investigating the link between international economic competition and decline in welfare standards, see Deborah Maranville, *Unemployment Insurance Meets Globalization and The Modern Workforce*, 44 SANTA CLARA L. REV. 1129 (2004).

³² See Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 887–90 (1990). It should be noted, however, that Delaware's superiority in the corporate law market has also been attributed to other factors, such as its company lawyers, its specialized courts, or the role of the federal government. See Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003). A similar regulatory competition in the area of corporate legislation exists between EU Member States. See, e.g., Marco Ventoruzzo, "Cost Based" and "Rules-Based" Regulatory Competition: *Markets for Corporate Charters in the U.S. and in the E.U.*, 3 N.Y.U. J. L. & BUS. 91 (2006).

³³ See *supra* note 8.

C. *International Models or Conventions*

Another category of legislation with outside roots, yet different from ordinary legislation which is merely inspired by foreign statutes, consists of laws enacted in the wake of international instruments. The most obvious instance of international impact on domestic legislation concerns international conventions that mandate, or at least encourage, the contracting parties to adopt conforming laws. Although this dynamic may lead to similar statutes in different countries, the legislatures that follow these conventions are not directly influenced by other legislatures, but rather abide by the relevant international conventions.³⁴ At times, they do so due to pressures to adapt domestic legislation and practices to international standards.³⁵ A special case of implementation of norms produced at the international level into domestic systems is that of the EU directives. European directives, which are legislative acts of the European Union, are transposed into the national systems of the Member States through a variety of legislative procedures.³⁶

Another category of activities in the international sphere which have an impact on domestic legislation includes model laws prepared by organs of the United Nations³⁷ or other international forums of cooperation, with recommendations for adoption by national legislatures.³⁸ These model laws are not binding and, therefore, national legislatures are not legally compelled to follow them.³⁹ Despite the absence

³⁴ At times, however, this process does not merely reflect an influence coming from above—that is, from the international level—because international norms are often created under the influence of hegemonic countries. Therefore, this process also exemplifies the influence of some states upon others, but in a much more complex manner.

³⁵ The impact of international conventions can be traced back not only at the level of ordinary legislation, but also in national constitutions. See Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451 (1994); Wiktor Osiatynski, *Rights in New Constitutions of East Central Europe*, 26 COLUM. HUM. RTS. L. REV. 111 (1994).

³⁶ See generally Dionyssis G. Dimitrakopoulos, *The Transposition of EU Law: 'Post-Decisional Politics' and Institutional Autonomy*, 7 EUR. L.J. 442 (2001); Francesco Duina, *Explaining Legal Implementation in the European Union*, 25 INT'L J. SOC. L. 155 (1997); Geraint G. Howells, *The Rise of European Consumer Law—Whither National Consumer Law?*, 28 SYDNEY L. REV. 63 (2006) (focusing on the cases of the EU Product Liability Directive and the Unfair Commercial Practices Directive); Heinrich Siedentopf & Christoph Hauschild, *The Implementation of Community Legislation by the Member States—A Comparative Analysis*, in 1 MAKING EUROPEAN POLICIES WORK 8 (Heinrich Siedentopf & Jacques Ziller eds., 1988).

³⁷ An important international institution in this regard is the United Nations Commission on International Trade Law (UNCITRAL).

³⁸ Another important example is that of the UNIDROIT (the International Institute for the Unification of Private Law), an independent intergovernmental organization that prepares uniform rules of private law in various fields. The UNIDROIT was established as an auxiliary organ of the League of Nations and later reestablished in 1940 on the basis of a multilateral agreement, the UNIDROIT statute (available at <http://www.unidroit.org/english/presentation/statute.pdf>). An example of a comparable project at a more preliminary stage is the Commission on European Contract Law (CECL), which is comprised of a body of experts in charge of outlining the unified Principles of European Contract Law. The actual prospects of this initiative leading to future legislation are still not clear. See Christian V. Bar, *From Principles to Codification: Prospects for European Private Law*, 8 COLUM. J. EUR. L. 379 (2002); Klaus Peter Berger, *The Principles of European Contract Law and the Concept of the "Creeping Codification" of Law*, 9 EUR. REV. PRIVATE L. 21 (2001).

³⁹ For instance, the General Assembly of the United Nations has adopted a resolution approving the UNCITRAL Model Law on International Commercial Arbitration in 1985. This resolution only "recommends that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific

of a formal legal obligation to adhere to the recommended model, political and economic pressures may be exerted to that effect. A significant example can be found in the recommendations of the Financial Task Force on Money Laundering (FATF).⁴⁰

D. Fields Requiring Global Harmonization

A number of legislative acts are motivated by the legislators' intent to create a worldwide harmonization of the normative schemes applying in certain areas, especially those which are relatively indifferent to national borders, such as intellectual property rights or Internet law.⁴¹ The purpose of this type of legislation is to "adjust" national law to other countries' legal standards, as in the abovementioned case of the Copyright Term Extension Act's extension of copyright terms with a view to harmonize European and American copyright laws.

Legislation is not only the main but also the ideal route for transplantation. In principle, legislation allows for the adoption of any foreign legal scheme which is not subject to budget limitations or other bureaucratic constraints insofar as it does not violate the adopting legal system's constitutional principles. The imported statute can address these hurdles by securing the necessary budget and forming the government apparatus needed for the application of the borrowed norm. It should also be noted that, from a democratic perspective, transplantation through legislation has the advantage of being open to public deliberation and public scrutiny. Legislative transplantation thus enables citizens to discuss the very decision to borrow a foreign norm. This is not the case, however, when legislators are duty-bound to transplant foreign norms, as is the case with the transposition of European directives.⁴²

At any rate, legislative transplantation is often vulnerable to the risk that legislators might become so fascinated with foreign models that they will not always examine them cautiously enough, particularly when these models hold the promise of economic advantages.

needs of the international commercial arbitration practice." See GAOR Res. 40/72, ¶ 2, U.N. Doc. A/RES/40/72 (Dec. 11, 1985). The model law was not adopted by important countries in the sphere of international arbitration, such as England, France, and Switzerland. For further elaboration on this model law and its drafting, see HOWARD M. HOLTZMAN & JOSEPH E. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY* (1989).

⁴⁰ The FATF is an inter-governmental body that sets standards and develops policies to combat money laundering and the financing of terrorism. To promote this goal, the FATF has formulated recommendations regarding legislation and enforcement at the national level. The FATF was originally established as an initiative of the G-7 states and the European Commission, and many countries are not members of it. Nevertheless, its recommendations are powerful and affect national legislation due to the economic and political influence of the countries behind this initiative. For more information, see <http://www.oecd.org> (follow "By Department" hyperlink; then follow "FATF Financial Action Task Force" hyperlink).

⁴¹ On the borderless nature of Internet law, see David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367 (1996).

⁴² See, e.g., Stephen C. Sieberson, *The Proposed European Union Constitution—Will It Eliminate the EU's Democratic Deficit?*, 10 *COLUM. J. EUR. L.* 173, 174 (2004).

IV. TRANSPLANTATION THROUGH JUDICIAL DECISION-MAKING

Judges too are known for relying on other legal systems when adjudicating cases. Unlike legislators, and at least formally, judges are under greater constraints when they seek to learn from other jurisdictions. Judges are traditionally expected to apply rather than create norms. According to the generally accepted view of the judicial office, judges may seek advice from other legal systems when they are in the process of interpreting domestic norms, especially when they are facing a hard case, whose outcome is controversial due to conflicting interpretations. By contrast, they cannot adopt a new social welfare scheme, introduce new offenses not enacted in their domestic laws, and so forth. In other words, they cannot engage in transplantation practices which require institutional reforms or lack any basis in the existing norms.

Bearing this difference in mind, several circumstances may facilitate judicial transplantation.

A. Interpretation of Constitutional Standards of Human Rights

Constitutional norms on the protection of human rights are especially open to judicial interpretation through comparative law. These norms tend to rely on general and vague formulations and the expectation is that they will reflect human rights norms as expressed in international conventions.⁴³ Even the United States Supreme Court, known for its reluctance to resort to comparative law, nevertheless did so when addressing capital punishment for juvenile offenders.⁴⁴ In the European context, the propensity to interpret national law with recourse to the judgments of the European Court of Human Rights is especially significant. National courts in the Member States find explicit guidance in the decisions of the European Court of Human Rights and are not merely inspired by them.⁴⁵ A particularly extreme example of this approach comes from South Africa, where the Constitution authorizes the courts to “consider foreign law” and mandates them to “consider international law.”⁴⁶

B. New Beginnings and New Questions

When adjudicating matters which their legal system does not address through legislation or precedents, courts are more prone to rely on comparative law

⁴³ See Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 86–89 (2004).

⁴⁴ In *Roper v. Simmons*, Justice Kennedy, writing for the Court, thus argued: “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” 543 U.S. 551, 578 (2005). *Roper* overturned a previous decision, *Stanford v. Kentucky*, 492 U.S. 361 (1989), which had upheld the constitutionality of capital punishment and rejected the use of comparative law to oppose it.

⁴⁵ MARKKU KIHKERI, *COMPARATIVE LEGAL REASONING AND EUROPEAN LAW* 71–72 (2001).

⁴⁶ S. AFR. CONST. 1996. § 39 (providing: “[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law; and . . . may consider foreign law”); see also Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205 (1998).

materials. This occurs more frequently in recently established legal systems, which lack a systematic body of precedents of their own,⁴⁷ but established courts too may feel the need to look to other jurisdictions when facing novel questions of law.⁴⁸

C. Precedents from within the Legal Family or the Legal Culture in the Broad Sense

The inclination to learn from precedents decided in other jurisdictions is stronger when the basic principles of both the borrowing and the lending systems are similar. Courts find it easier to learn from precedents which have been formulated within their so-called “legal family”⁴⁹ (such as the common law system)⁵⁰ or their legal culture understood in the broad sense.⁵¹ In the European Union, however, the national courts’ recourse to EU law, including the decisions of the European Court of Justice, is not based merely on cultural preferences and legal similarities, but instead on the normative supremacy of EU law.⁵²

Judges are clearly advantaged when they resort to comparative law, as they enjoy a relatively greater expertise in such practice, which has become part of their professional skills (although admittedly, the legislature and the executive may obtain professional counseling when they look to foreign systems). Another advantage relates to the usual focus of judicial transplantation on universal norms of human rights. This concentration guarantees that the borrowed concepts are not irrelevant to the domestic system (since these universal norms are relevant to all systems). At the same time, however, judicial transplantation also involves shortcomings, particularly for opponents of broad judicial discretion, since the use of comparative law bestows

⁴⁷ Chief Justice Rehnquist made the following statement in one of his lectures: “When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law.” See William Rehnquist, *Constitutional Courts: Comparative Remarks*, in *GERMANY AND ITS BASIC LAW—PAST, PRESENT AND FUTURE: A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

⁴⁸ Fontana, *supra* note 16, at 553.

⁴⁹ It should be noted that, despite my use of the common expression “legal family,” from a theoretical perspective, the division into distinct legal families is but one way of differentiating between legal traditions. On this issue of legal classification, see, for example, Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45 *AM. J. COMP. L.* 5 (1997) (suggesting an alternative taxonomy, which distinguishes the traditions of “professional law,” “political law,” and “traditional law”).

⁵⁰ See, e.g., *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting: “[T]he Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment.”); see also Fontana, *supra* note 16, at 560 (arguing that “the more similar to the United States the legal issue, legal system, legal history and social situation that the other country faces, the more desirable the use of refined comparativism becomes”).

⁵¹ Fontana has described this focus on the resemblance between basic legal and cultural notions within the systems compared as “genealogical comparativism.” See Fontana, *supra* note 16, at 550; see also *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring: “[M]any countries have adopted forms of judicial review, which . . . unmistakably draw their origin and inspiration from American constitutional theory and practice. These countries are our ‘constitutional offspring’ and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues.”).

⁵² KIIKERI, *supra* note 45, at 69–70; Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 *EUR. L.J.* 262, 263 (2005).

judges with a significant latitude regarding decisions on when to borrow and from which source.

V. TRANSPLANTATION THROUGH THE EXECUTIVE

The practice of transplantation through the executive, that is, through the bureaucracy, is the silent or even hidden aspect of comparative law, although it constitutes a key aspect of its use. Officially, administrators are not supposed to create new legal norms, but in fact they do so in two major ways: through the transplantation of policies in the context of their broad statutory discretion and through legislation originating in initiatives of the executive. In addition, the executive generates legal transplantation indirectly when it borrows new governmental models of administration from other countries.

A. *Implementing Laws Granting Administrators Broad Discretion*

When statutes include provisions which grant broad administrative discretion, the administrators themselves usually get to define the nature and contours of this discretion. As a result, the policies adopted may be inspired by practices learned from other legal systems. The potential for transplanting the experience of other bureaucracies is especially high when, as is the case in the European Union, public officials from different countries have opportunities for cooperation and share the duty to follow the underlying principles of the EU.

B. *Initiating New Legislation*

Significant legislative reforms are often initiated and drafted by members of the executive professional staff, who rely on comparative materials when they believe that the experience of other countries might prove useful (as in the areas of anti-terrorism legislation, tax reforms, and so forth). In this sense, the discussion of transplantation through legislation often represents the tip of the iceberg: formally speaking, the act of transplantation is a new statute, but in fact the driving force behind the statute was the executive,⁵³ which had also drafted and promoted the bill all along.

An interesting example that sheds light on the use of both techniques—the implementation of discretionary powers and the initiation of new legislative reforms—is the spread of workfare policies under the influence of American legislation. American influences have been discussed extensively in the literature on the operation of workfare programs in England.⁵⁴ In fact, however, the English

⁵³ See, e.g., Klaus J. Hopt, *Comparative Company Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1161, 1168–69 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (noting that “[t]he German ministries of justice and finance, for example, have commissioned several comparative law studies, amongst others, the Max Planck Institute when preparing their reform on highly controversial questions such as whether to make directors liable to investors for untrue or misleading financial statements”).

⁵⁴ For a discussion of the American influence in England, see Alan Deacon, *Learning from the US? The Influence of American Ideas Upon “New Labour” Thinking on Welfare Reform*, 28 POL’Y & POL. 5 (2000); Joseph P. Rompala, Note, “Once More Unto the Breach, Dear Friends”: Recurring

statute on which the new workfare programs were based—the Jobseekers Act 1995—preceded its American counterpart, the Personal Responsibility and Work Opportunity Reconciliation Act, enacted in 1996.⁵⁵ The American statute, therefore, did not affect the legislative sphere; rather, it left its mark on policy decisions and programs (known as the English “New Deal”), which were accepted and implemented in the framework of the existing English law.

In Israel, too, American influence in this area made its way through the executive but in a different manner—through the drafting of a legislative reform aimed at adopting the American model. Following the report of an expert committee on the problem of welfare recipients who are unemployed for prolonged periods, a report which recommended the adoption of the American model,⁵⁶ the government tabled a bill to that effect.⁵⁷ This bill was presented to the Israeli Knesset as an integral part of the government budget proposal and was therefore enacted into law without any significant changes.⁵⁸

The English and Israeli cases seem to provide two different examples of the impact of U.S. welfare legislation on other legal systems—one of influence on the bureaucracy and one of influence on the legislature. On closer scrutiny, however, these two instances appear to be very similar to one another. In both cases, the American inspiration operated at the bureaucratic level, with members of the legislature playing a marginal role. In England, the government found it could implement the American model using existing legislation. In Israel, legislation was needed, but it was drafted and formulated by government officials. Although the legislature voted on it, its role was merely formal; the inspiration of the American legislation was based on the initiative of government officials and mediated by them.

C. Indirect Transplantation through the Import of New Governance Mechanisms

In many cases, government agencies import from other countries new methods of governance, such as outsourcing and privatization.⁵⁹ For instance, recent technological developments have put pressure on legislatures around the world to provide an adequate legal framework for so called “e-government” and electronic administrative communication more generally. However, such reforms are often introduced by administrative innovations and only later accompanied by

Themes in Welfare Reform in the United States and Great Britain and What the Principle of Subsidiarity Can Do to Break the Pattern, 29 J. LEGIS. 307 (2003).

⁵⁵ See Jobseekers Act 1995, c. 18 (Eng.); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

⁵⁶ TAMIR COMMITTEE, INTERIM REPORT (2001) (Hebrew) (submitted to the Israeli Minister of Labor and Social Affairs), available at http://www.tamas.gov.il/NR/rdonlyres/FC51E2FD-398F-43E3-A4CB-2BE88C305E57/0/Mehalev_tamir.doc.

⁵⁷ Chapter F of the Economic Policy for the Budget Year 2004 (Legislation Amendments) Bill, 2003 (Israel).

⁵⁸ Chapter G of the Economic Policy for the Budget Year 2004 (Legislation Amendments) Law, 2004 (Israel).

⁵⁹ One example is the initiative to establish privatized prisons. See, e.g., Uri Timor, *Privatization of Prisons in Israel: Gains and Risks*, 39 ISR. L. REV. 81, 82 (2006).

legislation.⁶⁰ Purportedly, these initiatives are merely administrative decisions that do not entail a normative content, but in fact, they shape the reality of access to administrative services, government transparency, and privacy.

Transplantation decisions made by the executive enjoy the relative flexibility of administrative decisions, which are generally conducted on a trial and error basis. They are sorely deficient in terms of democratic legitimacy, however. In addition, administrative decisions on transplantation, like other decisions accepted by government administrators, are usually not even transparent. In this sense, the executive can channel foreign norms into the domestic legal system free of public scrutiny, at least in the formative stages of this process.

VI. A NEW ASSESSMENT OF THE CONTROVERSY OVER COMPARATIVE LAW

The discussion so far reveals that, in fact, the practice of legal transplantation is more common than usually perceived. Far from being solely a judicial practice, it is a method which the legislature and the executive also embrace, as well as Constitution drafters in times of constitutional changes. Indeed, legislators and administrators probably use comparative law on an even larger scale. Hence, studies that evaluate the scope of the application of comparative law by focusing mainly on case law and academic literature may lead to inaccurate results.⁶¹

Despite the multi-layered uses of comparative law, the heated controversy surrounding it has thus far focused mainly on judicial practice.⁶² Why is the use of comparative law by judges under attack, whereas its use by legislators and administrators is received with minor criticism, if at all? Could the reason simply be the lack of awareness, within the legal community, of the broad recourse to comparative law by other branches of government and the tendency of legal academia to focus on courts and their decisions? I believe the answer is more complex.

This discrepancy should lead to a novel understanding of the current controversy surrounding the use of comparative law. Rather than focusing on the practice of comparative law as such, this controversy emerges as a variation on the dispute about judicial discretion.⁶³ Conservative jurists oppose judicial recourse to comparative law because they consider it a method that broadens the set of possibilities for judicial decision-making. A number of opponents to the use of comparative law argue that judicial recourse to it is but a covert means of maximizing judicial power and advancing subjective preferences of judges. The real

⁶⁰ J.E.J. PRINS ET AL., E-GOVERNMENT AND ITS IMPLICATION FOR ADMINISTRATIVE LAW (2002).

⁶¹ See, e.g., Mathias M. Siems, *The End of Comparative Law*, 2 J. COMP. L. 133 (2007) (making an argument about the relative “disregard” of comparative law by looking into case law and academic writings, with only marginal general comments about legislators).

⁶² For this controversy, see, for example, Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Richard A. Posner, *Forward: A Political Court*, 119 HARV. L. REV. 31, 84–91 (2005).

⁶³ Accord Markesinis & Fedtke, *supra* note 14, at 153.

issue at stake here is judicial discretion and innovation, not comparative law.⁶⁴ The arguments commonly put forward by detractors, who object to what they view as the imposition of foreign notions and cherry-picking by judges, support this description of the controversy.⁶⁵ This presentation of the debate is also compatible with the special attention it gets in the value-laden context of constitutional adjudication.

Placing the controversy against this backdrop opens the door to additional distinctions and observations.

A. The Difference between Statutory Judicial Interpretation and Constitutional Judicial Interpretation

Even those jurists who fear broad judicial discretion should differentiate between the use of comparative law in the context of statutory interpretation and the use of comparative law in the context of constitutional interpretation. Statutory interpretation is subject to legislative changes, and thus the concern for counter-majoritarian decision-making under the guise of comparative law is not as significant as it is in the context of constitutional interpretation.⁶⁶ This distinction, however, merely narrows down the scope of the controversy, since most of the current discussions in American legal scholarship have indeed touched on constitutional adjudication and not on statutory interpretation.

B. The Connection between Judicial and Other Forms of Institutional Transplantation

Objecting to the practice of judicial transplantation when the legal realm encourages transplantation in all other institutional spheres—constitution-making, legislation, and administrative decisions—is unreasonable. This claim is particularly plausible as applied to the comparison between judicial transplantation and executive transplantation, which are similarly removed from the democratic process. In addition, judicial transplantation is often influenced by the reliance of other government branches on comparative methods. For instance, when a legislature has found inspiration in foreign statutes, it is only natural for judges to study the way in which these statutes have been interpreted and implemented in their county of

⁶⁴ For a thorough critique of the judicial use of comparative law, based on a discussion of the appropriate role of the judiciary in a democracy and the notion of limited judicial discretion, see Donald E. Childress III, Note, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003).

⁶⁵ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting; “this Court . . . should not impose foreign moods, fads, or fashions on Americans” (quoting *Foster v. Foster*, 437 U.S. 990, n.* (2002) (Thomas, J., concurring; denying certiorari))); *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting; “[t]o invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.”).

⁶⁶ Indeed, the failure to distinguish between statutory and constitutional interpretation has been singled out as one of the most problematic mistakes in the debate regarding the proper use of comparative law. See Roger P. Alford, *Four Mistakes in the Debate on “Outsourcing Authority,”* 69 ALB. L. REV. 653 (2006). Alford criticizes Justice Blackmun for failing to make this distinction in Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994). In that article, Blackmun had bluntly stated, without drawing further distinctions, that “the courts should construe our statutes, our treaties, and our Constitution, where possible, consistently with ‘the customs and usages of civilized nations.’”

origin.⁶⁷ It does not follow that in doing so judges make foreign courts' practices binding.

C. The Importance of Discretion in the Use of Comparative Law

The use of comparative law should result from a relatively free choice, that is, from a decision to adopt a foreign norm when it is considered desirable on its merits. Choice in the process of legal transplantation is important because it addresses the concern occasionally implied by judges' criticism against the use of comparative law, namely that openness to comparative law will lead to the adoption of legal solutions which are either undesirable on their merits or in tension with the fundamental principles of the importing system.⁶⁸ On closer scrutiny, an evaluation of the question of choice in comparative law may lead to surprising findings. Generally, courts' use of comparative law only reflects an aspiration to seek inspiration for judicial interpretation. Therefore, the risk that it will lead to an uncritical adoption of foreign norms is relatively negligible. By contrast, legislators and administrators are more liable to import norms due to economic and political compulsion rather than by choice, such as when they adopt certain rules because of the pressure of economic competition or the mandates of international organizations. In addition, judges can fairly be assumed to be more experienced than legislators and administrators in resorting to comparative law and therefore better equipped for approaching foreign law with the required degree of suspicion.⁶⁹ Accordingly, the habitual concern with judicial uses of comparative law is exaggerated, and also misguided in the sense that it does not address the dangers stemming from the uncritical adoption of foreign norms by legislators and administrators. In this sense, judges' discretion in the use of comparative law, often depicted as a disadvantage, should be regarded as an important advantage of the judicial practice of comparative law.

VII. CONCLUSION

The debate over the recourse to comparative law needs to be reshaped. This debate has been so fixated on judicial uses of comparative methods that it has, to some extent, disregarded the uses of legal transplantation by other institutional players such as Constitution-drafters, legislators, and administrators. In addition to offering a thick description of the uses of comparative law by these different institutions, this Article has demonstrated that the relative advantages and disadvantages of the practice vary depending on the institutional context of the

⁶⁷ See Mark Wendell DeLaquil, *Foreign Law and Opinion in State Courts*, 69 ALB. L. REV. 697, 700 (2006).

⁶⁸ See, e.g., *Atkins v. Virginia*, 506 U.S. 304, 347–48 (2002) (Scalia, J., dissenting: “Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people”).

⁶⁹ The capability of trained lawyers and judges to use comparative methods is obviously dependent on the local legal culture and the tradition of legal training in a given jurisdiction. On the history and trends of comparative and international law education in American law schools, see Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on “Proportionality,” Rights, and Federalism*, 1 U. PA. J. CONST. L. 583, 592–94 (1999).

transplantation decision. Above all, this Article suggests that addressing the controversy over the uses of comparative law with reference to other institutional uses of legal transplantation reveals the real concern underlying the resistance to this practice, namely, discomfort with judicial discretion, rather than discomfort with comparative law as such.