2 LEGISLATION AS TRANSPLANTATION

Daphne Barak-Erez

2.1 INTRODUCTION

Legal transplants may be introduced into receiving systems by all branches of government – legislatures, courts or administrators. They are also used at the constitutional level, by constitution drafters. In addition, they inspire private actors who try to promote legal reform. The study of transplantation through legislation is, however, especially important. Legislation is not only the main but also the ideal route for transplantation. In principle, legislation allows for the adoption of any foreign legal framework, as long as it does not violate the adopting legal system’s constitutional principles. The imported statute can address possible hurdles by securing the necessary budget and forming the government apparatus needed for the application of the borrowed norm. From a democratic perspective, transplantation through legislation has the advantage of being relatively open to public deliberation and public scrutiny (in comparison to administrative decision-making processes). Legislative transplantation thus enables citizens to debate the very decision to adopt a foreign norm.

2.2 TRANSPLANTS IN TRANSITIONS

The most effective 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 introducing a fundamental change is legislation. This was most evident in the colonial era, when the rulers enacted statutes in their colonies that resembled those of their


3 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. See, e.g., S.C. Sieberson, ‘The Proposed European Union Constitution – Will It Eliminate the EU’s Democratic Deficit?’, Columbia Journal of European Law, Vol. 10, 2004, pp. 173-174.
Daphne Barak-Erez

respective homelands, or at least were inspired by them.4 Similarly, the large-scale use of transplantation through legislation has been an essential aspect of the process of opening up towards the West, which has transformed several legal systems after the 1850s, for instance in Japan and in the Ottoman Empire.5 In later periods, large-scale transplantation through legislation became part of the new beginnings of legal systems, such as the changes introduced by countries liberated from colonialism6 and from Communist regimes.7

2.3 Transplantation and Standard Lawmaking

Legislative transplantation is 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 varies, however, depending on the


6 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 that were enacted in Latin America in the nineteenth century, based on the French Code civil. See M.C. Mirow, ‘The Power of Codification in Latin America: Simón Bolívar and the Code Napoléon’, Tulane Journal of International & Comparative Law, Vol. 8, 2000, p. 83; M.C. Mirow, ‘Borrowing Private Law in Latin America: Andrés Bello’s Use of the Code Napoléon in Drafting the Chilean Civil Code’, Louisiana Law Review, Vol. 61, 2001, p. 291. 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., J.A. Gardner, Legal Imperialism: American Lawyers and Foreign Aid in Latin America, University of Wisconsin Press, Boston, 1980; J.L. Esquirol, ‘Continuing Fictions of Latin American Law’, Florida Law Review, Vol. 55, 2003, p. 41; D.M. Trubek & M. Galanter, ‘Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States’, Wisconsin Law Review, 1974, p. 1062.

7 After the collapse of the Communist regimes in Eastern Europe, states in the Eastern bloc 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 G. Ajani, ‘By Chance and Prestige: Legal Transplants in Russia and Eastern Europe’, American Journal of Comparative Law, Vol. 43, 1995, p. 93. 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 A. Seidman & R.B. Seidman, ‘Drafting Legislation for Development: Lessons from a Chinese Project’, American Journal of Comparative Law, Vol. 44, 1996, p. 1. 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., D. Berkowitz et al., ‘The Transplant Effect’, American Journal of Comparative Law, Vol. 51, 2003, p. 163; see also J. deLisle, ‘Lex Americana? United States Legal Assistance, American Legal Models and Legal Change in the Post-communist World and Beyond’, University of Pennsylvania Journal of International Economic Law, Vol. 20, 1999, p. 179.
local cultural norms and the political context, and is influenced by many factors. Among the factors affecting the use of comparative law by legislatures around the world are the following.

2.3.1 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 the regulation of high-tech innovations 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 behaviours 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 prevalent in other countries concerning the acceptance of same-sex marriages or registered partnerships.

2.3.2 Competition between States and Economic Incentives

Inspiration from foreign legislation is sometimes the result of competition, usually economic competition, between countries. States vie with one another for investments and new economic initiatives. Hence, lenient tax legislation or laws facilitating commercial activity and incremented profits are of immediate concern for competing countries. 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

---


10 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 C.-J. Ruetsch & T.R. Broderick, 'New Biotechnology Legislation in the European Community and Federal Republic of Germany', International Business Law, Vol. 18, 1990, p. 408.

that this sensitivity to the economic attractiveness of legal rules can result in a race to the bottom with regard to welfare legislation and labour protection schemes. In the United States, a well-known example can be found in the success of the corporate legislation that 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. 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). An even more extreme case is that of an economic incentive that takes the form of an external dictate. For example, during the 1980s, the World Bank conditioned loans to Asian countries on the legislation of commercial laws based on Western neoclassical economic models.

2.3.3 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


14 Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827-2829 (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.

directly influenced by other legislatures, but rather abide by the relevant international conventions.\textsuperscript{16} At times, they are pressured to adapt domestic legislation and practices to international standards.\textsuperscript{17} A special case of implementation of norms produced at the international level into domestic systems is that of the European directives. These 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.\textsuperscript{18}

Another category of activities in the international sphere that have an impact on domestic legislation includes model laws prepared by organs of the United Nations\textsuperscript{19} or other international forums of cooperation, with recommendations for adoption by national legislatures.\textsuperscript{20} These model laws are not binding, and, therefore, national legislatures are not legally compelled to follow them.\textsuperscript{21} Despite the absence of a formal legal obligation to

\textsuperscript{16} At times, however, this process does not merely reflect an influence coming from above – 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.


\textsuperscript{19} An important international institution in this regard is the United Nations Commission on International Trade Law (UNCITRAL).

\textsuperscript{20} 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 re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT statute (available at <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 comprises 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 C.V. Bar, ‘From Principles to Codification: Prospects for European Private Law’, Columbia Journal of European Law, Vol. 8, 2002, p. 379; K.P. Berger, ‘The Principles of European Contract Law and the Concept of the “Creeping Codification” of Law’, European Review of Private Law, Vol. 9, 2001, p. 21.

\textsuperscript{21} 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 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 H.M. Holtzman & J.E. Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Kluwer Law and Taxation Publishers, Boston, 1989.
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).  

2.3.4 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 that are relatively indifferent to national borders, such as intellectual property rights or Internet law. The purpose of this type of legislation is to ‘adjust’ national law to other countries’ legal standards, as in the above-mentioned case of the Copyright Term Extension Act’s extension of copyright terms with a view to harmonize European and American copyright laws.

2.4 Israel as a Case Study: A Mixed and Multilayered System

The Israeli legal system offers a unique case study that presents a rich usage of legal transplantation from different sources over time. This has been the result of the country’s complex legal history – building upon four hundred years of Ottoman rule, around thirty years of British Mandatory rule and later on Israeli law (since the independence of the state) – which has been developed by heavy reliance on borrowing foreign models of legislation.

2.4.1 Ottoman Law

The story of modern law in Israel starts with the Ottoman Empire. The Ottoman Empire had gradually reformed its laws during the nineteenth century, by enacting new statutes, inspired by contemporary European legislation, especially from France. Another source for the Ottoman legislation was Islamic law itself, which was codified in the law known as the Mejelle.  

---

22 The FATF is an intergovernmental 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 <www.oecd.org> (follow ‘By Department’ hyperlink; then follow ‘FATF Financial Action Task Force’ hyperlink).


2.4.2 Law in Mandatory Palestine

The British Mandate in Palestine opened the law of the country to a whole new source for legal inspiration – the laws of England, as well as British colonial legislation. During nearly three decades of British administration, the local legal system had gone through a process of Anglicization – Ottoman laws were gradually replaced by new laws inspired by both common law principles and British colonial legislation (in other parts of the world). This included, *inter alia*, the laws (known as ‘Ordinances’) on companies, partnerships, bankruptcy, bills of exchange, civil wrongs, criminal law, evidence and procedure, to name major examples.25 True, the process of Anglicization also relied heavily on the judicial system which followed British precedents and legal culture,26 but the legislative changes had a crucial role in the process of reshaping the system.27

2.4.3 Israeli Law after Independence

The legal history of the pre-state era is highly relevant for understanding the Israeli legal system, since it was fully incorporated into the law of the state. In order to avoid legal vacuum and instability, Israel enacted a law that gave force to the existing norms (until they are gradually replaced).28 Over time, the legal system was gradually exposed to more influence coming from outside and thus to more transplantation. Here are some major examples:

*The Codification of Civil Law and Europe* – Starting from the 1960s, the Israeli Ministry of Justice has led a continued effort of reforming civil law by borrowing from European

25 Companies Ordinance; Partnership Ordinance; Bankruptcy Ordinance, 1936; Bills of Exchange Ordinance; Civil Wrongs Ordinance, 1944; Critical Code Ordinance, 1936; Interpretation Ordinance, 1945; Evidence Ordinance; Civil Procedure Rules, 1938; Criminal Procedure (Arrest and Searches) Ordinance, Criminal Procedure (Trial Upon Information) Ordinance [complete citations]. See also U. Procaccia, 'Designing a New Corporate Code for Israel', *American Journal of Comparative Law*, Vol. 35, 1987, pp. 581, 581-582 (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.").

26 See A. Likhovski, 'In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine', *Israel Law Review*, Vol. 29, 1995, p. 291. In fact, the principle of reference to inspiration from the common law was also the product of legislation – § 46 of the Order in Council of Palestine, 1922 ("The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914 . . . and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England").


28 Law and Administration Ordinance, 1948, § 11 (Isr.) ("The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities.").
Daphne Barak-Erez

codification, especially the German one. The project took the form of a stage-by-stage process – aiming at legislating separate laws on the various topics (inheritance, contracts, special contracts etc.) that will eventually be consolidated and re-enacted as a full code.29

The appeal of Europe's civil law was based on the long heritage of codification that stood in stark contrast to the main disadvantage of the common law, based on endless precedents. Thus, the reference to Europe was understood to be more attractive in this context.30

The central example that demonstrates the influence of legislative transplants in this area is the adoption of good faith as a foundational principle of Israeli civil law, based on the German model.31

The Americanization of Commercial Law – More recently, transplantation has started to be influenced by American law. The process of Americanization in law converges with the special cultural and political impact of the United States in the Israeli public arena. It is most notable in the areas of corporate law and securities law.32 In 2000, a new Companies Law,33 heavily influenced by American doctrines, replaced the old Companies Ordinance enacted in Mandatory Palestine.34 A more recent example is the adoption of the model of the Sarbanes-Oxley Act, 2002, through regulation by the Israeli Securities Authority.35

New Forms of Regulation – Israel is open for the importation of new legal models of regulation in various areas, as a country that has no fixed legal tradition and a strong tendency for experimentation. A recent example is the heavily criticized experimentation with the Israeli 'Welfare to Work' legislation,36 inspired by similar programmes mainly in the United States, Britain, the Netherlands, Norway and Denmark. Other examples include the Clean Air Law,37 which was based on the American Clean Air Act,38 the 'fair use', imported from

30 Another important source was the reference of model legislation prepared in the international arena, such as the Uniform International Sale of Goods law. The Uniform law was imported to Israeli legislation. The Uniform law also served as the basis for Israel's Sale Law of 1968, and influenced on Israeli Contracts legislation.
31 Contracts (General Part) Law, 1973 (Isr.).
33 Companies Law, 1999 (Isr.).
35 Securities Law Regulations (Periodic and Immediate Reports) (Amendment No. 3), 2009.
37 Clean Air Law, 2008 (Isr.).
the American Copyright Act of 1976\textsuperscript{39} and the prohibition on the abuse of dominance, in competition legislation, imported from European Community (EC) law.\textsuperscript{40}

**Constitution-Making** – Since its establishment, Israel never completed the process of accepting a full formal constitution. It did, however, start a process of enacting a series of so-called basic laws that would be eventually consolidated into one document. This prolonged process has been influenced by various sources.\textsuperscript{41} It is worthwhile to mention briefly in this regard the influence coming from Germany (the use of the terminology ‘basic law’ as well as the centrality of the concept of human dignity enacted into Basic Law: Human Dignity and Liberty) and Canada (the drafting of the constitutional balancing tests and the adoption of the override mechanism).\textsuperscript{42}

### 2.5 Moving from ‘If’ to ‘How’

The extensive use of transplantation by legislatures all over the world is here to stay. The time has come to acknowledge this fact and concentrate on the implications of this phenomenon. Rather than resisting transplantation, the focus should be on bettering its quality. In other words, the concern should be, to a large extent, regarding the quality of the transplants and the mechanisms that facilitate them.

An important preliminary inquiry that should be part and parcel of every transplantation initiative should be an evaluation of the background conditions that had impact on shaping the legislation in the exporting system. Close analysis of these conditions – vis-à-vis the conditions of the importing system – should influence the decision whether and how to import. These background conditions should be analyzed with regard to the legal system itself as well as the social and economic factors surrounding it. The legal ‘fit’ to the system concerns compatibility with other laws, as well as legal traditions.\textsuperscript{43} The social,

---


\textsuperscript{42} Canadian Charter of Rights and Freedoms, 1982 (Part I of the Constitution Act, 1982).

\textsuperscript{43} Kanda and Milhaupt argue, for example, the fate of the transplant is connected also to the availability of substitutes to it in the importing system. The existence of such alternatives may leave the imported norm without use. See Kanda & Milhaupt, 2003, p. 891.
Daphne Barak-Erez

cultural and economic ‘fit’ is no less important. Some may even say critical. Accordingly, and considering the modifications needed, as well as the learning process that should accompany any reform of this type, the costs of the transplantation process should also be taken into consideration.

From a practical perspective, the focus should therefore be on the development of institutions and processes that would improve the capacity of legislatures to engage in high-level and sophisticated transplantation. To facilitate such transplantation processes, it is highly important that legislatures will include professional research units capable of carefully studying foreign models. The English model of the Law Commission is an example of an institution facilitating such a process. The Knesset (the Israeli parliament) has founded for this purpose its Research and Information Center (RIC) in order to provide relevant information (not only legal in the narrow sense) relevant for its activities.

Interestingly, the focus on the processes and institutions necessary for successful transplantation sheds light on the proximity between the role of legislatures and bureaucrats in the transplantation process. Realistically, legislators are bound to heavily rely on professionals when they study foreign models and it is often the case that legal transplants are mostly pushed forward by government legislative initiatives.

44 The extreme version of this view is that transplantation is doomed to fail. According to Legrand, a legal rule "does not survive the journey from one legal system to another". See P. Legrand, "The Impossibility of "Legal Transplants"", Maastricht Journal of European & Comparative Law, Vol. 4, 1997, pp. 111, 117. Kahn-Freund’s position was more flexible and thus discussed the concept of ‘a degree of transferability’, which depends on the law’s connection to the sociopolitical environment in the origin country, and the respective environment in the recipient country. See O. Kahn-Freund, ‘On Uses and Misuses of Comparative Law’, Modern Law Review, Vol. 37, 1947, pp. 1, 11.


46 Law Commissions Act 1965 (1965 c. 22).