

UNIVERZITA KARLOVA
Právnická fakulta

Mgr. Barbara Dufková, LL.M.

Success in Legal Transplanting

Rigorózní práce

Pověřený akademický pracovník: prof. JUDr. Zdeněk Kühn, Ph.D., LL.M.

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Mgr. Barbara Dufková, LL.M.

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1 Introduction

Designing domestic laws based on foreign models is recognized as a widely used method of legal development and reform. It is especially common in developing countries, which seldom create their own “indigenous” laws. On the contrary, they are wary of innovation and seek inspiration from models already operating in other, potentially more developed legal regimes. This may be for the sake of efficiency or because they lack domestic resources, time, and/or expertise to cultivate domestic legislation. Time-tested legislation from other countries promises to avoid the pitfalls that may have arisen in the early implementation stage in the country of origin. These drawbacks or potential lacunas are expected to be remedied by the time the borrowing takes place. It has been observed that in developing new laws to address contemporary issues, countries will inevitably use concepts from prior legal regimes, as it is simply easier to borrow from other jurisdictions than to invest in development of an entirely new law.¹

This process is described as *legal transplanting*. The high expectations placed on the design of domestic laws according to foreign models pose the question of whether legal transplants succeed, and if so, what makes them successful. The literature provides no clear definition of success in legal transplantation.² Does success mean that the transplanted law produces the same effects as in the donor jurisdiction? Does it mean that the law is able to accomplish the regulatory purpose for which it was adopted? Or should success be equated with the situation in which the transplanted law has different effects and fails to achieve the immediate regulatory objective, but nonetheless contributes to other social or political goals of the recipient jurisdiction? Yet, despite a lack of agreement on how success or failure in legal transplantation should be conceptualized, the literature suggests a variety of criteria that may be useful to consider. The most common view is that success is, to a certain extent, conditioned by the adaptation of the transplanted foreign rules, institutions, and norms to the wider legal, socio-economic, or political environment of the recipient country. This inevitably involves evaluating how the transplanted laws operate in their new environment. Yet, as with the very notion of success or failure, the literature does not offer a conclusive answer

¹ Jonathan B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 *ECOLOGY LAW QUARTERLY* 1295 (2001).

² See also William Twining, *Diffusion of Law: A Global Perspective*, 36(49) *THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW* 1 (2004) at 32.

regarding which domestic conditions are most crucial or regarding the dimensions against which such adaptation to domestic conditions should be evaluated.

The aim of this thesis is to fill in this gap and shed more light on the benchmarks that may be used to evaluate whether a transplanted law succeeds or fails. Implicit in this endeavor is the distillation of criteria that may be used to evaluate whether the transplanted law fits the environment of the recipient jurisdiction. Hence, the research questions this thesis aims to answer are:

- (1) How does the literature on legal transplants define success or failure in legal transplanting?
- (2) What criteria or benchmarks are used to evaluate such success or failure?

The definition of success or failure and overview of the criteria that are relevant in the evaluation of legal transplants may be particularly useful not only for legal borrowing, but also for any change through law. This is because the thesis will be informed by the sociological legal scholarship that examines relationships between the law and society that is applicable to any law, regardless of its origin.

To answer the above research questions, the next chapter will provide the general theoretical background of legal transplants. It will first briefly introduce the concept of legal transplantation (Section 2.1) then set it within the general framework of works pertaining to the role of law in society (Section 2.2). The third chapter will focus on how the literature on legal transplants conceptualizes success and failure. To that end, the thesis will first relativize the notions of success and failure (Section 3.1) to identify their most commonly resonating dimensions (Section 3.2). Section 3.3. will summarize the main implications stemming from the review of potential dimensions of success and failure. The fourth chapter will explore the meaning of success or failure in different branches of law. To that end, it will analyze how success and failure have been conceptualized in the literature evaluating legal transplants in both the private and public law spheres (Section 4.1). Implications of those case studies for the definition of success or failure will be summarized in Section 4.2. The fifth chapter will summarize the implications of the general strain of literature and of the case studies for the quest for definitions of success and failure in legal transplanting. Finally, the sixth chapter will conclude by linking those findings to the general

framework of legal transplanting and the ambition to create a comprehensive analytical framework to evaluate the success and failure of legal transplants.

The thesis will be based mainly on doctrinal methods. The identification of the benchmarks that can be used to evaluate or measure the “success” or “fit” of transplanted laws will require critical review of the literature on legal transplants and distillation of methodological approaches employed in the literature. Thus, this search for a “fitting” law will rely largely on the normative method that aims to provide normative criteria that will define whether the law fits. In addition to the review of literature on legal transplants in general, the thesis will also dive deep into case studies from the private and public law spheres to identify how the success of legal transplants has been defined or measured in those different spheres. This will involve not only critical analysis of the methodology used in those case studies but also a comparative approach to analyze commonalities and differences between those different branches of law.

The research will be mainly library-based and rely primarily on secondary sources. Given the overlaps in legal theory and philosophy, works from different fields will be sometimes mentioned for a more comprehensive background.

2 Legal transplanting

2.1 Notion of legal transplanting

Legal transplanting is understood as a process of borrowing rules from one jurisdiction (usually the donor jurisdictions) and implanting them in another (the recipient jurisdiction). *Watson* uses the term to refer to “moving of a rule or a system of law from one country to another, or from one people to another”.³ *Corrin* employs it to refer to “laws made by the legislature of one country (the “enacting country”) which are then either applied or extended by that legislature to be in force in a second country, or which are adopted by the legislature of the second country (the “receiving country”) to be in force there.”⁴ *Viven-Wilksch* understands legal transplanting as a process according to which a country uses notions from another legal system to fill a gap in and improve their own.⁵ *Cairns* defines the term as the adoption of foreign legal systems.⁶

Legal transplanting was considered an especially common method in colonial times.⁷ Yet, legal transplanting is still perceived as an important tool for legal reform⁸ and is a major method of legal development in, for example, the Asia-Pacific region. *Techera* observes how the transplantation of law in the Asia-Pacific in colonial times and post-independence resulted in mixed legal systems involving diffusion of legal norms and tools from multiple sources.⁹ Also, *Viven-Wilksch* considers legal transplants tools to fill in gaps and/or improve the domestic legal system.¹⁰ *Liljeblad* also sees in legal transplants the potential to transform its underlying context and approach so that the

³ ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21 (University of Georgia Press, 2nd edn. 1993). See also Alan Watson, *Comparative Law and Legal Change*, *CAMBRIDGE LAW JOURNAL* 37 (1978) at 313. The term was coined by Alan Watson in the 1970s (the first edition of the book was published in 1974). See also Twining, *supra* note 2 at 1. Nonetheless, the authors observe that it was used as early as in 1927. See Jonathan Liljeblad, *The Independent Lawyers' Association of Myanmar as a Legal Transplant: Local Challenges to the Idea of an Independent National Bar Association*, in *LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA* 211 (Vito Breda ed., Cambridge University Press 2019).

⁴ Jennifer Corrin, *Transplant Shock: The Hazards of Introducing Statutes of General Application*, in *LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA* 34–62 (Vito Breda ed., Cambridge University Press 2019) at 34.

⁵ Jessica Viven-Wilksch, *How Long Is Too Long to Determine the Success of a Legal Transplant? International Doctrines and Contract Law in Oceania*, in *LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA* 132–157 (Vito Breda ed., Cambridge University Press 2019) at 134.

⁶ John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41(3) *GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 637 (2014) at 687.

⁷ See, e.g., Matteo Solinas, *The Nature of Legal Transplants – Inspirations from Postcolonial Scholarship*, 22 *NEW ZEALAND ASSOCIATION OF COMPARATIVE LAW* 179 (2016).

⁸ Erika Techera, *Shark Sanctuaries as Vehicles for Transplanting Conservation Tools in Disparate Legal Jurisdictions*, in *LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA* 233 (Vito Breda ed., Cambridge University Press 2019) at 237.

⁹ Techera, *supra* note 8 at 241.

¹⁰ Viven-Wilksch, *supra* note 5 at 134.

transplanted laws function more effectively.¹¹ The author observes that in some cases, legal transplanting should be tied in with transfers of allied institutions directed at bringing about the transformation of contextual factors.¹²

2.2 Literature on legal transplanting

The examination of legal transplants in the literature revolves around questions related to its feasibility, how legal change through transplantation occurs, and whether and how legal transplants have been accepted or absorbed by the recipient jurisdictions.¹³

A common thread underlying these questions is the relationship between law and its societal context. Delving deeper into this interaction, the discussion revolves around the question of the degree of cultural and societal (pre)determination of law. In this regard, the debate reflects the foundational theoretical questions of legal philosophy and legal sociology, which both explore the position and role of law in society. By following the evolution of debates on the relationship between the law and its societal context, this chapter will offer a broader theoretical background against which it will set discussions on the feasibility of legal transplants.

2.3 Relationship between law and its societal context and implications for legal transplanting

The relationship between law and its societal context has long puzzled both sociologists and legal philosophers. Some authors identify a close relationship between the law and society. Others view the two as largely autonomous phenomena. An author's position largely determines their views as to whether legal transplants are feasible, and if so, to what extent.

¹¹ Liljeblad, *supra* note 3 at 222.

¹² Liljeblad, *supra* note 3 at 223.

¹³ See, e.g., WATSON, LEGAL TRANSPLANTS, *supra* note 3, Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37(1) THE MODERN LAW REVIEW 1 (1974), Pierre Legrand, *The Impossibility of "Legal Transplants"*, 4 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 111 (1997), Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61(1) THE MODERN LAW REVIEW 11 (1998), or Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, *The Transplant Effect*, 51 THE AMERICAN JOURNAL OF COMPARATIVE LAW 163 (2003).

The inseparability of law and society is enshrined in an approach commonly designated as the “mirror theory”. The idea behind this theory is that law is the mirror of society.¹⁴ Law is said to reflect the intellectual, social, economic, and political conditions of a country at a given point in time,¹⁵ influenced by the accepted moral values held by the society.¹⁶ It does not linger in a vacuum but rather reflects what is happening in society—i.e., the various forces shaping the society.¹⁷ As a result, the law is denied autonomous existence.

Tamanaha observes that the mirror theory has been one of the most applied metaphors in law and other subjects and resonates in the works of many authors.¹⁸ Nevertheless, *Tamanaha* concedes that authors sometimes vary in their consideration of the scope in which the law mirrors society or of the strength that should be ascribed to the society regarding its influence on law. Views differ in whether law is formed *purely* as a reflection of the society, or whether society influences law only to a certain degree.¹⁹ Relatedly, *Ewald* notes that authors also vary in the extent to which they acknowledge that other forces, aside from societal (such as political or economic), affect the shape of the law.²⁰ The author gives an example of *Friedman* as a representative of the absolutist view that regards law as a precise imprint of the society.²¹ *Tamanaha* observes that *Durkheim* also views the relation between law and society as an extremely tight one (especially between law and custom

¹⁴ Mirror Theory, in ENCYCLOPEDIA OF LAW & SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES 1025-1026 (David S. Clark ed., Sage Publications 2007)

¹⁵ BRIAN TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (Oxford University Press 2001), citing STEVEN VAGO, LAW AND SOCIETY 3 (Prentice-Hall 1981) as “[e]very legal system stands in a close relationship to the ideas, aims and purposes of society. Law reflects the intellectual, social, economic, and political climate of its time”, or Walter Ullmann, THE MEDIEVAL IDEA OF LAW (Barnes and Noble Books 1969) at vii) noting that “[n]owhere is the spirit of an age better mirrored than in the theory of law”.

¹⁶ TAMANAHA, *supra* note 15, citing H. L. A. HART, THE CONCEPT OF LAW 199 (Oxford University Press 1961) as “[t]he law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideas”.

¹⁷ TAMANAHA, *supra* note 15 at 2, citing Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STANFORD JOURNAL OF INTERNATIONAL LAW 65–90 (1996) at 72, noting that “[l]egal systems do not float in some cultural void, free of space and time and social context: necessarily, they reflect what is happening in their own societies”.

¹⁸ TAMANAHA, *supra* note 15 at 2.

¹⁹ See also, e.g., William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43(4) THE AMERICAN JOURNAL OF COMPARATIVE LAW 489 (1995) at 494 claiming that “there is a continuum here, and a mirror theory can be more or less strong depending on how close it asserts the relationship between X and the society’s laws to be”.

²⁰ Ewald, *supra* note 19 at 491.

²¹ Ewald, *supra* note 19 at 492 citing Lawrence M. Friedman, A HISTORY OF AMERICAN LAW 12 (2d ed. 1985) that “nothing in the law is autonomous, rather, law is a mirror of society, and every aspect of the law is modelled by economy and society”. Indeed, Cairns suggests that *Friedman*’s work might have introduced the legal culture as an analytical category in sociological approaches to law (see Cairns, *supra* note 6 at 679).

and law and morality).²² Similarly, *Savigny* argued that law, like language, has a folk character and should accord with the “Volksgeist” (national spirit).²³ Finally, *Montesquieu* is also considered a proponent of a classical version of the mirror theory. Indeed, his position represents the strain of authors who perceive the law as a product of not only the morality and customs of a given society but also other societal factors and even the physical settings and conditions of a particular jurisdiction.²⁴

The mirror theory has a significant bearing on the scholarship on legal transplants. *Twining* identifies a steady stream of work in most social sciences that focuses on the diffusion of law and where the relative importance of local and external factors must be weighed and their interaction considered.²⁵ Legal transplanting was also of interest to diffusionism, which *Twining* regards as a representation of a reaction against the prevailing 19th-century view that there were natural laws of evolution governing human progress.²⁶

The proponents of the mirror theory are usually rather skeptical that legal transplanting is feasible – it is often viewed as doomed to fail. *Montesquieu* did not believe that transferring laws of one nation to another was possible without compromising the effectiveness of the law. This is because he regarded the societal predeterminants of law identified above to be crucial for its effectiveness. He posited that the more closely the law corresponds to the underlying conditions of a given society, the better.²⁷ He noted that the political and civil laws of each nation should be so closely tailored to the people for whom they are made that it would be pure chance if the laws of one nation could meet the needs of another.²⁸

²² TAMANAHA, *supra* note 15 at 35 citing Émile Durkheim, *The Division of Labour in Society*, in DURKHEIM AND THE LAW (Steven Lukes and Andrew Scull eds., St. Martin’s 1983) at 34. See also Ewald, *supra* note 19 at 491.

²³ Michihiro Kaino, *Bentham’s Theory of Legal Transplants and His Influence in Japan*, in LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA 63–83 (Vito Breda ed., Cambridge University Press 2019) at 75.

²⁴ TAMANAHA, *supra* note 15 at 29. *Montesquieu* identifies a compound of physical, cultural and political predeterminants.

²⁵ William Twining, *Social Science and Diffusion of Law*, 32(2) JOURNAL OF LAW AND SOCIETY 203 (2005) at 208.

²⁶ Twining, *supra* note 25.

²⁷ The important conditions include not only the cultural or political predeterminants, but also geographical considerations such as the climate, fertility of soil, size or position of a country, in addition to sociological considerations such as the size of the population, trade customs, religion or interaction of various laws of a given country on each other and the purpose of the lawmaker. TAMANAHA, *supra* note 15 at 28.

²⁸ B. DE MONTESQUIEU, *THE SPIRIT OF LAWS* (Fred B. Rothman & Co, revised edition by J. V. Prichard 1991) at 7, or TAMANAHA, *supra* note 15 at 28.

Montesquieu's theory was later revisited by *Kahn-Freund*,²⁹ who observed that legal ideas are now moving freely around the world so as to influence legislation and pending law reform.³⁰ To assess this process, he picked up *Montesquieu's* account on the socio-economic, cultural, and political predetermination of law and re-evaluated to what extent these predeterminants are important during modern times. He concluded that as the cultural and economic conditions of the countries become more interconnected, significant differences are disappearing. He would probably agree with *Friedman's* idea that the world is becoming “flatter”.³¹ Yet, this does not seem to be the case regarding political conditions, *Kahn-Freund* argues, which are in fact becoming more divergent. This dual development of cultural and social assimilation and political differentiation leads him to conclude that the degree to which law can be transplanted does not depend on how deeply it is embedded in the originating country, but rather how it is linked with the power structure of that country. The prevailing ideology, the political institutions, and the interests of the powerful are likely to be the greatest sources of resistance to transplantation.³² This has implications for the feasibility and ease of legal transplantation. As legal institutions may be more or less deeply embedded in a nation's life and political environment, they are also more or less readily transplantable from one legal system to another. Yet, at one end of the spectrum, the law is so deeply embedded in a society that transplantation is, in effect, impossible.³³ Thus, the quality of the political relationship between the donor and the recipient jurisdictions will determine the success or failure of the borrowed law.³⁴

Although the mirror theory has dominated legal thinking, as most other theories were built on or presumed a close relationship between the law and society, some theories challenge its assumption. *Tamanaha* identifies several theories that led away from the mirror theory, which was long regarded almost as conventional wisdom in the field, and infused new perspectives into the

²⁹ David Nelken, *Towards a sociology of legal adaptation*, in ADAPTING LEGAL CULTURES 7-54 (Johannes Feest and David Nelken eds., Hart Publishing 2001) at 10.

³⁰ Kahn-Freund, *supra* note 13 at 10.

³¹ Using the expression coined by *Thomas L. Friedman* in the title of his book *The World Is Flat: A Brief History of the Twenty-First Century* (THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (Farrar, Straus and Giroux 2005).

³² Kahn-Freund, *supra* note 13 at 300. See also Twining, *supra* note 25 at 211.

³³ Ewald, *supra* note 19 at 495.

³⁴ John Jupp, *Legal Transplants as Tools for Post-Conflict Criminal Law Reform: Justification and Evaluation*, 3(2) CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 381 (2014).

conceptualization of the relationship between law and society. In particular, she refers to selective mirror theories or instrumentalist theories.³⁵ Utilitarian streams of thought (often accompanying the instrumental views) advocated views that particularly challenge the mirror theories.³⁶

Jeremy Bentham's account on the relation between the law and society is particularly noteworthy in this regard. He accused *Montesquieu* of confusing the question of the existence of law with the question of whether it was fit to exist. A strong advocate of an instrumental approach to law, he regarded law as having utilitarian principles that were true universally across all legal systems.³⁷ These principles represented the “abstract utility” that was ubiquitous and omnipresent in all societies. Good laws for one society are always good for another.³⁸ To give life to his idea, he came up with a set of codes called *Pannomion*, which embodies such abstract utility and which was to be applied universally all across the world. This gave him the nickname “legislator of the world”.³⁹ To make his idea viable, he needed to consider how these universal laws could be adapted to the circumstances of the countries in which they were implemented.⁴⁰ He found the answer in the “circumstances influencing sensibility.”⁴¹ He differentiated between conditions that necessarily must serve as a ground of variation and those that are not absolutely insurmountable.⁴² Whereas physical circumstances (such as climate) are unchangeable by the legislator, the circumstances of the government, religion, and manners are not unchangeable.⁴³ Although *Bentham* agreed that sociological variations need to be taken into account, he stressed that even laws that have deep connections to the culture of the recipient country should be replaced by better laws.⁴⁴ He developed rules for transplanting laws and proposed nine techniques that a successful legal

³⁵ Selective mirror theories share the position that the law reflects only some customs, morals or values of a society (*Tamanaha* refers to Marxism as one of the examples, TAMANAHA, *supra* note 15 at 96). Instrumentalist theories posit that the law is an instrument of a particular social interest. TAMANAHA, *supra* note 15 at 104.

³⁶ TAMANAHA, *supra* note 15 at 45.

³⁷ TAMANAHA, *supra* note 15 at 46 referring to PETER J. KING, UTILITARIAN JURISPRUDENCE IN AMERICA: THE INFLUENCE OF BENTHAM AND AUSTIN ON AMERICAN LEGAL THOUGHT IN THE NINETEENTH CENTURY 41 (1986). According to *Tamanaha*, maximizing the utility of the community provides the standard against which both government and law are to be evaluated in the utilitarianism.

³⁸ Andrew Harding, *The Legal Transplants Debate: Getting Beyond the Impasse?*, in LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA 13–33 (Vito Breda ed., CUP 2019).

³⁹ Kaino, *supra* note 23 at 67.

⁴⁰ Philip Schofield and Stephen Engelmann, *Place and Time*, in SELECTED WRITINGS: JEREMY BENTHAM 152-219 (Stephen Engelmann ed., Yale University Press 2011).

⁴¹ Kaino, *supra* note 23 at 68.

⁴² Kaino, *supra* note 23 at 69.

⁴³ Kaino, *supra* note 23 at 71.

⁴⁴ Kaino, *supra* note 23 at 70.

“transplanter” should follow.⁴⁵ He also argued that the freedom of press and public discussion would contribute to finding the true interests of the people and act as a support for abandoning laws that were at odds with the “abstract utility” embodied in his *Pannomion*. *Kaino* writes that by defining the abstract utility of the *Pannomion* and identifying the freedom of press and public discussion, *Bentham* indeed provides clear-cut criteria and a reasonable methodology for legal transplanting and social reform.⁴⁶ Although his project has not materialized, *Bentham’s* account offers an alternative perspective to the mirror thesis.

The loosening grip of the mirror theory is also embodied in the works of *Watson*. His theory on legal transplants revived the discussion on the feasibility of moving rules from one society to another and reconsiderations of the merits of the mirror theory. The debate his works triggered reflects the general divide between those who perceive law as sufficiently autonomous to allow the transplanting of norms from one society to another and those who insist that law must be rooted in specific social, economic, and political contexts.

2.3.1 Feasibility of legal transplants: *Watson-Legrand* debate and its implications

Watson believed that law lends itself to transplantation because of its independence from societal context, considering law to be an autonomous construct that exists independently of society and societal needs.⁴⁷ What led him to reach this conclusion was a specific understanding of legal rules. He sees legal rules from a “black-letter law” perspective and focuses on the idea behind the rules and whether that idea provides a suitable solution to a legal problem. Under this perception, legal rules are intrinsically devoid of any inherent cultural linkages and connotations. The rules expressed through words are bare propositional statements that can travel easily because they are independent of the workings of any social, historical, or cultural substratum. It is only through interaction with society in the form of interpretation that the legal rules acquire their meaning. As a result, the law is a combination of propositional statements and their culture-specific meanings.⁴⁸ The transfer of ideas rather than rules means that law can be very successfully transferred even

⁴⁵ *Kaino*, *supra* note 23 at 63.

⁴⁶ *Kaino*, *supra* note 23 at 76.

⁴⁷ The main source of reference is WATSON, LEGAL TRANSPLANTS, *supra* note 3, first published in 1974. See also TAMANAHA, *supra* note 15 at 108.

⁴⁸ See also Legrand, *supra* note 13 at 114.

where the relevant social, economic, and geographical and political circumstances of the recipient country are very different from those of the donor legal system, thanks to, among other things, the specific nature of the work of lawyers and other legal professionals. *Watson* maintains that for the purpose of their arguments and legal justifications, lawyers look principally to the legal tradition itself, and not, as a rule, to anything outside of that tradition.⁴⁹ He believes that the development of the civil law is the result of “purely legal history”, and can be explained “without reference to” social, political, or economic factors.⁵⁰ He calls such movements of rules from one country to another, or from one people to another, legal transplants⁵¹ and observes that these movements were indeed the most fertile source of legal development.⁵² Given the cultural attributes of the legal elite, law will tend to develop by transplantation rather than by creation *ex nihilo* and will tend to reflect the legal tradition rather than anything extrinsic to the law.⁵³ It is the legal profession’s traditions and professional concerns that shape the law (especially private law), far more than any social input.⁵⁴ As a result, the recipient system does not require any real knowledge of the social, economic, geographical, and political context of the origin and growth of the original rule.⁵⁵

Watson’s views were received with reservations. *Legrand* particularly strongly opposed *Watson*’s account and maintained that legal transplants are not possible because of the inextricable connection between law and its societal context.⁵⁶ He posited that the meaning of the rule is an essential component of the rule that cannot be extracted from the rule itself. The meaning of the rule, however, is not entirely supplied by the rule itself. Rather, the meaning is a function of the application of the rule by its interpreter, or the concretization in the events the rule is meant to govern. Such an ascription of the meaning is predisposed by the way the interpreter understands

⁴⁹ Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1121 (1983) at 1157: “To a considerable degree, the lawmakers of one society share the same legal culture with the lawmakers of other societies”. See also TAMANAHA, *supra* note 15 at 108, or Ewald, *supra* note 19 at 500.

⁵⁰ WATSON, LEGAL TRANSPLANTS, *supra* note 3. See also Ewald, *supra* note 19 at 500.

⁵¹ WATSON, LEGAL TRANSPLANTS, *supra* note 3.

⁵² WATSON, LEGAL TRANSPLANTS, *supra* note 3 at 95. See also Ewald, *supra* note 19 at 498.

⁵³ ALAN WATSON, THE EVOLUTION OF LAW (1985) at 119. See also Ewald, *supra* note 19 at 500.

⁵⁴ Michael H. Hoeflich, *Law, Society and Reception: The Vision of Alan Watson*, 85 MICHIGAN LAW REVIEW 1083 (1987). The author noted that according to *Watson* “the interconnection between law and society is not so close as to preclude borrowing from alien systems. Reception is both possible and explicable so long as one recognizes that the most important group for reception of legal rules is the legal elite” (p. 1089). What matters most is the attitude of the legal elite, who may act as a filter of social demands (p. 1093).

⁵⁵ Alan Watson, *Legal Transplants and Law Reform*, 92 LAW QUARTERLY REVIEW 79 (1976).

⁵⁶ Legrand, *supra* note 13.

the context within which the rule arises. *Legrand* concludes that the meaning of the rule is a function of the interpreter's epistemological assumptions, which are themselves historically and culturally conditioned. Such a multifaceted nature of rules requires, according to *Legrand*, that comparatists adopt a view of law as a polysemic signifier, which connotes, *inter alia*, cultural, political, sociological, historical, anthropological, linguistic, psychological, and economic referents. In short, each rule must be understood as a complete social fact. Such an understanding of legal rules led him to conclude that a meaningful legal transplant can be achieved only when both the propositional statement as such and its invested meaning (which jointly constitute the rule) are transported from one culture to another. However, he thinks that the crucial element of the rule—i.e., its meaning—would not survive that journey. Hence, legal transplants are not possible because the imported form of words would inevitably be ascribed a different, local meaning, which will make it *ipso facto* a different rule. This is because the meaning of the rule changes the rule itself. Therefore, the transplant does not, in effect, happen, as the key feature of the rule—i.e., its meaning—stays behind. Rules cannot travel because they must always be understood in a social context. He finds that what may seem to be legal transplants are nothing more than “law reformers on occasion find[ing] it convenient (...) to adopt a pre-existing form of words which may happen to have been formulated outside of the jurisdiction within which they operate”.⁵⁷ These words, however, do not carry definite meaning irrespective of interpretation and application—a legal proposition is meaningless without its culture-specific invested meaning. Therefore, legal transplantation, involving the transfer of the rule, including its meaning, is impossible. Even if there may be a technical integration of a legal borrowing, the rule's meaning “does not survive the journey.” When a transplant encounters the surrounding “deep structures” of the law—including legal culture, mentality, myth, and the legal unconsciousness—it takes on a new dimension that is not captured within the idea of transplant.⁵⁸ *Legrand* posits that if rules include their local context, then a legal transplant could only exist where the articulation plus the interpretation of the rule is transported from one jurisdiction to another, which would hardly ever happen.⁵⁹

In reaction to *Legrand's* critique, *Watson* explained that his proposition never implied that the transplanted legal rule retains its meaning. Indeed, he argued that the rule, once transplanted, is

⁵⁷ *Legrand*, *supra* note 13 at 121.

⁵⁸ *Legrand*, *supra* note 13 at 117.

⁵⁹ *Legrand*, *supra* note 13 at 116–117.

different in its new home.⁶⁰ He concedes that cultural conditions will need to be taken into account, or that the borrowing occurs with some degree of “adaptation”.⁶¹ However, it is the rules, institutions, legal concepts, and structures that are borrowed, not the spirit of the legal system. As a result, there is no need to be concerned about cultural aspects, as these will come into play only after the rule has been transplanted. Hence, transplants do take place relatively insulated from reference to surrounding social and cultural factors. The subsequent development of a legal rule in a way that does not parallel developments in its original society should not be confused with a rejection of that rule.⁶² The rules can be easily reduced to writing and are accessible. To support his argument that legal transplants are possible and indeed often take place, *Watson* provides several examples of successful transplants, such as the reception of Roman law in Western Europe, or Swiss law serving as a base for the Turkish civil code. He maintains that borrowing is the main tool of legal change.⁶³

2.3.2 Reconciliation

Although there may seem to be an insurmountable chasm between *Watson's* and *Legrand's* views regarding the feasibility of legal transplants, deeper analysis of their arguments shows that the bone of contention lies in their differing understanding of legal rules rather than in different views on societal aspects of law. Indeed, their views are not fundamentally irreconcilable regarding the existence of some influence of society on the law. This is because even *Watson* recognizes that cultural conditions are to play a role once the rules are transplanted. Rather, the analysis suggests that their conclusions on the feasibility of legal transplants depends on how they define *legal rules*. Defining rules as pure propositional statements or words without inherent cultural connotations, as *Watson* does, has different implications for the possibility of transferring such rules than defining rules as bearing inherent culture-specific invested meaning, as *Legrand* does.

⁶⁰ WATSON, LEGAL TRANSPLANTS, *supra* note 3. See also TAMANAHA, *supra* note 15 at 109. The lawmaking is surely informed by social values (Watson, *The Evolution of Law*, *supra* note 53 at 118). Also, the “cause” of legal rules is commonly rooted in social, economic and political factors important to the life of society or its leaders (Watson, *Legal Change: Sources of Law and Legal Culture*, *supra* note 49 at 1135). *Watson* recognizes that “*transplanting frequently, perhaps always, involves legal transformation*” (WATSON, LEGAL TRANSPLANTS, *supra* note 3 at 116). Nonetheless, he maintains that “*the input of the society often bears little relation to the output of the legal elite*” (Watson, *The Evolution of Law*, *supra* note 53 at 17).

⁶¹ He updated the definition of a transplant as a form of borrowing (with adaptation). Alan Watson, *Legal Transplants and European Private Law*, 4(4) ELECTRONIC JOURNAL OF COMPARATIVE LAW (December 2000) at 12. See also WATSON, LEGAL TRANSPLANTS, *supra* note 3 at 7.

⁶² See also Nelken, *supra* note 29 at 39.

⁶³ Watson, *Legal Transplants and European Private Law*, *supra* note 61.

Both also seem to focus on the extreme ends of the scale of the social predetermination of law. *Watson's* position that a legal concept is independent of its context and so available for transfer from one location to another may be overstating the ease with which the law travels. *Legrand's* view that a legal idea is a unique product of its context and thus is not transferable to others may be overstating the importance of cultural determinants of law. *Twining* notes that both authors may indeed be creating strawmen.⁶⁴ *Watson's* strawman is a strong version of the mirror theory that sees law purely as a product of society. *Legrand's* strawman may be *Watson's* alleged absolute denial of any influence of societal context on law.

Nonetheless, a milder version of *Legrand's* disagreement with *Watson* resonated in the literature.⁶⁵ For example, *Grossfeld* disagreed with *Watson's* optimism about the possibility of transplanting legal institutions.⁶⁶ He claimed that the nature of law as a cultural phenomenon created such constraints and linked it so closely to the culture within which it developed that the transfer of laws from one culture to another was unlikely and very difficult. That *Watson's* argument deserved more nuanced analysis was also observed by *Ewald*.⁶⁷

2.3.3 Compromise

The equilibrium on which the current scholarship has stabilized lies somewhere between the extreme views represented by *Watson* and *Legrand*. *Zhou* summarizes the debate between the “transferists”—i.e., those who advocate that legal rules can travel easily between and countries—and the “culturalists”—i.e., those who maintain that law has invested cultural meaning that prevents it from traveling between the countries, as useful in a way to draw attention to the various aspects of legal transplants, including both the rule and context.⁶⁸ Nonetheless, he observes that the views of the “transferists” and “culturalists” converged to an accord that the transplanted law must be adaptable to its new legal environment.⁶⁹

⁶⁴ Twining, *supra* note 25.

⁶⁵ Cairns, *supra* note 6 at 680.

⁶⁶ BERNHARD GROSSFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW 41–49 (Tony Weir 1990) at 45.

⁶⁷ *Ewald* identifies “strong” and “weak” *Watson*, pointing to the difference in the resolve with which *Watson* presented his views on the cultural aspects of the law. *Ewald*, *supra* note 19.

⁶⁸ Ling Zhou, *The Independent Director System and its Legal Transplant into China*, 6 JOURNAL OF COMPARATIVE LAW 262, 274 (2011).

⁶⁹ Zhou, *supra* note 68 at 289.

In this regard, *Nelken* notices that more sociologically inclined scholars insist that it is above all the enviroing society that shapes and reshapes law.⁷⁰ On the other hand, comparativists often criticize the attempt to correlate developments in law with the internal evolution of the society in which it is found.⁷¹ *Techera* argues that those scholars who believe that legal transplation is possible focus less on the specific articulation of law and instead accept that there is a limited number of legal tools; where the objectives are similar and the ideas aligned, law can migrate with some tailoring to the local context.⁷² *Ewald* argues that the scholarship must now approach the relationship between law and society (and possibly other factors) with cautious awareness of its complexity.⁷³

Kahn-Freund's account may also be useful for bridging the positions of *Watson* and *Legrand*.⁷⁴ He divides legal transplants into two categories.⁷⁵ The first comprises mechanical legal institutions, which are insulated from culture and so are easy to transfer from one context to another. This resonates with *Watson's* view. The second comprises organic legal institutions, which are culturally embedded and thus difficult to transfer across cultures. This corresponds to *Legrand's* position.

Similarly, *Trubek's* position may represent a compromise between strong “culturalist” and “transferist” views. He acknowledges the importance of culture but asserts that regardless of such cultural embeddedness of law, legal transplants are still possible.⁷⁶ *Nelken* also sees the idea of legal transplants as useful in describing the transfer of legal ideas so long as it is qualified by some consideration of context.⁷⁷

⁷⁰ Nelken, *supra* note 29 at 8.

⁷¹ Nelken, *supra* note 29 at 8.

⁷² Techera, *supra* note 8 at 237.

⁷³ Ewald, *supra* note 19 at 509.

⁷⁴ Liljeblad, *supra* note 3 at 214.

⁷⁵ Kahn-Freund, *supra* note 13 at 298. See also Cairns, *supra* note 6 at 643-5, or Teubner, *supra* note 13 at 11.

⁷⁶ David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 (1) YALE LAW JOURNAL 44 (1972).

⁷⁷ David Nelken, *Legal Transplants and Beyond: Of Disciplines and Metaphors*, in *COMPARATIVE LAW IN THE 21ST CENTURY* 19-34 (Andrew Harding and Esin Örtücü eds., Kluwer 2002). See also Melissa Crouch, *Asian Legal Transplants and Rule of Law Reform: National Human Rights Commission in Myanmar and Indonesia*, 5 HAGUE JOURNAL ON THE RULE OF LAW 146 (2013).

It follows that, assuming that legal transplanting, in terms of moving legal rules from one jurisdiction to another, is possible, there seems to be an agreement that society and culture play a role in the law's future operation. This indicates that the success of legal transplant depends, *inter alia*, on how it relates to or interacts with the societal context in which it is implanted. If the transplanted law does not conform to the recipient society and cultural expectations regarding what role that rule should play, it is likely doomed to fail. *Nelken* observes that there does not seem to be a real debate between “culturalists” and “transferists” that legal transplants need to be somehow “domesticated” to fit into their new context. Otherwise, there is a risk that these transplants will fail or be rejected.⁷⁸ Thus, the theoretical discussion on the conceptualization and feasibility of legal transplants does not seem to provide much practical impact in assessing what happens after the law was moved to the new environment. Indeed, *Harding* suggests that the debate on legal transplants has reached an impasse. The author identifies a set of binaries that frame the discussion that are not helpful in assessing the process of legal diffusion in practice. Thus, he suggests that the focus should be shifted from whether the transplanted legal rules survive the transplantation (and thus become considered law in the recipient jurisdiction) to considering whether the borrowed law is good law.⁷⁹ He suggests that the key might be hidden in understanding how the transplanted law operates in the recipient society.⁸⁰ It follows that defining successful legal transplants or finding conditions that determine them may bring more value to the evaluation of legal transplants than agreeing on their conceptual definition. Nonetheless, *Harding* concedes that evaluating the success of legal transplants is difficult.

The rest of the thesis ventures to move the debate on legal transplants beyond the theoretical impasse and focuses on enquiring what a successful legal transplant may look like and what determines its success. The equilibrium reached between “culturalists” and “transferists” suggests that underlying societal conditions in recipient jurisdictions are expected to play some role. However, the outstanding question is how important the role of such underlying societal considerations is. In other words, how closely should the law “fit” the recipient societal context to be considered successful? Also, it is unclear whether there are other factors apart from adaptation

⁷⁸ Nelken, *supra* note 29 at 13.

⁷⁹ Harding, *supra* note 38.

⁸⁰ Harding, *supra* note 38 at 24.

to the local context that determine the success of legal transplant, and if so, what bearing they have. These questions will be explored further in the thesis.

3 Success in legal transplanting

Although possibly reaching an impasse, as suggested by *Harding*, the discussion between “transferists” and “culturalists” and the feasibility of legal transplants also provides important insights for the conceptualization of success in legal transplantation. This is because the evaluation of the feasibility of legal transplanting is often closely linked to, or even equated with, the assessment of whether a transplant has succeeded or failed. *Nelken* observed that the way success is conceived determines whether legal transfers are thought to be generally feasible.⁸¹ Similarly, *Jupp* notes that transplant justification is related to transplant evaluation.⁸² Such an evaluative inquiry was, to a certain degree, reflected even in *Legrand’s* analytical framework. He seems to take a step further in his discussions on legal transplants to equal the question of their feasibility with their success or failure. In his view, where legal transplants are not possible, it is because they fail. *Watson*, on the contrary, seems to strictly separate the two. He posits that legal transplants are generally feasible and that their success or failure is to be assessed after the rules have been transplanted. In undertaking such evaluative enquiries, both *Legrand* and *Watson* seem to agree that societal context plays a role in the process of legal transplanting. Yet, whereas the impossibility of encompassing such societal context cannot lead but to the conclusion that legal transplants are impossible in *Legrand’s* view, the ignorance of societal context results in failure (rather than impossibility) in *Watson’s*. This illustrates that the choice of the analytical framework inevitably influences both the assessment of the feasibility of legal transplants and the evaluation of their success.

Other than conceding that the societal context into which the law is transplanted has a bearing on its success, there does not seem to be a conclusive account of how to understand or define success in legal transplantation. The majority of authors touch upon or describe success or failure only indirectly through the analysis or listing of (pre)conditions that are, in their view, determinative of or contributing to success or failure. However, the authors who have ventured to provide a general definition of success in legal transplanting agree that *success* is a highly relative and subjective term. Numerous reasons for such relativity are identified, such as the dependence on the role of law in a given society in general, the timeframe in which the evaluation is performed, or an area of

⁸¹ Nelken, *supra* note 29 at 36.

⁸² Jupp, *supra* note 34.

law that is being transplanted. Such relativity prompts some authors to conclude that it is indeed impossible to provide a general definition of success that would be universally applicable to legal transplants of all shapes and sizes. Nevertheless, when pondering the feasibility of defining success, authors often propose or suggest some dimensions that may serve as a benchmark for the delineation of success. Thus, although the literature does not seem to be conclusive on the conceptualization of success in legal transplantation, it offers valuable insights as to the various dimensions in which success can be understood. Accordingly, the following part of this thesis will first explain why success (or failure) is considered a highly relative concept in the literature. Then, it will sketch criteria identified in the literature as possible benchmarks for conceptualizing success.

3.1 Relativity of success

The authors agree that the conceptualization of success is not straightforward and depends on many variables. Indeed, being overwhelmed by their number, some authors even propose using the term *effectiveness* instead of *success*, as it implies greater objectivity.⁸³

This follows from the very notion of success as an evaluative criterion. The term *success* is defined by the English dictionaries as “the achieving of the results wanted or hoped for”,⁸⁴ or “favourable or desired outcome”.⁸⁵ The indefinite and open-ended words used in the definitions illustrate that the meaning attributed to success will necessarily depend on the measures through which it is evaluated. In addition, the meaning of success will also vary based on the meaning invested in those measures. Finally, the analytical framework and the purpose of the evaluation will also influence the understanding of success.

Below are summarized the most common grounds for the relativity of success:

- *Nelken* observes that the notion of success has strong evaluative overtones. Conceptualizing success may thus easily result in mixing normative and explanatory enquiries. For these reasons,

⁸³ See e.g. Yves Dezalay and Bryant Garth, *The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars*, in ADAPTING LEGAL CULTURES 241-56 (Johannes Feest and David Nelken eds., Hart Publishing 2001). Also suggested by Nelken, *supra* note 29. The term effectiveness is also used by *Zhou* (Zhou, *supra* note 68 at 266 or 268).

⁸⁴ Success, in CAMBRIDGE DICTIONARY, online at <https://dictionary.cambridge.org/dictionary/english/success> [last accessed 9 September 2021].

⁸⁵ Success, in MERRIAM-WEBSTER DICTIONARY, online at <https://www.merriam-webster.com/dictionary/success> [last accessed 9 September 2021].

He suggests using *effectiveness* instead of *success*.⁸⁶ However, he advises against the technical or mechanical evaluation of effectiveness because even this notion is inherently relative. He posits that the definition of success necessarily depends on the point of view of the assessor, the particular timeframe within which the assessment is made, or whether the law is transplanted from one or more jurisdictions.⁸⁷ Given the inherent relativity of *success*, he notes that the most fundamental, and indeed the decisive, question is who gets to determine what is meant by *success*.⁸⁸ With regard to its very definition, he emphasizes that such an endeavor assumes that law has goals that can be measured.⁸⁹ He is rather skeptical about the general usefulness of such an engineering approach to law, as he points out that law cannot always be considered only in terms of measurable goals. To support this claim, he gives an example of *soft law*, which does not serve to achieve a particular outcome but only to give opportunities to private contracting.⁹⁰ He concludes that without a prescribed end state, it is difficult to measure to what extent such a state has been achieved by the transplanted law. Nevertheless, he ascribes certain weight to the evaluation of the extent to which the problems encountered in the originating and recipient culture are the same as those entailed in any attempt to change a society through law in a domestic context.

- *Cotterrell* also questions the possibility of a uniform definition of success.⁹¹ He claims that the evaluation of success depends on the way the law is conceptualized—whether as positive rules normatively determining what should be, or as an instrument of some kind, or an expression or aspect of culture. Where law is perceived as positive rules, a mere official promulgation may be treated as successful transplantation, as the operation of law within society is beyond the scope of such considerations. Where law is perceived as an instrument, the focus shifts from the existence of the rule to how such rule operates in practice. Success will hinge on whether it has the intended effects, which were the reason for it. Finally, where law expresses culture, only those transplants that are consistent with the cultural environment of the recipient society, or that are reshaped based on it, can be considered successful. To support his claim that the

⁸⁶ Nelken, *supra* note 29 at 38.

⁸⁷ Nelken, *supra* note 29 at 39.

⁸⁸ Nelken, *supra* note 29 at 49.

⁸⁹ Nelken, *supra* note 29 at 46.

⁹⁰ Nelken, *supra* note 29 at 46.

⁹¹ Roger Cotterrell, *Is There a Logic of Legal Transplants?*, in ADAPTING LEGAL CULTURES 71-92 (Johannes Feest and David Nelken eds., Hart Publishing 2001).

interpretation of the role of law and the perception of its success of law will differ within the society, he proposes four types of communities: instrumental, traditional, community of belief and, affective community. For each community, the perception of success will necessarily differ.

- *Esquirol* also posits that the conceptualization of success is necessarily determined by the position of the evaluator.⁹² On this account, he criticizes the outsider perspective of the commentators who measure or describe alleged shortcomings of legal transplants based on legal constructs that are external to the examined jurisdiction. Such relativism is also reflected in his understanding of failure, as he identifies three types of failure depending on the benchmark against which the transplanted law is evaluated: a functional failure, which means that the practical implementation does not work; a legal failure, which means that the legal provisions are inadequate or wrong; and a policy failure, which points at defects in the merits or substance of the policies.
- *Gillespie* is also rather skeptical toward the feasibility of measuring the success of legal transplants.⁹³ He observes that the idea of success assumes that laws have measurable goals, which he doubts. As a result, the evaluation of success will always be relative. He frames legal transplantation as a discourse involving a structure of power relations and individual agency.⁹⁴ It is the shared or overlapping epistemologies and tacit understandings within societal or organizational groups that give legal transfers meaning and regulatory force. The process of legal transfer requires an exploration of the regulatory conversations between interpretative communities that share similar epistemological worldviews. He notes that it is this thinking that ultimately shapes the way in which legal transfers are adapted to a particular culture. Applying such discourse analysis, he posits that success cannot be assessed from an external, objective position. Thus, it is impossible to find a uniform interpretation of success that would allow for the deterministic prediction and modeling of successful transfers.⁹⁵ It is difficult to prove causality in the transfer process by identifying essential preconditions for a transfer's success. Thus, he considers normative evaluations in terms of good or bad legal transplants as only

⁹² Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AMERICAN JOURNAL OF COMPARATIVE LAW 75 (2008).

⁹³ John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 657 (2008).

⁹⁴ Gillespie, *supra* note 93 at 683.

⁹⁵ Gillespie, *supra* note 93 at 713.

secondary considerations with contextual meaning to those embedded in specific interpretative communities.⁹⁶ Due to such inevitable relativity enclosing the assessment of legal transplants, an objective notion of success seems impossible to find.

- Similarly, *Siems* also advocates a rather relativistic approach to legal transplants. He doubts the feasibility of reaching a common agreement on a positive or negative assessment of a particular legal transplant, as such evaluative endeavor would necessarily interact with normative conceptions or theories of justice and injustice that may differ considerably.⁹⁷
- *Jupp* also doubts the possibility of creating a universally applicable definition of a successful legal transplant. According to him, the concept of success may depend on whose point of view is considered.⁹⁸ He gives an example of an international reformer, who may perceive success in mere enactment of the law, and contrasts them with a judge, who may regard the application of such law as a failure. In addition, he points out that finding a general definition of success may not be conceivable because there may be nuances even when considering a single legal transplant—whereas some aspects of the transplanted laws may be considered as success, others may not. He also notes that it is difficult to accurately measure the effect of any law, let alone a transplanted law or the variables that determine its success or failure.
- The view that it is not possible to evaluate legal transplants as a whole is also shared by *Teubner*. He regards the transplanting metaphor as misleading because it suggests that the result of transferring legal rules and institutions is either an outright success or failure, when it is more likely a mix.⁹⁹ *Nelken* concurs that “most commonly success is partial”.¹⁰⁰ Relatedly, *Kanda and Milhaupt* express doubts as to whether success can be evaluated in relation to wholesale transplants of entire bodies of law.¹⁰¹ In any case, they acknowledge that the conceptualization of success is relative, as it depends on the baselines used for the measurement.

⁹⁶ *Gillespie* notes that the process of transfer requires the exploration of the regulatory conversations between interpretative communities that share similar epistemological worldviews – the author posits that it is this thinking which ultimately shapes the way in which legal transfers are adapted to a particular culture. *Gillespie, supra* note 93 at 657 and 713.

⁹⁷ *Mathias Siems, Malicious Legal Transplants*, 38(1) *LEGAL STUDIES* 103 (2018).

⁹⁸ *Jupp, supra* note 34.

⁹⁹ *Teubner, supra* note 13.

¹⁰⁰ *Nelken, supra* note 29 at 47.

¹⁰¹ *Hideki Kanda and Curtis J. Milhaupt, Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51(4) *THE AMERICAN JOURNAL OF COMPARATIVE LAW* 887 (2003).

- *Kanda and Milahupt* also observe that the conceptualization of success may depend on the timeframe in which the transplant is evaluated.¹⁰² They propose that the success or failure of legal transplants be evaluated in a longer time perspective. Such a dynamic view of legal transplants is also proposed by *Teubner*. He developed a theory of legal irritants in which he focuses on changes that are triggered by legal transplants. He particularly observes how legal irritants (a term he uses to replace the term “legal transplants”) unleash a unique and unpredictable set of events and outputs depending on the contexts and discourses they encounter in the recipient jurisdiction.¹⁰³ This suggests that the consideration of success or failure is dependent on the period over which the transplant is evaluated. This resonates with *Viven-Wilksch*, who highlights the importance of the timeframe within which legal transplants are evaluated.¹⁰⁴ This dynamic view is promoted also by *Stabmoulakis*, who proposes that the term “legal transfer” better corresponds to the legal evolution or creation aspect of legal transplants than the simple transplant analysis of where the practices have been sourced.¹⁰⁵
- Skepticism that the success of legal transplants can be easily measured is shared by *Breda*. In particular, he is skeptical that the multiplicity of factors that distinguish a modern cross-fertilization of legal, institutional, and economic principles can be easily measured. He illustrates how different perceptions lead to different evaluations of success or failure. For example, if the transplant of the concept of English trust into Chinese law was to replicate the laws of England in China, the Chinese equity law would be a failure, as it has very little in common with the English law system. Nonetheless, even though the transplant had unforeseen results and led to an unexpected institutional structure, it may have achieved its aims—i.e., to alter human conduct in a way that increases prosperity and protects rights.¹⁰⁶

These authors seem to share the view that any general conceptualization of success would necessarily reflect the specific circumstances of the evaluation, including its purpose, its relevant

¹⁰² Kanda and Milhaupt, *supra* note 101.

¹⁰³ Teubner, *supra* note 13.

¹⁰⁴ Viven-Wilksch, *supra* note 5.

¹⁰⁵ Drossos Stamboulakis, *Legal Transfer and ‘Hybrid’ International Commercial Dispute Resolution Procedures: Lessons from the Singapore International Commercial Court*, in *LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA* 183–210 (Vito Breda ed., Cambridge University Press 2019) at 189.

¹⁰⁶ Vito Breda, *Introduction*, in *LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA* 1–10 (Vito Breda ed., Cambridge University Press 2019) at 2.

timeframe, or the evaluator's epistemological and axiological views and value orientation. The understanding of success will be different in cases in which law is considered a tool for change, as opposed to cases in which law serves to proclaim generally accepted values and beliefs of a given society. In addition, adaptation of a law is expected to continue after the transplantation takes place, which makes it difficult to talk in terms of its success or failure.¹⁰⁷

The view on the function and role of law in general seems to be an especially powerful variable. *Twining* identifies instrumentalist, expressive/contextual, and ideological approaches.¹⁰⁸ The instrumentalist approach (mentioned above in relation to *Bentham*) sees the law as a problem-solving tool. Thus, legal transplanting serves to import legal solutions that are developed elsewhere to solve local problems.¹⁰⁹ This results in an emphasis on technical means to taken-for-granted ends.¹¹⁰ The values that may be appreciated in the evaluation of success include bureaucratic rationalism and ideas of economic efficiency. The ideological view, *Twining* argues, focuses on underlying values, principles, and political interests that motivate the borrowing rather than the details of particular rules or provisions.¹¹¹ This view reflects, for example, the notions of democracy, human rights, good governance, and the rule of law. Finally, the romantic (or expressive/contextual) view conceives of law as an outgrowth of values and traditions that in large part expresses or reflects local society. Law is said to be embedded holistically in local culture. This *a priori* makes reception and assimilation problematic, which may result in transplanting efforts being doomed to failure even before they take place. *Twining* argues that all these views have relevance—they only represent different perspectives with which law can be analyzed. Indeed, he notes that one cannot proceed far in law without considering underlying beliefs, values, and purposes.¹¹²

What may be inferred from *Twining's* account is that relativity in defining success is indeed desirable, as it corresponds to the constant tensions between different perspectives on law and its function in society. Thus, although the definition of success is bound to be relative and reflect the

¹⁰⁷ Corrin, *supra* note 4 at 60.

¹⁰⁸ Twining, *supra* note 2 at 26.

¹⁰⁹ Twining, *supra* note 2 at 26.

¹¹⁰ Twining, *supra* note 2 at 27.

¹¹¹ Twining, *supra* note 2 at 27.

¹¹² Twining, *supra* note 2 at 30.

various circumstances of the evaluative endeavor, such variability should not necessarily be regarded negatively. Rather, all the variables included in contemplation of success may mediate important considerations that are relevant in legal diffusion for different stakeholders in different circumstances. All those differing conceptualizations of success indeed provide useful hints as to dimensions by which the success or failure of legal transplants may be evaluated.

3.2 Dimensions of success

As a result of the relativity of the term, the dimensions by which success can be evaluated vary widely in their nature, scope, and purpose.¹¹³ The authors usually list numerous possible dimensions to illustrate the complexity of the transplanting endeavor. For the purpose of this thesis, such considerations were pared down to a list of considerations that play prominent roles in the literature. Therefore, linking a specific dimension to a specific author does not necessarily imply that the author considers this single dimension as the only or the most important dimension. Rather, it only means that they suggested the given dimension as a feasible dimension of success, among (many) others. In fact, some authors suggest that only multiple benchmarks may procure a relatively more complex picture of a given transplant.¹¹⁴

The distillation of various dimensions important in the literature provides insightful material for their subsequent categorization. In this regard, two large groups were identified. The first group comprises the dimensions that relate to the effects the transplanted law has in a recipient jurisdiction. For the purposes of this article, this view is called the *dynamic view*. The second group includes those dimensions that are concerned with how the transplanted law fits within the domestic environment (however defined) of the domestic jurisdiction, without examining its effects. This view is called the static view. The next chapter will proceed by describing the respective dimensions identified in each of the groups.

3.2.1 Dynamic view on success

When making judgments about success or failure of legal transplants, a number of authors look at the effects these transplants have in the recipient jurisdiction. For example, when analyzing the

¹¹³ See also Vito Breda, *Conclusion*, in LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA 321–324 (Vito Breda ed., Cambridge University Press 2019) at 322.

¹¹⁴ Breda, *supra* note 106.

transplantation of law in Latin America, *Esquirol* looks also at the effects the reform brought or failed to bring—e.g., whether it promoted economic growth or initiated desirable change.¹¹⁵

The range of effects that may be analyzed is considerably wide. Some of the most often occurring “forms” of such effects are mentioned below. These are, again, classified into two categories. The first category assembles those criteria that are closer to the processes or performance related to legal transplants—i.e., *what* the effects are and *how* they are realized, without looking at the results that those effects bring. The dimensions of success classified in the second category are closer to specific results related to legal transplants (and sometimes implicitly the reasons behind those transplants). It is to be noted, however, that certain dimensions could be classified in both categories: process- or performance-oriented *and* result-oriented. In such cases, they were classified based on the most prominent feature.

3.2.1.1 Process/performance-oriented effects

3.2.1.1.1 Mere official promulgation

One of the criteria suggested for the evaluation of legal transplants is whether the transplanted law has been officially promulgated.¹¹⁶ Where law is perceived as positive rules, a mere official promulgation of the borrowed law may be treated as transplantation.¹¹⁷ Thus, in this view, a successful promulgation would be equal to a successful transplantation.

3.2.1.1.2 Initiate discourse

Attention may also be given to the ability of the transplanted rules to initiate discourse. Where borrowed rules are actively discussed and change the behavior of a wide range of social actors, they may be regarded as being successfully transplanted. It does not matter whether the most forceful narrative supports bad law.¹¹⁸

3.2.1.1.3 Initiate any behavior (even unexpected)

¹¹⁵ *Esquirol*, *supra* note 92.

¹¹⁶ Cf. Cotterrell, *supra* note 91.

¹¹⁷ Cf. also Benjamin Gussen, *On the Hardingian Renovation of Legal Transplants*, in *LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA* 84–108 (Vito Breda ed., Cambridge University Press 2019) at 90.

¹¹⁸ Gillespie, *supra* note 93 at 720.

Success may also mean that the transplant initiates certain behavior (rather than simply discourse), regardless of the nature of such behavior and whether or not it was envisaged at the time of transplanting. The mere ability to initiate (any) behavior (i.e., that the law is visible to the legal actors and they are aware of it) is sufficient to deem it successful.

3.2.1.1.4 Initiate behavior contemplated by the donor or recipient

Qualification of the above criteria may provide a slightly more sophisticated benchmark of success. In such a view, success is determined by whether the legal transplant initiated the behavior contemplated by the donor or the recipient of the legal transplant. *Arvind* argues that for the evaluation of success, it may also be important to understand how the rules that are being transplanted function in the jurisdiction of origin.¹¹⁹ This view may suggest that if the transplanted rules function in their new environment in the same way as in the jurisdiction of origin, the transplantation can be considered successful. Similarly, *Zhou* looks at how the transplanted law functions in the jurisdiction of origin and what role it plays.¹²⁰ The author considers the legal transplant of the institution of independent directors to China to be a failure because the *raison d'être* underpinning the institute of independent directors in the donor jurisdiction (i.e., their independence) is not achievable in the current Chinese system. This is because that system imposes higher restrictions on directors' independence than may be the case in the donor jurisdiction.¹²¹

3.2.1.1.5 Change current behavior

Some authors suggest that successful transplants may need to change current behavior, especially if such transplants are conceived of or used as a tool for change. For example, instead of observing whether the transplant fits its new environment, *Dezalay and Garth* are more interested in seeing how the transplant transforms local structure or how it changes the recipient society.¹²² Similarly, *Nelken* acknowledges that the transplant may serve as a tool of change. He looks at the extent to which the problems encountered by legal transplants that are used as tools of change are the same

¹¹⁹ T. T. Arvind, *The "Transplant Effect" in Harmonization*, 59 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 65 (2010).

¹²⁰ Zhou, *supra* note 68.

¹²¹ Zhou, *supra* note 68 at 290.

¹²² Dezalay and Garth, *supra* note 83.

as those entailed in any attempt to change society through law in a domestic context.¹²³ *Harding* believes that the objective of legal transplant is not to reflect society, but to change it or reform it.¹²⁴ Similarly, *Breda* believes that the aim of legal transplanting is not to create cultural artifacts, but rather to achieve a change in conduct.¹²⁵ He adds that foreign-inspired legal reforms are often elements of wide-ranging socio-economic policies aimed at fostering specific aims.¹²⁶ *Teubner's* entire theory on legal irritants is built on the assumption that the borrowed law initiates processes to change the context of the recipient society.¹²⁷ In particular, legal irritants are expected to trigger unexpected consequences through an “evolutionary dynamic in which the external rule’s meaning will be reconstructed and the internal context will undergo fundamental change”.¹²⁸ *Viven-Wilksch* and *O’Brien* concur with *Teubner's* view and apply it to their own analyses. The testing of correlation between foreign-inspired legal reforms and expected (and unexpected) cultural changes has been the subject of a volume of collected essays on legal transplantation in East Asia and Oceania.¹²⁹ *Gal* observes that law can play an important role in constituting culture, if it fits well with the existing ideology and is not too culturally invasive.¹³⁰

3.2.1.1.6 Use in a specific way

Other authors focus on the way the transplanted law is used. *Viven-Wilksch* looks at whether the transplanted law is used at all.¹³¹ Where it is unused and rejected, it fails.¹³² Some authors require as a condition of success that the transplanted law does not deviate from its model in the donor jurisdiction (subject only to justified deviations). Other authors focus more on usage that is in congruence with the recipient jurisdiction. This suggests that the authors implicitly presume that deviations from the model will necessarily take place. *Kanda and Milhaupt* consider a transplant successful if it is used in the same way that it is used in the donor country, subject to adaptation to

¹²³ David Nelken, *Beyond the Metaphor of Legal Transplants?: Consequences of Autopoietic Theory for the Study of Cross-Cultural Legal Adaptation*, in *LAW'S NEW BOUNDARIES: THE CONSEQUENCES OF LEGAL AUTOPOIESIS* 265 (Jiri Prihan and David Nelken eds., Ashgate 2001) at 269-275.

¹²⁴ *Harding*, *supra* note 38.

¹²⁵ *Breda*, *supra* note 113 at 322.

¹²⁶ *Breda*, *supra* note 106 at 3.

¹²⁷ *Teubner*, *supra* note 13.

¹²⁸ *Teubner*, *supra* note 13.

¹²⁹ *Breda*, *supra* note 106 at 2.

¹³⁰ Michal Gal, *The 'Cut and Paste' of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, 9(3) *EUROPEAN JOURNAL OF LAW REFORM* 484 (2007).

¹³¹ *Viven-Wilksch*, *supra* note 5 at 133.

¹³² *Viven-Wilksch*, *supra* note 5 at 133.

local conditions.¹³³ Nevertheless, they also consider a transplant successful if it contributes to the development of social norms but is otherwise unenforced. *Vice versa*, they see a failure where the application or enforcement of the imported rule leads to unintended consequences or where the imported rule is ignored by the relevant actors. *Waelde and Gunderson* observe that the more an imported legislative model is opposed to powerful strands in the existing and emerging socio-economic and legal culture, the more it is likely that either the model will not work at all or its real effect will be very different from its socio-economic function in the society of origin.¹³⁴ *Berkowitz, Pistor, and Richard* suggest measuring success by the effectiveness of legal institutions, as compared with their effectiveness in the donor jurisdiction.¹³⁵ In their theory on the “transplant effect,” they posit that a transplanted legal order will likely function less effectively than in its original form and context if it does not either adapt to local conditions or does not have a population that is familiar with it and therefore capable of handing the new regime. For *Harding*, legal transplant is successful if the law has stuck and been culturally absorbed and accommodated.¹³⁶

3.2.1.1.7 Conclusion

The above dimensions show that the process- or performance-related effects that the transplanted law may bring into a recipient jurisdiction vary. Ranging from dimensions focused on the very incorporation of the law to the immediate process-oriented effects of the law, they cover the whole “life cycle” of a legal transplant. Nonetheless, they may not be that useful in evaluating what implications the transplanted law has for the recipient jurisdiction. In particular, although their fulfillment serves as a necessary condition for the transplant to achieve some results (as described in the following chapter), they may not procure much information about the qualitative importance of those effects to the recipient jurisdiction—i.e., whether it is “good” or “bad” that these processes happened and from whose point of view these effects should be evaluated. For example, although promulgation may be the first step and a necessary precondition for the law to become effective, it is agreed that official promulgation as the criteria of success may not have true interpretative value as to the role of the transplant in the recipient jurisdictions. Similarly, the ability of the transplanted

¹³³ Kanda and Milhaupt, *supra* note 101.

¹³⁴ Thomas W. Waelde and James L. Gunderson, *Legislative Reform in Transition Economies: Western Transplants—A Short-Cut to Social Market Economy Status*, 43 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 347 (1994).

¹³⁵ Berkowitz et al., *supra* note 13.

¹³⁶ Harding, *supra* note 38.

law to initiate some behavior may not have much interpretative value, as whether the initiated behavior is “good” or “bad” for the recipient jurisdiction remained unconsidered. In addition, there may be difficulties in evaluating what behavior was triggered, or at least expected to be triggered, in the donor jurisdiction. Indeed, the usefulness of the comparison between the ways the law is used in the donor and in the recipient jurisdiction is approached with skepticism by some authors. For example, *Friedman* doubts that it is possible to ascertain how the transplanted law works in the donor jurisdiction and exactly what impact that particular legislation had at home.¹³⁷ For these reasons, he posits that it is difficult to judge whether the transplanted law has taken root in the recipient jurisdiction.

Thus, evaluating success from process- or performance-oriented dimensions may lead to the danger of designating as success some transplants whose effects were completely unanticipated (provided such effects can be determined, both in the donor and the recipient jurisdictions) and that have indeed proven “bad” for the recipient jurisdiction. Therefore, shifting focus to results, rather than simply processes or performance triggered, may provide more value, especially in cases on which the transplant was chosen as a means to a further end.

3.2.1.2 Result-oriented effects

Where a legal transplant was imported as a means to a further end (which should arguably be the norm), the accomplishment of such a further end may serve as a benchmark of success. *Nelken* observes that one of the points of introducing legal transplants is the hope that the transplant brings about the conditions (flourishing economy) found in the wider context in which the borrowed law flourishes (which implies failure when the real effect of the law is very different from the socio-economic function in the society of origin).¹³⁸ Legal transplants are also often introduced as a means of legal change. *Harding* suggests that the point of introducing legal transplants is to change or reform society.¹³⁹ The existence of such end goals calls for an evaluative dimension that focuses on result- rather than process- and performance-oriented effects.

¹³⁷ Lawrence M. Friedman, *Some Comments on Cotterrell and Legal Transplants*, in ADAPTING LEGAL CULTURES 93-98 (Johannes Feest and David Nelken eds., Hart Publishing 2001).

¹³⁸ Nelken, *supra* note 29.

¹³⁹ Harding, *supra* note 38.

Similar to process- and performance-oriented effects, result-oriented effects may be evaluated from two perspectives. The first is that of the recipient society, including the society in general and the interested persons in particular. The second is that of the donor society—again, including the society in general and the interested persons in particular. Below are some of the most commonly cited result-oriented effects.

3.2.1.2.1 Benefit to the society or persons responsible

One of the evaluative dimensions of success mentioned in the literature is whether the transplanted law benefits the recipient society. On the assumption that one of the functions of law is to regulate human behavior for the benefit of society,¹⁴⁰ it may be justified and legitimate to expect that the ultimate goal of a transplanted law may be to benefit the recipient society. Finding and achieving benefit is, or should be, the role of the state and its political representation.

Such benefit-oriented analysis may be observed, for example, in the works of *Örücü*. The author analyzes the adoption of a whole body of law and designates success as a situation in which direct exposure to the model contributes to the social system. Meanwhile, *Örücü* perceives failure as a situation in which the official legal system curdles and becomes dysfunctional.¹⁴¹ Similarly, for *Gal*, it is important to consider whether the transplanted law can benefit the country.¹⁴²

Breda understands a dysfunctional transplant as a social-engineering experiment that did not deliver the expected results. He proposes analyzing the costs and potential benefits that foreign-inspired legal reforms might have.¹⁴³

Nevertheless, the problem with this dimension is that the notion of societal benefit is at least as indeterminate as the notion of success, if not more. As a result of these practical restraints on finding an objective notion of *benefit to the recipient society*, certain authors suggest that legal transplants might be evaluated based on whether they deliver benefits to the persons responsible.

¹⁴⁰ On the functions of law see e.g. Joseph Raz, *The Functions of Law*, in *AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 163-179 (Clarendon Press 1979).

¹⁴¹ Esin Örücü, *Law as Transposition*, 51(2) *THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 205 (2002).

¹⁴² Gal, *supra* note 130.

¹⁴³ Breda, *supra* note 113 at 322.

By adopting this more targeted approach, they do not look at the effects in terms of the service of a legal transplant to the given legal system. Rather, they see success as benefitting the people who stand behind the legal transplant—i.e., to those who initiated the change by legal borrowing. That analytical framework is based on an observation that the usage of legal transplanting instead of resorting to pure “domestic” drafting is usually driven by specific, benefit-oriented motivation.

3.2.1.2.2 Motivation

The above discussion suggests that the benefits the transplanted law is supposed to bring may be inferred from the motivation that stood behind its adoption—i.e., the reasons that motivated domestic legislators to resort to legal transplanting as opposed to other forms of legal change. For example, *Miller* argues that the motivation behind the legal transplant should be the benchmark against which to evaluate its success.¹⁴⁴ He bases his conclusion on the observation that legislators generally resort to legal transplants, as opposed to wholly domestic laws, with a specific motivation in mind: that the specific goal is better achieved, or can only be achieved, by transplanted laws. Thus, he is not much concerned with the effects of the transplanted norm in terms of its application, as he sees no crucial difference between domestic and transplanted rules in this aspect. Rather, he enquires whether the transplant brought specific benefits for the person whose interests motivated its adoption. In the case of a cost-saving transplant, he would look at whether the transplant saved the costs of the government. In the case of an externally dictated transplant, he asks whether it satisfied the requirement of the foreign country to adopt certain laws. In the case of an entrepreneurial transplant, he looks at whether the transplant brought political or economic benefits to people who invested in it. Finally, in the case of a legitimacy-generating transplant, he assesses whether it generated legitimacy for the stakeholders’ group. Accordingly, *Miller* sees success where the motivation behind the transplant is accomplished: success equals the benefit the transplant brings to the person who stands behind it.

The motivation behind the transplant was also determinative in evaluating the success of the introduction, by form of a legal transplant, of the concept of independent directors to China, analyzed by *Zhou*.¹⁴⁵ In *Zhou’s* view, the failure of independent directors in China may be seen as

¹⁴⁴ Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51(4) THE AMERICAN JOURNAL OF COMPARATIVE LAW 839 (2003).

¹⁴⁵ *Zhou*, *supra* note 68 at 290.

a success from the point of view of the Chinese business elites. The author claims that the communist party-state has been able to create a semblance of “independence,” but in reality, the independent director role has been carefully circumscribed and incorporated into the existing structure of dominant shareholder control.¹⁴⁶

Similarly, *Kanda and Milhaupt* suggest that the motivation behind the transplant has implications for its success or failure.¹⁴⁷ This motivation may provide hints as to what would likely be considered success. For example, if the reason for resorting to a legitimacy-generating transplant was a belief that the foreign model is more efficient, then efficiency may be a measure of success.

Harding posits that comparativists should focus on when and how societies decide to accept and implement foreign legal solutions to tackle local problems¹⁴⁸ and contemplate the actual effect of legal change.¹⁴⁹

3.2.1.2.3 Goal

Another commonly cited potential dimension of success is the achievement of the goal that was hoped to be attained by the transplanted law. For example, *Gal* understands success as the ability of a transplanted law to achieve its goals in the recipient country. She considers a transplanted law successful even if it brings slightly different results than those in the originating jurisdiction. Indeed, she recommends that the law be interpreted differently if the underlying conditions differ and believes that achieving the goals of the law would not be possible without regard to specific conditions that are present in the recipient jurisdiction. She also suggests that these underlying conditions may be even more important to the achievement of the goal of the law than the substantive provisions of such law themselves.¹⁵⁰

¹⁴⁶ Zhou, *supra* note 68 at 290.

¹⁴⁷ Kanda and Milhaupt, *supra* note 101.

¹⁴⁸ Harding, *supra* note 38 at 10.

¹⁴⁹ Andrew Harding, *Global Doctrine and Local Knowledge: Law in South East Asia*, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 51 (2002) at 35.

¹⁵⁰ Gal, *supra* note 130.

A similar goal-oriented view is advocated by *Alshorbagy*. He measures success as the extent to which the imported rules serve the purpose for which they were transplanted,¹⁵¹ not by comparing whether it achieves the same goals as in the originating jurisdiction. He admits, however, that such a purpose may differ from the donor jurisdiction. In relation to finding that purpose, he claims that it should be determined by legal practitioners.

Donnagio seems to apply a goal-oriented analytical framework to evaluate the success of transplanting the corporate governance model to Brazil.¹⁵² The author measures success by the effects of the law (in her case, the development of capital markets) and whether the goals of the law have been achieved (in her case, investor protection). The author concludes that transplantation of the corporate governance model in Brazil was not successful and that the goal has not been met because of the lack of enforcement and deficient interpretation of the rules.

3.2.1.2.4 Efficiency

The law-and-economics-inspired approach advocated by some authors leads to considering success in terms of measures of economic efficiency. For example, *Mattei* looks at success from an economic point of view and suggests that efficiency, as an economic concept, can be used to evaluate legal transplants.¹⁵³ The author observes that the general convergence of modern legal systems can be explained as a movement toward efficiency. The most efficient model will be considered the most prestigious one, leading to synergy. In that view, efficiency is whatever avoids waste, makes the system work better by lowering transaction costs, is considered better by consumers in the legal marketplace, or does not pointlessly foreclose the development of a better organized human society.¹⁵⁴ The focus on economic efficiency is often used in relation to legal transplants that may have bearing on some measures of performance of the economy, such as competition law. For example, *Kronthaler* evaluates recently enacted competition laws by

¹⁵¹ Ahmad Alshorbagy, *On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law*, 22 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 273 (2012).

¹⁵² Angela Donnagio, *Limitations of Legal Transplants and Convergence to Corporate Governance Practices in Emerging Markets: The Brazilian Case*, in CORPORATE GOVERNANCE IN EMERGING MARKETS: THEORIES, PRACTICES AND CASES 465-484 (Sabri Boubaker and Duc Khuong Nguyen eds., Springer 2014).

¹⁵³ Ugo Mattei, *Efficiency in Legal Transplants: An essay in Comparative Law and Economics*, 14(1) INTERNATIONAL REVIEW OF LAW AND ECONOMICS 3 (1994).

¹⁵⁴ Mattei, *supra* note 153.

measures of efficiency.¹⁵⁵ Focus on efficiency-driven dimensions may also be observed in legal origins theory, which posits that legal origins influence in distinctive ways the content of legal rules in countries where the origins have been transplanted, as well as the enforcement of the rules and ultimately the structure of markets and economic performance. It assumes that certain rules and institutions are conducive to economic growth, irrespective of the environment in which they are introduced and the method of their introduction.¹⁵⁶

Efficiency-related criteria were used by Gussen to evaluate constitutional designs. The author based his argument on the observation that constitutional designs exhibit characteristics that are inherited from parent constitutions but adapted to achieve higher efficiency.¹⁵⁷ In evaluating the Canadian and Australian constitutional designs, the author looks at how these designs allowed for efficiency gains through a posteriori adaptation of the US and UK designs. To this end, he applies efficiency criteria from the discourse of evolutionary biology.¹⁵⁸

3.2.1.2.5 Conclusion

Dimensions of success evaluating the result-oriented effects of transplanted laws provide more useful insights into the factors that play a role in legal diffusion. Nonetheless, they are not devoid of deficiencies.

Regarding benefit as an evaluative dimension, it may be difficult (if not impossible) to ascertain what the benefit for the society means. This would make attempts to evaluate success impossible. Looking at more immediate personal motivation and benefits that the transplanted law brings to persons responsible for the transplant may provide useful insights into the hopes that have driven the use of legal transplanting, as well as its future prospects. It also helps avoid speculative and inherently subjective views as to what the interests of a given society are. Although the society

¹⁵⁵ Franz Kronthaler, *Effectiveness of Competition Law: A Panel Data Analysis* (IWH Discussion Papers, No. 7/2007, Leibniz-Institut für Wirtschaftsforschung Halle (IWH)), online at <https://econpapers.repec.org/scripts/redirector.php?u=https%3A%2F%2Fwww.econstor.eu%2Fbitstream%2F10419%2F29973%2F1%2F534695396.pdf;h=repec:zbw:iwhdps:iwh-7-07> [last accessed 9 September 2021].

¹⁵⁶ A. Bakardjieva Engelbrekt, *Legal and Economic Discourses on Legal Transplants: Lost in Translation?*, in SCANDINAVIAN STUDIES IN LAW VOL 60: LAW AND DEVELOPMENT 111-142 (Stockholm Institute for Scandinavian Law, Law Faculty, Stockholm University 2015).

¹⁵⁷ Gussen, *supra* note 22 at 85.

¹⁵⁸ Gussen, *supra* note 22 at 105.

may wish to have the interests of the legislators transplanting the law aligned with the interests of the society, this may not be the case in all situations. Dissonance between the benefits to the society at large and more immediate benefits to be reaped by persons involved in transplantation may run the risk of designating as a success a legal transplant that harms societal welfare but accords benefits to the selected interest groups.

Using motivation as an evaluative dimension may help overcome uncertainties connected with searching for societal benefit. In addition, where the motivation is known (for example, because it was declared by legislators or is mentioned in the provisions of the law itself) and its fulfillment easily measurable, the evaluation of whether it was accomplished may be a mechanical endeavor. For example, drawing on *Miller's* typology,¹⁵⁹ a cost-saving transplant would need to be considered successful if its implementation brought cost-savings to the government. However, using motivation as an evaluative benchmark of success may create axiological controversies, like the benefit framework. For example, where the motivation behind a legal transplant is problematic from a moral point of view, its achievement would still require concluding that a transplant is successful. Also, *Breda* observes that motivation for resorting to foreign transplants may be part of a “cheap window-dressing exercise” that small economies with limited resources do to facilitate trade, obtain international recognition, or request financial support.¹⁶⁰ The accomplishment of this motivation would not tell much about the regulatory aspects of the transplant, as it does not consider the application of the rule and its effects in terms of regulatory functions. Thus, using motivation as a general evaluator of success may not have large informative value regarding the benefits the transplant brings to the society as a whole. Its subjective character may also compromise potential comparisons with different legal transplants in the same jurisdiction or similar legal transplants in different jurisdictions.

Using a goal to be achieved by the legal transplant as an evaluative dimension, where such goal is determined objectively (e.g., in view of the function that the law should perform detached from any personal interests), this may remedy the subjectivism inherent in the notions of benefit and motivation. However, the line between benefit and goal is not always a clear-cut (as the interest in

¹⁵⁹ Miller, *supra* note 144.

¹⁶⁰ Breda, *supra* note 113 at 324.

bringing benefit to the society may be presumed to be the underlying goal of any law). Some have expressed skepticism toward using goals of legal transplants as a useful objective dimension for evaluation of success. *Nelken* questions the possibility of finding universally applicable benchmarks for evaluating the goals.¹⁶¹ This is because there may be numerous goals that a legal transplant is to achieve, and these may even be in conflict. He adds that success evaluated from the perspective of the originating culture will necessarily differ from success from that of the new context. In addition, he recognizes that some legal transfers may be a means to a further end, which adds additional complexity to the goal-oriented evaluation.¹⁶² He also notes that there are highly likely to be conflicting interests at stake.¹⁶³ Thus, for *Nelken*, the most telling measure of success would be the end state that the law must achieve. However, he admits that this end state is often not explicitly identifiable or ascertainable. In addition, the use of law does not have to produce coherent effects, and it would be very difficult to attribute a certain end state to a single particular law (as other laws may also have contributed and law is a living organism). *Negura* also claims that transplanted laws usually cannot achieve the same results in the country of adoption as in the country of origin.¹⁶⁴

Efficiency as an evaluative dimension of success may be perceived as a useful tool to overcome concerns about the inherent subjective nature of the other evaluative dimensions. Without having to delve deeper into the goals that have driven the adoption of the transplant, whether these are good or bad for the society, or whether the transplant brought benefits and, if so, to whom, it may provide a useful, presumably objective proxy to the success of the transplanted law. Yet, given the cultural values of law, certain authors criticize this approach. For example, *Nelken* advises against technical evaluation of effectiveness when considering the process of transplantation.¹⁶⁵ This may be because he suggests that the law can play such an instrumentalist role in initiating change only after a certain stage of development. He assumes that law in more developed countries is less dependent on congruence with popular mores and begins to be able to transform them.

¹⁶¹ Nelken, *supra* note 29 at 48.

¹⁶² Nelken, *supra* note 29 at 48 claiming that “*in studying transnational legal transfers it will not be enough to consider whether the new law functions if the reason that it was imported was as a means to a further end*”.

¹⁶³ Nelken, *supra* note 29 at 48.

¹⁶⁴ Laura-Cristiana Negură, *Exporting Law or the Use of Legal Transplants*, 2 CHALLENGES OF THE KNOWLEDGE SOCIETY (2012), at 812-819.

¹⁶⁵ Nelken, *supra* note 29 at 38.

3.2.2 Static view of success

In addition to the dynamic view focusing on the effects (in terms of processes triggered or results) of the transplanted law, authors also often focus on the static dimension of transplanted law—i.e., how it fits the environment of the recipient jurisdictions. This dimension reflects the above-described debates on the cultural determination of law. Building on the assumption that the law is culturally predetermined, the authors believe that ignorance of the cultural dimension of the legal transplant would lead to its ineffectiveness, or failure. The authors thus agree that the more the transplanted law is tailored to the domestic conditions of the recipient jurisdiction, the more likely it is to be successful. *Nelken* describes this as sociological conventional wisdom.¹⁶⁶

Yet, despite amounting to conventional wisdom, evaluating whether the law fits its underlying context is not a straightforward endeavor. This is because the notion of fit may prove as indeterminate as the notion of success. The English dictionaries define *fit* as, among other things, “be[ing] the right size or shape for someone or something”¹⁶⁷ or “conform[ing] correctly to the shape or size of”¹⁶⁸ something. These definitions suggest that the evolution of fit may differ depending on what is considered right or correct, as well as by whom or against what. Nonetheless, the literature offers some dimensions that may be relevant for the evaluation of the fit of transplanted law. In particular, it is often argued that in order to be successful, transplanted law must fit within the wider socio-economic realities and political economy of the recipient country. This implies that the success of a transplant is largely determined by its consistency with local culture (including shared traditions, values, beliefs, customs, and morals) and/or wider political economy. Given the tight connection between the legal infrastructure of the recipient country and the transplanted law, legal culture is often singled out as a specific subcategory of culture that should be given particular attention. All these categories are indeed reminiscent of the mirror theory and the contextual conditions that the law is said to reflect.

¹⁶⁶ Nelken, *supra* note 29 at 20 or 47.

¹⁶⁷ Fit, in CAMBRIDGE DICTIONARY, *online* at <https://dictionary.cambridge.org/dictionary/english/fit> [last accessed 9 September 2021].

¹⁶⁸ Fit, in MERRIAM-WEBSTER DICTIONARY, *online* at <https://www.merriam-webster.com/dictionary/fit> [last accessed 9 September 2021].

3.2.2.1 Aspects of fit

3.2.2.1.1 Fit with local culture and political economy

- The importance of cultural and societal values has already been highlighted by *Legrand*, who pointed to the pervasive nature of domestic interpretation of legal norms and the inability to detach cultural and societal values from the interpretation of any transplanted legal idea.¹⁶⁹
- *Spataru-Negură* argues that legal transplants that are inconsistent with deeply held moral and political beliefs may work if they only slightly affect convictions at the periphery of the local value system,¹⁷⁰ while success is doubtful if they contradict fundamental cultural gut reactions. The more complex and multi-layered a particular environment, the greater the danger that legal imports will irritate local sensibilities. Thus, legal transplants are predicted to fare better the more institutional support and personnel they have and the less dependent they are on local cooperation and approval. Also, transplants that correspond to common habits and beliefs, or that can connect with institutions and procedures that have performed reasonably well in the past, seem much more promising than those that must create change from scratch.
- Similarly, *Berkowitz, Pistor, and Richard's* theory on the “transplant effect” posits that a transplanted legal order would likely function less effectively than in its original form and context if it does not adapt to local conditions or if it affects a population that is unfamiliar with it and therefore incapable of handling the new regime it offers.¹⁷¹ In particular, they describe as the transplant effect a mismatch between preexisting conditions and institutions on the one hand and the transplanted law on the other. This mismatch weakens the effectiveness of the imported legal order.¹⁷²
- Similarly, *Jopp* suggests investigating the socio-legal dimension of legal transplants. This involves evaluation of the extent to which the transplanted law has been accepted by the local population, which he suggests using specific objective performance indicators to ascertain.¹⁷³ In addition to the socio-legal dimension, he proposes evaluating legal transplanting from a

¹⁶⁹ Legrand, *supra* note 13 at 111 or 123-124. See also Viven-Wilksch, *supra* note 5.

¹⁷⁰ Negură, *supra* note 164.

¹⁷¹ Berkowitz et al., *supra* note 13.

¹⁷² Their approach concentrates on the legality and considers legality to be determined by the ability of a country to give meaning to the transplanted legal order and apply it within the context of its own socio-economic conditions. The proxies they use to evaluate legality are effectiveness of judiciary, rule of law, absence of corruption, low risk of contract repudiation or low risk of government repudiation.

¹⁷³ Jupp, *supra* note 34.

positivist dimension. This involves evaluation of the extent to which the transplanted law has achieved the objective for which it was enacted in the context of the situation in which it was introduced—i.e., the reasons for the demand for the law and the motivation for relying on the transplant mechanism.

- *Stabmoulakis* suggests that a shift from debating whether legal transplanting takes place to considering what happens after it takes place requires moving beyond the validity or legitimacy of the transfer into broader concerns of acceptance—i.e., assessing the extent to which the transfer is aided by or congruent with the social context, cultural values, and political preferences of the adopting entity. This necessarily entails a consideration of the role of both legal and extra-legal impacts and actors across the spectrum of legal borrowings and the likely impact on the success of the transfer.¹⁷⁴ In this regard, *Stabmoulakis* observes a dichotomy between formal and informal institutions. Whereas the former refers to rules, regulations, and procedures, the latter relates to socio-legal considerations of the social practices stemming from norms and culture. In evaluating legal transfers, he wishes to analyze how informal institutional preconditions impact the legitimacy of transfers of formal institutions. Thus, he suggests shifting from surface-level formalist or functionalist approaches in evaluating legal transplants to considering a broader aspect of the transfer as emanating from the legal culture.¹⁷⁵
- *Merry and Levitt* speak of a translation of the norm within context. They observe how local practices and ideas are incorporated into the transplanted norms and how it affects the transformative potential of the norm.¹⁷⁶ *Merry* adds that such incorporation happens on a continuum, from outright rejection to replication and to hybridization, depending on the degree of local influence.¹⁷⁷ Subversion can also take place when key references are retained, but the new norm's content and structure are significantly changed.¹⁷⁸

¹⁷⁴ Stabmoulakis, *supra* note 105 at 190-191.

¹⁷⁵ Stabmoulakis, *supra* note 105 at 192.

¹⁷⁶ Sally E. Merry and Peggy Levitt, *Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States*, 9 GLOBAL NETWORKS 441 (2009) at 456.

¹⁷⁷ Sally E. Merry, *Transnational Human Rights and Local Activism*, 108(1) AMERICAN ANTHROPOLOGIST 38 (2006) at 44.

¹⁷⁸ Merry, *supra* note 177.

- *O'Brien* notes that the effects of the transfer will depend on factors including how high the new society's barriers to vernacularization are and the extent of the local and regional appetite for the new norm.¹⁷⁹
- *Breda* observes that legal reforms in East Asia and Oceania tend to be specifically designed to meet the requirements of distinctive cultures.¹⁸⁰ The author identifies a marked tendency in East these locations to free alien institutions from their doctrinal, historical, and jurisprudential burdens.¹⁸¹ These transplants to fit into a preexisting culture.¹⁸² This may result in transplanted institutions being seen as a product of a mismanaged cultural extrapolation.¹⁸³
- Interestingly, even the supporters of "global" legal regimes concede the importance of culture. To overcome the seeming contradiction between the need to tailor the law to domestic circumstances and the purported existence of global law, they suggest that some of the underlying cultural determinants related to a particular law are shared universally. They especially identify such fundamental similarities in the field of law that regulates and addresses human interactions with parts of a common external world.¹⁸⁴ They also attribute potentially increased ease of transplantation of environmental law to the fact that it represents the fundamental utility in managing the environment, as opposed to hegemonic dominance of one (Western) legal culture.¹⁸⁵ *Gal* concedes that there is a tradeoff in tailoring the law to domestic needs and preserving harmony with international standards.¹⁸⁶ She observes that law can play an important role in constituting culture, if it fits well with the existing ideology and is not too culturally invasive.¹⁸⁷

3.2.2.1.2 Fit with the preexisting legal infrastructure

¹⁷⁹ Sophia O'Brien, *Global Norms; Local Resistance: Addressing Impunity in Japan and Beyond*, in LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA 256–296 (Vito Breda ed., Cambridge University Press 2019) at 287.

¹⁸⁰ Breda, *supra* note 113 at 321.

¹⁸¹ Correspondingly the author suggests that the process should be described as migration of legal ideas rather than transplantation. Breda, *supra* note 113 at 324.

¹⁸² Breda, *supra* note 106 at 3.

¹⁸³ Breda, *supra* note 113 at 322.

¹⁸⁴ Tseming Yang and Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY LAW QUARTERLY 615 (2009) at 653.

¹⁸⁵ Yang and Percival, *supra* note 184 at 653.

¹⁸⁶ Gal, *supra* note 130 at 479.

¹⁸⁷ Gal, *supra* note 130 at 484.

- The importance of the preexisting legal infrastructure was noted from the very writings of *Watson*¹⁸⁸ and has been supported by other authors, such as *Dezalay and Garth*.¹⁸⁹
- *Kanda and Milhaupt* differentiate between macro-fit—i.e., how well the imported rule complements the preexisting institutions of political economy in the host country—and micro-fit—i.e., how well the imported rule complements the preexisting legal infrastructure in the host country.¹⁹⁰ Micro-fit of legal transplant means that the transplant is designed to deal effectively with the special characteristics of a given jurisdiction.
- The compatibility with the new legal environment and domestic legal institutions was also considered important by *Alshorbagy*.¹⁹¹ He argues that success depends on the existence of a functional and legal infrastructure that can amend the imported rules to make them compatible with their new legal environment. The purpose of the transplanted rules and their achievement should be determined by legal practitioners. Therefore, the fit with the wider preexisting legal system and the ability of legal practitioners to integrate the law into the preexisting legal infrastructure may be crucial for the success of the transplant.
- This resonates with *Viven-Wilksch*'s position that to maximize success, the donor and receiving legal systems must be matched according to the similarities of their branches of law, structure, and values.¹⁹² She also recognizes the importance of legal professionals in implementing the transplanted law.¹⁹³ In this endeavor, she emphasizes the need to find the right balance between internationalization and domestication of legal ideas.¹⁹⁴
- *Breda* also observes how legal institutions are embedded in a legal culture for a period of time exactly because they are perceived as having value for the stakeholders.¹⁹⁵ The author infers that in legal transplanting, the connections among national aspirations, foreign-inspired reforms,

¹⁸⁸ For *Watson*, the role of legal professionals in driving the transplantation would be crucial.

¹⁸⁹ *Dezalay and Garth* concluded their study of transplants, focusing on developments in Central and South America, by acknowledging that “[t]he idea that legal transplants came from an autonomous group of elite lawyers, as suggested by Alan Watson, is not implausible for this kind of process.” *Dezalay and Garth, supra* note 83 at 309.

¹⁹⁰ *Kanda and Milhaupt, supra* note 101.

¹⁹¹ *Alshorbagy, supra* note 151.

¹⁹² *Viven-Wilksch, supra* note 5 at 134.

¹⁹³ *Viven-Wilksch, supra* note 5 at 150-151.

¹⁹⁴ *Viven-Wilksch, supra* note 5 at 151.

¹⁹⁵ *Breda, supra* note 113 at 323.

and legal culture needs to be explored.¹⁹⁶ The author also notes that transplants may be a part of the communal learning experience designed to meet the specific demands of a legal culture.¹⁹⁷

- In evaluating the transplantation of the independent director system to China, *Zhou* looks at the wider corporate governance environment, legal culture, and the reception of the law by the people.¹⁹⁸
- *Prosser* links difficulties in transplanting a single concept of public service in the EU to different understandings among the EU member states of the tradition of constitutionalism and administrative law.¹⁹⁹
- *Gal* emphasizes the role of legal professionals in interpreting the law in congruence with the local culture.²⁰⁰ Indeed, she sees this as a major cause of the success of legal transplants.

The above suggests that fit within the preexisting legal infrastructure may be considered from two perspectives. The first is the perspective of the substantive provisions of the law and their congruence with the preexisting legal system. The second is the procedural perspective—i.e., the application and enforcement of the law. The authors agree that substantive provisions of the law may not be as important if the law manages to fit within the preexisting legal infrastructure. This seems to correspond to the above-identified skepticism about the importance of substantive provisions for success. Nevertheless, the authors concede that if substantive provisions fit well within the environment, or are already tailored to the domestic specifics, they may significantly facilitate the future enforcement of the law. Still, the interpretation and actual usage of the provisions in practice seems to offer a better approximation to the meaning of the law as understood by the society.²⁰¹

3.2.2.2 Fit equals success?

Some authors seem to go as far as to suggest that the fit of the transplant, or its assimilation to the domestic environment, equals success. They suggest that where the transplanted law fits, it is bound

¹⁹⁶ Breda, *supra* note 113 at 323.

¹⁹⁷ Breda, *supra* note 106 at 4.

¹⁹⁸ Zhou, *supra* note 68 at 268.

¹⁹⁹ Tony Prosser, *Marketisation, Public Service and Universal Service*, in ADAPTING LEGAL CULTURES 223 – 239 (Johannes Feest and David Nelken eds., Hart Publishing 2001).

²⁰⁰ Gal, *supra* note 130 at 484.

²⁰¹ Cf., e.g. Arvind and his discussion on success. Arvind, *supra* note 119.

to be successful. Although these categories will at least partially overlap in many cases, success seems to be a larger category. It is theoretically conceivable that mere assimilation of the rule would not bring any tangible benefits to the receiving country. For instance, tailoring the law to domestic conditions does not automatically imply that the law would be effectively used in practice and achieve the desired goals. This is because there may be occasions on which the fit of legal transplant does not guarantee its success. Fit especially seems to neglect the procedural or applicational aspects of the law. For law to be successful, it may be wished that the law not only fits but is also relied on and applied in practice. In addition, should the law serve as an ignition of change, fit with the domestic environment may not be enough to deliver such effects. Thus, the notion of success should be differentiated from the preconditions that are determinative for success. Fit should rather be regarded as one of the dimensions that may be considered in contemplating whether the transplanted law is successful. It seems more useful to approach the requirement that the transplanted law fits as a precondition of success rather than as success itself.

This view is advocated, for example, by *Kanda and Milhaupt*, who use the term fit to refer to preferable preconditions for success, but they do not seem to be equating success and fit. This is because they also identify other conditions of success, such as the availability of substitutes for the transplanted law or motivations that informed the adoption of the law.²⁰²

3.2.2.3 Challenge to the “fit”

Nelken identifies numerous dimensions from which fit can be assessed, such as institutional, functional, structural, and hermeneutic.²⁰³ This, however, makes him rather skeptical as to the usefulness of fit for determining success. He believes that fit, similar to success, is a multidimensional phenomenon and that the very components of the fit would always be considered through the lenses of a particular culture. Hence, their understanding will ultimately depend on the conception of the role of law in a given society.

Skepticism regarding the evaluation of fit is also voiced by other authors. Given the plethora of factors that may influence the standing of legal transplants, certain authors criticize the alleged

²⁰² Kanda and Milhaupt, *supra* note 101.

²⁰³ Nelken, *supra* note 123 at 269-75.

inclination of the legal transplantation scholarship to overestimate the notion of fit and its assessment. They allege that since law and society are complex phenomena, with interact not only one-sidedly but in both directions, it may be reductionist to describe law as a phenomenon that needs to “fit” the broader societal context when the relations will presumably be more complex and variegated. Nevertheless, regardless of the outcome of the doctrinal debate between the relation between law and society, the appreciation of the “fit” and its parameters may provide a useful framework for analyzing transplanted law. It may guide the interested groups so that they ensure that the dimensions of fit that are determinative for their understanding of success are well taken care of.

Similarly, some authors, although they acknowledge the relevance of the fit for the success of a legal transplant, prefer focusing on different and, in their view, more important aspects. This is especially true in cases where legal transplants are adopted as a tool of legal change. For example, instead of observing the fit of transplanted law with the domestic conditions present at the time the transplantation takes place, *Dezalay and Garth* are more interested in seeing how the transplant transforms the local structure.²⁰⁴ They criticize the centrality of the discourse on the success of legal transplants in its inherent assumption that any deviation from the model has to be justified in terms that resonate with the donor jurisdiction. They advocate a rather dynamic view on legal transplants, as opposed to a static view that focuses on the fit with current conditions, and propose that the evaluation should focus more on how the transplants change the recipient society. They also acknowledge that the idea that legal transplants came from an autonomous group of elite lawyers, as suggested by *Watson*, is not implausible for this kind of process.²⁰⁵

Siems also touches upon the idea that success may also lie in the fact that the foreign model only triggers changes that pursue new aims.²⁰⁶ It may be argued that from this perspective, foreign law does not necessarily need to fit. *Harding* shares the same view when he says that the point of new ideas is not to find the best societal fit but to change existing behavior and attitudes.²⁰⁷ Nonetheless,

²⁰⁴ Dezalay & Garth, *supra* note 83.

²⁰⁵ Dezalay & Garth, *supra* note 83 at 241, 251.

²⁰⁶ Mathias Siems, *Bringing in Foreign Ideas: The Quest for 'Better Law' in Implicit Comparative Law*, 9 THE JOURNAL OF COMPARATIVE LAW 119 (2014).

²⁰⁷ Harding, *supra* note 38.

he still sees the underlying cultural context as important, as he notes that it is a mistake to say that the law can always be detached from societal conditions in the recipient jurisdiction.²⁰⁸

Nelken also notes that the aim of certain legal transplants may be to recreate some aspects of the wider context from which the transplant is taken.²⁰⁹ In this view, the transplanted law may be expected to trigger certain processes. Nevertheless, he believes that the law can play such an instrumentalist role as to initiate change only after a certain stage of development. He assumes that law in more developed countries is less dependent on congruence with popular mores and gains the ability to start transforming them. *Teubner's* view of legal transplants as legal irritants may reflect this dynamic.²¹⁰ He goes beyond the *Watson-Legrand* dichotomy of integration or repulsion of legal ideas across cultures by seeing the idea of legal irritants as incurring unexpected consequences through an “evolutionary dynamic in which the external rule’s meaning will be reconstructed and the internal context will undergo fundamental change”.²¹¹ *Viven-Wilksch* summarizes that legal transplants can become successful, become a legal irritant that disrupts the balance of the legal body of rules in the receiving country, or be rejected by that body.²¹² *O'Brien* also urges the need to look beyond the binary concepts of success and failure, as they fail to encompass the highly contingent and dynamic process of legal transplantation.²¹³ *Stabmoulakis* agrees that it may be more interesting to examine how the transfers happened and what happened afterwards, rather than focusing on whether transplant exists (as is the case in the law versus culture debate).²¹⁴

One may also infer that the fit or appropriateness may also not be as important in the case of *Miller's* legitimacy-generating transplants.²¹⁵ In fact, it can be expected that modifications to the model may not even be desired, as they may undermine the legitimacy of the model. The need to accommodate the transplant to local conditions may thus be a condition of success for some types of legal transplants only. Legitimacy-generating transplants may acquire rather symbolic value and

²⁰⁸ Harding, *supra* note 38.

²⁰⁹ Nelken, *supra* note 29 at 19.

²¹⁰ Teubner, *supra* note 13.

²¹¹ Teubner, *supra* note 13.

²¹² Viven-Wilksch, *supra* note 5 at 135.

²¹³ O'Brien, *supra* note 179.

²¹⁴ Stabmoulakis, *supra* note 105 at 190.

²¹⁵ Miller, *supra* note 144.

be regarded as such in the recipient society, even though they have little connection with substantive local needs. Similarly, transplants whose purpose is to change the underlying cultural or political background are expected to divert from this background. Yet, it still seems that they have to be integrated into the legal system so that they can be successfully implemented and enforced to realize the envisaged change. The law still needs to connect with the underlying societal context.

The view that the underlying societal context needs to be supportive of the change that the transplant envisages to advance is also advocated by *Liljeblad*. Lack of fit with the necessary contextual factors may corrupt the success of the transplant even where the other conditions of success, such as acceptance and involvement by some domestic actors to support the foreign idea, are present.²¹⁶ The author particularly observes how the ability of a legal transplant to instigate transformative change can be restrained by contextual factors that impede the implementation of foreign ideas even as they allow discussion about them.²¹⁷ This suggests that even legal irritants need some context in which they can be rooted to initiate the envisaged change.

Nonetheless, it seems that this accommodation of local practices shall not be excessive. *Merry and Levitt* observe that while the transplanted rules need to be capable of a degree of resonance with local practices in order to travel, too much resonance generates an echo chamber rather than transformation.²¹⁸ *Harding* also requires that a legal transplant must be “fit for purpose”—i.e., a foreign-inspired reform must be socially integrated, or at the very least, must prepare the conditions for its progressive legal and sociological acceptance.²¹⁹

Breda adds to relativization of the fit by suggesting that fit shall be assessed pragmatically rather than theoretically.²²⁰

3.2.2.4 Implications of the literature review for the “fit”

²¹⁶ *Liljeblad*, *supra* note 3 at 222.

²¹⁷ *Liljeblad*, *supra* note 3 at 222.

²¹⁸ *Merry and Levitt*, *supra* note 176.

²¹⁹ *Harding*, *supra* note 38. See also *Breda*, *supra* note 106 at 36.

²²⁰ *Breda*, *supra* note 106.

The literature suggests that success in legal transplanting is, to a certain extent, conditioned by adaptation of the transplanted law to the socio-economic and political environment of the recipient jurisdiction and that the level of this adaptation can be used as a dimension to measure success. Nonetheless, it does not seem conclusive on the benchmarks or criteria that should be used to evaluate the fit. There does not appear to be unequivocal agreement on what the term “domestic conditions” (to which the transplanted law must correspond) should mean. In addition, there is no precise requirement voiced in the literature regarding the degree of the necessary adaptation. The authors use different meanings of the term “fit” and focus on different factors when describing it. In this regard, “fit” seems to be as abstract as “success” and does not seem truly helpful in explaining or categorizing the conditions for a successful transplant.

The dimensions against which to measure whether the law fits range from the wording of the law itself to its interaction with the recipient society. Whereas some authors utilize the narrower understanding of “fit,” others include in this notion dimensions such as the receptivity to foreign law in general. This suggests that to encompass the sheerness of the notion, similar to the notion of “success,” the analysis of “fit” should encompass all such dimensions. The law may also be found to fit some criteria and not others. Some authors thus suggest evaluating the “fit” against several benchmarks separately. The dimensions suggested by *Nelken* (i.e., institutional, functional, structural, hermeneutic, and other)²²¹, by *Jupp* (i.e., socio-legal dimension and positivist dimension),²²² or by *Stabmoulakis* (i.e., functionalist, formalist, and contextual dimensions)²²³ seem particularly useful (although these dimensions are, *certes*, not mutually exclusive and collectively exhaustive).

The literature also challenges the importance of the texts and paper rules and sees the attitude of the society towards the law in general and a given legal transplant in particular as more important. Nonetheless, on this count, it would not really matter whether the law is a product of legal transplanting or of domestic drafting and adoption. Thus, some claims about the necessity to tailor the law to domestic conditions rather overlap with the general preconditions for the effectiveness of any law, regardless of whether domestic or transplanted. This is based on the belief that law is

²²¹ Nelken, *supra* note 123 at 269-275.

²²² Jupp, *supra* note 34.

²²³ Stabmoulakis, *supra* note 105 at 190.

dependent on values and goals external to it for its viability. Domestic drafting presumes that these values and goals are incorporated into the law. Thus, in domestic law, the text should already reflect those values. In the case of legal transplants, there may be discrepancies. In such cases, what is determinative is not the wording of the law (although that may also have certain value), but rather the receptivity of society to the law.

3.2.3 Conditions of success

Given the relativity of the notion of success itself, some authors are more comfortable with identifying factors that may influence, or be determinative of, success. These factors may contribute to success to different extents, which will depend on the dimension of success considered.

The most frequently cited condition of success is fit with the local context or domestic conditions of the recipient jurisdiction. Its theoretical conceptualization and benchmarks against which its degree can be measured were addressed in the previous chapter.

Nelken identifies numerous factors aside from fit that may influence success. These include the area of law that is being transplanted (as law dealing with economic matters is traditionally thought to be easier to transfer than law bearing on private and religious spheres)²²⁴ or potential similarities between donor and recipient societies.²²⁵ The degree of the economic development of donor and recipient jurisdictions may also be relevant, as some authors believe that in less developed legal systems, legal culture may play a more important and prominent role than in more developed regimes.²²⁶

Kanda and Milhaupt also identify several conditions of success, such as the fit of the transplant to the domestic conditions of the host country, the availability of substitutes (in other words, the need of the society to adopt the law), and motivation for adopting the law.²²⁷

²²⁴ Nelken, *supra* note 29 at 42. Nevertheless, he admits that because the meaning and significance of different types of law are culturally variable it is increasingly difficult to generalize about which type of law transfers most smoothly.

²²⁵ Nelken, *supra* note 29 at 42.

²²⁶ Nelken, *supra* note 29.

²²⁷ Kanda and Milhaupt, *supra* note 101.

Other determinants of success may include whether the society is familiar with the basic legal principles of the transplanted law,²²⁸ whether the society is receptive to foreign law in general,²²⁹ and what the political relationship between the donor and the recipient jurisdiction is like.²³⁰ Legal transplants that are voluntary are said to have more chances of success than transplants that are externally dictated.²³¹ Another aspect to consider is the extent to which the transplanted law is dependent on local cooperation or approval.²³² Nonetheless, *Liljeblad* observes that even if the transplant has local acceptance, other contexts can override such positive attitudes.²³³

As suggested above, the type of law that is being transplanted may also play a role. On this count, *Cotterrell* suggests that some areas of law are more amenable to successful transplantation than others. Instrumental law tied to economic interests is argued to be easier to transplant.²³⁴ Because of the limited social ties that it represents, instrumental law is relatively precise and thus needs little cultural context to make it meaningful when expressed in legal terms. This was also observed by *Kahn-Freund*, who noted that the success of a transplant depends on the type of law involved, with public laws being the least likely to succeed due to their cultural specificity.²³⁵ Similarly, *Zhou* observes that legal transplants seem to take place in the commercial field more often than in any other.²³⁶ The author sees reason for this in, *among other things*, the fact that domestic law in many legal systems has been significantly affected by the adoption of international commercial treaties.²³⁷ Thanks to such convergence of law, which is further supported by globalization, transplantation in the commercial area is sometimes less difficult than in other areas.²³⁸ Meanwhile, *Prosser* illustrates difficulties in transplanting the concept of public service in the EU because its understanding is influenced by the tradition of constitutionalism and administrative law, which are very different in the EU.²³⁹ *Ewald* acknowledges that public law can be considered less insulated

²²⁸ Berkowitz et al., *supra* note 13.

²²⁹ Gal, *supra* note 130 at 473.

²³⁰ Jupp, *supra* note 34.

²³¹ Miller, *supra* note 144 at 839.

²³² Negură, *supra* note 164.

²³³ Liljeblad, *supra* note 3 at 222.

²³⁴ Cotterrell, *supra* note 91.

²³⁵ Kahn-Freund, *supra* note 13 at 5-6.

²³⁶ Zhou, *supra* note 68 at 267.

²³⁷ Zhou, *supra* note 68 at 267.

²³⁸ Zhou, *supra* note 68 at 268.

²³⁹ Prosser, *supra* note 199.

from political, economic, and social forces.²⁴⁰ It may thus be that these forces are so dominant that they have the potential to override the importance of substantive rules of the law. *Harding* noted that some laws that have complex relations to culture are not easy to transplant.²⁴¹ *Kaino* notes that family laws are certainly among those that have a deeper relation to culture.²⁴² Similarly, *Jupp* notes that findings regarding the evaluation of the transplantation of civil and commercial law may not be fully applicable to criminal law as a kind of public law.²⁴³

Indeed, it may be observed in the literature that whether a transplant is successful or not is usually not evaluated based exclusively on the wording of the transplanted law. The authors do not attribute great importance to the wording of the law, as they claim that what is decisive is the existence of the shared values and epistemologies in the society. That texts are irrelevant is one of the arguments of *Friedman*, who opines that transplants generally succeed because larger societal circumstances eventually reshape or bypass paper rules.²⁴⁴ Other authors add that effectiveness has to do less with the substantive provisions than with the internal logic of existing institutions. Similarly, some authors posit that formal statutes and texts are relatively irrelevant for success or failure—what is decisive is the mix of converging, complementary institutions and parallel motivations.²⁴⁵ For *Donnagio*, formal rules are not sufficient for success.²⁴⁶ Rather, they must also be accompanied by effective implementation in practice, which undoubtedly hinges on the domestic reception of the transplanted rules. Similarly, *Liljeblad* emphasizes the need to integrate the transplanted institution into a broader, comprehensive, and coordinated strategy that would create supportive institutions.²⁴⁷

Some authors see the impact of external factors (as opposed to the wording of the law) as so strong that they urge that criteria that are adopted for evaluating the success of any legal transplant must ultimately be fundamentally related to the environment into which the new law is imported.²⁴⁸ This

²⁴⁰ Ewald, *supra* note 19 at 503. See also William B. Ewald, *The American Revolution and the Evolution of Law*, 42(1) AMERICAN JOURNAL OF COMPARATIVE LAW (1994).

²⁴¹ *Harding*, *supra* note 38.

²⁴² *Kaino*, *supra* note 23.

²⁴³ *Jupp*, *supra* note 34.

²⁴⁴ *Friedman*, *supra* note 137.

²⁴⁵ *Arvind*, *supra* note 119.

²⁴⁶ *Donnagio*, *supra* note 152.

²⁴⁷ *Liljeblad*, *supra* note 3 at 222.

²⁴⁸ *Jupp*, *supra* note 34.

also supports the view that success should be considered from the point of view of the recipient rather than the donor jurisdiction.

3.3 Implications of the literature review

The above review of literature related to legal transplants and evaluation of their success or fit lends itself to interesting observations regarding the definition of success, the relationship between success of legal transplants and domestically grown law, and theoretical understanding of law.

3.3.1 No uniform definition

The literature on legal transplants offers numerous criteria that might be used as measures of success. Annex 1 of this thesis provides a summary of the most often-cited criteria. Some of these criteria are based on dynamic aspects, while others are based on static aspects. Regarding dynamic aspects, some authors concentrate on process-related dimensions, whereas others concentrate on the result-related dimensions of the transplanted law. Similarly, some of the criteria are subjective in that the intentions of the people behind the rules are more important than the generally or objectively measured objectives of improving societal well-being and social welfare. Finally, some of the conceptions of success work more on *Watson's* concept of a legal transplant—i.e., only the idea behind the rules is being transplanted—whereas others are more akin to *Legrand's* idea that the success is determined by conditions external to the transplanted rule. The reviewed literature also showed that the general scholarship on legal transplants often examines the adoption of a whole legal system, rather than some of its parts (such as civil law) or specific laws (such as civil code). Legal transplants are also often discussed in relation to legal reform, which suggests that their focus should be on triggering the process of change rather than conserving the status quo.²⁴⁹

3.3.2 Relationship between success of legal transplants and domestically grown law

The above literature review also revealed an important factor that may explain why the authors identified so many differing criteria or benchmarks of success. This factor is whether being a legal transplant is a decisive property of adopted law, or if this origin is in fact disregarded and the same benchmarks are used to evaluate its effectiveness as for any other norm in a given legal system.

²⁴⁹ See e.g. the volume examining legal transplantation in East Asia and Oceania in the framework of legal reforms. VITO BREDA ED., *LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA* (Cambridge University Press 2019).

The evaluation of the success of a legal transplant should arguably have some additional dimension to those of domestic law. What should be evaluated in this additional dimension is whether the transplanted law is adapted not only to the national legal system but also to the socio-economic and political conditions and cultural expectations of a given society. In the case of domestically grown laws, this criterion seems to be presumed to be achieved by domestic drafting of the law and interaction of various stakeholders in the related adoption processes. Legislators or regulators are presumed to have considered the law to be somehow useful for a given society (e.g., for resolving pressing issues in a given jurisdiction or society). Also, they are presumed to have given thought to the law before they enacted it and thus factored the underlying domestic conditions into its provisions and the envisaged enforcement mechanisms.

Miller observes this difference between domestic drafting and legal transplanting. He argues that the motivation that led the legislators to opt for a transplant instead of domestic law makes the difference between a wholly autochthonous norm and a legal transplant.²⁵⁰

However, the pace and intensity of globalization forces the question of whether there are truly some norms that are purely domestic despite borrowing between legal systems becoming almost a standard form of legislation. With the incessant intermingling of legal systems and harmonization in an increasing number of areas of law, it may become extremely difficult, if not impossible, to track the roots of certain laws or legal institutions.²⁵¹ For example, in environmental law, *Techera* notes that a finite range of regulatory options is available. Thus, although environmental problems are inherently local, ideas and legal tools migrate between jurisdictions and are translated into domestic law as states seek effective and efficient legal responses.²⁵² This view is shared by *Yang and Percival*, who observe that environmental legal principles can no longer be seen as belonging to any particular system, which could speak of their movement as an act of borrowing.²⁵³ This is due to the intermingling of the various trends, such as convergence, integration, and harmonization, that led to the distillation of a few principal approaches to regulation that are being embraced with

²⁵⁰ Miller, *supra* note 144.

²⁵¹ Nelken, *supra* note 29 at 13.

²⁵² Techera, *supra* note 8 at 234.

²⁵³ Yang and Percival, *supra* note 184 at 664.

local variations.²⁵⁴ In this way, it may be the case that even unconscious borrowings occur—*Yang and Percival* would not consider those as a product of legal transplantation but rather as a product of legal convergence.²⁵⁵

This observation led *Miller* to relativize the observed difference between domestic and transplanted law. He argues that most newly enacted laws are successful in achieving the aims of their drafters for domestic reasons unrelated to whether the norm is a legal transplant.²⁵⁶ He challenges the usefulness of the distinction between legal transplanting and domestic drafting and suggests that the likelihood of a transplant having a practical effect depends on the overall degree to which legal rules are already respected and the degree to which the rule is adapted to the recipient system. Similarly, *Nelken* wonders to what extent the problems encountered in evaluating legal transplants are the same as those entailed in any attempt to change a society through law in the domestic context.²⁵⁷

Taken to the extreme, it would not really matter whether a rule is a transplant because what is important is not the wording of the law (and to what extent that wording fits the society), but rather the attitude of society toward law in general and toward this particular piece of legislation in particular. In this view, the differentiation between domestic law and legal transplant loses its justification because domestic drafting does not guarantee that the law would make sense for a given society and can be presumed to be accepted by it. Relatedly, claims about the necessity to tailor the transplanted law to domestic conditions would overlap with the general preconditions for the effectiveness of any law, regardless of whether domestic or transplanted. Any law may be regarded as being dependent on the values and goals external to it for its viability.

The distinction between domestic law and legal transplants may also lose its relevance where the rules, once implanted in the recipient jurisdiction, do not play the same role as in the donor

²⁵⁴ Yong and Percival, *supra* note 184 at 664.

²⁵⁵ The authors define convergence as a process where disparate legal systems become similar not because of deliberate act of copying but rather as a response to similar external pressures. They contrast this with their understanding of legal transplantation (in its purest form) as efforts by countries with less developed legal systems to “catch-up” with more sophisticated systems already in place elsewhere by wholesale “importation”. Yang and Percival, *supra* note 184 at 627.

²⁵⁶ Miller, *supra* note 144.

²⁵⁷ Nelken, *supra* note 123.

jurisdiction. Some authors believe that such rules should rather be considered indigenous institutions sharing with the rule only the name. This may also lead back to the discussion between *Watson* and *Legrand* as to what a legal rule is. Where rules are regarded as having an autonomous nature and pure ideas of how to regulate particular social phenomena that are available in some shared pool of general knowledge accumulated during human history, legal borrowing may be, in fact, taking place all the time (or not at all?). Yet, such a rule is likely to be considered a domestically grown product of legal evolution.

The extent to which a legal transplant should be adapted to local specifics so that it can still be considered a legal transplant rather than a domestic rule is thus not clear. Some authors suggest that this question may not be that important after all, such as *Dezalay and Garth* in their criticism of the assumption that any deviation from the model must be justified in terms that resonate with the donor jurisdiction.²⁵⁸ They consider it more interesting to observe how the law operates once it is transferred.

3.3.3 Notion of success and theoretical understanding of law

The above dimensions of success often seem to be linked to a specific understanding of the function of law and the way in which it regulates social relations in general. Some of these approaches are sketched below.

Law may be analyzed based on the functions that it performs in a society. In this view, first, the function of a legal transplant within a given society should be determined (or what function it is expected to serve at the time the legislators decide on a legal transplant). Second, it should be evaluated whether a legal transplant fulfills this function. Where one of the desired results or goals of the transplant is that it indeed delivers this function, this may correspond to the goal-oriented approach, in which the success of transplant is equaled with the achievement of that goal. For example, *Yang and Percival* suggest looking beyond the wording of legal provisions to concentrate on the function they play. They posit that provisions that appear to be similar might function rather

²⁵⁸ Dezalay and Garth, *supra* note 83.

differently and have little in common. Conversely, seemingly disparate schemes might be functional equivalents because of their substantive effect of analogous operation.²⁵⁹

Law may also be understood instrumentally—i.e., as an instrument that serves social or individual interests.²⁶⁰ In this view, legal transplant may be considered successful if it accomplishes the motivation behind the legal transplant. For example, *Harding* suggests that law in Asia may be considered in instrumental terms.²⁶¹ Indeed, it is suggested that the *Watsonian* thesis that the idea of a law can be readily transplanted is, in relation to Southeast Asia, clearly made out.²⁶² He notes that the strictures of *Montesquieu* and *Kath-Freund* do not generally apply in Southeast Asia. This suggests that the law transplanted to this region may be considered successful if the motivation driving the adoption of such law was fulfilled. An instrumentalist approach may indeed be an appropriate framework to evaluate legal transfers for the very reason that conscious legal borrowing suggests that the borrower has a clear idea about the role the transplanted law should perform.²⁶³

A similar instrumental approach to law in East Asia and Oceania is observed by *Breda*. The author describes legal transplants in East Asia and Oceania as a manifestation of multiple social-engineering endeavors managed by the receiving legal systems.²⁶⁴ These reforms aim to enhance the commonwealth of the community and establish a commercial and cultural exchange with an alien system.²⁶⁵ Correspondingly, *Breda* considers a dysfunctional transplant as a social engineering experiment that did not deliver the expected results.²⁶⁶

²⁵⁹ Yang and Percival, *supra* note 184 at 661.

²⁶⁰ TAMANAHA, *supra* note 15 at 45.

²⁶¹ Andrew Harding, *Comparative Law and Legal Transplantation in South East Asia: Making Sense of the “Nomic Din”*, in ADAPTING LEGAL CULTURES 199-222 (Johannes Feest and David Nelken eds., Hart Publishing 2001).

²⁶² Harding, *supra* note 261 at 218-219.

²⁶³ Nelken, *supra* note 29 at 47.

²⁶⁴ Breda, *supra* note 113 at 324.

²⁶⁵ Breda, *supra* note 106 at 4.

²⁶⁶ Breda, *supra* note 113 at 322.

4 Meaning of success of legal transplants in different branches of law

The primary finding from the above review of the theoretical understanding of success and its determinants is that the success of legal transplants is likely to be highly relative. Many authors suggest that one dimension of relativity is that success will be judged differently depending on the type or branch of law that is being transplanted. The following part of this thesis will compare how legal transplants are evaluated in different branches of law. These will include branches of both private and public law and focus on contract law, commercial law, international arbitration law, criminal law, and constitutional law. Examples from each area will be selected, and a review of the arguments used by various authors will be presented. Annex 2 provides a summary of the understanding of the success and evaluative dimensions used in the case studies.

4.1 Contract law

The following parts will examine transplanting the good faith principle into common law and the Convention on Contracts for the Internal Sale of Goods and the UNIDROIT Principles of International Commercial Contracts to Australia. Each part will first summarize the observations that the respective author made in the examination of the given transplant, and then distill methodological implications as regards the analytical framework employed.

4.1.1 Good faith in common law

4.1.1.1 Summary of the analysis

Gray looks at the incorporation of good faith in relation to contracts in common law.²⁶⁷ The author understands the doctrine to be common in civil law legal systems, in international contracting conventions and standards, and in American commercial law. The author thus conceives of it as a legal transplant to other common law jurisdictions, where its acceptance varies. In relation to British commercial law, *Gray* observes that although British common law initially accepted the good faith doctrine, this approach was later reversed, and until recently, the doctrine was accepted only in insurance contracts.²⁶⁸ This has, however, changed with the recent UK Supreme Court decision that accepted the doctrine as a principle applicable to all contracts. Nonetheless, the reserved approach of the decision makes *Gray* rather skeptical as to whether it could be accepted

²⁶⁷ Anthony Gray, *The Incomplete Legal Transplant – Good Faith and the Common Law*, in LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA 111–131 (Vito Breda ed., Cambridge University Press 2019).

²⁶⁸ Gray, *supra* note 267 at 111.

as a general principle in UK commercial law. In this regard, *Gray* observes how some of the courts follow the decision and apply the doctrine, while the others continue to reject it.²⁶⁹ The author sees this uncertainty itself being transplanted to Asian common-law systems, which rely on the common law case law of the UK. Uncertainty permeates Australian common law. Canadian common law, on the contrary, applies the doctrine. As to whether it is good for common law to embrace the notion, *Gray* evaluates to what extent it is compatible with the common law system. On this count, *Gray* is rather positive and believes that it fits well with the relational nature of most contracts and supports the idea that contracts should reflect ordinary commercial practices, as well as the reasonable expectation of the commercial parties.²⁷⁰ *Gray* also observes that common law systems already embrace and apply principles similar in nature to good faith doctrine, though they may call them something else.²⁷¹

4.1.1.2 Methodological implications

First, it should be emphasized that the subject matter of *Gray*'s analysis—i.e., the transplanting of good faith doctrine into common law—represents the transplant of a doctrine rather than a specific law or legal provisions. This seems to have influenced *Gray*'s conceptualization of success. As the author follows the premise that good faith is compatible with and “fits” common law, success is dependent on the courts fully embracing the doctrine and applying it in their decision-making practice. Thus, the author describes the transplant of good faith into common law as an “incomplete” one, as it has not been unanimously accepted by the courts in all common law jurisdictions. In relation to fit, *Gray*'s analysis highlights the importance of the congruence of the transplant with the underlying social ordering and practices. In addition, the fit is supported by the existence of functional substitutes to good faith doctrine in common law.

In sum, the benchmarks of success used by *Gray* are the application of the rule by the courts. Fit is evaluated by congruence with social practices.

4.1.2 Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts in Australia

²⁶⁹ *Gray*, *supra* note 267 at 129.

²⁷⁰ *Gray*, *supra* note 268 at 129.

²⁷¹ *Gray*, *supra* note 268 at 129.

4.1.2.1 Summary of the analysis

Viven-Wilksch evaluates the legal transplant of the Convention on Contracts for the International Sale of Goods (the Convention) and the UNIDROIT Principles of International Commercial Contracts (the Principles) to Australian contract law. The author looks at the judicial practice and the influence of the Convention and the Principles on legislation²⁷² and observes that the number of cases relying on or referencing the Convention and the Principles is low. These references are also usually rejecting the rules of the Principles (i.e., making them inapplicable in a given case) rather than endorsing them.²⁷³ Similarly, the Convention is only rarely relied on.²⁷⁴ *Viven-Wilksch* also notes that the difficulties in interpreting some of the concepts under the Convention, particularly the good faith provisions,²⁷⁵ cause judges to refer to the domestic legal system to give meaning to those provisions. In this regard, *Viven-Wilksch* refers to *Legrand* and his view that interpretation seems impossible to detach from the domestic environment²⁷⁶ and thus concludes that the obstacles to the transplant being successful is the lack of appropriate interpretation and the separation from domestic law.²⁷⁷ Nonetheless, the author notes that the deficient usage of the Convention and Principles should not be condemned as a failure. This is because success or failure should always be evaluated in a longer timeframe and bearing in mind that a change to domestic contract law cannot happen overnight. The author believes that as long as there is a link between the recipient country and the international instrument, there is still the possibility that the transplant will be successful after all,²⁷⁸ and proposes a monitoring system that would observe how the transplant fares in the new environment. The Convention and the Principles have the potential to initiate legal change and reshape Australian law to make it relevant in a globalized world. Stronger involvement of not only legal reformers and courts but also educators to increase the relevance of the instruments among Australian legal professionals may contribute to the transplant being considered a success.²⁷⁹

4.1.2.2 Methodological implications

²⁷² *Viven-Wilksch*, *supra* note 5 at 144.

²⁷³ *Viven-Wilksch*, *supra* note 5 at 146.

²⁷⁴ *Viven-Wilksch*, *supra* note 5 at 147.

²⁷⁵ *Viven-Wilksch*, *supra* note 5 at 149.

²⁷⁶ *Viven-Wilksch*, *supra* note 5 at 150.

²⁷⁷ *Viven-Wilksch*, *supra* note 5 at 151.

²⁷⁸ *Viven-Wilksch*, *supra* note 5 at 152.

²⁷⁹ *Viven-Wilksch*, *supra* note 5 at 154.

Viven-Wilksch's analysis provides an important empirical underpinning to some of the theoretical observations related to the evaluation of the success of legal transplants. First, it highlights that the determination of success depends on the timeframe. Where a transplant may be considered a failure in the short-term perspective, it may still become a success in the long term. Second, it corroborates the importance of a supportive local environment by suggesting that where the motivation for implementing a legal transplant comes from within and is supported by internal demand driven by the acknowledgement of the potential benefits, the transplant is more likely to succeed. Finally, *Viven-Wilksch's* analytical framework emphasizes the role of legal professionals in recognizing the potential benefits the transplanted law is to bring and in driving the corresponding legal change. *Viven-Wilksch's* account also implies that where the approach of legal professionals is rather conservative, legal change as a result of the transplant may progress only slowly.²⁸⁰

In sum, the benchmarks used by *Viven-Wilksch* to evaluate success were motivation, benefits to the recipient society, fit with the legal infrastructure (the extent to which the transplanted rule is considered relevant by the legal professionals), and supportive societal environment.

4.2 International law

The following parts will examine the transplant of the international arbitration court to Singapore, anti-impunity norm to Japan, and migration law in general. As above, each part will first summarize the results of the analysis by the respective author then deduce methodological implications for the choice of an appropriate analytical framework.

4.2.1 International arbitration court in Singapore

4.2.1.1 Summary of the analysis

Stabmoulakis analyzes the Singapore International Commercial Court (the SICC). He considers the idea of international commercial courts as being of a transplanted origin and evaluates the influence of some Singaporean realities that influenced the final shape of the transplant. In this regard, he observes how the SICC's procedures are modelled by the surrounding socio-legal cultural landscape.²⁸¹ He maintains that these cultural influences help comprehend the contours of some

²⁸⁰ See also Breda, *supra* note 113 at 323.

²⁸¹ Stabmoulakis, *supra* note 105 at 199-200.

adaptations to the transferred concept of international commercial courts. In particular, the adaptations are perceived as the product of the surrounding local, institutional, and transnational culture, as applied and understood by the SICC.²⁸² The author notes that the conceptualization of the SICC is driven by the willingness, supported by embedded cultural features, to divert from the structure of traditional dispute resolution mechanisms and develop an institution that adopts elements of hybridity. The relevant cultural features include, *inter alia*, Singapore's stable institutional and legal structures and a Singaporean reformist culture in international business matters. In other words, the SICC's success in hybridizing complex dispute resolution procedures is due to its willingness to make Singapore a transnational business-friendly environment. Nonetheless, he concludes that it may be too early to infer from these supportive conditions the true success of the transplant and believes that the ultimate measure of the SICC's success will be to what extent the contracting parties actively choose to submit their disputes to the SICC.²⁸³

4.2.1.2 Methodological implications

Regarding the conceptualization of success, *Stabmoulakis's* analysis suggests that the ultimate benchmark for evaluating the success of SICC as an alternative dispute resolution mechanism is whether it is used by the parties to resolve their disputes. The author's analytical framework also suggests that the ability of the transplant to contribute to the overarching strategies and goals of the recipient jurisdiction (e.g., supporting Singapore's image as a business- and investment-friendly jurisdiction), may also be useful in evaluating the success of the SICC. In addition, *Stabmoulakis's* analysis provides significant findings as to the conditions that are conducive to the success of a legal transplant. First, fit with the domestic socio-legal and cultural environment is highlighted as important. Where the transplant reflects this environing context, it is more likely to gain traction and deliver the desired benefits. The author expects that the adaptations to the transplanted rules in their new jurisdiction are to be attributed to and reflect this environment. The congruence between the overarching strategic interests of the recipient jurisdiction and the idea behind the transplant may be an especially important dimension of fit. The two-way relationship between the strategic interests and the transformative potential of the transplant also implies that a fitting legal transplant may further support and contribute to such interests and the related developmental or reform

²⁸² Stabmoulakis, *supra* note 105 at 200.

²⁸³ Stabmoulakis, *supra* note 105 at 206.

strategy. In addition to fit, *Stabmoulakis's* analysis implies that the level of advancement of legal infrastructure and general institutional adaptiveness may also significantly influence the success of a legal transplant and the incorporation of transplanted legal ideas.²⁸⁴

In sum, the benchmarks used to determine success were whether the mechanism is used by the parties (i.e., the congruence of the motivation for the adoption with the actual usage), the fit with the domestic socio-legal cultural environment, and the fit with the developmental strategy (i.e., the willingness to divert from the status quo to accomplish some other motivation). Another condition of success was institutional adaptiveness.

4.2.2 Anti-impunity norm in Japan

4.2.2.1 Summary of the analysis

O'Brien analyzes the reception of an anti-impunity norm as an emerging international law doctrine in Japan. The role of the norm is to ensure that perpetrators of human rights violations and serious international crimes do not evade responsibility for their actions. Relatedly, it also seeks to ensure that victims of rights violations and international crimes are granted access to justice and suitable reparations.²⁸⁵ The author identifies difficulties in embracing the norm in Japan. These difficulties are attributed to a number of factors, including the legislators' hostility toward international law in general and Japanese attitudes towards the role of law. In Japan, law is said to be perceived as a mechanism of social ordering. It serves to ensure legality, certainty, and rule-obedience rather than to protect individuals' rights and liberties. In addition, law is said to be devoid of moral content, as morality is traditionally defined and secured by extra-legal institutions. As a result of such a perception of the role of law, *O'Brien* notes that transplanting the universal and transcendental moral standards that underpin the norm would require the modification of not only the content of Japanese laws, but also the worldview within which the law operates.²⁸⁶ In addition to these conceptual differences, *O'Brien* identifies a hostile political climate that reinforces resistance to the norm.²⁸⁷ Nonetheless, the author does not believe that these obstacles cannot be simply interpreted as a transplant failure or rejection. Rather, the author sides with *Teubner's* concept of

²⁸⁴ See also Breda, *supra* note 113 at 323.

²⁸⁵ *O'Brien*, *supra* note 179.

²⁸⁶ *O'Brien*, *supra* note 179 at 279-280.

²⁸⁷ *O'Brien*, *supra* note 179 at 281.

legal irritants. *O'Brien* posits that the introduction of the impunity norm to Japan has caused a unique and unpredictable set of events.²⁸⁸ Although the Western understanding of the essential content of the norm has not been transplanted, its introduction challenged and reconstructed local views on impunity, leading to the emergence of a distinctly Japanese way of confronting the issue. Nonetheless, it shall probably not be regarded as bringing a fundamental transformation to Japanese society.²⁸⁹ Rather, it may be seen as a useful tool to allow Japan to confront its war responsibility without sacrificing its core interests and socio-legal traditions.²⁹⁰

4.2.2.2 Methodological implications

The transplant of the impunity norm highlights the wider political and moral aspects upon which the law may touch. It may indeed be considered as an example of transplantation of a legal concept that is, in *Kahn-Freund's* perspective, so deeply embedded in the society and its political and moral agenda that its transplantation is likely to run into serious obstacles. It also illustrates the tensions that may arise when the externally driven transplantation of foreign norms runs counter to what is considered culturally appropriate in the recipient jurisdiction. Such transplantations may unleash unpredictable processes with more or less transformative effects in the recipient jurisdiction.

In this case, success has been understood as the achievement of the transcendental moral standards that underpin the norm. The conditions of such success were the acceptance of the idea by the society and culture, including legal culture, and a conducive political climate that approves of the idea behind the norm.

4.2.3 Migration law in Asia-Pacific

4.2.3.1 Summary of the analysis

Torresi analyzes a specific kind of temporary migration pattern that she describes as “temporary migration projects” and what role legal transplants may play in response.²⁹¹ The author considers

²⁸⁸ *O'Brien*, *supra* note 179 at 285.

²⁸⁹ *O'Brien*, *supra* note 179 at 284.

²⁹⁰ *O'Brien*, *supra* note 179 at 284.

²⁹¹ Tiziana Torresi, *Legal Transplants, Temporary Migration Projects and Special Rights*, in *LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA* 297–320 (Vito Breda ed., Cambridge University Press 2019). The author understands this type of migration as a kind of migration where the migrants retain the intention to return to their home country after specific goals are achieved in the receiving country.

numerous legal regimes potentially applicable to migrants and concludes that a regime of special rights²⁹² would be a good fit for the Asia-Pacific region.²⁹³ In evaluating this fit, *Torresi* focuses on several aspects. First, the author observes that there are similar patterns of migration in the region, suggesting that there are similar needs and vulnerabilities that may need to be addressed by regulation.²⁹⁴ Second, the author notes that the relevant states are incentivized to adopt this kind of legislative approach, primarily because they choose migration as a developmental strategy and have interests in the continued sustainability of the model.²⁹⁵ Correspondingly, the author observes that there are no obstacles to the transplantation of the suggested regime of special rights.²⁹⁶ Nonetheless, *Torresi* is skeptical about the possibility of “transplanting” more inclusive citizenship models, or models of regional members, as in the EU. The author observes that as a result of the tight connection of citizenship law to national identity, culture, and values, such a transplant would likely face greater obstacles.²⁹⁷

4.2.3.2 Methodological implications

Torresi's analysis provides a nice example of how legal regulation (adopted through transplanting) adapts to local conditions and societal needs. Also, it contrasts two facets of migration—the first being tied to national citizenship, which is unlikely to be amenable to transplantation, and the second being tied to the “outward” aspects of migration, which may be, as a result of their cross-border scope, more promising for transplantation.

The benchmarks used to evaluate success were the fit between the situation that needs to be addressed and the legal solution (i.e., whether the legal solution is able to fulfill the need) and fit with the overarching regulatory strategy of the state.

4.3 Company law

²⁹² These include rights on the top of national citizenship that can accommodate the life plans and address the specific vulnerabilities of temporary migrants. *Torresi*, *supra* note 291 at 305 and seq.

²⁹³ *Torresi*, *supra* note 291 at 314.

²⁹⁴ *Torresi*, *supra* note 291 at 314.

²⁹⁵ *Torresi*, *supra* note 291 at 314.

²⁹⁶ *Torresi*, *supra* note 291 at 315.

²⁹⁷ *Torresi*, *supra* note 291 at 315.

The next part will look more closely at transplanting the independent director system in China and corporate governance standards through stock exchange listing in Brazil. A summary of the analysis by the respective authors will be provided first, followed by a distillation of wider methodological implications.

4.3.1 Independent director system in China

4.3.1.1 Summary of the analysis

Zhou evaluates the transplant of an independent director system to China. The author observes that the concept comes from the Anglo-American corporate governance model.²⁹⁸ To evaluate the success of the transplant, *Zhou* highlights the different contexts of the jurisdictions of origin and China.²⁹⁹ Whereas the corporations in the former are characterized by dispersed ownership and a unitary board structure, many of the listed companies in China have a highly concentrated ownership structure and generally adopt a German-like two-tier board structure. *Zhou* believes that the influence of majority shareholders in Chinese corporations (usually state- or government-linked) poses the greatest obstacle to having truly *independent* directors.³⁰⁰ As a result of the board structure being dominated by majority shareholders, the transplant is problematic and dysfunctional.³⁰¹ The root cause of the problem is thus the unreceptiveness of the transplant to the Chinese legal culture and the specific social and political contexts of contemporary China. In other words, the independent director system does not fit the Chinese corporate governance context.³⁰² The deficiency that the transplant was envisaged to address was to be dealt with by strengthening the position of minority shareholders, who systematically lack the means to voice their needs and concerns. *Zhou* notes that this motivation is different from the motivation that has driven the adoption of the Anglo-American corporate concept (which was to protect shareholders from the management rather than from other shareholders).³⁰³ In addition to different motivations, *Zhou* also attributes partial responsibility for the failure to the fact that the Chinese context lacks other mechanisms that would support the independence of the directors. These include institutional weakness and the overwhelming decision-making power of dominant shareholders in selecting

²⁹⁸ *Zhou, supra* note 68 at 279.

²⁹⁹ *Zhou, supra* note 68 at 263.

³⁰⁰ *Zhou, supra* note 68 at 264.

³⁰¹ *Zhou, supra* note 68 at 264.

³⁰² *Zhou, supra* note 68 at 264.

³⁰³ *Zhou, supra* note 68 at 277.

independent directors.³⁰⁴ In addition, the implementation of the doctrine is hampered by the uncertain scope of the responsibilities of independent directors³⁰⁵ and the absence of adequate incentives for performing the duties.³⁰⁶ Another weakness is the lack of enforcement.³⁰⁷ Cultural factors also have their share in the failure of the transplant—*Zhou* attributes part of the failure to the fact that independent directors are mainly recruited from academics, for whom it may be difficult to fully embrace the role.³⁰⁸ Finally, the author attributes some influence to the path dependency in Chinese corporate law in refusing to provide functional substitutes that may make the rules more meaningful.³⁰⁹ *Zhou* concludes that the transplant is less effective than anticipated as a monitor of company governance.³¹⁰ To remedy this, the author proposes that the transplant better addresses the specific weaknesses of the Chinese corporate structure.³¹¹ The modification of the environment in which it is applied may also contribute to better operation of the transplant.³¹² To conclude, *Zhou* notes that the transplant may nevertheless be considered a success—in view of some of the key players engaged in the adoption process who did not want the transplant to work effectively or who sought to make the impression that it is somehow operative, the transplant may be deemed successful.³¹³

4.3.1.2 Methodological implications

In distilling the effects of the transplant in its new environment, *Zhou* focuses on the function that the law plays, both in donor and recipient jurisdiction. Thus, it seems that for *Zhou*, what is decisive for the success of the transplant is not whether the law performs the same function as in the jurisdiction of origin. Rather, it is whether or not it achieves its goal in the recipient jurisdiction. The factors that may influence the success or failure of the transplant are both formal aspects of the law (i.e., its wording and interpretation) and its interaction with other institutions in the Chinese corporate governance system, as well as broader cultural, societal, and policy considerations. The

³⁰⁴ *Zhou*, *supra* note 68 at 283.

³⁰⁵ Especially the unclear monitoring role of independent directors which overlaps with that of supervisors. *Zhou*, *supra* note 68 at 283.

³⁰⁶ *Zhou*, *supra* note 68 at 285.

³⁰⁷ *Zhou*, *supra* note 68 at 286.

³⁰⁸ *Zhou*, *supra* note 68 at 287.

³⁰⁹ *Zhou*, *supra* note 68 at 288.

³¹⁰ *Zhou*, *supra* note 68 at 289.

³¹¹ *Zhou*, *supra* note 68 at 290.

³¹² *Zhou*, *supra* note 68 at 264.

³¹³ *Zhou*, *supra* note 68 at 290.

failure may be particularly attributed to the ambiguous and unclear wording of the law, the lack of fit with other corporate governance law institutions, the lack of accompanying infrastructure to make the institution more effective, or the general lack of enforcement. The proposed remedy is to better tailor the law to the specificities of corporate structure and related problems in Chinese corporations. Thus, *Zhou's* analysis emphasizes the importance of incorporating legal institutions into a wider regulatory framework and the specifics of the existing legal institutions and background. The author also highlights the relativity of the notion of success.

In sum, the benchmarks used to evaluate success were the function that the law plays in the recipient jurisdiction (i.e., how it addresses the underlying problems) and the fit with the wider regulatory framework and related institutions and cultural background.

4.3.2 Corporate governance standards through stock exchange listing in Brazil

4.3.2.1 Summary of the analysis

Donnagio examines the effectiveness of investor protection rules of the “Novo Mercado”—i.e., a listing segment of the Brazilian stock exchange for companies committed to higher governance standards.³¹⁴ It was introduced to Brazil in 2000 by means of legal transplanting and is said to be inspired primarily by the German model of self-regulated listing platform. The author finds mixed results regarding its success. On one hand, the transplant has contributed to the development of Brazilian capital markets; on the other, it did not work as expected. The main motivation for the creation of the Novo Mercado was to increase fairness and guarantee equal treatment for minority shareholders.³¹⁵ However, the transplant has not managed to alter the main agency problem between the controlling and minority shareholders that characterizes Brazilian companies.³¹⁶ *Donnagio* attributes this failure to the cultural, political, economic, and institutional elements that permeate the entire market. The reasons for this ineffectiveness are mainly (i) the relationship between regulation and self-regulation in the Brazilian legal system, (ii) the incompleteness of the law, (iii) inadequate interpretation, (iv) the need for additional specific procedures, and (v) the lack of enforcement.³¹⁷ *Donnagio* identifies three primary root causes that are manifested to greater or

³¹⁴ *Donnagio, supra* note 152.

³¹⁵ *Donnagio, supra* note 152 at 469.

³¹⁶ *Donnagio, supra* note 152 at 477.

³¹⁷ *Donnagio, supra* note 152 at 477-478.

lesser extent in the listed grounds of ineffectiveness. The first is the conflict of interest between the regulator and the regulated entities.³¹⁸ The second is an overly formalistic interpretation of the rules that does not adequately consider the surrounding legal environment. The third is the lack of adequate oversight structure. *Donnagio*'s account also suggests that the failure is probably cannot be attributed to the choice of the model jurisdiction, given that the Brazilian and German markets witnessed similar problems driving the adoption of the law, such as weak equity markets in relation to the gross domestic product, low liquidity, and high concentrations of control.³¹⁹ Nonetheless, despite these deficiencies, the author observes that the transplant contributed to transforming Brazil's capital markets especially through more restrictive rules.³²⁰

4.3.2.2 Methodological implications

Donnagio's analysis provides an effective illustration of the tension between the two evaluative frameworks—i.e., allegedly an objective and a subjective one. Under the “objective” framework, the author looks at how the law contributes to the recipient country. Under the “subjective” framework, the author examines the motivation that led to implementing a transplant. Whereas on the objective front, the transplant was seen as a success, the subjective account was less so. *Donnagio* identified several factors responsible for the failure, relating both to some of the realities of the examined jurisdiction and to the incorporation of the law into the local legal infrastructure. The author's account also suggests that the similarities in some market realities in the donor and recipient jurisdiction are not a guarantee that the law will address similar issues in its new context.

In sum, the benchmarks used to evaluate success were whether the transplant brings benefits to the country or whether it achieves the motivation that was sought to be achieved by the transplant, while the success was influenced by the fit with the legal infrastructure (i.e., supportive enforcement institutions and adequate interpretation).

4.4 Constitutional law

In the area of constitutional law, the following part will examine the transplantation of the proportionality principle in Czech constitutional law and in Australian public law and the

³¹⁸ *Donnagio*, *supra* note 152 at 481.

³¹⁹ *Donnagio*, *supra* note 152 at 469.

³²⁰ *Donnagio*, *supra* note 152 at 480.

transplantation of the concept of an independent lawyer association to Myanmar. As in the previous parts, a summary of the relevant author's findings will be provided, followed by deduction of methodological implications for the analytical framework for defining the success of legal transplants.

4.4.1 Proportionality principle in Czech constitutional law

4.4.1.1 Summary of the analysis

Although the transplanted origin of the principle of proportionality to Czech constitutional law is widely recognized in the literature, the authors usually do not explicitly evaluate its success. Hence, the following part will not focus on a single work but instead will rely on a compilation of articles and studies that have mapped the transposition of the principle of proportionality in Czech law and its development.

It is not explicitly mentioned in the Czech Constitution³²¹ but has been introduced into Czech constitutional law through the case law of the Czech Constitutional Court (CCC). The first decision explicitly referring to the principle is the case of an anonymous witness in criminal proceedings,³²² and the CCC formally derived the principle from the material rule of law.³²³ Yet, the authors observe that materially the principle found its way into Czech law through the case law of the European Court of Human Rights (ECHR) and the German Constitutional Court.³²⁴ *Ondřejek* traces the origins of the principle to the traditions of Prussian police science and the German concept of the constitution as an objective order of values, in which fundamental rights play a central role.³²⁵ The CCC occasionally explicitly refers to the case law of the ECHR and German jurisprudence when discussing the principle of proportionality.³²⁶ In some decisions, the CCC

³²¹ Constitutional law no. 1/1993 Coll., Constitution of the Czech Republic, as amended.

³²² Decision of the Czech Constitutional Court of 12 October 1994, file no. Pl. 4/94.

³²³ Decision of the Czech Constitutional Court of 12 October 1994, file no. Pl. ÚS 4/94. See also the decision of the Czech Constitutional Court of 12 April 1994, file no. Pl. ÚS 43/93.

³²⁴ AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (CAMBRIDGE STUDIES IN CONSTITUTIONAL LAW) 198 (Cambridge University Press 2012).

³²⁵ Pavel Ondřejek, *Zrod a utváření principu proporcionality v poválečném německém ústavním právu*, 3 ACTA UNIVERSITATIS CAROLINAE – JURIDICA 155 (2015).

³²⁶ See, e.g. the decision regarding the conditions for enlisting a graduate of a foreign law faculty in the list of trainee lawyers of the Czech Lawyers Association, which contains references to the ECHR case law (decision of the Czech Constitutional Court of 25 October 2016, file no. II. ÚS 443/16, para 28), or the decision regarding the setting of the minimum amount of fine taking into account the financial situation and personal circumstances of the offender, which

explicitly declares that it was inspired by the jurisdictional practice of the German constitutional court.³²⁷ The inspiration from the German doctrine was also explicitly recognized by some judges of the CCC, who were themselves inspired by it, and this inspiration, along with that from the case law of the German Constitutional Court, is also justified by the fact that the very Czech Constitution was to some extent based on German Basic Law (*Grundgesetz*) and that the Czech Republic adopted a similar model of constitutional judiciary.

On its face, the principle is applied by the CCC in the same three-step sequence as by the German Constitutional Court (i.e., the consideration of suitability, need, and proportionality in the narrow sense), which first formulated this method in its seminal judgment in the *Apotheken-Urteil* case.³²⁸ Yet, the authors note that while the incorporation of the basic three-step process into the case law occurred rather quickly, the development or fine-tuning of concepts considered within the respective steps has not been entirely consistent in the case law of the CCC.³²⁹ *Holländer* identifies, on the one hand, a line of cases in which the doctrine crystallized in case law but, on the other hand, also points out inconsistencies in the understanding of the content of the principle of proportionality.³³⁰ *Ondřejek* notes that a unified theory of consideration of proportionality in a narrow sense has yet to be developed.³³¹

Nonetheless, the doctrine still seems to mirror its German model. The refusal to apply the doctrine in the case of so-called social rights serves as an example. The CCC refuses to apply the traditional proportionality framework in cases of some economic, social, and cultural rights, whose realization is dependent on the “advancement” of the society. There is a provision in the Czech constitutional order that limits the scope of social rights—Article 41(1) of the Charter of the Fundamental

contains references to German jurisprudence (decision of the Czech Constitutional Court of 13 August 2002, file no. Pl. ÚS 3/02).

³²⁷ PAVEL HOLLÄNDER, *FILOSOFIE PRÁVA* 169-170 (Aleš Čeněk, 2nd ed 2012).

³²⁸ The decision of the German Constitutional Court of 11 June 1958, file no. 7 BVerfGE 377-444.

³²⁹ David Kosař, *Kolize základních práv v judikatuře Ústavního soudu*, XVII(1) JURISPRUDENCE 3 (2008), or PAVEL ONDŘEJEK, *PRINCIP PROPORCIONALITY A JEHO ROLE PŘI INTERPRETACI ZÁKLADNÍCH PRÁV A SVOBOD* (Leges 2012).

³³⁰ Pavel Holländer, *Putování po stezkách principu proporcionality: intence, obsah, důsledky*, 3 PRÁVNÍK 261 (2016) at 263. See also PAVEL HOLLÄNDER, *ÚSTAVNĚPRÁVNÍ ARGUMENTACE: OHLÉDNUTÍ PO DESETI LETECH ÚSTAVNÍHO SOUDU* (Linde 2003) at 21-23 and 69-72.

³³¹ Pavel Ondřejek, *Poměrování jako klíčový argument přezkumu ústavnosti v éře proporcionality a některé projevy jeho kritiky*, 4 PRÁVNÍK 349 (2016) at 353.

Rights³³² stipulates that the rights set out in Articles 26, 27(4), 28 to 31, 32(1) and (3), and 33 and 35 of the Charter may be claimed only within the limits of the laws implementing those provisions. The CCC rules that the principle of proportionality is not applicable in relation to those rights because it is unsuitable for such rights, given their dependence on the specification of their contents in the law. This is in congruence with the German approach. Yet, interestingly, the inapplicability of the principle on social rights in Germany is grounded in the fact that there are no social rights in German *Grundgesetz* to which the principle could theoretically be applicable. That was also the case at the time when the principle was used by the German Constitutional Court for the first time.³³³ The CCC could have justified its restraint from applying the principle to social rights by simply referring to the practice of the German constitutional court, yet it went further and searched for justification in the very nature of the principle itself and in the overall context of the Czech constitutional order. This suggests that the principle, once “seeded” in Czech constitutional law, developed a life of its own and evolved, to an extent, independently of its model. This is despite the fact that, as some authors note, the CCC generally prefers to take over the tests already proved in the foreign models before creating its own methodology.

4.4.1.2 Methodological implications

The transplantation of the principle of proportionality into Czech constitutional law highlights the importance of the context in transplanting rules that are tightly connected with a value system and political institutions. The relevant context includes not only the other provisions of the Constitution (or the Constitutional order in the Czech case), but also the political system—i.e., the division of power within the state (which also served as another justification for the principle not being applicable to social rights) and the relative strength of the constitutional judiciary in repealing the laws.³³⁴ There are suggestions that extra-legal factors such as values, history, or empirical experience may also play a role, such as a history of totalitarian regimes and “precautionary” suspicion toward encroachments on human rights.

³³² Resolution no. 2/1993 Coll., Resolution of the Presidency of the Czech National Council on the promulgation of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic, as amended.

³³³ See also Jan Kratochvíl, *Test racionality: skutečně vhodný test pro sociální práva?*, 12 PRÁVNÍK 1052 (2015) at 1053.

³³⁴ In this regard, the Czech system is similar to the German one in that the constitutional courts of the two countries are quite strong – they are allowed to repeal laws found unconstitutional. This plays a role in the application of the principle as the more intensive the judicial review, the narrower the discretion of the court as regards the exercise of its functions, including the interpretation of the proportionality principle.

The transplantation of the principle also highlights the importance of the context in cases where what is being transplanted is a methodological principle rather than a specific legal rule. A method of legal argumentation provides a “cookbook” that describes the steps that need to be taken, but the specific rules, as the ingredients, are to be supplied by the local context. Therefore, the measure of success of the transplantation should arguably not rest in evaluating whether the application of the rule leads to the same results (e.g., whether a specific right trumps another in a comparable setting), but rather in considering whether the method itself is useful in addressing similar types of clashes of rules or principles or in performing the weighting exercise.

Finally, the transplantation of the principle of proportionality to Czech constitutional law also points out to the role that legal professionals (in this case the judges) play in transplanting and fine-tuning the principle. The authors often examine to what extent the principle is applied uniformly by different senates of the CCC or different judges.

It follows that the benchmark success of the transplant of the principle of proportionality in the Czech constitutional law may be whether the method contributes to the resolution of the legal problem for which it was intended in the jurisdiction of origin. The uniform application of the principle by the judiciary can also be useful in evaluating success. The condition of success may be congruence in the encompassing constitutional, political, and extra-legal context.

4.4.2 Proportionality principle in Australian public law

4.4.2.1 Summary of the analysis

Campbell and Lee analyze the transplant of the proportionality principle in Australian public law. They observe that the proportionality doctrine, being traditionally of German origin, migrated to the case law of the European Court of Justice and the European Court of Human Rights, and found its way also to Australian public law. They observe that in relation to the evaluation of implied freedoms, there seems to be a full convergence with the European doctrine in constitutional cases.³³⁵ They also observe the application of the doctrine in cases involving federal powers and in

³³⁵ Colin Campbell and H. P. Lee, *Proportionality in Australian Public Law*, in *LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA* 158-182 (Vito Breda ed., Cambridge University Press 2019) at 165.

administrative law. Nonetheless, they see problems in the adoption of the proportionality principle to impugn administrative decisions as part of the judicial process.³³⁶ They attribute these problems to the lack of determination of what counts as “rights” in Australia. In particular, as opposed to the European jurisdictions, there is no “Bill of Rights” in Australia.³³⁷ On the whole, the authors note that the proportionality principle continues to shape constitutional discourse. Yet, they concede that there is a lack of unanimity about accepting all the components of the transplant.³³⁸

4.4.2.2 Methodological implications

Campbell and Lee’s analysis suggests that the obstacle to rooting the legal transplant may be the lack of a legal context in which the transplanted rule could crystalize in the domestic jurisdiction. The missing definition of “rights” in Australia creates additional hurdles that must be overcome before the principle can be applied. This may dissuade its actual usage in practice. Their analysis supports the conclusion that the level of willingness of legal professionals to embrace the law may also play an important role in a successful transplant.³³⁹

In sum, the benchmark used to judge success were whether the concept is applied in the same way as in the country of origin. They also highlight the transformative potential of a legal transplant—i.e., whether it may act as a tool for change and drive discourse. The conditions of success was the existence of a legal context in which the transplanted rule could crystalize in the domestic jurisdiction.

4.4.3 Independent lawyer association in Myanmar

4.4.3.1 Summary of the analysis

Liljeblad evaluates the transplant of an independent lawyer association to Myanmar. The author is skeptical that the transplanted institution will constitute a true independent lawyer association.³⁴⁰ This is primarily because of the unsupportive context, especially the structure and agents surrounding the association. The limitations the association is facing demonstrate that the ability

³³⁶ Campbell and Lee, *supra* note 335 at 175.

³³⁷ Campbell and Lee, *supra* note 335 at 175.

³³⁸ Campbell and Lee, *supra* note 335 at 179.

³³⁹ See also Breda, *supra* note 113 at 323.

³⁴⁰ Liljeblad, *supra* note 3 at 221.

of a legal transplant to instigate transformative change can be restrained by contextual factors that impede the implementation of foreign ideas, even in cases in which the discussion of such foreign ideas takes place.³⁴¹ To overcome this, the author suggests that the transplant be accompanied by a suite of associated ideas that advance the reform of Myanmar's legal profession. The author concludes that the case of the association shows that the context may have overridden the transformation potential of the legal transplant as an irritant.³⁴²

4.4.3.2 Methodological implications

Liljeblad's analysis illustrates how an unsupportive context can complicate the process of transplantation despite the apparent acceptance and involvement of international and foreign actors for a foreign idea. It also suggests that where a legal transplant is to serve as a tool of change, it may be necessary to accompany such a transplant with the transfer of related concepts and institutions to support its incorporation into the environment of the recipient country.

In sum, success was considered as a replicating of the institution from the jurisdiction of origin, including the transfer of the ideas that surround it, in the recipient jurisdictions. The conditions of success of such a transfer were supportive context and the existence of accompanying institutions and regulatory concepts.

4.5 Environmental law

In the area of environmental law, the transplant of shark sanctuaries to the Pacific Islands region will be analyzed. First, the author's findings will be summarized. Second, the methodological implications will be distilled.

4.5.1.1 Summary of the analysis

Techera analyzes the transplantation of shark sanctuary regulation in the Pacific region and identifies several factors that may contribute to the spread of such regulations. First, *Techera* attributes an important role to cultural mores and mindsets, especially the way many Pacific Island states share certain cultural perceptions related to sharks, such as a belief that they have spiritual

³⁴¹ Liljeblad, *supra* note 3 at 222.

³⁴² Liljeblad, *supra* note 3 at 223.

powers.³⁴³ Second, the author notes that the long history of shark fishing in the region may be responsible for the increased demand for regulation of shark sanctuaries.³⁴⁴ Third, the author observes that there are not many shark attacks in the region, which may also further spur interest in their protection.³⁴⁵ Such interest may also be evidenced by the adoption of a regional plan of action.³⁴⁶ Finally, the author also points out the existence of strong regional organizations and the history of regional responses to other environmental challenges.³⁴⁷ Moving to the consideration of the respective legal instruments that were adopted in the Pacific Island states to ensure shark protection, *Techera* observes that the states utilized the same legal instruments. In analyzing this legislation, the author notes that the substantive provisions are alike even in legal content,³⁴⁸ which is interesting, given the fact that the states were not borrowing legal instruments directly from each other—rather, it was more the idea standing behind shark sanctuaries that traveled in the region. Nonetheless, the author recognizes that national approaches are tailored to take into account jurisdictional differences.³⁴⁹ *Techera* concludes that although the idea of shark sanctuaries seems to have traveled seamlessly in the region, the remaining challenge to the achievement of their ultimate aims is implementation—i.e., the need to ensure effectiveness and enforcement of law.³⁵⁰

4.5.1.2 Methodological implications

Techera's analysis represents another example of a legal transplant involving a transfer of an idea rather than a specific regulatory solution. Interestingly, where such an idea is met with similar underlying cultural conditions and other realities of the environment (even of a “physical” nature), it may independently give rise to similar legal solutions. This also means that where cultural perceptions call for certain regulation, this creates ground conducive to the success of a legal transplant chosen to deliver that regulation. In addition, supportive cultural diffusion taking place in concurrence with legal diffusion may raise the likelihood of success of a legal transplant. *Techera's* account thus implicitly emphasizes the importance of a supportive culture.

³⁴³ *Techera, supra* note 8 at 243.

³⁴⁴ *Techera, supra* note 8 at 243.

³⁴⁵ *Techera, supra* note 8 at 243.

³⁴⁶ *Techera, supra* note 8 at 244.

³⁴⁷ *Techera, supra* note 8 at 244.

³⁴⁸ *Techera, supra* note 8 at 249.

³⁴⁹ *Techera, supra* note 8 at 252.

³⁵⁰ *Techera, supra* note 8 at 253.

In sum, success has been conceived as whether the transplant achieves the ultimate aims of the regulation. The conditions of that success were the effective implementation, congruence with the cultural mores and perceptions, and fit with other realities.

4.6 Criminal law

The transplant of a criminal procedural code to Afghanistan will be provided as an example of a legal transplant from the branch of criminal law. The summary of the analysis provided by the author will be followed by an evaluation of its methodological implications.

4.6.1.1 Summary of the analysis

Jupp evaluates the adoption of the 2004 interim criminal procedure code in Afghanistan as an example of a transplanted criminal law introduced in a post-intervention state.³⁵¹ The code was modeled primarily after the Italian criminal procedure code.³⁵² *Jupp* measures the success of this transplant using several benchmarks.³⁵³ First, the author evaluates whether the code has been accepted by the local population, looking at its application and the extent to which it is regarded as meaningful and appropriate. Second, the author evaluates whether it has achieved its objectives. The greater the extent to which a law has been accepted and achieved its objectives, the more successful it is. According to *Jupp*, this evaluation requires both a positivist examination of the law's provisions as logically applicable rules and the collection of quantitative data to measure its application performance. In addition, assessing the extent to which a law is considered meaningful and appropriate by the legal actors responsible for enforcing it and the manner in which it is being applied by them requires socio-legal enquiries into variables such as compatibility with legal tradition, local interpretation, capacity, training, commitment to the law, and social, political, and economic concerns. It also requires consideration of the constraints on transplant reception in these environments (such as insecurity, collapse of the domestic state justice system, limited law enforcement personnel and capacity, or corruption). *Jupp* notes that all of these factors can threaten the potential for a new transplanted law to be accepted and to achieve its objectives.

³⁵¹ *Jupp*, *supra* note 34.

³⁵² *Jupp*, *supra* note 34 at 60.

³⁵³ *Jupp*, *supra* note 34 at 55.

Based on this test, the article finds that the transplant has not been successful. *Jupp* attributes this result to many challenges facing the reform of Afghanistan's state justice system, which is constantly challenged by Islamic and customary legal traditions in Afghanistan. Also, *Jupp* observes that the inadequacies and omissions of the code itself have also reduced the extent to which it has been accepted and achieved its objectives. In particular, the application of the code is observed to be compromised by a critical failure of both the local population and legal practitioners to find it sufficiently meaningful and appropriate for application to domestic criminal justice disputes.³⁵⁴ This is, *among other things*, also because it fails to draw on procedural rules from either Afghanistan's customary traditions or Islamic legal ones.³⁵⁵ *Jupp* also notes that the reasonableness of relying on a legal transplant as a solution for creating a new law will depend on the sensitivity with which it is employed. This is said to require knowledge of legal transplant feasibility, local history, and legal traditions, as well as reflection on the potential of successful reception of the law before its implementation.³⁵⁶

4.6.1.2 Methodological implications

Jupp measures the success of a legal transplant by two benchmarks: the first is the acceptance of the transplant by the local population (including its meaningfulness and appropriateness in application), and the second is the achievement of its objectives. The former stretches not only to the addressing of the norm but also to the legal practitioners who are to apply the transplanted norm. This necessitates the evaluation of the compatibility of the norm with legal tradition, local interpretation, capacity, training, and commitment to the law, but also of social, political, and economic concerns. The identification of potential constraints on the reception of the transplanted norm (such as insecurity, corruption, and limits on law enforcement) may also help in evaluating the acceptance of the norm by the local population, as well as its prospects in achieving its goals. In this framework, the cause of non-acceptance by the local population and legal practitioners may subsist in the failure of the transplant to factor other legal traditions and cater to different principles of these different legal traditions to which the local population is accustomed. This may lead to transplants being considered "insensitive" to the local environment.

³⁵⁴ *Jupp*, *supra* note 34 at 71.

³⁵⁵ *Jupp*, *supra* note 34 at 74.

³⁵⁶ *Jupp*, *supra* note 34.

In sum, the benchmarks to evaluate success were acceptance by the local population (including meaningfulness and appropriateness in application) and achievement of the transplant's objectives (i.e., reasons for demanding the law and motivations for relying on the transplant mechanism to prepare it). The conditions of success (or the influential factors) were compatibility with the recipient's legal tradition, local interpretation, and enforcement capacities, as well as social, political, and economic concerns.

4.7 Competition law

Competition law will be the last branch of law in which a specific legal transplant will be analyzed. This transplant involves the transfer of the prohibition of abuse of dominance into Israel. After a summary of the relevant analysis, its methodological implications for the definition of success in legal transplanting will be evaluated.

4.7.1.1 Summary of the analysis

Gal evaluates the success of competition law in Israel,³⁵⁷ defining success as the ability of the transplanted law to achieve its goals in the recipient country.³⁵⁸ *Gal* considers this transplant successful, as it benefits to the recipient country (although the benefits may not be exactly the same as in the donor country), and notes that success was also assisted by the fact that the area of competition is unique in combining notions of law and economics and is not based on legal doctrine alone. Therefore, a prohibition that is largely based on economic concepts can better travel between jurisdictions than one based solely on legal concepts. In evaluating competition law, *Gal* looks at the specifics of Israel's market, which is regarded as a small and developing economy. The prohibition of abuse of dominance was transplanted from the EU's Article 82 EC (currently Article 102 TFEU).³⁵⁹ According to *Gal*, one of the important benefits of the transplant is that the reception of the "text" of the article was followed by the reception of the accompanying interpretation, which allows the Israeli courts to refer to EU sources when applying the law.³⁶⁰ She also observes that the transplant helped push through new concepts and ease their acceptance. It is arguably the

³⁵⁷ *Gal*, *supra* note 130.

³⁵⁸ *Gal*, *supra* note 130 at 472.

³⁵⁹ EC as the Treaty establishing the European Community (Consolidated version 2002), OJ C 325, 24.12.2002, p. 33–184, and TFEU as the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

³⁶⁰ *Gal*, *supra* note 130 at 476.

legitimacy of the EU law that helped to convince local constituencies of the importance of the transplant. It also provided legal authority to push new ideas and concepts. In particular, *Gal* hopes that the new prohibition against monopolies may change the legal status of deep-rooted types of business conduct. *Gal* also recognizes that there are two sides to tailoring the law to domestic needs. On the one hand, fine-tuning each system of competition law to the idiosyncratic needs of a given society may be desirable in view of achieving the greatest acceptance and efficiency. On the other hand, this comes with significant transaction costs as a result of the absence of harmonization and coordination with other (potentially more influential) competition law systems. *Gal* suggests that the right equilibrium is to conserve the benefits of harmonization and coordination by sticking to certain regulatory standards but ensuring that the transplanted law is not unduly burdensome and does not significantly diverge from the “optimum” law for a given jurisdiction (as determined by its needs).³⁶¹ Despite the benefits of the transplanted norm, *Gal* also observes that it has brought some unexpected results for Israeli competition law.³⁶² For example, the author notes how the transplanted rebuttable presumption of abuse of dominance under Article 102 TFEU was met with the definition of monopoly in Israeli law (based on a non-rebuttable presumption), which may lead to the over-inclusiveness of the prohibition.³⁶³ The author also observes potential difficulties with the application of the prohibition of unfair prices and conditions. These difficulties stem from implementing the uncertain definition of the prohibition within the enforcement structure under Israeli competition law, in which private actions are a common way of enforcing legal prohibitions. As a result of this enforcement structure, it is difficult to adopt the policy of non-implementation as in the EU in relation to this prohibition, where the implementing authority—i.e., especially the European Commission—can determine its enforcement priorities.³⁶⁴ This uncertainty in the scope of the prohibition is even more troubling because competition law violations may serve as a basis for criminal conviction.³⁶⁵ *Gal* also warns against the interpretation of the transplanted provision in light of the goal of market integration, which is relevant in the EU but not in Israel.³⁶⁶

³⁶¹ *Gal*, *supra* note 130 at 479.

³⁶² *Gal*, *supra* note 130 at 480.

³⁶³ *Gal*, *supra* note 130 at 480.

³⁶⁴ *Gal*, *supra* note 130 at 480.

³⁶⁵ *Gal*, *supra* note 130 at 481.

³⁶⁶ *Gal*, *supra* note 130 at 481.

Based on the analysis, *Gal* explicitly identifies the conditions for the success of the transplant.³⁶⁷ These include: (i) socio-economic ideology supportive of the concept, (ii) internal and external support for its adoption, (iii) the suitability of the model (for example, she notes that the EU law is a good choice as a model because it is an established yet evolving competition law code), (iv) high competence of enforcement agencies that ensure the law is interpreted in congruence with domestic conditions, (v) the unique nature of competition law combining law and economics and not being based on legal doctrine alone, (vi) the “evolutionary” character of the transplant in relation to the already existing law,³⁶⁸ and (vii) general receptiveness of the culture to foreign concepts.³⁶⁹

4.7.1.2 Methodological implications

Gal emphasizes the ability of the law to change underlying political structures and increase public acceptance. In this regard, the author seems to emphasize the legitimacy-generating aspect of legal transplant in *Miller’s* typology. *Gal’s* account is also interesting in mentioning the need to find the right balance between tailoring the competition law to the domestic needs of a receiving country and preserving a certain degree of congruence with the model law or standards to reap the benefits of harmonization and coordination. This seems to call for selective and informed reception—i.e., although the law may be transplanted together with its interpretation, this interpretation cannot be used wholesale. Rather, the usefulness of each concept needs to be weighed against the goals that have driven the transplant and the surrounding framework in which the law is applied. Informed diversions from the model to cater to the different legal context are necessary to ensure that the application of the law does not result in disturbance or violation of other legal norms or principles. *Gal* also gives a list of conditions that likely determine whether the transplant is to succeed. These include factors relating to the receiving jurisdiction (its socio-economic conditions, position of the local population and legal practitioners, familiarity of the jurisdiction with related regulatory concepts, or the receptiveness of a given society to foreign law in general) but also immanent to the transplant itself (the suitability of the model law for transplantation in general or the “nature” of the transplanted law).

³⁶⁷ *Gal*, *supra* note 130 at 482.

³⁶⁸ In case of the examined transplant, *Gal* observes that some provisions on the prohibition of monopolistic abuse existed in Israeli competition law also prior to the transplant.

³⁶⁹ *Gal* observes that Israeli culture is not hostile to foreign, especially Western concepts. *Gal*, *supra* note 130 at 483.

To sum up, success is understood as the ability of the transplanted law to achieve its goals in the recipient country (or benefit it). The conditions of success are factors emanating from the recipient country (i.e., socio-economic conditions, position of local population and legal practitioners, familiarity of the jurisdiction with related regulatory concepts, and receptiveness to foreign law in general), as well as from the transplanted law itself (i.e., the suitability of the model for transplantation and the “nature” of the transplanted law).

5 Implications of the case studies on the definition of success and its conditions

The above review of the literature examining the success of legal transplants in different legal fields has several implications for the definition of success and its conditions. The theoretical strain of the literature suggests some lines that may shape the difference. These hypothetical lines include a divide between (i) private and public law transplants, (ii) transplants of laws tied to personal rather than economic interests, or instrumental laws and laws that have a deeper relation to culture, and (iii) transplants of laws in fields in which harmonization or globalization of laws occurs and in those which it does not occur. The following part will evaluate whether these lines are perceptible from the above case studies and, if so, what bearing this has on the benchmarks employed by the authors to evaluate the success and fit of such transplants. Annex 2 of this thesis, which features a summary of the dimensions used in the case studies, may be useful for reference.

5.1 Public/private law divide

An often-recurring hypothesis voiced in the general literature on legal transplants holds that different analytical frameworks may be useful in analyzing legal transplants occurring in the public as opposed to private law sphere. Arguably, proper analytical frameworks for private and public law transplants may differ in weight according to political, socio-cultural, and economic factors.

The boundary between private and public law can be drawn along several lines. One of the oldest is the Ulpianus theory. In this theory, the demarcation line was the interest that the law protects or accomplishes—public law is to govern public interests or common good, private law is to govern private interests.³⁷⁰ Success in private law may lie closer to the consideration of private interests that the law protects or serves to fulfil. On the contrary, success in public law may lie closer to the consideration of public interests that are to be accomplished by the law. However, this theory has been criticized, primarily because it is not possible to concretize concepts such as *public interest* as opposed to *private interests*, *general welfare*, *public tasks*, etc. Also, legal norms should pursue general utility, even in those cases in which it is a matter of private interests and private autonomy of entities.³⁷¹

³⁷⁰ “*Publicum ius est, quod ad statum rei Romanae spectat; privatum, quod ad singulorum utilitatem pertinet.*”

Dušan Hendrych, *Oddíl 2. Právo veřejné a právo soukromé*, in *SPRÁVNÍ PRÁVO. OBECNÁ ČÁST 13-15* (Josef Staša et al., C.H.Beck, 9th edition 2016) at 13.

³⁷¹ Hendrych, *supra* note 370.

Several theories to set the boundaries between public and private law have crystalized in the scholarship. The “formal organic theory” (coined by H. J. Wolff) understands public law as a set of legal regulations that consider the holder of public power exclusively as the entitled or obligated subjects.³⁷² The “material organic theory” conceives of public law as a set of legal norms in which at least one subject of a legal relationship is a holder of public power (because it has the corresponding authority, responsibility, or fact of being organized as a holder of public power).³⁷³

The “subjects” theory tries to overcome some limitations of the organic theories by focusing on subjects of the law. According to the “new theory of subjects,” the general law is private law, as it regulates the rights and obligations of all legal entities, including holders of public authority. On the contrary, public law is a special law limited to holders of public power in the exercise of their sovereign powers.³⁷⁴ The “subject” theory may provide hints as to what might be interesting to look at in evaluating the success of legal transplants. As public law is said to regulate the “behavior” of public agencies and give them instructions as to how to act, including when enforcing regulation, it may be relevant to look at the view of such agencies (i.e., the legal and other professionals acting on behalf of those agencies) on the appropriateness of the law.

Of the transplants analyzed, the following may be considered public law transplants: the proportionality doctrine in the Czech Republic and Australia, the independent lawyer association in Myanmar, the shark sanctuaries in Asia Pacific, the anti-impunity norm in Japan, the legal regime for migration in the Asia-Pacific, and the criminal procedure code in Afghanistan. The private law transplants are good faith in common law, the Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles in Australia, the international arbitration court in Singapore, the independent director system in China, and corporate governance standards through stock listing in Brazil. Competition law is difficult to rank in any of the two categories.

³⁷² H. J. WOLFF ET AL., VERWALTUNGSRECHT (C.H.Beck, 12th edition 2007) at 187. See also Hendrych, *supra* note 370.

³⁷³ Hendrych, *supra* note 370.

³⁷⁴ Hendrych, *supra* note 370.

The reviewed examples of legal transplants from various legal areas do not seem to offer a conclusive determination as to whether different analytical frameworks are necessary for public versus private law transplants. No specific analytical patterns may be observed. The public law transplants considered the following dimensions relevant: legal and regulatory context (including the existence of accompanying institutions) and the application and interpretation of the rules by the courts and other legal professionals, legal culture and legal tradition, degree of congruence with the cultural mores and perceptions, values of the society and other (even physical) realities of a given jurisdiction, and responsiveness to the needs of a given jurisdiction. The private law transplants considered similar dimensions: legal and regulatory context and application and interpretation of the rules by the courts and other legal professionals (including focus on the wording of the law, where possible), and the socio-legal and cultural environment, including the broader state policies.

The appurtenance of the law to a particular legal family *per se* may thus not be a useful indicator, as the analytical frameworks to evaluate success of transplants in private and public law do not seem to considerably differ. The view of the enforcement agencies (including the courts) was considered in both private and public law transfers, as was congruence with the societal values at large.

However, the public/private law divide may be useful in identifying the importance or weight that the respective dimensions shall receive in the analysis. Where the viability of the law relies primarily on the people and its usage in their daily interactions without necessitating any regulatory intervention, the views of the general public regarding the appropriateness and meaningfulness of the law may be crucial for the transplant's success. On the contrary, where the viability of the transplanted law rests mainly on application by public law bodies and legal professionals, the fit with the existing legal infrastructure and legal system may have a greater influence on success than the acceptance of the law by the general population. The analytical framework may be skewed in one direction or the other.

The transplantation of the proportionality principle into Czech or Australian constitutional law would correspond to this hypothesis. For the assessment of fit, the relevance of the rule to legal

professionals played a role, and success was judged by the application of the rule by the courts. Nonetheless, the evaluation of the shark sanctuary transplant in the Pacific Island region does not fully support this hypothesis. The fit was evaluated through the assessment of congruence with cultural mores and perceptions rather than through the views of legal professionals (nonetheless, it may be that their views are implicitly factored in the views of the general public). Other case studies, however, may not fully support the hypothesis. For example, to evaluate the success of transplant of good faith in common law, *Gray* did not look at whether the principle is relied on by the parties but rather examined whether it is applied by the courts. However, the fit was evaluated through the lenses of the parties to commercial transactions. Similarly, the application by the courts was relevant for the evaluation of success in the case of a public international law transplant. The fit, however, was considered by evaluating the relevance of the rule for legal professionals (although a supportive societal environment was also mentioned).

Rather than making a case for a separate framework, the case studies suggest that regardless of the public- or private-law character of the legal area, the views of the legal professionals overseeing the law's enforcement are important. This may also be because legal professionals are presumed to be responsive to the views of the society at large.

5.2 Instrumental/culturally embedded law

Although the classification of a legal transplant as public or private law transfer may not *per se* be helpful in devising a tailored analytical standard, looking deeper into why an area of law is regarded as public as opposed to private in the first place promises to offer more useful insights. The cultural embeddedness of the law may play a role in this regard.

The case studies suggest that congruence of the transplanted law with cultural values was important in spheres of law typically considered to be of public law character. The cultural fit played an important role in administrative or regulatory law and the evaluation of the prospective success of shark sanctuaries regulation, or in public international law and the evaluation of anti-impunity norms in Japan. It was also decisive in the transplantation of criminal procedure law. Being of a public law character, it seems to be, to a great extent, influenced by different legal traditions (and tied with the values of the particular state). Hence, it may be difficult to implement it without

anchoring it within the existing justice systems alternative to the state one. The evaluation of the transplantation of the independent lawyer association to Myanmar also involved consideration of the cultural context, and the success was judged by whether the transplant achieved the transcendent moral principles that underpin the norm. Nonetheless, *O'Brien's* analysis also showed that the cultural support by the population may not be ultimately decisive for the success of a transplant, which ultimately hinged on the existence of accompanying context, institutions, and regulatory concepts.

In private law transplants, although the authors ascribed importance to a fit between ordinary commercial practices and reasonable expectations of the parties, the ultimate measure of success was whether the doctrine is relied on by the courts (as opposed to being relied on by the parties). Similarly, although the private international law convention on the sale of goods regulates private dealings between the parties, its success was analyzed with reference to the application of the relevant rules by courts and the suitability of the rules to benefit the whole society. The congruence with societal cultural values and mores was not the primary object of analysis. Nonetheless, the fit with cultural background was considered a factor of success in transplanting an independent director system to China. Also, cultural elements were considered to influence the success of corporate governance standards in Brazil.

The above shows that no definite conclusion can be made as to whether cultural factors are more important in the case of public as opposed to private law transplants. Rather, the analysis suggests that the importance of culture depends on the extent to which transplanted law is culturally determined and in need of the supportive cultural context to be effective. The decisive factor is not the public or private law character of the law, but rather the subject matter of the law and its dependence on the related legal context (i.e., to what extent it only becomes effective in connection with other regulation).

In addition, some subject matters may be more or less culture-laden in different legal cultures. This seems to depend on the position of such laws in the complex web of the whole legal system and how they link with other laws. It also seems to be connected to the function that the transplanted law is to play in the recipient jurisdiction. For example, the anti-impunity norm is to have a

different, culture-specific meaning in Japan and in other countries and will also be used to serve different interests and purposes.

In this regard, it has been suggested that instrumental law tied to economic interests may be easier to transplant. Although this may be the case, it does not seem that instrumental laws would need a different analytical framework than other types of laws. Transplant of the international commercial court to Singapore may be considered an example of a transplant of instrumental law. Nonetheless, the domestic socio-legal and cultural environment was considered a relevant dimension for the assessment of the fit. Similarly, transplant of Article 102 TFEU to Israel may be considered a transplant of law tied to economic interests. Yet, socio-economic conditions and the position of legal practitioners were considered as factors influencing the success of the transplant. Therefore, the economic-related character of the transplant does not seem to have a bearing for the analytical framework *per se*. Rather, it may be useful to acknowledge in analyzing the importance of such cultural factors and the extent to which they influence the fit or success of the transplant. The same holds true for political, economic, or social forces.

5.3 Internally grown demand for transplants as opposed to externally imposed transplants

Finally, the differentiation between different areas of law is sometimes drawn along the “harmonization” line—i.e., whether the law is being transplanted as a part of larger harmonization efforts in the field. If so, those laws are regarded as more amenable to transplantation.

The case studies suggest that the acknowledgement that the law is being transplanted as a part of some harmonization effort seems to play a role in analyzing the motivation driving the transplant, or the aims or goals that are hoped to be achieved by the transplant. Also, it may influence the extent to which the fit with the domestic conditions will be considered decisive in evaluation of success of the transplant. Transplanting law as a part of harmonization efforts was discussed in the context of transplanting Article 102 TFEU to Israel and in transplanting the Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles to Australia. Although harmonization efforts were recognized in the discussion on motivations or goals, it does not seem that a different analytical framework was used to analyze those transplants.

What may also be relevant is considering whether the demand for the law has grown internally or whether it was “imposed” (even as a part of harmonization efforts). This may also partially overlap with the categories of transplants aiming to conserve the *status quo* and those aiming to achieve legal change. This is because where the law is imported to change the *status quo*, the analytical framework should not leave out the analysis of potential barriers to its effectiveness (as was the case, for example, in analyzing criminal procedure law transplant to Afghanistan). On the contrary, having an internally grown demand for some law presupposes that the barriers are not present at all or are relevant only to a lesser extent. Nonetheless, this view was partially challenged by the lawyer association transplant to Myanmar, where, although having some domestic support, the resistance of another group of stakeholders led to the failure of the transplant.

The case studies rather suggest that differentiation between transplants serving as a tool for the conservation of the *status quo* and transplants serving as a tool for change may be useful in devising an appropriate referential framework of legitimacy. In particular, these different motivations may influence the weight given to cultural and legal fit on the one hand, and the receptiveness of the transplant by the actors responsible for legal change on the other. In the case of the former, the transplant must correspond to the already existing value system and normative framework. An example of such a *status quo* conserving law may be criminal law. Even legal practitioners (who are said to be innately more conservative rather than liberal) would be expected to value continuity with the already existing tradition. The legitimacy of the transplant stems from the “inside”—i.e., from the receiving legal system itself. In the case of the latter, the broader transformative environment in which the legal change by transplantation occurs should be analyzed. Also, greater weight is to be given to the jurisdiction that served as a model and its repute among the local population and legal practitioners. In this case, the legitimacy of the transplant may be externally oriented. For this account, the “benefits” or “goals” of the recipient jurisdiction framework are relevant, as it allows subsuming both the “conservation” or “transformation” goals. These legitimacy-centered considerations played a role in evaluating the competition law transplant to Israel. In addition, it seemed to implicitly play a role in transplanting the independent lawyer association concept to Myanmar.

It may also be that the analysis of certain factors is useful in both internally driven and externally imposed transplants. In relation to transplants that are driven by the internal demand for the law, the examination of the societal realities and culture may be useful in understanding the needs that have arisen in the society to which the legislators responded by having resorted to legal transplanting. In relation to externally imposed transplants, the framework that focuses on the larger political environment, as well as on the motivations of the important stakeholders engaged in the reception process, may be potentially more relevant (especially in cases where these dimensions serve as a benchmark of success). Nonetheless, the analysis of the social realities and culture may also be informative in the case of externally imposed transplants, as it may provide useful hints regarding the viability of the transplanted law and its regulatory prospects.

5.4 Other observations relating to case studies and different types of transplants

The “form” of the transplant is relevant. The case studies showed that legal transplantation concerns not only specific legal provisions, but also the transfer of ideas, more general legal concepts or methodology of interpretation or legal argumentation. This may influence the analytical framework. Where a specific piece of legislation is transplanted, it may be worthwhile to examine, at least in a cursory fashion, the respective transplanted provisions. Although they will not usually be decisive for the outcome of the analysis of the transplant’s success, they may nevertheless help predict potential pitfalls in the implementation of law in practice. Where the transplantation involves borrowing a methodology, the specific outcome of the cases where such methodology was applied does not seem as important as whether the methodology serves the purpose for which it was created.

Yet, in all areas, regardless of whether public or private law, the implementation seems to be crucial. The receptiveness of the transplant by the institutions and people in charge of enforcing it seems particularly important for that implementation. For example, the court’s view on the good faith doctrine in common law was the measure of a successful transplant in *Gray’s* study. Similarly, it played a role in evaluating the success of the implementation of the Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles in Australia and was a factor in consideration of transplantation of the proportionality doctrine to the Czech Republic and Australia. The success of the shark sanctuary regulation in the Pacific Island region ultimately

hinged on the effective implementation of the regulation in practice. Where the implementation of the law rests mainly with the parties in a specific legal relationship, the actual usage of the law by them may indicate success. For example, actual usage by the parties was decisive in the case of the international commercial court in Singapore. Yet, it needs to be noted that in the above analyzed case of transplantation of commercial law, the implementation of transplants was not considered in evaluating its success. Rather, it was analyzed whether the transplanted mechanisms have the potential to change the current operating system.

5.5 Conclusion

The case studies show that the divides sketched in the literature on legal transplants regarding the viability and likelihood of success of legal transfers in different areas of law may not have a decisive influence on the analytical framework employed to analyze those transplants. Regarding the private-/public-law divide, it seems that what counts is the cultural embeddedness of a given law and its subject matter rather than its appurtenance to a specific legal family. What seems crucial is whether the law needs a cultural context to operate. The case studies also showed that the level of cultural embeddedness of a certain law differs across jurisdictions and legal cultures. For example, while some commercial law institutes may be infused with national interests and used to advance those interests (such as the “sabotage” of the independent director system introduced to Chinese commercial law), the same institute may be free from any political connotations in other jurisdictions. Omitting socio-economic and political dimensions from the evaluation of private law (or at least “at-face” private law) transplants may provide incorrect results.

This implies that a comprehensive analytical framework should cover all dimensions on which success and fit can be analyzed. However, acknowledging that such an analytical framework may be overly burdensome (if not impossible to conceive at all), more targeted analytical frameworks may be employed. Nonetheless, these should recognize their limited analytical scope and acknowledge that they focus on a specific dimension of the legal transplant only. A sound limitation seems to be linking the measure of success with the dimensions that are relevant to, or may somehow influence, this dimension. This approach can be useful when the measure of success is more narrowly focused. For example, when success is measured by the application of the rule by courts, the views of the legal professionals regarding the meaningfulness of the transplant may

serve as a useful factor to consider in evaluating its success. Yet, more comprehensive measures of success—e.g., the ability to contribute to a given jurisdiction or to address its main pain points—will typically require consideration of a much wider array of factors, ranging from the very wording of the law (if any), to the economic, socio-cultural, and political context, which may either facilitate or impede what may seem, on its face, as a successful transplantation of legal provisions or concepts.

6 Conclusion: Definition of success in legal transplanting

This thesis aimed to answer two research questions, namely (1) how the literature on legal transplants defines success or failure in legal transplanting, and (2) what criteria or benchmarks are used to evaluate such success or failure.

The thesis has found that these questions are intrinsically linked. The theoretical strain of the literature examines the notion of success and fit in the abstract. It often looks for referential frameworks in legal philosophy or the sociology of law. For the understanding of success, it seems crucial to recognize that it hinges not only on the text of the law but also (and perhaps more importantly) on the environment in which it is to operate. For the understanding of fit, it seems crucial to differentiate between transplants that serve as a tool for legal change and reform and those that perform some other function. This differentiation will influence the degree to which the transplanted law must fit domestic conditions and culture. The inherent subjectivity of the terms success and fit often leads the authors to be skeptical about finding a general framework that would identify or predict a successful legal transplant. Nonetheless, when pondering the complexities that may feed into the conceptualization of success or fit, the literature suggests some important factors that may be worth examining when making conclusions about the success or failure of legal transplants.

The application of some of these factors may be seen in the literature examining specific legal transplants. They illustrate that, despite the subjectivity of the term success or fit, the evaluation of legal transplants is still possible. What seems crucial is recognizing the purpose of the evaluative endeavor and building the evaluative framework around those factors or dimensions of success that correspond to that purpose. For example, where the examination focuses on the socio-legal receptiveness toward the transplant, it may be useful to use the dimensions related to the fit with the culture (including the legal one) and the implementation of the transplant in practice. On the contrary, where the purpose of the evaluation is to evaluate to what extent the transplants further some kind of objective welfare of the recipient society, different benchmarks may be more appropriate (such as whether the transplant accomplishes its function). In addition, there are indications that different benchmarks may be appropriate in different legal fields.

For these reasons, this study will not provide a concrete analytical framework to evaluate legal transplants. However, it will offer some suggestions as to the dimensions that a fairly comprehensive evaluative framework may wish to feature:

- Firstly, the framework shall cover both the “subjective” and “objective” aspects of legal transplants. Among the subjective dimensions—e.g., the motivation behind the legal transplant—may be assessed. Among the objective dimensions, the accomplishment of the function the law shall play in a given jurisdiction, given its specific needs, may be useful.
- Secondly, the framework shall also cover the dimensions “internal” to the law itself (e.g., the provisions of the law to be analyzed as a part of the evaluation of whether the law serves its function), as well as the “extraneous” factors (e.g., the motivation driving the adoption of the transplant or the culture). This takes into account that these dimensions may be given different importance in different jurisdictions, depending, *inter alia*, on their level of economic development (as, e.g., cultural environment may be more relevant in less developed countries). The categories should also be broad enough to allow for focusing on those aspects of the relevant categories that are the most important in the given context in a given jurisdiction.
- Finally, the framework may also wish to enable the evaluation of both the fit of the law *stricto sensu* and its success. This is because, as suggested above, different cases may require different degrees of fit that are needed for the law to be considered successful. Whereas the fit may be looser for change-generating transplants, it may need to be stricter for status quo-conserving ones. A comprehensive framework shall thus include criteria related to the fit of the law *stricto sensu* (e.g., as regards its functional or cultural fit), as well as the criteria related to the success (e.g., as regards the accomplishment of the motivation that led the legislators to resort to legal transplanting as opposed to another form of legislation).

An analytical framework featuring the above-suggested dimensions may provide a useful starting point for analyzing the success or failure of a legal transplant and may be further modified based on the purposes of the evaluative endeavor.

Annex 1: Dimensions of success and conditions of success

Dimensions of success

A. Dynamic view on success

a. Process/performance-oriented effects

- i. Mere official promulgation
- ii. Initiate discourse
- iii. Initiate any behavior (even unexpected one)
- iv. Initiate behavior contemplated by the donor or recipient
- v. Change the current behavior
- vi. Use in a specific way

b. Result-oriented effects

- i. Benefit to the society or persons responsible
- ii. Motivation
- iii. Goal
- iv. Efficiency

B. Static view on success

a. Fit with local culture and political economy

b. Fit with the pre-existing legal infrastructure

Conditions of success

- Fit with local context or domestic conditions
- Area of law
- Receptiveness of recipient jurisdiction to foreign law in general
- Similarities between donor and recipient jurisdictions
- Political relationship between donor and recipient jurisdictions
- Degree of economic development of donor and recipient jurisdictions
- Availability of substitutes
- Motivation

Annex 2: Benchmarks of success and fit in case studies

Area of Law	Transplanted Law	Benchmarks of Success	Factors influencing Success	Benchmarks of Fit
Contract law	Good faith to common law	<p>What is being analyzed: Application of the rule by courts</p> <p>When is it successful: when applied</p>	<p>Presumed fit of the doctrine with common law</p> <p>Functional substitutes present in common law</p>	<p>Fit with the relational nature of contracts</p> <p>Congruence with ordinary commercial practices</p> <p>Fulfillment of reasonable expectations of the parties</p>
Private international law	Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts to Australian contract law	<p>What is being analyzed: - Application of the rule by courts - Motivation for transplanting the law</p> <p>When it is successful: brings benefits to the recipient society</p>	<p>Fit</p> <p>Appropriate interpretation (including separation from domestic context where necessary)</p> <p>Supportive societal environment</p> <p>Internally driven motivation for the law</p>	<p>Fit within legal infrastructure (including relevancy of the rule for legal professionals)</p>
International arbitration law	International arbitration court to Singapore	<p>What is being analyzed: - Motivation for transplanting the law - Actual usage</p> <p>When it is successful: when used by the parties in congruence with the motivation for</p>	<p>Fit</p> <p>Supportive cultural features (incl. stable institutional and legal structures, reformist culture in international business matters)</p> <p>Institutional adaptiveness</p>	<p>Fit with domestic socio-legal cultural environment</p> <p>Fit with developmental strategy (i.e. congruence of the overarching strategic interests with the idea)</p>

		the adoption (i.e. the law contributes to the overarching strategies and goals of the recipient jurisdiction)		standing behind the transplant)
Company law	Independent director system to China	Function of the transplanted law in the recipient jurisdiction, i.e. how the law addresses the pain points of the recipient jurisdiction	<p>Formal aspects of the law (its wording and interpretation)</p> <p>Interaction with other institutions in the corporate governance system (accompanying infrastructure, adequate enforcement)</p> <p>Broader cultural, societal and policy considerations</p>	<p>Fit with the wider regulatory framework</p> <p>Fit with related institutions and cultural background</p>
Company law	Corporate governance standards through stock exchange listing to Brazil	<p>Delivery of benefit to the country</p> <p>Achievement of motivation that was sought to be achieved by the transplant (legal change)</p>	Cultural, political, economic and institutional elements that permeate the entire market + deficiencies of the law itself (incompleteness, inadequate interpretation, lack of enforcement)	Fit with the legal infrastructure (supportive enforcement institutions, adequate interpretation)
Constitutional law	Proportionality principle to the Czech Republic	Contribution to the resolution of the legal problem	Congruence with the encompassing constitutional,	Fit with related institutions and

		for which it was intended in the country of origin Uniform application of the principle by judiciary	political and extra-legal context	cultural background
Constitutional law	Proportionality principle to Australia	Application of the rule by courts in the same way as in the country of origin	Existence of legal context in which the transplanted law crystallized in the domestic jurisdiction Willingness of legal professionals to embrace the law	Fit with legal concepts and related institutions
Constitutional law	Independent lawyer association in Myanmar	Replicating the institution from the jurisdiction of origin, including the transfer of the ideas that surround it	Fit	Supportive context and existence of accompanying institutions and regulatory concepts
Administrative / regulatory law	Shark sanctuaries to Pacific islands region	Achievement of the ultimate aims of the regulation	Effective implementation (effectiveness and enforcement of the law) Fit	Congruence with the cultural mores and perceptions Fit with other realities
International law	Anti-impunity norm to Japan	Achievement of the transcendental moral standards that underpin the norm	Fit Conductive political climate that approves of the idea behind the norm	Acceptance of the idea by the society, culture, legal culture (including the role of law in general)
Migration law	Legal regime for temporary migration to Asia-Pacific region	Legal solution is able to fulfil the need	Fit Absence of obstacles to transplantation	Legal solution fits the situation that needs to be addressed

				Fit with the overarching regulatory strategy of the state
Criminal law	Criminal procedure code to Afghanistan	Acceptance by the local population (including meaningfulness and appropriateness in application) + the achievement of the law's objectives (reasons for the demand for the law and the motivations for relying on legal transplanting to prepare it)	Fit Local interpretation and enforcement capacities Social, political and economic concerns	Compatibility with legal tradition (proxy is "sensitiveness")
Competition law	Article 102 TFEU to Israel	Ability to achieve goals in the recipient country (or bring benefits to the recipient country)	Factors from the recipient society (socio-economic conditions, position of local population and legal practitioners, familiarity with related regulatory concepts, receptiveness to foreign law in general) Factors of the law itself: suitability of the model law for transplantation, "nature" of the transplanted law	The law responds to the needs of the jurisdiction

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Úspěch v právní transplantaci

Abstrakt

Rigorózní práce se zabývá konceptualizací úspěchu v právní transplantaci. Práce identifikuje právní transplantaci jako dominantní metodu přijímání práva v globalizovaném světě. Poukazuje však na to, že neexistuje dohoda, jak posoudit, zda byla právní transplantace úspěšná či nikoli. Navzdory absenci takové obecné dohody si práce všímá, že literatura o právních transplantacích pracuje s řadou kritérií, která mohou být užitečná pro zkoumání nebo zohlednění při hodnocení úspěchu nebo neúspěchu právních transplantací. Na tomto pozadí se práce snaží ponořit hlouběji do literatury z oblasti právní transplantace, aby zaprvé analyzovala, jak je v této literatuře úspěch nebo neúspěch v právní transplantaci definován, a zadruhé zkoumala, jaká kritéria nebo měřítka se používají k hodnocení takového úspěchu či neúspěchu. Za účelem zodpovězení těchto výzkumných otázek práce nejprve představí koncept právní transplantace a zařadí jej do obecného rámce zkoumajícího vztah mezi právem a společností. Poté se přesune k literatuře o právních transplantacích samotné, aby zjistila, jak tato chápe úspěch nebo neúspěch. Pro doplnění tohoto obecného a teoretického zkoumání se práce bude také zabývat konkrétními případovými studii hodnotícími transplantace právních předpisů z různých odvětví práva (veřejného i soukromého), a to za účelem zjištění, jak byl v těchto případech definován úspěch nebo neúspěch. Hlavním zjištěním práce je, že teorie i její aplikace v případových studiích se shoduje v tom, že společnost a prostředí, do kterého je právní transplantát zasazen, mohou být přinejmenším stejně důležité (ne-li více) než samotný text transplantovaného práva. Literatura se shoduje, že transplantované právo musí „zapadnout“ do domácího prostředí, aby bylo funkční. Míra „vhodnosti“ závisí zejména na tom, zda je úlohou transplantace zachovat stávající stav (*status quo*) nebo sloužit jako nástroj právní změny. Práce také zdůrazňuje, že v důsledku relativity pojmů úspěchu a vhodnosti musí být každý pokus o vytvoření analytického rámce pro hodnocení úspěšnosti konkrétního právního transplantátu přizpůsoben účelu tohoto hodnocení. Zaměření na konkrétní dimenze hodnotící úspěch (jako je například naplnění motivace, která vedla k jeho přijetí, plnění obecné regulatorní funkce, kterou má transplantovaná norma hrát či „zapadnutí“ do domácí kultury) slibuje poskytnout užitečnější pohled na fungování transplantované normy než všeobíhající analytický rámec, který by byl univerzálně použitelný pro všechny právní transplantace.

Klíčová slova:

právní transplantace, právo a společnost, definice úspěšného a „zapadajícího“ práva

Success in Legal Transplanting

Abstract

The thesis deals with the conceptualization of success in legal transplanting. The thesis identifies legal transplanting as a dominant method of adoption of law in a globalized world. Yet, it points out that there is no agreement as to how to assess whether a legal transplant has been successful or not. Despite the lack of such an agreement, the thesis observes that the literature on legal transplanting suggests a variety of criteria that may be useful to examine or factor in the evaluation of success or failure of legal transplants. Against this background, the thesis strives to dive deeper into the scholarship on legal transplanting to, first, analyze how success or failure in legal transplanting is defined in the scholarship, and second, examine what criteria or benchmarks are used to evaluate such success or failure. To answer those research question, the thesis will first introduce the concept of legal transplantation and set it within the general framework examining the relation between law and society. It will then move to the literature on legal transplanting itself to identify how success or failure is understood in the scholarship. To complement this general and theoretical enquiry, the thesis will also look into specific case studies evaluating legal transplants from different branches of law (both public and private) to see how success or failure was understood in those cases. The main findings of the thesis are that the both the general and case-specific literature agrees that the society and environment in which the transplanted law operates may be at least as important (if not more) than the very text of the law. There is an agreement that the law needs to “fit” the domestic environment to be operative. Yet, the degree of “fit” likely depends on whether the role of the transplant is to conserve the *status quo* or serve as a tool of a legal change. The thesis also highlights that as a result of the relativity of the notions of success and fit any attempt to create an analytical framework to evaluate success of a particular legal transplant shall correspond to the purpose of that evaluative endeavor. Focus on the respective dimensions of success (such as fulfilment of the motivation that has driven its adoption, fulfilment of the general function that law is presumed to play, or fit with domestic culture) may provide more useful insights into the operation of the transplanted law than an all-encompassing analytical framework that would be applicable to all legal transplants alike.

Keywords

legal transplanting, law and society, definition of success and fit of law