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# Entanglements in Legal History: Conceptual Approaches

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Legal Transplants between Time and Space | 129–148



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## Legal Transplants between Time and Space

### 1. Introduction: Situating Legal Transplants

The concept of legal transplants has been a main focus of the comparative lawyers' craft in recent years. Alan Watson, who is credited with coining the term, holds that legal transplants are an essential part of a strange paradox exhibited by law. On the one hand, each group of people has a unique set of laws that is a sign of their identity; however, such uniqueness has not suppressed the occurrence of legal transplants, which "have been common since the earliest recorded history." In Watson's words, legal transplants mean "the moving of a rule or a system of law from one country to another, or from one people to another."<sup>1</sup>

Movement is, thus, what characterizes the idea of a legal transplant, a rule, institution or knowledge identified in a social group is transported to another. For Watson, the idea of the movement "of a rule or a system of law" is essentially linked to legal development. While he admits that legal development by any means can be understood only by taking into consideration "the parameters of legal thinking" of a given community, such parameters "almost always include a propensity to look at some, but by no means all, other systems, and hence a tendency to borrow from these, but not from others."<sup>2</sup>

Watson's version of legal transplants is characterized by a spatial dimension. Legal movement from one localized place to another, such as a state or community, occurs frequently and, in turn, propels another movement: the development or evolution of specific legal rules or a legal system.<sup>3</sup> Watson's

\* I would like to express my gratitude to the participants of the "Entanglements in Legal History Workshop," held at the Max Planck Institute for Legal History, in Frankfurt, for their excellent comments and suggestions on a previous version of this paper.

1 WATSON (1993) 21.

2 WATSON (1993) 112.

3 Advancing the metaphor, he states: "A successful legal transplant – like that of a human organ – will grow in its new body, and become part of that body just as the rule or

critics seem to have realized – if not entirely, at least in part – the spatial implications of legal transplants. Pierre Legrand exhibits such understanding in his proposition of the complete impossibility of legal transplants.

To Legrand, Watson’s ideas on the subject lead to a view of law decontextualized from its social and cultural contexts. A rule or a legal system cannot exist apart from its given meaning, and such meaning can be found only in the specific context in which the rule or legal system operates. For Legrand, “[i]n any sense of the term, ‘legal transplants,’ therefore, cannot happen. No rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed. This is because, as it crosses boundaries, the original rule necessarily undergoes a change that affects it *qua* rule.”<sup>4</sup> Hence, Legrand summarizes his case: “Rules are just not what they are represented as being by Watson. And, because of what they effectively are, rules cannot travel. Accordingly, legal transplants are impossible.”<sup>5</sup>

By criticizing the impossibility of the movement or traveling implied by legal transplants, Legrand only emphasizes the spatial dimension of Watson’s original proposition. At one point, Legrand accuses Watson of being drawn into “mechanical analogies.” Correctly, Legrand deploys the term “mechanical” to show that legal transplants lead to a detachment of the “constituents” (law, for example) from the “social totalities.”<sup>6</sup> Nevertheless, “mechanical” here does not only influence the quality of Watson’s analogy; it also implies that the analogy follows the laws of mechanics, which have an important spatial component.

Moreover, it is important to note that Legrand’s critique is also essentially space-oriented. Instead of stressing movement as a factor in legal borrowing, however, he overstates the role and even the necessity of stasis. In his appeal for comparatists to look at the unique aspects of legal systems and to connect those peculiarities with specific attributes of the laws and overall legal system, Legrand evokes, as does Watson, the idea of space. Situationality is essential, “[b]ecause insensitivity to questions of cultural heterogeneity fails

institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused with rejection.” WATSON (1993) 27.

4 LEGRAND (1997) 120.

5 LEGRAND (1997) 114.

6 LEGRAND (1997) 122.

to do justice to the situated, local properties of knowledge, the comparatist must never abolish the distance between self and other.”<sup>7</sup> Such a static perspective on what constitutes legal systems – and the traditions behind them – is why some commentators, although in agreement with Legrand’s stress on the centrality of issues related to *différend* in comparative legal studies, have not completely followed his critique of Watson. Inevitably, traditions have a certain degree of hybridism; their boundaries are constantly renegotiated.<sup>8</sup> Moreover, it is fair to contend, just like Teubner, that the spaces in which such renegotiation takes place are not national societies, but a global one: “[t]he transfer of legal institutions (...) is a direct contact between legal orders within one global legal discourse.”<sup>9</sup>

Other approaches to the concept of legal transplants also have a spatial dimension. The post-colonial perspective in comparative legal studies is an eloquent expression of orientation toward space. The post-colonial critique departs from the fundamental premise that the “Euro-American World” still sets the agenda of comparative legal studies in the ways of seeing, speaking, and feeling. Who is invisible or not, who determines those that must speak or be silent, and who downplays the suffering of colonized people is one located in the “Euro-American World.”<sup>10</sup> The post-colonial critique’s vocabulary divides the world spatially. The categories of North and South, First and Third Worlds, and Euro-American and Extra-Euro-American Worlds constitute the imagination of post-colonial scholars and propel them to ask for change in the field of comparative legal studies. Issues related to space are traditionally of the utmost importance for post-colonialism, as evidenced by Edward Said’s description of his work as “a kind of geographical inquiry into historical experience.”<sup>11</sup>

Similarly, the extremely influential functionalist heritage in comparative law clearly emerged from the conflict of laws doctrines, which inherently involve issues of space. As rightly pointed out by Michele Graziadei, Ernst Rabel’s concern about the issue of characterization in the conflict of laws led him to rely on the comparative method. If legal systems are different and initially appear so different that they cannot be compared, the only way to

7 LEGRAND (1997) 123.

8 NELKEN (2003) 445–446. See also, *inter alia*, GILLESPIE (2008) 669–673.

9 TEUBNER (1998) 16.

10 BAXI (2003) 50.

11 SAID (1993) 7.

bring them into a fruitful comparison is to focus on the similarity of their factual circumstances. Therefore, “[c]omparative law must concentrate on isolating the fact from which legal consequences follow, quite irrespective of the way they are looked at, or categorized, in any legal system.”<sup>12</sup> Rabel’s turn to a functionalist approach to solve problems arising from the application of legal rules and institutions in a multitude of different spaces, characterized as states or, at least, distinctive legal systems, is symptomatic of the space-oriented perspective of the functionalist method and its heritage.

A great number of perspectives and traditions in comparative legal studies center their analyses on the presupposition that legal transplants rest fundamentally upon a spatial dimension: Rules or arguments originally existent in a single space, be it a state or any other group ruled by law, become applicable, for several different reasons, in another discrete space. Even such diverse approaches to the topic agree that legal systems are inevitably porous to outside influences (even Legrand does not deny that) and are to a degree dependent upon a number of factors, such as power, culture, or society. The outside element to be transplanted is often associated with a foreign legal system or one organized beyond the boundaries of the nation-state. Beyond the illustration of transplants, current comparative legal literature uses an abundant variety of similar metaphors that implicate the idea of movement. For example, metaphors of diffusion, borrowing, circulation, cross-fertilization, migration, transmission, transfer, and reception connote the idea that a person or idea is moving.<sup>13</sup> It is irrefutable that the world is spatially divided and that legal systems rest on the common acceptance of the necessity of specific spaces, even cyberspace, to exist in order for rules to be applied. We cannot simply disregard the importance of

12 GRAZIADEI (2003) 105–106.

13 For those and other similar terms, see PERJU (2012) 5. For the author, four of the terms above have a “greater staying power”: transplants, borrowing, circulation and migration. My aim is not to establish what terminology is the best, but to state that they all connote the idea of movement. Sometimes, such connotation takes place in a stronger way, as Günter Frankenberg suggests in the case of “migration” and “transfer” (the former more than the latter), but the idea of movement is there. Frankenberg (and many others) puts too much emphasis on the terminological debate. For him, they “are not ‘only words’ but signifiers of rather different theoretical approaches and interpretations.” FRANKENBERG (2010) 566, 570. I do not intend to take sides on such debate. At this stage, it is sufficient to say that there is a connection between the idea of movement and that of transplant and its competing metaphors.

space and the number of entities organized according to the idea that spatial divisions produce social consequences.<sup>14</sup>

In addition, however, there is another dimension, apparently neglected by most comparatists, that strongly affects the way legal transplants (or any other concept grounded on the idea of movement) operate: time. The attempt to transplant a rule or argument from one legal system to another involves an expectation that someone wants to be fulfilled in the future. To employ two terms disseminated by Reinhart Koselleck, a legal transplant can be viewed as a collection of *experiences* that happened in one legal system and are *expected* to be realized in the future in a different legal system. Therefore, legal transplants are not devoid of a sense of the future; as expectations, they try to anticipate the future and, consequently, change it.

In this article, I will argue that in addition to a spatial dimension, legal transplants have a temporal dimension, materialized as transplants are fueled by experiences and expectations and try to bridge the gap between them. In a broader perspective, this article aims to bring comparatists and legal historians closer together. This effort might seem outdated, since comparatists are often enthusiasts of the study of history. Watson, for example, attributes a great importance to history and was a legal historian himself. Nevertheless, comparatists, and I would add jurists in general, pay scant regard to issues related to the theory and the philosophy of history. History is important because it supplies good narratives on which comparative law discourses can rely; in other words, it provides the elements necessary to apply or to destroy legal authority. This article claims that history – understood as historical science or historiography – can provide methods and insights to better understand legal transplants.<sup>15</sup> The categories of experi-

14 As a matter of fact, space has duly been considered in an emerging literature on legal pluralism and legal transplants. For a general picture, see VON BENDA-BECKMANN/VON BENDA-BECKMANN/GRIFFITHS (2009) 1–29. Some take the spatial turn in legal studies so seriously to the point of arguing that modern legal systems are invariably mixed, what demands a complete reconceptualization of territoriality. For Donlan, for example, “[t]he uniqueness of mixed jurisdictions is thus no longer the fact of their hybridity, but their particular mix and character.” DONLAN (2011) 29. Even if such argument may sound exaggerated, it seems undisputable that we must look more thoroughly to the spatial implications of the relationship between legal systems.

15 The opposite is also true, although this is not the main concern of this article. On the subject, especially on the identification of at least three important contributions of

ence and expectation, as formulated by Koselleck, are good examples of how an encounter between comparative law and the theory and philosophy of history can be productive.

The piece is divided into two parts. In the first, I will briefly present Koselleck's ideas about the categories of experience and expectation and show how they are essential to understanding any historical argument in modern times (*Neuzeit*). I will then demonstrate the importance of treating the temporal dimension of legal transplants by showing how concepts such as progress and prognoses affect the operation of legal transplants. Some short concluding remarks will then be presented.

## 2. Adding Time: Experience and Expectation

Koselleck's contributions to the development of the theory of historical science have been recognized as outstanding. His reflections on the emergence of modern history have opened new ways to think about issues neglected by professional historians reluctant to engage in theoretical discussions: the scientific cognitive categories which historians, since the advent of modern times, have employed in their craft.

These scientific cognitive categories can also be found at work in other professions, where they are equally neglected by the majority of experts. In the case of lawyers, bridges with historians must be kept open at all times. It is almost a truism that lawyers need history to find their own identity. Historical arguments are useful not only to give authority to a legal argument, but also to destroy or question the authority received from past generations.<sup>16</sup> Therefore, in their constant engagement with the past, lawyers must investigate these categories. In this paper, I will focus on a small number of them, namely experience and expectation.

Modern people do not see history as merely an accumulation of past experiences, but also as the likelihood of changing the future. History as

comparative law (and the comparative method as well) to legal history, see GRAZIADEI (1999) 530.

16 The search for authority (or its destruction) is on the basis of Robert Gordon's taxonomy of the three uses of the past by lawyers: static, dynamic (concerned with looking for authority), and critical (focused on the destruction or the questioning of authority). See GORDON (1996) 124–26.

*magistra vitae* is not possible anymore, because the future is conceived as open for human beings to build upon. In Koselleck's thought, past and future are connected through the categories of "space of experience" and "horizon of expectation." These concepts are, for him, so essential "that they indicate an anthropological condition without which history is neither possible nor conceivable." Far from being opposing categories, these ideas simply cannot exist apart from each other.<sup>17</sup>

Understanding how history is conceived and articulated in different arguments inevitably leads to a realization of the inherent relationship between experience and expectation. As Koselleck defines it, "Experience is present past, whose events have been incorporated and can be remembered. Within experience, a rational reworking is included, together with unconscious modes of conduct that do not have to be present in awareness. There is also an element of alien experience contained and preserved in experience conveyed by generations or institutions." Expectation is defined in the following terms: "At once person-specific and interpersonal, expectation also takes place in the today; it is the future made present; it directs itself to the not-yet, to the non-experienced, to that which is to be revealed. Hope and fear, wishes and desires, cares and rational analysis, receptive display and curiosity: all enter into expectation and constitute it."<sup>18</sup>

Koselleck discusses experience in terms of space, because this concept has a clear spatial dimension. Experience is not a monolithic entity, but rather an assemblage of several layers of time put together simultaneously in the present. It cannot be organized in terms of before and after. In Koselleck's words, "Chronologically, all experience leaps over time; experience does not create continuity in the sense of an additive preparation of the past."<sup>19</sup>

On the other hand, expectation is described in terms of horizons, because "the horizon is that line behind which a new space of experience will open, but which cannot yet be seen." The future, explains Koselleck, cannot be experienced, so it cannot be integrated into a single space.<sup>20</sup> As one commentator succinctly puts it, "The scope of our vision as we look at the open

17 KOSELLECK (2004) 257. Those categories may be retraced to two authors that deeply influenced Koselleck's thinking: Martin Heidegger and Hans-Georg Gadamer. On this, see OLSEN (2012) 220–226.

18 KOSELLECK (2004) 259.

19 KOSELLECK (2004) 260.

20 KOSELLECK (2004) 260–261.

horizon at sea becomes synonymous with a sense of future as open and unlimited, inciting us to conceive beyond what we can actually see.”<sup>21</sup>

Experience and expectation cannot exist apart, but as distinctive cognitive categories, they do not supersede each other. Out of the difference between experience and expectation emerges what can be called historical times, a concept that is more than the mere passing of chronological time, but expands to include a dimension “tied to social and political units of action, to the particular acting and suffering of human beings, and to their institutions and organizations.”<sup>22</sup> If such a subjective dimension constitutes historical times, the term must be used in the plural, since it is felt in multiple ways by different human beings. More importantly, the ways in which different historical times can fill the gap between experience and expectation are uncountable.

One of Koselleck’s main hypotheses about the relationship between experience and expectation is that modernity is characterized by an increasing gap between these cognitive categories.<sup>23</sup> Previously, concepts such as progress played a crucial role in filling that gap. Progress promises to create a continuous bridge between the past (experience) and the future (expectation), and its effects can be measured only by reference to events in the past; in order to be a better time, the present must be compared to previous experiences. Furthermore, progress provides a solid foundation for the idea that what is expected in the present can (or will) be accomplished in the future. Although the critique of progress is widespread in modern times, social and political language have developed concepts similar to progress; words such as republicanism and constitutionalism evoke the idea of movement. As Koselleck himself points out, “Republicanism was, therefore, a concept of movement which did for political action what ‘progress’ promised to do for the whole of history. The old concept of ‘republic,’ which had previously indicated a condition, became a *telos*, and was at the same time rendered into a concept of movement by means of the suffix ‘ism.’ It served the purpose of theoretically anticipating future historical movement and practically influencing it.”<sup>24</sup> Concepts such as moderniza-

21 PICKERING (2004) 272.

22 KOSELLECK (2002c) 110.

23 KOSELLECK (2004) 263.

24 KOSELLECK (2004) 273.

tion or even development, frequently employed today, carry in themselves the idea of movement, the mediation of what was experienced and what is expected. In other words, these concepts have a temporal structure that is simultaneously grounded on the past and oriented to the future.

I argue that the concept of legal transplants, especially due to its characteristic of movement and strong reliance on similar concepts (including the aforementioned ideas of modernization and development, but also good governance, globalization, and others), is an attempt to fill the gap between experience and expectations in the legal field. What many comparatists have failed to see is that such movement has not only spatial implications, but also temporal implications. A rule or institution that is transplanted from one space to another carries at its core many expectations waiting to be fulfilled in the receiving legal system.

Among comparatists, one of the few exceptions who attempts to realize the temporal dimension of transplants is David Nelken – albeit with no direct reference to Koselleck. He lucidly stresses, “Law can ‘belong’ not only to other places, but also to the past, to a previous social and economic order, to tradition and to history, as much as to the present. Or it can aim at the future, acting as an index of desired social, political, and economic change, of what society would like to become (or should like to become).”<sup>25</sup> Nelken then makes his argument even clearer: “Legal transplants are frequently – perhaps predominantly – geared to fitting an imagined future. Most legal transfers are imposed, invited, or otherwise adopted because the society, or at least some groups or elites within that society, seek to use law for the purposes of change. The goal is not to fit law to what exists but to reshape what exists through the introduction of something different.”<sup>26</sup> Nelken does not develop his argument further, but instead, uses his claims about the relationship between legal transplants and imagined futures to issue a call for a research agenda that should be advanced by comparatists. Despite that limitation, his argument is powerful and promising, because it opens new ways to study transplants beyond the relationship between law and society (to which comparatists inescapably refer, epitomized by the debate between Watson and Legrand) to reach the very structure of the act of legal transplantation.

25 NELKEN (2003) 451.

26 NELKEN (2003) 457.

While I agree with Nelkin, his perspective must be broadened by recourse to the category of expectation. He contends that legal transplants are “predominantly” suitable to “fitting an imagined future.” Expectations deal not only with imagined futures, in Nelken’s sense of a planned future, but they also encompass elements like probabilities, fear or chance. Expectations belong to the domain of the not-yet, something that cannot be completely rationalized or planned. I complement Nelken’s insight by arguing that legal transplants *always* (at least since the coming of modernity and in relation to those affected by it) carry with them expectations and, consequently, a future-oriented perspective, because expectations can be found in the very structure of legal transplants. Current typologies of legal transplants (or, I insist, other similar concepts grounded on the idea of movement) do not interfere with such a conclusion. Take, for example, Jonathan Miller’s oft-cited division of transplants into four types: (1) cost-saving; (2) externally-dictated; (3) entrepreneurial; (4) legitimacy-generating. It deals with motivations in the act of transplanting rules, institutions or decisions from one legal system to another. Someone is involved in legal transplantation because: it costs less than “to think up an original solution” (1); “a foreign individual, entity or government” imposed it as a condition for something – a loan or political autonomy, for instance (2); “individuals and groups (...) reap benefits from investing their energy in learning and encouraging local adoption of foreign legal model” (3); a foreign model is seen as a way to enhance legitimacy in a given legal system – as in the case of fulfilling the task of a “source of prestige” (4).<sup>27</sup> Those different intentions found in transplants do not interfere in their orientation towards expectations. If we are in accordance with the existence of such types, they only tell us that expectations come from different realms. Some are legitimate, external to the individuals’ free will, altruistic, but some are not. They explain the decision taken by someone to transplant a legal model (where both the donor and the receiver may fulfill different roles), but not how the idea of transplanting itself works.<sup>28</sup>

Linking legal transplants to expectations and, consequently, sustaining they have a future-oriented dimension may sound like too much of a

27 MILLER (2003) 845, 847, 849–50, 854–855.

28 That is why Miller states that “[w]hat the four typologies share (...) is a focus on the persons responsible for bringing the transplant about.” MILLER (2003) 872.

Eurocentric statement. After all, one may argue, the idea of history (and modernity) has emerged in a very limited part of the globe. Peoples “without history,” in other words, those “societies where myths are the predominant mode of organizing experiences of the past,”<sup>29</sup> do not necessarily have a historical consciousness; or they may not feel the need to articulate the idea of time in terms of a relationship between experience and expectation. In fact, for them, past, present and future can be intertwined, rather than separated, categories.

This is a very powerful argument. Peoples “without history” challenge the very idea of history as the only way of “constructing the past.”<sup>30</sup> Their existence demands historians to face their own past and think about different possibilities of conceiving time.

However, my point is not to argue there are no alternative manners to think about the past (and the future too), but that, following Koselleck, a specific way to conceive the past emerged with modernity and it affected the idea of legal transplants. It is possible that legal transplants occurred in the past – or some that still occur in the present – remain outside the realm of modernity and its consequences (although the power and the impact of the colonial encounter cannot be underestimated).

In sum, my hypotheses may not explain every single legal transplant in the past, in the present or even in the future, but it is an explanation of transplants that were and are affected by the advent of modernity. And modernity was not only imposed to “others”; sometimes, it influenced societies through processes of conversation and conflict.<sup>31</sup>

In line with this, the assumption that legal transplants also have a temporal dimension, since they project an expected future influenced by “foreign experiences,” can draw the literature’s attention to important issues neglected by comparative lawyers but often studied by legal historians. Progress and prognoses are only two of them.

29 NANDY (1998) 162.

30 NANDY (1998) 166.

31 See KLEIN (2011) 111.

### 3. Legal Transplants and Progress

The concept of progress is extremely difficult to grasp. From the conceptual history perspective, employing the concept of progress makes sense only if it is directed toward the past, to its different uses throughout the years. Despite its variations in time, aspects of this concept remain constant. Progress means “a clear objective determination of direction,” and the most influential variations of progress are “tied to standards of value, progress towards something which is subjectively better.”<sup>32</sup>

Starting in the nineteenth century, progress became what would be nowadays called an ideology. In contrast to Kant or Hegel who linked progress with ideals such as freedom, progress became identified by a deficit: regression, or decay. The future projected by others is considered fundamentally flawed if it does not fit into what an adversary considers to be progressive. Progress has acquired a relational character and increasingly fulfills the task of creating and maintaining a dichotomy between opposing poles such as right and wrong, good and evil, and civilized and uncivilized nations.<sup>33</sup>

Despite the criticism of progress, especially in the twentieth century,<sup>34</sup> as an ideology, it still influences legal discourse and the theory and practice of legal transplants. There is a long tradition of comparative legal studies that are grounded on the assumption that law progresses. Henry Maine and Max Weber are two prominent examples. Maine’s paradigm of change in law follows the narrative of status relationships as a less evolved way to regulate society to the embodiment of rights and duties in the shape of “anonymous and individualized” contracts. The same evolutionary pattern is identified in many law and development proposals that attribute a great importance to the law of contracts. On the part of Weber, progress in law is “clearly oriented toward formal rationality.” He shows a clear antipathy towards legal systems that have not achieved the level of organization based on formal rationality.<sup>35</sup>

The study of the concept of progress can enhance the legal transplants research agenda in at least two ways: by emphasizing that ideology matters

32 FAUL (1985) 13.

33 See GALINDO (2010) 137–170.

34 For a good summary of those criticisms, see TAGUIEFF (2006).

35 RILES (2005) 4–14.

in any transplantation process and by refiguring otherness in comparative legal studies. In an important article, the Italian comparatist Michele Graziadei draws attention to the fact that by helping to forge consensus or resistance to transplants, ideology “transforms power into influence” and acts as “an interface between individual practice and collective action.” Graziadei advocates making the study of ideology central to comparative legal studies to encourage a micro-perspective in contrast to the grand totalizations common in the field.<sup>36</sup>

The powerful ideology of progress does not necessarily lead to domination through a given legal transplant. Progress has been a significant force in national liberation movements and in policies that emphasize local, rather than foreign, solutions to problems. If captured by individuals rather than used as a tool to shape society, progress is an important element of subjective historical times and still functions as a bridge between experiences and expectations. Essentially, it provides a way to control the future through ideas.

In addition, the study of progress can assist legal comparatists in realizing that this concept helped create the sense of otherness and primitiveness that still influences comparative law, especially when faced with Extra-Euro-American legal systems. To prove the need for a certain legal transplant, a legal system must be imagined as imperfect, less evolved, or primitive. In order for one to say that a legal order is primitive, there must be a reference, structure, or set of rules for the purposes of comparison. The mold of another legal system often fulfills such a role perfectly. However, a future imagined in this manner builds upon the experiences provided by the legal system perceived as more evolved and, therefore, serving as a framework in the process of transplantation.

The study of the concept of primitiveness, fully informed by the ideology of progress, can even create a new beginning for comparative legal studies. As Steven Wilf beautifully puts it, “most discussions of legal transplants, however, rely upon a remarkably botanical turn of phrase. Law is transferred from one place to another – it takes seed, is grounded in the needs of another society, perhaps even grafted to existing legal norms, and ultimately becomes either a successful transplant or withers away. ... Legal transplants are part of a system of international exchange. Legal primitivism, however,

36 GRAZIADEI (2009) 738–740.

challenges this straightforward model of encounters. It was closer to the mounted specimen of an exotic species than a living plant. It was a pastiche of legal materials imported for the very purpose of cabining, setting aside, and distinguishing from contemporary law.”<sup>37</sup>

Structural adjustment programs are good examples of the difficulties, or the impossibility, that international financial institutions face in dealing with otherness and can be seen only through the lens of “good governance.” And such a situation brings us to another issue: that of prognoses.

#### 4. Legal Transplants and Prognoses

Related to the concept of progress is that of prognoses. The idea that the future is an open space leads modern human beings to make predictions and plan for the years or centuries to come. Anticipating the future has serious implications for power relations. Prognoses can take the shape of pure wishful thinking or be a call or even an ultimatum for action. Koselleck provides two examples of such prognoses in the inter-war years: Hitler’s prediction about the invasion of Czechoslovakia and Churchill’s call for action in Danzig and in the Polish Corridor. Those two prognoses were more than wishful thinking; they were based on the capacity of Germany and the allies to provoke or avoid a result. In other words, they wanted to mold the future.<sup>38</sup>

Focusing on such prognoses that are based on imposition can didactically emphasize the complexity of legal transplants, especially if seen from the point of view of the receivers. Conditionalities imposed by international financial institutions in “structural adjustment programmes” resemble the prognoses described by Koselleck that, in the final iteration, mean that a person is compelled to act. The imposition of conditionalities is associated with the idea of good governance that must be followed by specific states that accept the adjustments. Good governance “involves the creation of a government which is, among other things, democratic, open, accountable, and transparent, and which respects and fosters human rights and the rule of law.”<sup>39</sup> That being said, the agenda of good governance contained in those

37 WILF (2009) 508.

38 KOSELLECK (2002c) 141–143.

39 ANGHIE (2005) 248.

adjustment programs, as is widely known, have deep impacts on states' internal affairs, ranging from reductions in government spending to economical liberalization requiring subsidy cuts or privatization. In practice, such good governance agendas have created insurmountable burdens for states that, for one reason or another, were compelled to turn to international financial institutions and consequently became bound by conditionalities. For example, despite being theoretically in accordance with human rights standards – after all, human rights are an important component of good governance – structural adjustment policies quite often “undermine, if not violate, important economic and social rights.”<sup>40</sup> Conditionalities in adjustment programs act not only as tools to achieve current political objectives, but they also aim to affect time itself by controlling societies, as well as legal systems, and direct them to a pre-determined and anticipated future that will promote and realize the idea of good governance. Political action, therefore, happens now and has an anticipatory function that is capable of tying together present and future generations. That work is exactly what Koselleck assigned to historical times, a deeply subjective perspective on time that goes beyond chronology.

The International Monetary Fund has approved specific guidelines on conditionalities. In an eleven-page document, the principles of conditionality are deployed using vocabulary that makes explicit the contractual philosophy behind their application to those seeking resources from the fund. The fifth principle makes the temporal-political dimension of conditionalities clear: “A member’s request to use Fund resources will be approved only if the Fund is satisfied that the member’s program is consistent with the Fund’s provisions and policies and that it will be carried out, and in particular that the member is sufficiently committed to implement the program.”<sup>41</sup> Several words denote the temporal dimension: “program,” “provisions and policies,” “carried out,” and “implement.” Fundamentally, access to the fund’s resources is restricted to those able to prove that there is a convergence between a member’s projection of the future and the fund’s own projection of the future.

The prognostic character of a legal transplant might seem irrelevant. What is so special about saying that political action is projected toward the

40 ANGHIE (2005) 260.

41 INTERNATIONAL MONETARY FUND (2002).

future? The concept of prognoses can however shed some light on the way comparative lawyers use the vocabulary of legal change, which is relatively frequent in the legal transplants literature. Quite often, legal change is used in a too abstract manner, with no consideration of its prospective implications for society. That neglect arises in the case of Watson, for whom legal change sometimes seems to be an end in itself. His definition of the task of comparative law demonstrates such an “abstraction bias” and a lack of concern about the future social consequences of changes in law. In Watson’s words, “in the first place, Comparative Law is Legal History concerned with the relationship between systems. ... In the second instance, I suggest that Comparative Law is about the nature of law, and especially about the nature of legal development.”<sup>42</sup> Moreover, by using concepts such as legal systems’ “sophistication,” “maturity,” “modernity” or “evolution”<sup>43</sup> in a poorly problematized way, Watson tends to generally disregard the role of the future in legal transplants (and also seems to lean towards a defense of progress in law). Therefore, to avoid such abstraction, the relationship between legal transplants and prognoses must become an important field of research for comparative lawyers.

## 5. Conclusions

Legal historians can offer a crucial contribution to the debate on legal transplants if they convince comparative lawyers that, besides a spatial dimension, a transplant also implies a specific conception of time that encompasses both the space of experiences and the horizon of expectations. Legal transplants not only transpose legal rules and arguments from one place to another; they fundamentally try to change the future.

As a matter of fact, legal transplants are deeply influenced by what Koselleck called historical times, a very subjective (sometimes irrational or emotional) perception of how time flows. The plea to emphasize the study of legal transplants through the lenses of historical times seems to have its counterpart in a tendency found in comparative legal studies to stress the role of individual actors in the transplantation process.<sup>44</sup> An inquiry into

42 WATSON (1993) 6–7.

43 See, for instance, WATSON (1987) 537, 550–551.

44 RILES (2005) 41–45.

such role may show not only that individual perceptions on several issues vary, but also that they have different perceptions on how time flows.

Because I argue legal transplants try to fill the gap between experience and expectation, they place themselves in a mined camp, full of tensions. Some comparatists tend to overlook such tension by emphasizing more the similarities than the differences among legal systems. I think Günther Teubner's ideas about legal irritants provide a good way to uncover such tensions and implicitly emphasize the temporal dimension comparatists should be aware of. In Teubner's words: "Legal irritants' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change."<sup>45</sup> Irritants cannot be domesticated not only because a rule or institution was displaced, but also because time itself cannot be domesticated. We can only expect a legal transfer will "work" in another legal system, but we cannot say for sure. That is why Koselleck refers to prognoses as a "difficult art." However, even with its inherent difficulty, modern people insist on prognosticating because of their inclination towards the control of time.

The relationship between experience and expectation is not only tense, but sometimes unbalanced. For Koselleck, moderns tend to put a lot of stress on the expectation dimension when the amount of experience is scarce. This is the price that must be paid for an open future, free from the burdens of traditions. The same may happen with transplants. Sometimes, the trust in a transplant is so thick that it overshadows the experience a foreign legal system had with a rule or institution; contextualization is erased or, at least, forgotten. As Frankenberg puts: "For the constitutional elites and their experts, when going about the reassembling of the imported items, must operate without knowing the original master plan or its meaning and may, at best, rely on fairly unreliable, abstract instruction manuals provided by global constitutionalism."<sup>46</sup>

Progress and prognoses are good examples of the temporal implications of legal transplants. On the one hand, the sense of otherness that influences

45 TEUBNER (1998) 12.

46 FRANKENBERG (2010) 575.

much of the comparative legal field has a strong relationship to the idea of amelioration contained in the ideology of progress. On the other hand, different agents establish prognoses through the means of legal transplants and imposition of a given behavior on the receiver, as in structural adjustment programs.

Engagement with the concept of legal transplants is necessary for the field of comparative legal studies to enhance legal change and to excavate the causes and consequences of stasis in law. Recognizing the influence of temporal and spatial structures in the process of transplantation can open new paths for research and builds stepping stones to the ultimate – but often forgotten – aim of law: the realization of justice.

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