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The essays in this volume span a broad array of geographic conditions, historical experiences and legal systems. Each offers valuable insights in its own right, and collectively they take useful positions on the theory and practice of borrowing legal ideas, with a special emphasis on the role of the legislature. Together, they remind us that law does not exist in a vacuum, but rather arises from an amalgamation of traditions, practices and ideas.[1] The creation of constitutions and the writing of ordinary laws can entail merging the new with the old or the exotic with the mundane. These days, an adventurous lawmaker can draw upon any number of models.

Each essay presents a view on how legal transplantation and synthesis happen – in the moment of constitutional creation or as an ongoing exercise in regular lawmaking – and whether it is a coherent and valuable practice. After reading these essays, I am convinced that studies become richer and more promising once we adopt an institutional perspective. Some nations draw on foreign and international law more confidently and expertly than others. Importantly, the institutional turn in the study of legal borrowing permits us to see that even within a given country, certain institutions can be more or less receptive to the use of foreign and international law. To what extent can institutional design influence the borrowing that later occurs, and how much can legal culture be reshaped through softer means of education, modelling or popular culture? Further, the very mention of borrowing raises the spectre of cultural control. Many opponents of borrowing fear the loss of ideological consistency to the law, political domination or cultural distinctiveness. How such concerns are met helps to render legal cross-pollination normatively desirable and socially acceptable.

The least objectionable moment for legal transplantation is during the writing of a constitution. Because the populace is understood to be highly engaged during such deliberations,

1 On the cross-national migration of legal ideas, *see generally* S. Choudry (Ed.), *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006; A. Watson, *Legal Transplants: An Approach to Comparative Law*, University of Georgia Press, Athens, 1993.

legal creativity is not only legitimate but often essential to codify a break in historical time. A successful constitution must not only put the past in its proper place, but also chart a brave new course for the future. The legal ideas of other nation states (which ones to endorse, which ones to avoid) are particularly salient in constituting a distinctive self-governing people. In fact, it might be said that the purposeful consideration of all relevant law at that moment – law found indigenously as well as useful foreign law – itself is a powerful act of sovereignty in modern times. Design choices over which kind of legislature to have, the relative status of the legislature *vis-à-vis* other branches of government, and how the people's representatives should fulfil their daily tasks can be, and frequently are, influenced by impressions of other countries' practices.

As colonialism recedes, a more purposeful usage of foreign law fills the vacuum and continues to characterize a people's independence. A celebration of mixed heritage typifies the new-found political identity. Encouraging scholars to focus on legislative techniques, Cappelletti and De Siqueira show how Brazilian lawmakers repurpose the laws of other nations to create a hybrid system.[2] They explain how the President dominates the legislative process through the constitution's assurance of his role in that domain, as well as through the control exerted on lawmaking by party leaders. Within a president-dominated process, the borrowing of foreign law by legislators apparently swings between two poles: some rote and wholesale copying of foreign ideas and other instances where lawmakers act as bricoleurs, mixing and matching foreign ideas to suit their purposes. The authors do not venture an explanation for these divergent outcomes, but follow-up work would seem useful to explore possible explanations. Rote copying could be explained by extreme deference (say, to the President), a lack of expertise or resources, or perhaps it only appears to be rote copying and wholesale lifting is best understood under the circumstances as complete endorsement of an idea or institution. Politics may play a different role where incongruent ideas are stitched together in legislation, for example, expressing a desire to mollify competing constituencies.

Namibia's experience is fairly typical for a people who have broken the shackles of colonialism and are finding their way. As Rautenbach and Spigno explain, independence is characterized by political compromise, and legal pluralism is the positive name given to what is a politically necessary combination of local interests.[3] Constitutions can only ever be what the active agents of the people compose, and it should be little surprise that even after a break in historical time, the law continues to exhibit the ideas and naked self-interests of both colonizers and colonized. In countries that undergo a relatively orderly transition to democratic self-governance, the tendency towards hybridity is more pronounced. Namibian constitutional law includes a hodgepodge of Western elements

2 M. Cappelletti & J.P.F.H. de Siqueira, 'Brazilian Legislator's Vocation for Using Foreign Law'.
3 C. Rautenbach & I. Spigno, 'Foreign Influences on the Legislative Process in Namibia'.

(Roman, Roman-Dutch and English) and Namibian customary laws. In establishing the major institutions of government, the country's 1990 Constitution juggles both the British parliamentary practice and the American preference for direct elections of the President. Further, Namibia's bill of rights simultaneously incorporates facets of international law and represents a repudiation of legal practices that once facilitated "colonialism, racism, and apartheid".[4]

But endorsing legal pluralism has its costs. Legal expertise becomes a premium in the new political order, raising the risk of domination by elites. Confusion among traditions may ensue as lawmakers must reconcile divergent traditions. As Rautenbach and Spigno point out, Namibia went from a system of pure legislative supremacy to one of constitutional supremacy and judicial review, where, at least in theory, the national legislature is bound by the rule of law and must deal with co-equal institutions. However, drafters of the constitution reserved the power to overrule decisions of the Supreme Court through "an act of Parliament, lawfully enacted".[5] So, in theory, the Constitution is supreme, but as an institutional reality, a majority of Parliament can be the final interpreter of that basic law. The tension between these two models – one ideal, the other practical – can only be resolved or clarified when tested, of course, but it remains an uneasy combination of legal traditions.

Australia falls on the happier side of the continuum, with the people desiring to maintain certain political and cultural ties to the United Kingdom, and deciding to use the British parliamentary system as the central feature of the Australian lawmaking process. Aroney, Bassu and Popp demonstrate how Australians took from the legal traditions of not only Great Britain but also Canada, Switzerland, Germany and the United States (most notably, ideas of separation of powers and federalism).[6] The authors attribute the nation's receptivity to outside ideas to the people's orderly transition to independence, though a desire to ensure cultural compatibility seems to explain the narrow range of countries whose laws are considered. They insist that Australians have carefully adapted ideas taken from other countries in unique ways – for example, by more narrowly protecting private property taken for public purposes than the United States – and that this purposeful and nuanced process reflects political maturity and true sovereignty. Thus, Aroney, Bassu and Popp seem to argue that the manner in which outside ideas are considered and adapted offer evidence as to whether borrowing is genuinely popular and well-considered.

South Africa's experience underscores the promise of control and identity that can come from increased use of foreign and international law, but it also offers warnings about the darker aspects of legal borrowing. Federico and Movshovich show how a legal system that

4 Constitution of the Republic of Namibia, preamble; Arts. 5-25 (1990). Among other things, Namibia's bill of rights bans the death penalty and arbitrary detention, and enshrines affirmative action as a tool to undo the effects of apartheid and other forms of past discrimination.

5 *Id.* Art. 81 (1990).

6 N. Aroney, C. Bassu & C. Popp, 'Legal Transplants in the Australian Legal System'.

presented itself as a hybrid legal order proved to be hierarchical and removed from the cultural practices of the majority.[7] Before South Africa's constitutional revolution of the 1990s, borrowing served as a tool for the continuation of colonialism by other means. Federico and Movshovich portray a happier picture of the people once they have authored a constitution of their own, through which foreign elements are consciously adopted by the majority for its own goals rather than imposed by external powers for theirs. In a democratic South Africa, foreign law and international law are used on a daily basis, constitutional law itself appears to be more tightly enmeshed with local culture and all of this seems to align well with enhancements in popular sovereignty.

One crucial factor favouring institutional receptivity to borrowing surely must be the 1996 Constitution's explicit authorization for the use of international law when interpreting South Africa's bill of rights. Under that provision, any court, tribunal or forum "must" take international law into account and "may consider foreign law" on the matter.[8] The authors mention but do not dwell on this textual authorization to engage in transplantation. But it seems to me crucial in two respects: as evidence of a popular consensus in favour of increased use of external sources of law and as a general statement about the relationship between popular sovereignty and foreign law. That cover is important for judges and other officials who might desire to draw on foreign law. It is uncertain whether there is any significant difference between a "must" and "may" on this front. Either provision would seem to operate as a license for legal creativity, encouraging litigants and jurists to scour sources of law that might otherwise be put off limits by rigorous adherence to domestic law and national identity. From the authors' case study, it appears that legal creativity extends to the legislature, especially with the end of apartheid. It might be said, then, that a cynical form of borrowing once served colonial ends, but that enhanced receptivity to international law has facilitated a decisive move towards public respectability. The South African Constitution says as much.

As a counterpoint, the United States has struggled mightily with its orientation towards foreign and international law. The 1787 Constitution offers no easy answers. It indicates that "the law of nations" is part of America's fundamental law and is superior to state and local law. There is no mention of foreign law. Hierarchy and uniformity were important to the founders, but questions of receptivity and transparency were left for future generations to fight over. International law and foreign law are consulted sporadically throughout a fractured legal system. At the state and local level, one can easily detect efforts to frustrate the use of comparative methods.[9]

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7 V. Federico & V. Movshovich, 'The Influence of Comparative Law in South African Law'.

8 Constitution of the Republic of South Africa § 39 (1996).

9 *See*, *e.g.*, A. Fellmeth, 'U.S. Legislation to Limit Use of International and Foreign Law', *American Journal of International Law*, Vol. 106, 2012, pp. 107-116.

Federico and Movshovich are almost certainly correct that the South African Constitution's birth "in the comparative law cradle" of that period helps to explain a noticeable receptivity to foreign law. But memories of original context can fade, rendering written commitments all that more important. On its face, Namibia's Constitution is closer to America's in that it makes international law an explicit part of national law, but makes no mention of foreign law as a separate body of law. This distinction has made little difference in practice, according to Rautenbach and Spigno, for Namibian lawyers and policymakers make plentiful use of both. Like Federico and Movshovich, the authors believe that the local culture in which a constitution was authored affects how it is interpreted on a contemporary basis.

But suppose that political culture changed, and a conservative movement arose to scrub Namibian law more completely of Western influences, might it matter that the constitution contains no explicit authorization to use foreign law? Could its absence be characterized as evidence that pluralism is nothing more than a misguided, temporary policy rather than a foundational principle? Such a challenge, periodically seen in the United States, would test the primacy of legal culture against the importance of legal text.

If writing a new constitution is seen by democratic theorists as the most appropriate time to consider other countries' experiences, then the legislative process is perceived as the best venue for creative cross-fertilization during times of ordinary lawmaking. Indeed, many of the authors move beyond the practice of borrowing in the design of legislatures to focus on the mechanics of legislative borrowing. This choice to study the behaviour of democratic assemblies shows that inter-systemic borrowing – the taking of ideas from another people's legal experience – is fraught with many political and cultural concerns. Compared with more localized, intra-systemic forms of borrowing – say, between bodies of legal knowledge within a national or regional legal order – inter-systemic cross-pollination raises significant questions of fit, transparency, completeness and yield.[10] These concerns are magnified in a constitutional system precisely because ordinary lawmaking must conform to the structural and cultural parameters established during earlier moments of legal creation. The impression shared by many of the authors, but not always openly stated, is that such concerns can be confronted most adeptly, or at least most legitimately, through the people's elected representatives on a daily basis.

Hence, Justice Barak-Erez argues that legislation "is not only the main, but also the ideal route for transplantation".[11] Because the work of a legislature is ordinarily assumed to satisfy the democratic conditions of transparency and accountability (their work is published, and representatives are subject to elections), the process is seen as the least objectionable

10 *See generally* N. Tebbe & R.L. Tsai, 'Constitutional Borrowing', *Michigan Law Review*, Vol. 108, 2010, pp. 459-522. In this article, we discuss mostly intra-systemic borrowing as part of the ongoing practice of constitutional maintenance.

11 D. Barak-Erez, 'Legislation as Transplantation'.

way for a country to incorporate foreign norms during times of ordinary lawmaking. At the same time, questions of cultural fit must always be answered. Non-native ideas must be deemed compatible with existing laws and traditions, as well as background social and economic agendas.

Of course, there are drawbacks with politically responsive institutions doing most of the legal borrowing. Some of the essays underemphasize these drawbacks. Expertise may be hard to come by, and unrelated political considerations may distract decision makers from taking valuable approaches seriously. Broader structural conditions prevalent in society may be most potent during legislative debate. In particular, Barak-Erez worries that market forces and competition between nation-states can retard borrowing of social welfare laws. This is the flip side of the story we often heard told: a desire to join the community of civilized states leads a nation to borrow human rights norms. But regressive ideas can also be recycled. Barak-Erez believes that global economic forces can produce either a race to the bottom or superficial endorsement of progressive ideas. In order to engage in transplantation well, she encourages more proceduralism through the development of new bodies and processes to study and draft new laws. Ideally, the existence of such "professional research units" improves the capacity of legislators to engage in "high-level and sophisticated transplantation".

An increased preference for institutional formality and professionalism in the handling of foreign and international law has emerged in a world where most legal borrowing occurs informally, and access to foreign knowledge are often matters of serendipity. In the Spanish experience, comparative law is widely taken into account at the reporting stage of the lawmaking process, when a subcommittee is charged with taking into account relevant legal, political and economic issues. But there is no explicit mandate to consider foreign or international law, and the research service relied upon by legislators do not always do so. Even so, Spanish lawmakers frequently consider foreign experiences. Griglio and Manzano argue that this receptivity to outside influences flows not only from the hybrid quality of the Spanish constitutional experience, where architects happily took the best of post-war constitutional ideas, but also from the ongoing, mostly positive, relationships enjoyed by Spanish legal actors with their counterparts in other countries.[12]

What factors most shape the borrowing that takes place during the course of ordinary lawmaking? Echoing Federico and Movshovich (as well as Griglio and Manzano), Bray and Fasone suggest that the original design of a legal system can make a significant impact on downstream decisions.[13] The European Union was designed as a plural system that depends on autonomous member states to implement EU law. Specialized lawmaking

12 E. Griglio & J. Jaria i Manzano, 'Legal Transplants in the Spanish Parliamentary Architecture and Legislative Decision-Making'.

13 R. Bray & C. Fasone, '"Foreign Influence" in EU Law-Making: The Case of the European Parliament'.

through the European Commission's structured dialogue process presents opportunities for foreign law (that is, non-binding law from non-EU countries) to influence policy. Similarly, the highly decentralized nature of lawmaking through the European Parliament, which relies on standing committees to gather information and draft laws, makes that legislative process permeable to foreign legal norms. Few experts or representatives of international organizations have actually appeared at committee hearings, but the authors do not offer an explanation for why this has been the case. It may be that the nature of the issues discussed or the politics involved must still make transplantation a salient possibility in a legal system that is friendly towards foreign law.

The role that supranational institutions (either regional or international organizations, or looser relationships and social networks among professionals) can play in encouraging the systematic migration of legal ideas emerges as a theme in a few of the essays, one that warrants further investigation. Dallara and Ionescu's work focuses our attention on a particular EU tool that has generated significant legislative borrowing by EU countries: the conditionality mechanism.[14] As a condition for EU membership, a country must agree to make political and economic reforms so as to ensure an orderly integration. For Romania, these reforms entailed alterations to the internal operating practices of parliament so as to increase efficiency and reduce corruption. Financial inducements by international actors also have played a major role in generating reforms, especially in the areas of agriculture, transportation and public works.

Still, the uniqueness of the EU as a supranational institution, with no pre-existing legal culture of its own to draw upon or contend with, may limit the usefulness of any design lessons for the traditional nation-state. Nationalism can rear its head and constrain legal borrowing, but fears of cultural control appear to be somewhat mitigated by the European Union's refusal to identify strongly with any one people's traditions and its elaborate lawmaking procedures. Mechanisms to induce increased reliance of international and foreign law will work only when a country's self-interest is already intimately tied to a regional or other supranational organization, where the benefits of borrowing outweigh its costs, broadly understood.

Timoteo and Zhou's investigation of Chinese environmental reforms points the way towards another worthwhile line of inquiry.[15] Their paper bypasses questions of institutional design (whether original or legislative) and takes up other factors that may dictate the frequency and quality of legislative borrowing. The authors demonstrate that the relative complexity of a policy problem creates opportunities for transplantation: the more difficult and numerous the issue taxing existing resources and talents, the more likely legislators may

14 C. Dallara & I. Ionescu, 'The EU-Driven Foreign Influences on Legislation in Romania'.

15 M. Timoteo & J. Zhou, 'Channelling Foreign Law Models into Domestic Legislation: A First Inquiry on the Making of the Chinese Environmental Protection Laws'.

look beyond their own borders for successful models. In the environmental context, clear direction from the head of the drafting team for the legislative committee to engage in comparative fieldwork yielded increased reliance on French and Canadian law. The sheer magnitude of the environmental problem led drafters to embark on a lengthy and deliberative process in which experts played a prominent role. Extended time for study apparently improved Chinese comfort with foreign law: one law (Tort Law) was studied for seven years before it was drafted, and another (Promotion of Cleaner Production Law) for three years before action was taken. The essay sounds a cautionary note about transplantation heard elsewhere: confusion may arise at the level of implementation. A lack of familiarity with, or dedication to, transplanted mechanisms such as burden-shifting environmental rules can lead to misunderstandings or defiance on the part of jurists.

Martinico and Skinner identify three other factors that add to legal complexity, thereby improving the odds that legislative borrowing will occur: extra-jurisdictional impact of a policy issue, kindred economic interests and geographic proximity.[16] In their view, the near certainty of legal friction between nation states over such matters as the environment pushes policy-makers to prefer harmonious solutions. Physical proximity and economic ties can also increase the odds of legal borrowing, as with the influence of US environmental law on Canadian law. As for how legal lifting takes places, the authors see in the Canadian experience mostly soft or informal mechanisms at the federal level, though Quebec has a highly developed network dedicated to inter-parliamentary relations. When governmental processes lack a high degree of formality, borrowing remains episodic, unpredictable, less visible and difficult to assess in terms of actual influence.

These challenges, repeated by several of the authors, will continue to bedevil studies of borrowing. The omission of references to foreign or international law in legislative reports or enactments itself does not negate the possibility that such sources influenced decision making. At the same time, silence renders it difficult to show what, if any, impact foreign law had on actual deliberations. Even within legal systems that are relatively open to foreign law, its usage can be haphazard. And when references to foreign law do arise in public debate, they may be misleading. Dallara and Ionescu's warning is apt: such references may only reflect "wishful" discourse, aspirations that a foreign law model be followed, rather than hard evidence that such a model actually influenced a legislature's decisions.

Ribeiro and Ciammariconi suggest that the linguistic competence of a country's experts or lawmakers can limit which countries' laws are taken into account.[17] If true, this surely falls among the least defensible grounds to ignore valuable models, and one that can surely

16 G. Martinico & C. Skinner, 'Shaping Law through Inter-Parliamentary Cooperation: The Case of Canada'.

17 F.B. Ribeiro & A. Ciammariconi, 'The Influence of Comparative Law on the Portuguese Parliament and the Legislative Process'. The authors believe that Portugal was more likely to borrow law from their neighbours, from countries with which it shared similarities in language and culture, or from countries with whom Portugal had formal relationships (especially through membership in supranational organizations).

be addressed through additional investments in training, better selection of experts, and more exposure to unfamiliar legal traditions. The authors' study of Portuguese parliamentary borrowing hints at one possible problem with the rise of formal methods favouring cross-pollination. In an intriguing experiment, Portuguese lawmakers since 2007 have altered parliamentary procedures to require evaluation of comparative and international law. Before that, workups of foreign law took place at the behest of lawmakers. But Ribeiro and Ciammariconi observe that lawmakers sometimes avoid grappling with complicated notes evaluating comparative law, perhaps out of suspicion that legal staff may be subverting the lawmaking process.

A strong preference for formality in dealing with comparative law – widely shared in the literature – should itself be tested in future work of this nature. Greater formality is presumed to be normatively desirable for reasons of democratic legitimacy and policy-making efficiency. But there might be a point when these benefits end and become counterproductive. It is possible that, under certain conditions, greater institutionalization of comparative law research and drafting leads to overspecialization and insularity. In other words, accountability may be enhanced at the sake of fit and yield when new institutions take on the task of comparative lawmaking. Moreover, it is not always the case that further institutionalization leads to greater transparency: as bureaucracies develop identities, resources and constituencies of their own, they can also develop pathologies. Even when institutions exist that would appear to facilitate legal cross-fertilization, there may not always be the wherewithal to hear from certain kinds of experts, deal with certain kinds of issues or, as the studies in this volume show, systematically study all relevant countries' laws. Like other bureaucracies, permanent organizations devoted to comparative law work can still encounter political or professional pressures.

By contrast, ad hoc institutions might be able to exhibit greater flexibility in dealing with the precise political and policy-making considerations involved. Such organizations can be staffed by experts and joined by a wider circle of stakeholders. Especially in cases where public policies will be controversial, or the cultural climate appears hostile to foreign or international law, such panels may be able to do some of the work showing that foreign ideas are a good fit and that adopting them can yield social benefits. At times, temporary organizations can serve the goals of productive cross-pollination without the risks of bureaucratic entrenchment or undue backlash.

Scaffardi and Weston's work on the UK experience is useful in this regard.[18] An independent panel was established by the Ministry of Justice, the Education Department and the Welsh government to study a proposal to adopt Australia's approach to family law, which presumes "equal shared parenting" after parents separate. Cautionary notes sounded by the panel ultimately were taken into account by the British government as it amended the

18 L. Scaffardi & E. Weston, 'The Use of Comparative Law in the Legislative Process at Westminster'.

bill and by Parliament during legislative debate. Generally speaking, select committees established by Parliament are able to investigate the legal landscape surrounding an issue and, if the will exists, act with precision and dispatch.

Harris and Vespaziani introduce another, fruitful set of analytical tools.[19] They encourage us to turn attention to legislative motivations, namely, why legal actors choose to borrow (or perhaps refuse to borrow). The authors suggest that legal takings can be classified as either "functionalist" or "universalist" in orientation: the former, aimed at producing sound policy solutions; the latter, when a borrower seeks answers to a common problem. This distinction between the two attitudes does not appear sharp to my mind, for both kinds of borrowing seem to be driven by similar instrumentalist goals. Perhaps "functionalist" could be contrasted with "aesthetic", with the second category capturing such interests as integration with regional or communal norms for reasons of order, efficiency or public relations. More promising is the authors' distinction between "technocratic" and "political" borrowing, where technocratic borrowing involves looking to the empirical evidence surrounding another legal model and political borrowing consists of taking (or refusing to take) foreign ideas strategically to improve one's standing with constituents or other elected officials.

Analyzing the practices of the US Congress, Harris and Vespaziani find legal borrowing to be a rare occurrence. When evidence of it does arise during legislative debate, it is usually because an American legislator cites another country's legal experience in negative terms – as something to be avoided at all costs. Moreover, many such references are seemingly done for political rather than functionalist reasons: demagoguery, re-election, fund raising. There is some record of functionalist borrowing to be found in the work of the Congressional Research Service, especially on environmental issues, but these more sober considerations of foreign law occur in non-transparent settings. The authors venture an explanation for the dearth of borrowing by American legislatures: lawmaking occurs in a largely isolationist political culture and within a legal system that is fragmented and highly responsive to cultural fears.

In Italy, Lupo and Rizzoni detect an increasingly systematic quality to the body of knowledge developed on international and foreign law.[20] The authors attribute this improved coherence to the Senate's reliance on a Research Department to gather such resources as well as comprehensive efforts by the Library staff of the Chamber of Deputies to update this information. Even so, Lupo and Rizzoni contend that use of foreign and international law sources are often driven by narrow political interests rather than technocratic reasons. They analyze electoral reforms in 1993 and 2005 that altered the representative process. During legislative debate, the British first-past-the-post method and French

19 P.B. Harris & A. Vespaziani, 'Foreign Flavours in the American Legislative Sausage?'.

20 N. Lupo & G. Rizzoni, 'Foreign Influences on (the Procedure and Content of) the Italian Legislative Process'.

twice-around-the-post method repeatedly came up. Lupo and Rizzoni show how each actor's views were shaped by expectations of how a foreign model might affect his party's political fortunes.

While I have no doubt politics mattered, one might wonder whether the case studies chosen involved issues that are already intensely fraught with partisanship, such that these examples might be atypical of legislative borrowing (or non-borrowing). In other words, it is possible that on other kinds of issues, the goal of making the best public policy possible might play a greater role than maximizing political self-interest. Whatever the case, there can be little doubt that increased formality yields more, and often more accurate, comparative data available to legislatures. How legislators choose to use such information, if at all, is a different matter entirely.