

Legal Transplants – an Analysis Using Typologies

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Abstract

The term “legal transplant” describes the process, in which lawmakers borrow law from other jurisdictions. Norm transplantations have become commonplace in day-to-day politics. Legislators more and more frequently attempt to copy foreign norms as an example for their own legal system. Nevertheless, transplantation of foreign law may also be a challenge for lawmakers. Legal transplants are often complex processes, in which different legal cultures and socio-cultural structures collide. When do those differences turn into problems? What can be done in order to avoid ‘failed legal transplants? To those questions, there is no general answer as the context of every legal transplant is unique.

An analysis of legal transplants using typologies can help us to get acquainted with problems that emerge with borrowing foreign law. It also helps us to get to know possible strategies to overcome those problems.

This dissertation develops a typological approach that may be useful for legal practise in order to avoid problems in connection with legal transplantation in the future. Hence, this work presents a typology of the causes of legal transplant problems and attempts to categorise the different phenotypes of legal transplants. Those two typologies are the basis for an “alert pattern”, which may be used by lawmakers in order to become more conscious about immanent problems and in order to avoid them. On that basis, the dissertation develops potential strategies for good implementation of transplanted law. It also tackles the question when law should only be transferred in a modified form.

This analysis is developed and illustrated by a variety of deliberately chosen examples of legal transplants taken from different areas of law, different legal cultures as well as different legal historical backgrounds. The reception of the Swiss Civil Code (“Zivilgesetzbuch”) in Turkey in the 1920s, the reception of the so called “MacArthur Constitution” in Japan after the Second World War, the reception of the German “Sachenrecht” in Estonia in the 1990s as well as the (current) German reception of the concept of Independent Regulatory Agencies from the United States rank among the most important illustrative examples.