

The World of Small States 8

Danny Pieters

# Social Security Law in Small Jurisdictions

 Springer

# **The World of Small States**

Volume 8

## **Series Editors**

Petra Butler, Faculty of Law, Victoria University of Wellington, Wellington,  
New Zealand

Caroline Morris, School of Law, Queen Mary University of London, London, UK

Small states differ considerably in their geography, history, political structures, legal systems and wealth. Nevertheless, because of their size, small states face a set of common challenges including vulnerability to external economic impacts such as changing trade regimes and limited ability to diversify economic activity; limited public and private sector capacity, including the legal and judicial infrastructure. A number of small states have experienced colonization and must accommodate the legacy of one or more forms of colonial law alongside the customary law of the indigenous people. Many small states are islands. These are particularly susceptible to environmental impacts such as natural disasters and climate change. Small states can also be flexible, adaptable, sites of social development and innovation, and have an influence in the world disproportionate to their size.

The importance of research into small states is increasingly recognised by the global legal community . Small states are microcosms which allow us to study and gain insight into the challenges of big states. Their small size makes research easier and the testing of solutions more easily. Small states, however, also have unique problems for which unique solutions must be designed. For example, in a small state with a correspondingly-sized legal profession, ethical guidelines in regard to the appointment of judges have to take into account to the small size of the profession.

The aim of this exciting and unique series is to be the essential compendium for every legal researcher interested in small states but also for practitioners and policy makers working in small state.

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# Social Security Law in Small Jurisdictions

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Danny Pieters  
Department of Law  
KU Leuven  
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# Preface

This book examines the following key question: are small jurisdictions (states) confronted with specific issues/problems providing social security and how to deal with these issues/problems? How is social security law impacted by the smallness of the jurisdiction?

In order to address these questions, we examine in a first chapter the key concepts of ‘small jurisdiction’ and ‘social security’ as we understand them in the current literature. Next, we pay some attention to the relation between social security and social security law and subsequently make an excursion to explore the notion of legal transplants. In a second chapter, we examine the main features that characterise small states according to the general literature on small states, naturally focusing on these features that may be relevant to social security. We also include an overview of the (limited) literature dealing with the specific social security issues small jurisdictions have to deal with. In Part II of the book, we look at the social security systems of 20 selected small jurisdictions. We do this in a uniform scheme to facilitate their comparison. In Part III, we compare the social security systems of the 20 small jurisdictions. This allows us not only to draw some conclusions about our main question but also to test the validity of the current literature on the topic as described in Chap. 2 of Part I. In the concluding part of the book, we formulate some suggestions for the benefit of the social security systems of the small jurisdictions, based on our research.

The book reflects information and literature available up to May 2020. However, at the time of writing, a pandemic hit the world and made it necessary during the writing of Part II to rely primarily on information accessible on the web as well as on the assistance of people from the concerned jurisdiction.

As always, a monograph is not really the book of only one person. In writing this work, I could count on the collaboration of many. For the information on the social

security systems of the selected small jurisdictions, the collection of materials, and the help with the redaction of the country reports, we would like to express our gratitude to Leroy Adolphus, Dennis Arrindell, Cheryl Joy Augustine-Kanu, Julia Axelsson, Joelle Barnes, Antonella Benedettini, Carlos Bollen, Sieglie Burleson, Pema Choden, Colin Connelly, Daniel D’Amato, Sangay Dorjee, Milika Feaomoemanu Tuita, Marcello Forcellini, Christian Frommelt, Mahesh Gajmer, Glenda Gil, João Gabriel Gonçalves, Flora Goudappel, Joyce Grech, David Hales, Regin Djurhuus Hammer, Richard Herr, Mininnguaq Kleist, Bárður Larsen, Philip Martis, Elin Mortensen, Kirsten Olesen, Elia Panayiotis, Paul Patron, Michael Peil, Rachel Perri, Nicholas Richardson, Patricia Schiess, Shaista Shameem, Jan Sjóstein, Hassan Sobir, Hildur Sverrisdóttir Röed, Adi Talanaivini Mafi, Pem Thinley, Lisa Tomassini, Marisol Tromp, and Nicolas Vantomme, all in their respective capacities and with their respective titles. I would also like to thank for their precious help in the various stages of the research project: Gerard Everaet, Patrik Jaspers, Thijs Keersmaekers, Niel Laenen, Eric Mijts, and Elzaan Rossouw. A special word of thanks goes to our colleagues Dr. Caroline Morris, Director of the Centre for Small States at Queen Mary University London, Prof. Peter Edge of Oxford Brookes University, as well as our colleagues at KU Leuven Prof. Paul Schoukens and Prof. Bert Demarsin, as they showed interest in the project from its very start and were a great support throughout the writing of this book. Finally, I would like to mention the Institute for Comparative Law of the KU Leuven and especially its Small Jurisdictions Research Group: here I found the best environment to do this research. May many other research projects and publications on small jurisdictions follow!

Leuven, Belgium  
Spring 2021

Danny Pieters

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# Part I

## Small Jurisdictions and Social Security: State of the Art

In this part, we first examine the key concepts ‘small jurisdiction’ and ‘social security’ as we understand them. Next, we pay some attention to the relation between social security and social security law and subsequently make an excursion to explore the notion of legal transplants. In a second chapter a state of the art of the literature on small jurisdictions is provided, focusing on the features most relevant to social security, such as: the impact of economic and environmental shocks; scale disadvantages and flexibility; the limited human resources and infrastructure; the training needs; the limited number of people covered by social security; the importance of migration; and the strong ties with other states. Issues related to homogeneity and proximity, to the unity of administration and the lack thereof in the benefit schemes, and financial issues will be discussed. In this chapter, we also give an overview of the existing literature dealing with the common features of small jurisdictions, focusing on the features relevant to social security. As such, this part gives a *status quaestionis* concerning our central theme: are small jurisdictions confronted with specific issues or problems when dealing with social security?

# Chapter 1

## Conceptual Framework



### 1.1 Small Jurisdictions

We will examine the social security systems of small jurisdictions. Our understanding of jurisdictions includes states as well as semi-sovereign entities that enjoy full autonomy as far as social security is concerned. As such, our study will complement the emerging literature on small states/small jurisdictions.<sup>1</sup>

Various authors have deplored that scientific interest in small states has been limited in the past; an evolution that, as a consequence of the competitive, career and economic pressures on the scientific world, seems to rather worsen than ameliorate.<sup>2</sup> Nevertheless, it is interesting to study small states, not only for the sake of these states, but also because they can be perceived as laboratories, the results of which can also be relevant for larger countries.<sup>3</sup>

Bogdan wrote in this respect:

Among the many interesting research problems of a general nature found within the area of comparative law, two complex issues are particularly fascinating . . . : the problem of mixed (hybrid) legal systems and the problem of the so-called “small jurisdictions”.<sup>4</sup>

But how do we define ‘small jurisdictions’ as a category?

Simply put: small jurisdictions are jurisdictions that are small. They consist of states, i.e. politically and legally speaking sovereign countries. In this way, sovereignty can be used as a blunt criterion, as could be the membership of the United Nations. For many purposes more or less independent territories (such as the British) or confederated or federated entities with elements of sovereignty may present

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<sup>1</sup>Unless otherwise mentioned, we shall use the terms small state and small jurisdiction in an interchangeable way.

<sup>2</sup>Kirt and Waschkuhn (2001); Wolf (2016), p. 1.

<sup>3</sup>Wolf (2016), p. vi (nr. 35) and p. 2.

<sup>4</sup>Bogdan (1989), as quoted by Donlan et al. (2017), p. 191.

similar features for concrete legal research.<sup>5</sup> In our research, we decided to include in our study the small states, members of the United Nations Organisation, with some territories enjoying partial independence and full autonomy in the area of interest to us, social security.

The other element to be defined is ‘small’. Small states are not characterised by having fewer tasks to fulfil than larger states, but they are different on the basis of specific qualitative or quantitative criteria. The criteria chosen to identify small states will depend on the context.<sup>6</sup> For instance, in economics, the Gross Domestic Product (GDP) may be a useful criterion. Nevertheless, the World Bank prefers the criterion of population size. A general abstract definition of ‘the small state’ is thus not present.<sup>7</sup> Criteria most used to define a small state are the superficies of the territory and the number of the population.<sup>8</sup> These criteria not only appear most pragmatic, but are also appropriate, as the specificity of the concerned states often depends on their limited human resources and, although to a lesser extent, the limited space they cover. Sometimes one will even distinguish between small states and very small states or microstates, although that distinction is often disputed.<sup>9</sup>

In general, small states are thus usually defined by their population of up to 1½ million people, a criterion first used by the Commonwealth and then adopted by the World Bank (although not as a formal category).<sup>10</sup> We shall follow this approach, as we find that the number of inhabitants of the state is indeed the most relevant factor as far as social security is concerned.

Whatever definition is used of small states, it is clear that there is a high degree of variability among these states. Small states are spread across five continents. Jeanne Hey (2003) groups the small states into three groups: the insular microstates of the Caribbean, the Pacific and along the African coast; the European small and micro-states; and African states and former colonies.

Many small states belong to a category that has a “high vulnerability”, i.e. being among the poorest countries in the world. Very often, literature on small states and on developing countries tends to coincide, although there are clearly many small states that are more developed. In fact, some small countries are among the richest in the world, as defined by GDP per capita.

From a research standpoint, yet another distinction can be made between the small states: between the Anglophone small states, which are more frequently the

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<sup>5</sup>Wolf (2016), p. 3.

<sup>6</sup>Ibid.

<sup>7</sup>Maass (2009), p. 75.

<sup>8</sup>*Ibidem*.

<sup>9</sup>Geser (2001), p. 92; Gstöhl (2001), pp. 123–124; Wolf (2016), p. 4.

<sup>10</sup>One has to be cautious when browsing literature, as sometimes also countries like Belgium, Norway etc. are called ‘small countries’, see e.g. Katzenstein’s comparative study *Small states in world markets* explaining why, during the 1980s, standards of living were higher in the ‘smallest’ European states. With ‘small states’ he meant countries like Austria, Belgium, Denmark, the Netherlands, Norway, Sweden, and Switzerland, none of which qualify as a ‘small state’ as we understand it (Irving 2011, p. 230).

subject of comparative research, and the small states using other languages, such as Dutch or Portuguese.<sup>11</sup>

Small jurisdictions are many and diverse; over sixty small jurisdictions can be found all over the world. Given the above variety of small jurisdictions, we selected the following twenty as a representative sample: in Europe, the states Cyprus, Iceland, Liechtenstein, Malta and San Marino, and the semi-independent territories Gibraltar, Faroe Islands and Greenland; in South America: Suriname and Guyana; in the Caribbean: the states Trinidad and Tobago and Grenada, and the countries of the Kingdom of the Netherlands: Curaçao, Aruba and Sint-Maarten; in the Pacific the states Fiji and Tonga; in Asia: Bhutan and the Maldives; and in Africa: the Seychelles. We have a combination of member states of the UNO and of territories with a link to Britain, The Netherlands and Denmark. We have small countries with a population above half a million (Cyprus, Suriname, Guyana, Fiji, Bhutan and the Maldives) and microstates (or territories with 100,000 or less population (San Marino, Liechtenstein, Gibraltar, Greenland, Aruba, Sint Maarten, Tonga and Seychelles). Two thirds are small island states. Some of the small states have a large territories (e.g. Greenland), while others are very small (such as Gibraltar or Aruba). Some states have a very high GDP per capita, such as Liechtenstein and Iceland (world top 10) or a low GDP per capita such as Guyana or Tonga. Some of the small states listed have very low poverty rates, such as Liechtenstein, while the percentage of the population in poverty is high in others, such as Suriname or Fiji. Some of the selected small jurisdictions can be considered common law countries, other civil law countries or even belonging to other hybrid legal systems.

We realise that we have chosen about one third of the small jurisdictions of the world and that others would make other choices, but we believe that our selection makes sense as it tries to reflect a wide diversity.

The following scheme is intended only to give an idea of the diversity of the twenty selected countries; the figures are not suitable for genuine comparison as they are taken from a various sources at various points in time.

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<sup>11</sup>Veenendaal and Wolf (2016).

	Region of the world	Pop. (* by 100,000) <sup>a</sup>	GDP per cap. Int \$ <sup>b</sup>	Poverty % pop living below national poverty line <sup>c</sup>	% of pop. Daily Income <5.5 \$ <sup>d</sup>
Liechtenstein (LI)	Europe	0.4	<i>139</i>	NA	NA
Malta (MT)	Europe	4.6	43	16	0
Iceland (IS)	Europe	3.4	57	NA	0
Cyprus (CY)	Europe	8.5 (12.7) <sup>e</sup>	36	NA	0
San Marino (SM)	Europe	0.3	59	NA	NA
Gibraltar (GI)	Europe	0.3	<i>62</i>	NA	NA
Faroe Islands (FO)	Europe	0.5	<i>40</i>	10	NA
Greenland (GL)	Europe	0.6	<i>42</i>	16	NA
Suriname (SR)	South America	6.1	16	70	56
Guyana (GY)	South America	7.5	9	35	56
Trinidad and Tobago (TT)	Caribbean	12	32	20	33
Granada (GD)	Caribbean	1.1	16	38	NA
Aruba (AW)	Caribbean	1.2	25	NA	NA
Curaçao (CW)	Caribbean	1.5	<i>15</i>	NA	NA
Sint Maarten (SX)	Caribbean	0.4	67	NA	NA
Fiji (FJ)	Pacific	9.3	11	31	49
Tonga (TO)	Pacific	1	6	23	28
Bhutan (BT)	Asia	7.8	11	12	39
Maldives (MV)	Asia	4 (5.4) <sup>f</sup>	15	15	54
Seychelles (SC)	Africa	1	31	39	7

<sup>a</sup>Rounded figures, based on 2020 United Nations Population Division estimates and our own country reports of Part III. See Worldometer (2020)

<sup>b</sup>Rounded figures for 2018 of the World Bank estimates. See World Development Indicators Database (2018a). The figures in italic are rounded figures from the World Factbook of the Central Intelligence Agency. See World Factbook (2020)

<sup>c</sup>Rounded figures from the World Factbook of the Central Intelligence Agency. See World Factbook (2020)

<sup>d</sup>Rounded figures from The World Databank of The World Bank. See World Development Indicators Database (2018b)

<sup>e</sup>The total population of the island of Cyprus is approximately 1,270,000, but only 855,000 are living under the jurisdiction of the Republic of Cyprus

<sup>f</sup>According to the above mentioned Worldometer (2020): 5.4; according to countrymeters (<https://countrymeters.info/en/Maldives>) and sources consulted when drafting the Maldives report: 4, a figure most likely considering the 2014 census reported 3.4 Maldivians

## 1.2 Social Security

Social security can be defined in very general terms as the body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings (i.e. income from paid labour) or particular costs, and this in the case of recognised ‘social risks’. Social security can take the form of social insurances or social assistance.<sup>12</sup> The goal of social security arrangements is usually defined in a double way: the fight against poverty or social exclusion, and the provision of income replacement or financial support in the case of certain eventualities, called ‘social risks’. The first objective is most often associated with social assistance, the second with social insurances, although social insurances are increasingly also perceived in the perspective of combatting poverty.<sup>13</sup>

Social assistance can take the form of money transfers or the form of the provision of goods and services in kind. Regardless of the names given to the arrangements, nearly all countries have one or more such arrangements aimed at alleviating the burden of poverty and social exclusion for the poorest sections of the population. Legislation defines who qualifies as belonging to these poorest sections.

Social insurances usually cover one or more of the social risks enumerated in the ILO Convention no. 102 on the minimum norms in social security: schemes covering medical care, sickness, unemployment, old age, industrial injury and industrial illness, family, maternity, invalidity and survivor’s benefits. In this sense, it does not normally include social assistance. The social insurances cover all or some groups of workers and/or all or some groups of the population. Yet not all states have expanded their social insurance schemes to all workers or to the entire population; it seems that social insurance is rather the privilege of some stronger groups in some more vulnerable economies.<sup>14</sup> Again, legislation determines which workers/inhabitants qualify for the personal scope of the most important social insurance schemes.

It will not always be easy to draw the line between social insurance and social assistance schemes, e.g. when a means tested benefit is targeted to the poorest sections of the population. Moreover, the terminology that states use to qualify the benefit schemes may sometimes be confusing. It may also sometimes be difficult to distinguish social security schemes from other social protection programmes. To avoid most of these problems and to maintain a sufficient degree of comparability, we have opted to limit our research to public cash transfer schemes that provide an income or compensate for certain costs, in the case of old age, survivorship, incapacity to work (sickness or invalidity, both in general or related to professional risks), unemployment, need for medical care, family burden or poverty. We shall not include social services; health care will only be included as far as the coverage of health care costs are concerned; the provision of health care by the state will in

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<sup>12</sup>Pieters (2006), pp. 1–8.

<sup>13</sup>Pieters (2009), pp. 21–25.

<sup>14</sup>Pieters and Schoukens (2012), p. 10.

principle not be examined. We shall also not deal with other social programmes, such as the ones relating to education or food. We are aware that this relatively narrows the perspective we have chosen and may pass by some important social policy issues, but we want to focus on what is traditionally viewed as one, valuable, social policy instrument, i.e. social security.

While social security, both social assistance and social insurances, have been the subject of much research, also legal and comparative research,<sup>15</sup> attention to the social security arrangements of small states has remained limited.<sup>16</sup> Moreover, the research very often focussed on regional issues, such as in the Caribbean or Pacific regions, which while certainly relevant to the small states concerned, are not necessarily linked to the fact that these jurisdictions were small (but e.g. rather linked to the high unemployment or poor demographic situation). We will explore whether the fact that a jurisdiction as such is small impacts its social security legislation and the way the social security system functions.

### 1.3 Social Security and the Law

Having defined the two crucial concepts of our research, i.e. small jurisdictions and social security, it is now important to clarify our research question. As we mentioned earlier, we would like to find out whether the fact that a state/jurisdiction as such is small has an impact on both the contents of the social security system and the way the social security law has been developed.

As for the impact of smallness on the social security system, it will be important to distinguish features of the social security systems of small jurisdictions that are not related to their limited population (but related to other features) and those directly connected to the limited population covered. Here, at first glance, some older studies related to small social security systems of larger countries may also seem to be relevant: when, for instance, in a country like Italy, self-employed architects have their own social security arrangements, these are small in terms of covered population, although Italy is not a small state. Small states' social security systems are small by definition, but in larger states, small social security systems may also exist. However interesting it may be to draw a comparison between small social security

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<sup>15</sup>See e.g. the research mentioned in Pennings (2006) and Pennings and Vonk (2015).

<sup>16</sup>Exceptions being e.g. UNRISD (2009). A worldwide overview of the main social insurance schemes, including also smaller states, is to be found in Social Security Programs Throughout the World (2020), in (the older) International Social Security Association (1980) or International Social Security Association (1994).

The renowned Commonwealth Small States Centre of Excellence in Malta focuses on public debt management, natural disaster management and mitigation, broadband internet connectivity, diplomatic training, women and enterprises and ocean governance; thus no social topics are included (see Commonwealth Small States Centre of Excellence 2020).



arrangements of bigger states and social security arrangements of small states,<sup>17</sup> it makes sense to focus here only on the social security systems of small jurisdictions: only they lack the administrative, financial, etc. backing of a large state; their lawyers and legislators who can deal with the social security law are limited (unlike in larger countries).

We shall not describe the social security systems of the 20 small jurisdictions under examination in detail, but rather explore the impact of their small population on these contents. Where possible, in our conclusions we shall not only identify some common features and challenges the social security systems of small jurisdictions face, but also suggest some paths to address these.

With regard to the impact of smallness upon social security law and its implementation, we shall naturally have to deal with a number of issues that are typically related to law and small states, such as the capacity of legislators (parliaments, governments, but also judges and administrators) to produce good law, more precisely good social security law. Special attention will be paid to the question where these legislators get their inspiration: is there an important phenomenon of legal transplants that must also be identified in social security law of small states? And if legal transplants have been used in some way, can they be considered to have been successful?

An extensive literature on legal transplants already exists, but it does not engage with the area of social security law. Considering the importance of elaborating the comparative legal theory on legal transplants, also in the area of social security law, we expand on the state of the art as far as legal transplants are concerned. Our study of the social security law of the twenty small jurisdictions will enable us to start verifying the general theory, doing so for an atypical sample of countries and an area of law that is often considered peripheral in comparative law.

As access to social assistance (under whatever name and form) and access (of some workers/inhabitants) to social insurance are quintessential for attaining the first of the sustainable development goals defined by the United Nations,<sup>18</sup> i.e. the fight against poverty, we will focus on the way the laws of social security of small states have defined that access.

Researching the impact of smallness on both the contents of the social security systems of small states and on the law governing these, can be distinguished, but in practice both aspects will often show to be strongly intertwined. This may already be exemplified by our special focus on the access-issue.

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<sup>17</sup>As was the case in International Social Security Association (1980). International Social Security Association (1994).

<sup>18</sup>See: United Nations (2020).

## 1.4 An Excursion: Legal Transplants

No legal order has developed completely independently from all other legal orders. All legal orders were influenced to a larger or lesser extent by foreign law. Each legal order consists of a unique mix of innovative law-making and borrowing of law.

In the case of a legal order, part thereof or an isolated legal norm or institution being taken over by domestic law from foreign law, we are dealing with a legal transplant or legal transfer. Some authors prefer to use other terminology, such as a ‘transposition of law’,<sup>19</sup> ‘the circulation of legal models’,<sup>20</sup> or even ‘legal irritants’.<sup>21</sup> We use the terms most commonly used in the literature, ‘legal transplant’ and ‘legal transfer’.

At this stage, it is already important to see that, notwithstanding the value of the concept of legal transfer or legal transplant, we are not confronted with a monolithic phenomenon, but rather with a spectrum that goes from influence to reception. Legal transplants or transfers will usually not be an exact copy of the foreign example. There is usually a translation: a linguistic translation and a translation into the legal language of the recipient legal order. Other adaptations may also be made to fit the recipient country’s legal order to coordinate with other legislation of the recipient country or simply to introduce local preferences etc. Of course, the more adaptations made, the greater the distance between the transferring and the recipient pieces of law will grow. Let us also observe in this context that it may not always be opportune for a recipient legal order to be open about the presence of a foreign influence or a transplant; as a consequence, legal transplants often go ‘undercover’ and are ‘disguised’ as genuine domestic law.<sup>22</sup>

Comparative law ‘discovered’ the issue of legal transplants in the 1970s with the pioneering work of Alan Watson.<sup>23</sup> In subsequent years, important literature on the topic was produced. Some have opposed the idea of legal transplants being possible altogether,<sup>24</sup> but the mainstream literature accepted the concept and focused not so much on the ‘if’, but rather on the ‘how’ of legal transplants.

Legal transplants can operate through case law, jurisprudence and legislation. Mainly legal transplants via legislation, new statutes or regulations, attracted most scientific interest,<sup>25</sup> but transplants have also been addressed through court decisions. We will also concentrate on transfers operated through legislation, when a lawmaker more or less takes over statutes or regulations developed elsewhere; some call it cases of ‘happy plagiarism’ by the lawmakers. This preference for statutory or regulatory transplants is related to the legal area. Social security law, which we are

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<sup>19</sup>Örücü (2004).

<sup>20</sup>Sacco (1990).

<sup>21</sup>Teubner (1998).

<sup>22</sup>Fedtke (2012), p. 552.

<sup>23</sup>Watson (1974).

<sup>24</sup>See: Legrand (1997).

<sup>25</sup>Barak-Erez (2014), p. 17.

considering examining, is usually dominated by statutes and regulations, also in common law countries.

As mentioned, the literature on legal transplants has so far shown particular interest in other areas of law, such as private law in general, commercial law, investment law, financial and banking law etc. It has also focused a great deal on transfers of law from Western European or US law to the law of other parts of the world. According to Jörg Fedtke,

borrowing is easier in areas of the law which could be described as more ‘technical’ in nature [...], whereas the outcome of a legal transplant becomes far less predictable when policy considerations and fundamental values such as human rights come into play.<sup>26</sup>

A similar distinction between ‘organic matters’ and more mechanical ones had already been made by Otto Kahn-Freund.<sup>27</sup>

The comparatist is interested in the phenomenon of legal transplants as such, but even more so in questions such as the factors determining a successful legal transfer. Also, the choice of the source legal order and the evaluation of the (dis)advantages of legal transfers as opposed to those of ‘home grown’ legislation, will fascinate the comparatist.

The reasons why a lawmaker, say a parliament or a government, will adopt pieces of legislation from another country can be very diverse. It can be for very pragmatic reasons: importing foreign law can simply save time and money compared to what one would have to spend writing new legislation oneself. This may be especially true when countries need to legislate in rather important areas of law in a very short space of time, as is the case after a substantial regime change (e.g. independence; end of communism; fall of a dictatorship). It may also be related to the need to respond to technological innovations and the possible moral dilemmas associated with these innovations.<sup>28</sup>

It is also possible that the transplant is motivated by the will to enjoy (at least part of) the prestige or credibility of the legal order one copies. A country may copy legislation of another country with a good reputation to promote foreign investment. The recipient country may also simply want to refer to another country whose prestige is important, even without consideration of a specific legal issue. The transplant may also occur because of popular pressure, be it ideological, political or religious preferences. For example, the impact of Soviet law on countries adopting Communism or, more recently, the pressure to incorporate parts of Sharia Law into domestic law in some countries.

Michele Graziadei observes that the role of university teaching and education, and that of private actors, such as global law firms, should also not be underestimated.<sup>29</sup> When most of your judges, practising lawyers, members of

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<sup>26</sup>Fedtke (2012), p. 552.

<sup>27</sup>Kahn-Freund (1974), pp. 1–17.

<sup>28</sup>Barak-Erez (2014), p. 19.

<sup>29</sup>Graziadei (2006), p. 473.

Parliament and other actors received their education in a specific country (the former colonial power, the US or the Soviet-Union, for instance) it is likely that the legal orders of these countries will continue to have an impact on them when active in the small state.

Transplants may also occur under some form of external pressure. In its milder form, a country may be invited or advised by other countries or international institutions to adapt certain pieces of domestic legislation. The pressure will of course increase if there are financial consequences for accepting a legal transfer. Here we can refer to all kinds of 'recommendations' from international lenders or international institutions. In an extreme form of pressure, the transplant will simply be imposed upon the recipient country by an occupying force or a colonial power. In such cases, the transplant is carried out *manu militari*, by force and without much of a say for the recipient country.

Finally, the transplant may be due to the adoption of international institutions establishing model laws. In such cases, the parties to the treaty are supposed to introduce domestic legislation more or less identical to the model law.

In the case of small states adopting foreign legislation, any of the reasons mentioned above for the use of legal transfers may be present, although some reasons may be more important for smaller states than for larger ones. For instance, the lack of personnel and resources is more likely to force small states to borrow from other states. There may also be a conflicting stance on the takeover of the legal system of the former colonial power: motives of prestige and reliability may encourage the adoption of laws from former colonial rulers, whereas this same historical relationship may discourage adoption if independence was gained as a result of conflict.

It is also important to look at the success of transplants, because developing a system to make better use of them would greatly benefit smaller states. As Barak-Erez puts it: "[r]ather than resisting transplantation, the focus should be on bettering its quality. In other words, the concern should be, to a large extent, regarding the quality of the transplants and the mechanisms that facilitate them".<sup>30</sup> In the literature, much attention has also been paid to the conditions that are more likely to lead to a successful legal transfer. These include the social, economic, cultural, ideological and religious environment in which the legal transplant will have to function, as well as the suitability of the foreign law to be incorporated in the recipient legal order. The flexibility of the transplant to adapt to a new legal environment and the political acceptance of foreign influence or pressure can be mentioned here too.

Finally, coming back to our starting point, because every legal order is a mix of domestic innovative law-making and legal transplants, we could say that the measure of success of a legal transplant could be compared to the (hypothetical) success of an equivalent domestic law-making process. It is, however, remarkable that until recently relatively little attention has been paid to directly comparing legal transplantation to its alternative; domestic law-making. An exception is the research by

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<sup>30</sup>Barak-Erez (2014), p. 25.

Grajzl and Dimitrova-Grajzl (2009), who explored the trade-off between the promulgation costs of a novel, home grown set of laws and the adjustment costs associated with subsequent amendments of transferred law. They conclude that transplantation saves on initial drafting and administrative costs compared to domestic law-making. On the other hand, when initial rules are transplanted, the need for subsequent adjustment, which is costly, may be greater. In their conclusions, they find that the factors that determine the choice to be made include the degree of heterogeneity of interests, the extent to which law reform caters to political elites, the attained level of legal maturity in a jurisdiction, the perceived match of the law considered for transplantation to local reality, and the degree of adaptability of the legal system.

Focusing on the specificities of small states, we believe we might find quasi-laboratory situations where the comparison between the “cost” of using a legal transplant and the “cost” of developing a home grown law may be easier to make. This could be the case for some small island states of the same region of the world, with similar legal systems and histories, some having chosen to develop legislation on a given topic themselves, whereas others have implemented it with a legal transplant. In our future research, we hope to be able to identify those cases which, for the theory of legal transplants, could prove to be extremely valuable. This could also illustrate the value of borrowing from other small states, rather than always looking to larger, often former colonial, jurisdictions.

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