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Editorial

In this issue, REALaw is the proud host of a series of contributions on transplants in the European administrative space. Guest editors for this special issue are Yseult Marique and Emmanuel Slautsky.

For several years now, I have been teaching a class to master students at the University of Antwerp on the 'what, why and how' of comparative administrative law. Even though the students have already enjoyed a thorough compulsory course on comparative law at the time when this class is offered to them, I still find it useful to specifically highlight some of the particularities of comparative research in my own field of law. A text from which I often quote during that session is one by della Cananea entitled 'Administrative Law in Europe: a Historical and Comparative Perspective'. In this particularly rich contribution, the author puts forward – but also challenges – the idea of administrative law as 'a national *enclave*'.[1] Indeed, the time during which legal systems only borrowed private law-related solutions from each other and regarded administrative law as too entangled with the political and historical foundations of the state has long gone. It is a time so far behind us that much of our comparative efforts today aim to find inspiration in other legal systems to solve legal problems in our own.

However – much like a kidney or heart transplant – a legal transplant can lead to rejection. In medicine, rejection is caused by a patient's immune system. Genetic factors are key in this respect, which is why family members will often be suitable donors. The European Union – if we can at all compare it to a family – does not consist of siblings with a joint parent from which they would have inherited common features. In fact, the EU's genesis has been a process more comparable to that of centripetal federal states, with enough common ground between Member States to make integration possible as well as differences to expect resistance now and then.

Therefore, increasing our knowledge of successful and unsuccessful legal transplants can crucially teach us something about our own domestic legal systems. As della Cananea explains, comparative analysis can 'hone our understanding of our own laws and institutions':[2] it enables us to define the characteristics of our own system of administrative law in sharper terms, and to convey information on prevailing national administrative law to others. Örücü's striking way of emphasizing this particular role of comparative law comes to mind:

'We know that everyday process of thinking involves the making of a series of comparisons, that is, a process of contrasting and comparing, juxtaposing the unknown and known, and we comprehend the phenomena round us by observing differences and similarities.

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1 G della Cananea, 'Administrative Law in Europe: A Historical and Comparative Perspective' (2010) 2 Online Italian Journal of Public Law 162, 167ff.

2 ibid, 208.

Just as the qualities of a yellow, its hue, brilliance and tone are perceived and sharpened most truly by placing it first on or beside another yellow and secondly by placing it in contrast to purple, so we explore the world around us.[3]

This is precisely the thought process that can be found in many of the contributions for this special issue: when legal transplants are rejected, it makes one wonder why this has happened and what this tells us about the receiving system. In discussing the success or failure of certain transplants, the authors have each been invited to explain which features of their system have been decisive for the outcome. Undoubtedly, the authors themselves gained new knowledge of their domestic legal system in the process.

When reading the contributions for this special issue, another thing that came to mind is that much can get lost in the process of transplanting, too. Indeed, whilst a legal system may intend to adopt a solution found in another legal system, it may fail to adopt those features that are its constitutive elements. Dacian C. Dragos' contribution is especially illustrative in this respect. The author explains that the institution of the Ombudsman was not received all too warmly in Romania at first, amongst other things due to its perceived lack of resources (hard law powers). Today, the Romanian ombudsman can 'lodge a court action in a plaintiff's name, challenging the public administration over its illegal acts or activities or its silence (no action or response)'.[4] This seems quite remote from the original idea behind the Ombudsman as implemented in many other European states, where mediation and the power to issue recommendations are often what is valued in the institution.

Some contributions by the authors have also rightfully warned us against taking for granted the existence of a 'European common ground' on many issues of general administrative law all too easily. This is even the case for general principles that have filled numerous books written by scholars specialized in EU law. The contribution by Sophie Boyron and Yseult Marique, for instance, reminds us that even in Western legal systems like the UK, the idea of proportionality as a general principle of administrative law – often expected to replace more traditional reasonableness tests – is all but generally accepted or self-evident: constitutional context matters. In this respect, another eye-opener was Emilie Chevalier's article on the reception of the principle of legal certainty in France. In other cases, even the idea of codifying certain parts of administrative law by giving them a proper statutory basis – and the legal status that comes with that – may still be hard to fit into certain national administrative contexts.

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3 E Örücü, 'Developing comparative law' in D Nelken and E Örücü (eds), *Comparative Law. A handbook* (Hart Publishing 2007), 45.

4 See title 4 of the contribution.

In the case of Agnė Andrijauskaitė's contribution, it was revealed to be for historical reasons.

Ulrich Stelkens' contribution discusses judicial protection in the area of public procurement law. In Germany, this has been considered an aspect of administrative action governed by private – rather than public – law, making the introduction of judicial review all but evident. Indeed, the degree to which a legal system accepts that administrative decision-making should be governed by a set of independent rules labelled 'administrative law', and not by private law, may also influence a system's readiness to welcome legal solutions developed elsewhere. When it comes to regulating the relationship between the administration and citizens, the degree of exceptionalism – i.e. the belief in the need for a set of rules distinguished from civil law – may vary widely across legal systems.

It is not only public institutions (usually courts) that often cast the decisive vote on whether or not legal transplants are successful. Social or political conventions or traditions, and the actors that embody them, can play a considerable role as well. The contribution by Petra Lea Láncos, Írisz E. Horváth and Sándor Szemesi's on leniency in Hungarian competition law is an excellent illustration of this, emphasizing the role of business culture. Moreover, Emmanuel Slautsky's analysis of the adoption of independent regulators in Belgium reveals a reason for resistance against this mode of administrative organization – one which thus far has remained under the radar. Slautsky refers to the traditionally strong role of social partners in regulating the Belgian economy, and to how this influence has been weakened by (EU) requirements for 'independence' in the case of independent regulatory authorities in the network industries.

Just as the various country-specific contributions in this special issue are each a delight to read, the guest editors' introductory article is in itself also a masterpiece. Readers will especially appreciate the systematic way in which the phenomenon of resistance is fleshed out. Specifically, the editors present us with a clear conceptual theoretical framework to study the *loci*, expressions, main factors, and outcomes of resistance against transplants.

In the concluding paragraphs, Yseult Marique and Emmanuel Slautsky advise us to be patient in awaiting the development of a *ius commune* in administrative law in Europe, since mindsets and routines change slowly. Some of the contributions in this edited volume indeed reveal that time – or a lack thereof – may be essential in making administrative law reforms acceptable and accepted in a certain legal community. In many legal systems throughout Europe, such as my own Belgian system, administrative law is still one of the least codified areas of the law. Change is often incremental and theories of administrative law are built up in an inductive way, ripening slowly in the case law through an exchange of arguments between litigating parties and the courts. However, change can go in all directions, and that direction is hard to predict. Change does not

guarantee progress.[5] Moreover, local or national traditions are not per se phenomena to wish away. This is all the more so since Article 4(2) TEU[6] itself protects national (constitutional) identity. This provision has been much debated, and there is still no broad consensus on its significance. As Marique and Slautsky themselves emphasize, the formal or unwritten constitution can be a reason not to welcome legal transplants. Administrative bodies and courts may find it much harder to depart from their general principles or rules of administrative law than we may be able to envisage, especially when these have constitutional value. These rejections are often rooted in beliefs and conceptions about democracy, the rule of law, separation of powers, and other core values of modern constitutions whose concrete consequences may still differ across European public law systems.

Seen from that perspective, resistance may be something to embrace. When it stems from constitutional concerns, it can reveal that those resisting – especially when they are public institutions – still care enough about upholding the ideals of liberal democracy, which can be translated very differently across constitutions of different nation states. Moreover, rejection may teach us something about what it may take to make this marriage of nation states we call the EU a successful one. Like a quarrel every now and again in an actual marriage, resistance informs us of what our partners in the EU require in terms of self-determination to stay in. Therefore, one should hope for much more research on legal transplants and resistance in the future of the same high quality as that brought together in this special issue.

Our issue also contains a case note by Giulio Allevato and Fernando Pastor-Merchante on the Hungarian Advertisement Tax case. The authors dive into the particularities of the case and warn not to transplant its reasoning to other cases all too quickly.

Finally, Rónán R. Condon took time to write an extensive book review of Zsófia Varga's *The Effectiveness of Köbler Liability in National Courts*. Even though the reviewer would have liked to see more attention paid to the *sui generis* constitutional structure of the EU, Varga's ambition to develop a bottom-up approach and the efforts made to put *Köbler* liability in context were much appreciated.

Stéphanie De Somer[7]

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5 Again, I find inspiration in G della Cananea, 'Administrative Law in Europe: A Historical and Comparative Perspective' (2010) 2 Online Italian Journal of Public Law 162, 193.

6 Consolidated version of the Treaty on European Union [2016] OJ C202/15.

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