Comparative Law as the Study of Transplants and Receptions

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Abstract and Keywords

The comparative study of transplants and receptions investigates contacts of legal cultures and explores the complex patterns of change triggered by them. The study of legal transfers offers considerable intellectual rewards. It shows that the law is a complex phenomenon and corrects simplistic views regarding what law is and how it develops. The spread of legal institutions, ideals, ideologies, doctrines, rules, and so on, is often in the hands of professional elites. The study of transplants and receptions demonstrates that the knowledge and standing of those elites comes from interactions between the local and non-local dimensions of the law, that is, between the national and international spheres. This picture is true in Berlin and in New York, in London and in Lima, but it is also true in less cosmopolitan environments.

Keywords: legal cultures, legal transfers, cosmopolitan environments, professional elites, Berlin, New York

I. Introduction

THE comparative study of transplants and receptions investigates contacts of legal cultures and explores the complex patterns of change triggered by them. While transplants and receptions have played an important part in shaping the world's legal systems since antiquity, even in the cosmopolitan world of comparatists, the subject of this chapter is a relatively new field of inquiry. Indeed, while the reception of Roman law in Europe has been an academic subject at least since the nineteenth century, the treatment of transplants and receptions as general phenomena became a major topic in comparative law only in the last three decades of the twentieth century, after the publication of pioneering studies that appeared before the 1970s.[1]

In 1970, the International Academy of Comparative Law dedicated a section of its Congress to 'The global reception of foreign law'.[2] Four years later, Alan Watson's *Legal Transplants* singled out that theme as a major subject for comparative legal studies.[3] In the same year, general methodological issues of comparative law were linked to the study of legal transplants and receptions by Rodolfo Sacco.[4] In the following years, the notion of legal transplants rapidly (p. 443) became a central 'paradigm' in comparative law. None the less, the very possibility of legal transplants was also contested and various essays by Pierre Legrand animated a lively controversy about transplants, attracting even more attention to the topic.[5]

Most of these contributions advanced theoretical reflections unconnected to actual projects of legal change, such as those promoted by the earlier American law and development movement.[6] None the less, in a shrinking world, those reflections were long overdue. Today, the importance of the topic is still growing. One sees it, for example, in law reform programmes adopted or supported by international institutions that promote legal change on a global scale. It is also prominent in the law and economics literature that investigates the relevance of transplants to economic performance.

II. Terminology

Possibly due to its rapid growth, the terminology of the field is still surrounded by some uncertainty. The term ‘transplant’ is based on a metaphor that was chosen *faute de mieux*, ill-adapted to capturing the gradual diffusion of the law or the continuous nature of the process that sometimes leads to legal change through the appropriation of foreign ideas. Alternative terminology that has gained acceptance (especially outside the common law world) is ‘circulation of legal models’. Thus, the Thirteenth Congress of the International Academy of Comparative Law discussed the topic to which this chapter is dedicated under that title. The *Association Henri Capitant* dedicated one of its annual meetings to the circulation of the French legal model abroad. More recent contributions speak of the ‘transfer’ instead of ‘transplant’ of law. The term ‘reception’ is sometimes used as a synonym for any and all of the above, though it also has a specific denotation referring to global legal transfers. In this sense, the most important case of ‘reception’ in the history of Europe is the diffusion of Roman law that occurred when the subject was taught in universities during the medieval and early modern ages. ‘Reception’ as a synonym for global legal transfer is not limited to this case. Indeed, the first legislative acts of the newly independent American States enabling their courts to receive and develop the English common law are known as ‘reception statutes’. And the list of terms used to identify legal change by legal transfer goes on. Generic (p. 444) expressions such as ‘influence’ or ‘inspiration’ are also in use, while other terms, for example, ‘cross-fertilization’, are gaining currency. All these variations subtly qualify the study of the main theme, but may also denote phenomena similar to those covered by a different terminology.

This contribution will take the terminological couple transplant/reception to be all-embracing for present purposes and will speak of ‘transfer’ where a generic term is suitable. It will not adopt further distinctions because it does not aim to develop a typology of the available materials, but rather to address some fundamental issues of this field of study. This approach does not pre-empt the question of the borders of the relevant phenomena, nor does it deny the variety of approaches and problems inherent to the study of legal transplants and receptions. In fact, the current debates over terminology reflect the open character of the debates over the law's mobility. The following pages will map them and assess them critically.

III. Some Classical Cases

An overview of the transplants and receptions that have changed (or are changing) the legal landscape of the world is a task that exceeds the ambitions of this piece. A brief presentation of some legal transfers that have acquired historical prominence is none the less helpful to understand the scale of the phenomenon and the complexity of the issues involved. Accordingly, this section covers the reception of the Roman law from the Middle Ages up to the epoch of the national codifications, the diffusion of some influential national codifications both inside and outside Europe, the expansion of the common law across the world, and the interaction between common and civil law in mixed legal systems. The last part of this section concerns the transfer of specific institutions in several places, as opposed to the reception of an entire legal system.

Inevitably, the cases considered below constitute a very small sampling of examples of legal transplants and receptions. The general character of both phenomena should alert the reader to the fact that the dynamics triggered by transplants and receptions are not unique to the geographical areas covered by the following survey, nor to the fields of law touched by it. There is, indeed, no lack of evidence that transplants and receptions have taken place in geographical areas and fields of law outside the reach of Roman, civil, or common law. An interesting case is the influence of traditional Chinese law outside China, notably in Japan before the Meiji era. Japan first borrowed Chinese characters in the early centuries of the Christian era, many centuries after their first use in China. The influence of China's literate culture in Japan produced the reception of the T’ang (AD 619–906) (p. 445) Codes by the imperial court during the eighth century AD. After that, Japan was exposed to neo-confucian ideas of family and governance that were adapted to the local situation. Even in the Tokugawa period (AD 1603–1867), which was marked by a relative isolation, Chinese influence in Japan was at work in the shogunate and daimyo domains.[7] The diffusion of Islamic law in the world is another major example of legal modelling on a large scale that has been studied in depth and deserves attention.[8]

1. The Reception of Roman Law in Europe and in Other Parts of the World

The re-birth of Roman law in the Middle Ages and its spread to most parts of continental Europe and Scotland probably represents the best-known case of diffusion of a legal model across the European space.[9]

This gradual process started in Bologna, the first centre of university learning, around the year AD 1070, as an intellectual attempt to bring to life an ideal model of law, out of force and not sanctioned at first, by any political power. The lawyers involved in this enterprise, with the notable exception of the Humanists, were not philologists. They tried to elucidate the meaning of their sources, but they looked at them primarily from the perspective of their contemporary reality. This fundamental attitude persisted until the end of the *ius commune* in Europe and explains the subsequent transformations of the interpretation and application of the Roman sources during that epoch. The lawyers involved in the reception of the Roman law felt free to adapt and reinterpret it whenever

they had sufficient reasons to do so.[10] This was hardly an original sin, however, as Justinian's compilation itself (p. 446) had seen the light thanks to the selective appropriation and the interpolation of the original sources.

As mentioned above, the story of this long love affair with Roman law had its initial centre of gravity in the universities. The universities adopted the study of Roman law as a proper object of learning. From the eleventh century onwards, Roman-law-based education at the universities prepared a whole class of learned lawyers who practised law as administrators, judges, and advocates. The Roman law revived by the universities eventually received political sanction from the Emperor, but sometimes met resistance even within his realm.[11] To be sure, the Roman law never completely prevailed, nor was it uniformly received throughout Europe even in the lands that today form part of the civil law world. Canon law, feudal law, and the law merchant evolved in parallel and were also part of the European landscape together with local legislation and the customary laws of each region. None the less, they too were often infiltrated by Romanist learning because of the common Roman-law-based education of the lawyers who dealt with them.

It is often claimed that Roman law was received in most European countries because of its superior quality but this point has been disputed too. Paul Koschaker, for example, held that this claim was at odds with the historical reality—the reception of Roman law in Europe was not the result of free choice, but of historical necessity.[12] To be sure, the occasional presence of strong central institutions antedating the triumph of the Roman law tradition at the universities may explain patterns of resistance to its reception. The growth of English law provides indirect support to this argument, which is also illustrated by several chapters of the history of French law.[13]

English common law developed on the foundations of the institutional structures provided by a set of centralized courts staffed by lawyers who were mostly trained as practitioners and not as doctors in civil law. To be sure, this is not to say that England remained completely isolated from the continent or that it ignored the Romanist legal heritage for most of its history. There are simply too many pages of English legal history that reveal contacts with that tradition to adopt this simplistic point of view.[14] In fact, over the centuries, the Romanist legal heritage (p. 447) repeatedly attracted attention in England. It inspired the elaboration of specific rules and eventually offered the opportunity to organize the structure of major subjects, such as contracts and torts.[15] Indeed, some institutions that are often thought to be specifically English, such as trusts, are, on closer examination, part of a wider European picture.[16] Even the sharpening perception of the distinctive features of the English legal tradition owes much to the comparison between the laws of England and the laws of continental Europe.[17] Until the twentieth century, American law was also exposed to the influence of the civil law, which began to decline only with the outbreak of World War I.[18]

For better or for worse, during most of its history, the system of origin of one of the world's main legal traditions developed along a path that was quite separate from the

teaching of the Roman law in the universities so that the impact of civilian learning remained much more limited than on the continent.

Outside Europe, the initial spread of the Romanist learning in Central and Latin America and elsewhere, for example, South Africa, was an effect of the expansion of colonial powers. The Roman law tradition was the legal tradition of the colonizers and, thus, became one of the sources of the local law.

2. Some Civil Codes and their Diffusion

The period of the *ius commune* on the European continent came to an end when the movement to codify the law produced a wave of legal change. The most (p. 448) influential codification in Europe was the French civil code enacted in 1804. Its model was widely imitated throughout the world.[19]

The diffusion of the French civil code was at first linked to the military success of the Napoleonic army. The civil code was initially enacted in countries annexed by France or brought under its rule. Thus, it entered into force in the Netherlands, first in a slightly altered version and then in its original form, when it was annexed in 1809. Belgium and Luxembourg were French territories when the code was introduced there. In Germany, the code was enacted in the territories beyond the Rhine that were annexed. Moving further east, the Napoleonic code entered into force in Poland where, as in some other countries, the code was not translated but simply enacted in French. In Switzerland, the Canton of Geneva and the Bernese Jura (both parts of the French Republic) had the code. But the French code was also imitated without being imposed. An early example of this different dynamic is found in the Louisiana Digest of 1808. This text followed the plan of the French civil code and was largely influenced by it, though Spanish civil law was also very influential in Louisiana at first.[20] The French legacy in Lower Canada was also apparent in the civil code of Lower Canada of 1866, effective until it was superseded by the Quebec civil code of 1994.[21]

The restoration following Napoleon's fall did not generally lead to the repeal of the civil code. In the countries where the original version of the code was repealed, modified versions were subsequently enacted. In the Netherlands, the *Burgerlijk Wetboek* of 1838 (recently repealed with the entry into force of the new Dutch civil code)[22] was essentially a translation of the French codification.[23] The Italian civil code of 1865, applicable until superseded by the *Codice civile* of 1942, was also by (p. 449) and large a translation of the French model.[24] The French civil code and the project of the first Italian civil code were in turn the basis of the Romanian codification that entered into force in 1865.[25]

The diffusion of the French *Code civil* outside Europe is remarkable as well. In Central and South America, its advent was facilitated by the fact that most countries achieved independence when the French civil code was practically the only model available (other than the Austrian codification of 1811). The Dominican Republic, Haiti, and Bolivia

replicated the original text most closely. Many of the subsequent codifications are indebted to the civil code of Chile (1855) and show a tendency to draw from more recent codes as well, such as the German (1900), the Swiss (1912), and the Italian (1942).[26]

In Asia, the Japanese civil code of 1898 is largely indebted to the German model, though it also includes features of the French.[27]

With the exception of Turkey and Israel, the *Code civil* reached Africa and the Middle East as well. African law students from francophone countries still often approach the law through the provisions of the *Code civil*.[28] Another vehicle of (indirect) French influence was the Egyptian civil code of 1949, which sought to knit together Islamic and Western law.[29]

While this diffusion of the *Code civil* was often imposed by force, the initial imposition was not the key to its final success. Its acceptance after Napoleon's defeat calls for further explanation.[30] In many European countries, the content of (p. 450) the civil code was not entirely novel. In fact, it rested to a great extent on the foundation of a common legal heritage. Though the *Code civil* could claim to be the first codification in the world to herald the ideals of a bourgeois society, the most radical ideas aired during the French Revolution were not incorporated into it. Furthermore, the rather loose character of several of its provisions made it a flexible and adaptable text. Indeed, its acceptance did not always mean a departure from the local legal culture. Finally, the introduction of the code (or some version of it) was often accompanied by reforms that excluded parts of it, such as the articles on marriage and divorce. Other parts that were considered defective from a technical point of view were also often rejected by the importing countries (eg the regulation of mortgages).

All in all, even when no legislation intervened to adapt the code to local circumstances, the application of the civil code in foreign lands made it part of, and influenced by, local history. Outside the European continent, the code has been simply one of the many components of a local legal order that was (and largely remains) pluralistic (see below, Section V). But, even in Europe, the fate of the code was more complicated than one would at first imagine. Neither Italy nor the Netherlands, for example, let liability for damage caused by things in someone s custody grow into a comprehensive system of strict liability, as it did in France on the unlikely textual basis of Art 1384 *Code civil*. In fact, the interpretation of the code outside France often stuck more closely to its letter than was the case at home. Thus, the course of the code's interpretation was no more predictable in France than abroad.

While no other civil code has matched the French *Code civil* in terms of foreign influence, the project of the German civil code became a source of inspiration for the Japanese civil code, which also bears traces of the French model. In turn, the Japanese codification provided the basis for the draft civil code of 1911 prepared in China during the last years of the Qing dynasty.[31] South Korea, while under the direct rule of Japan, also came into contact with the German model via the Japanese civil code. In Europe, the German codification influenced the present Greek civil code. But the history of the influence of the

German model abroad is a complex matter because that code was heavily indebted to the German legal science of its epoch. The influence abroad of German legal science from the middle of the nineteenth century through the first three decades of the twentieth century was simply immense. For example, virtually every twentieth-century civil code that (p. 451) has a general part is indebted to the German model of private law, in code form or otherwise.[32]

As another example, the Swiss civil code and the Swiss code of obligations[33] provided the substance for the Turkish civil code, enacted in 1926 after the creation of the Republic of Turkey by Kemal Atatürk. This transplant has been repeatedly investigated in the last century because of the remarkable differences between Switzerland and Turkey. The official demise of Islamic law and the adoption of a secular order as a consequence of the choice to modernize Turkey met resistance from the majority of the population. Today, the coexistence of official and unofficial law in Turkey offers a typical example of legal pluralism (see below, Section V).[34] Currently on its way to accession to the European Union, Turkey has recently amended its Constitution and changed the code to promote gender equality in family matters and to modify parts of its patrimonial law.

3. The Diffusion of the Common Law

The presence of the common law across the globe owes much to the growth of British trade and of Britain as a world power. At the heyday of its expansion, in 1921, the British Empire included almost a third of the world's lands and about a quarter of its population. After World War II, decolonization brought the empire to an end. The last significant British colony, Hong Kong, returned to Chinese sovereignty in 1997.

The British colonies comprised a variety of territories. Some lands were acquired by conquest or cession, others, such as the Australian continent, by right of first possession because they were considered to be unoccupied (*terra nullius*), although the factual premises of this distinction were sometimes false or dubious.[35]

The territories the English settlers colonized without recognizing prior sovereignty were brought under the rule of the common law unless the local circumstances rendered this solution inappropriate. This qualification was often more (p. 452) important than the rule itself. The sources of law in each colony varied because each settlement could be treated differently in consideration of the nature of the venture and pursuant to the applicable legislation. By contrast, the British policy concerning conquered or ceded colonies was to leave the law that was previously applicable in force, unless it was undesirable or repugnant from the British point of view.[36] Thus, the local court system, and the traditional mechanisms of dispute resolution in accordance with customary law, often continued to operate. Pursuant to this general policy, family and succession matters in the Indian subcontinent remained subject to Hindu or Muslim law.[37] However, during the nineteenth century, the common law effectively became the applicable law most other regards. This was camouflaged by the general principle that, specific enactment aside,

the courts of British India adjudicated cases according to ‘principles of justice, good conscience and equity’ if found applicable to Indian society and circumstances.[38] When the British Crown itself took over the administration of India from the East India Company after 1857, it pursued a programme of codification and consolidation of law along the lines of English law. Over a period of fifty years, a number of Acts prescribed rules for civil and criminal procedure, contracts, the sale of goods, partnerships, succession, and other matters. After the fall of colonial rule this legislation was not repealed wholesale and the common law legacy became part of the legal system of India.

A similar pattern of transition was apparent in the United States. After the creation of the Union, many of the federated States adopted ‘reception statutes’ receiving the English common law and Acts of Parliament as they existed as of a certain date (usually 1507, 1620, or 1776), provided that they were not contrary to federal or state constitutions or statutes.

The formal recognition of the link between the law of newly independent entities and English law has not been universal but, even where it has not occurred, the English legal heritage remained part of the newly established legal system. Therefore, today the laws of jurisdictions once under British control still share many distinctive common features. The role of the judiciary, the relationship between bench and bar, the methods of legal education, and the style and substance of the legislation make the impact of the common law tradition (p. 453) immediately clear to the foreign observer. Indeed, one could argue that some features of the original model are better preserved abroad than in England. But such a view of the matter is somewhat partial and superficial.

4. Mixed Legal Systems

Transplants and receptions have taken place across different legal traditions. In some cases, they have created mixed legal systems, that is, systems that exhibit features commonly associated with different legal traditions. Generally speaking, legal systems come in a variety of blends, for example, those produced by the influence of religious laws on secular regimes (and vice versa). In this sense, most legal systems are the result of mixing and show a motley composition. But the term ‘mixed legal system’ is commonly employed in a much narrower sense, that is, to denote legal systems in which the Romano-Germanic tradition (or, rather, a branch of that legal tradition, eg Spanish law, Roman Dutch law, etc.) has become suffused to some degree by English or United States law.[39]

Notable mixed jurisdictions in the latter sense include the Republic of South Africa, Scotland, Louisiana, Quebec, Puerto Rico, The Philippines, and Israel. All these legal systems have distinct foundations containing elements of both civil law and common law, though they sometimes include other components as well, depending on the circumstances. They imply a kind of pervasive duality that goes beyond mere acknowledgement of the historical origins of a specific rule or institution. For a variety of

historical reasons, these systems are often indebted primarily to their civilian heritage for the foundations of their private laws and to the Anglo-American legal tradition for their constitutional and public law, including court structure and procedure. Mixed legal systems thus show that the same legal order may be open to what is now often called ‘bijuralism’.[40]

5. Specific Examples

Is it possible to transfer a specific legal institution from one legal system to another? If wholesale transfers can take place, one can easily see why transfers (p. 454) concerning specific elements of law are possible as well. Indeed, there are countless examples. They are so numerous that one is tempted to conclude that nobody really likes to re-invent the wheel.

Transfers are easy to trace where they involve institutions that were introduced in rapid sequence in various places. If the national parliaments of several countries have, one after another, introduced workers' compensation schemes, compulsory insurance for automobile accidents, no-fault divorce, or antitrust legislation, we may rightly suspect that all these changes are somewhat related. The local law often evolves by learning from, or at least by being exposed to, other experiences.

Quite often, however, it is not easy to determine who produced the initial innovation that becomes the model. A vivid illustration of this point is provided by the diffusion of the system of land transfer that takes its name from Sir Robert Richard Torrens. Torrens was an Irish emigrant to South Australia in the nineteenth century. He claimed to have invented a system of land registration modelled after Lloyd's of London's method for keeping track of maritime insurance. He successfully campaigned for its introduction and was eventually appointed chief land registrar under the newly established system. However, the reform he promoted was not original. In South Australia, title registration had been an issue for more than twenty years before Torrens became involved. Several bills had already been presented to Parliament before Torrens actually took up an earlier project, the handiwork of a German immigrant, Dr Ulrich Hübbe, who had modelled it on the system operating in the German Hanseatic cities, and managed to have it enacted. But wherever similar legislation was introduced, the terms ‘Torrens Act’ and ‘Torrens titles’ were employed to refer to the innovation. Its intellectual precedent thus fell into obscurity. For more than a century, the Australians, who knew better, insisted on speaking of their ‘Real Property Act titles’, rather than ‘Torrens titles’ but since the 1970s, they too have accepted the general terminology. The history of the diffusion of the Torrens type of land registration is noteworthy because it also shows that some innovations may cross the boundaries of legal traditions that are usually considered to be far apart. Notably, the French colonizers introduced versions of that system in Tunisia, Madagascar, French Congo, West Africa, and Morocco, though the system of land registration in France was very different (except in Alsace-Lorraine).[41]

Even today transplants tend to be eclectic—they are often no more ‘coherent’ than those occurring in the past. Croatia's law on company groups followed the German model, but its tender offer rules are inspired by the American model.[42] (p. 455) The Italians looked to American law when they reformed their criminal justice system in the 1980s, but failed to adopt several crucial aspects of it.[43]

Two general remarks are appropriate here. First, transfers are often shrouded in ambiguity. The intellectual means deployed to carry them out and their material conditions and purposes often generate this lack of clarity. Usually, each player in the game has different stakes in it, different motivations, and different (eg linguistic or conceptual) means at hand.[44] Second, a new law enacted as a consequence of a transplant cannot be considered proof that the same economic, political, or social conditions prevail in both the giving and the receiving system. Thus, one country may enact legislation strongly protective of human or consumer rights in response to human or consumer rights movements, and such legislation may become the model for the law in another country where such movements are completely absent.

IV. Factors of Change

Legal change is caused by a variety of factors. Historically, the migration of a population often explains transfers of law.[45] Political decisions influence law making and sometimes lead to transplants or receptions. Religious, moral, or philosophical influences have produced changes across vast geographical areas. Technological change is often at the root of similar laws in different countries. Comparative law itself is sometimes involved in the transformation of the legal system. The abundant literature on the use of comparative law by legislatures and courts shows this possibility, though legal change inspired by the example of foreign models is seldom carried out on the basis of in-depth comparative legal studies. In the last decades, the production of uniform or harmonized legal norms at the international level has become a major force stimulating legal transplants across the world. Legal instruments providing uniform rules for several jurisdictions are usually adopted in the form of international treaties and conventions. Recourse to soft law texts, pursuing substantially the same ends, is becoming increasingly common. In the public law sphere, the ongoing elaboration of human (p. 456) rights instruments is a fundamental aspect of this general movement and touches upon constitutional law at the national level. Uniform and model laws are parts of the same trend with regard to private and commercial laws. Institutions such as UNCITRAL and UNIDROIT have been very active in this field and their work has a truly global dimension. Today various other entities compile and draft texts that help to disseminate uniform or harmonized models across the world.[46] Some of these organizations have a regional dimension. Thus, for example, the *Organisation pour l’Harmonisation en Afrique du Droit des Affaires* is working to reform the contract and commercial laws of sixteen African countries. Many public and private initiatives target specific geographical areas or sectors.[47] Projects of

regional integration often involve the enactment of uniform or harmonized legislation, as is the case under the European Community Treaty.

Confronted with the problem of understanding legal change, comparative law, of course, pays attention to these factors and initiatives. For example, comparative law is sometimes employed to gauge how much uniformity or harmonization is actually achieved by enacting uniform or harmonized norms, or to construe the respective instruments. Yet, the study of transplants and receptions should focus particularly on three factors of legal change that feature prominently in the analysis of these phenomena. These are: imposition of law through violence in one form or another; change produced by the desire to follow prestigious models; and reform for the purpose of improving economic performance. These factors accordingly receive special attention in the following pages.

1. Imposition

Transplants and receptions have often been the result of military conquest or expansion. During the twentieth century, the extension of German law to Austria after the *Anschluss* of 1938 is a notable example. The Sovietization of the law in Central and Eastern Europe after World War II is another case in point. The growth of colonial empires in Africa, the Americas, Asia, and Oceania brought with it the importation of Western models, which were the only ones familiar to the colonizers.[48] In (p. 457) the Middle Ages, military expansion by Islamic rulers extended the reach of Islamic law. Contemporary military operations in different parts of the world still trigger legal transplants affecting various dimensions of the law.

However, the landscape is not uniform. On the one hand, the imposition of foreign legal models can be a dramatic but transitory experience. In that case, there is ample opportunity for the ultimate rejection of the model imposed. On the other hand, the imposition of foreign law may be backed by the permanent political or military control of the dominating power. The regime thus established often generates dual and contradictory notions of legality.[49] This happens, for example, when the law in force grants rights to only part of the population while denying equal treatment to the rest.[50] Such a strategy of differentiation was characteristic of colonial rule but by no means limited to it and shows how oppressive legal regimes may enforce exclusion and produce alienation.[51]

Domination carried out by the application of force often requires the use of local skills and abilities. It is no wonder, therefore, that the colonial rulers invested so much energy in the creation of the stereotype of the loyal colonial subject.[52] Recourse to violence has also contributed to the diffusion of law in an altogether different way, that is, by causing lawyers to emigrate to a different country where they then contribute to the development of the domestic law. The intellectual history of comparative law in the twentieth century

is a testimony to this phenomenon: jurists escaping Nazism and fascism had to abandon their homeland and start a new life abroad.[53]

2. Prestige

Although legal change can be brought about by outright imposition, most often receptions and legal transplants have occurred without violence. The desire to have what others have, especially if it is deemed superior, may be enough to trigger (p. 458) transplants or receptions. Thus, 'prestige' motivates imitation.[54] While some have objected, describing prestige as a 'largely empty idea',[55] that objection fails to recognize that prestige is a well-known social fact.[56]

Generally speaking, prestige, like dominance, is normally associated with social stratification. Yet, as a factor of change, prestige differs from dominance in many respects. In contrast to prestige, dominance does not produce spontaneous adherence to cultural models. Furthermore, dominance is clearly dependent on the application of force and often disappears with it. Prestige does not display this dynamic. Though dominance and prestige are often joined, there are many examples of legal imitation driven by prestige alone. For example, the influence of German criminal law thinking among American scholars in recent decades can be explained only in terms of prestige.[57]

Legal change induced by the influence of a prestigious source often involves a variety of elements. A prestigious model may influence the development of the law by shaping legal ideals, institutions, categories, and rules. At least at the initial stage, those who are trying to replicate a prestigious model may be tempted to identify themselves with its authors. Thus, in the last quarter of the nineteenth century, the German professoriate became a role model for top legal academics in the United States.[58] Innovation brokers can also positively influence the diffusion of innovation associated with prestige. An innovation strongly supported by an opinion leader will spread much more rapidly than one that fails to enlist such support.[59]

Who governs the diffusion of an innovation supported by prestige? To be sure, the source proffered for imitation may provide incentives. Yet, the originators of the innovation may be unaware, or only dimly aware, of its impact elsewhere. They may know nothing (or very little) about the influence of their new model abroad and the local actors at the receiving end will manage the process of change. Their choice about what to do with the imported model can include options that would leave the authors of the original model baffled, surprised, or disappointed. An instance of this productive mismatch is the complex pattern of reception of the jurisprudence of Kelsen, Hart, and Dworkin in South America.[60]

(p. 459) 3. Economic Performance and the Transplant of Legal Institutions

Some of the most ambitious programmes of legal reform in the last decades have been launched by international financial institutions (in the first place the World Bank), or within the framework of international trade law agreements. Since 1990, the World Bank alone has supported 330 rule-of-law projects and spent almost $3 billion to fund them. The World Trade Organization agreements required legal changes on a massive scale in many countries. Many of these changes broadly qualify as legal transplants, or raise issues related to this topic. Quite often, the question is whether the transplanted law will function as expected by its supporters or merely constitute a deceptive façade behind which other arrangements prevail. The answer to this question is rarely an unqualified yes or no.

This aspect of the study of legal transplants involves an analysis of the relationship between economic performance and legal institutions. The question is whether legal transplants can improve economic performance by leading to the adoption of more efficient legal institutions. In other words, is the search for economic efficiency a major factor in producing legal transplants?

One thesis is that transplants often do facilitate the development of efficient legal institutions.[61] At first glance, this claim has some merit. The rise of similar legal institutions in different societies may be related to their capacity to lower transaction costs. The modern corporate form, trusts and other asset-management techniques, as well as negotiable instruments, among others, have replaced earlier legal forms that generated higher transaction costs. The inference is that their diffusion must be linked to their competitive advantage over alternative institutions associated with higher transaction costs.[62]

Yet, the notion that the efficiency of an institution or a rule explains its diffusion remains problematic. The idea that competition among legal institutions explains legal transplants (and more generally legal change) is questionable because of the assumptions on which it rests. The nature of decision-making under conditions of uncertainty and imperfect rationality in a world where ‘ideas, ideologies, myths, dogmas, and prejudices matter’,[63] suggests prudence. Nor can one ignore that vested interests play a major role in any battle for or against (p. 460) change.[64] The crucial factor in evaluating the chances of success for a proposed legal change seems to be the character of the transfer process rather than the nature of the law at stake.[65]

This is, of course, not to deny that the study of economics can provide empirical evidence about the effects of legal transplants. Thus, it is a welcome addition to the stock of tools usually employed by comparative legal studies for that purpose. Still, the quality of the economic indicators used to prove a correlation between economic performance and the law remains a persistent problem. None the less, projects pursuing reform through legal transfers are increasingly frequent. These transfers are usually supported by the promise of benefits designed to reward positive responses to the proposed changes.[66] As a consequence, governments come under pressure to introduce changes that conform to predetermined conditions. The accession to the European Union of the countries in

Central and Eastern Europe is a case in point.[67] At the international level, the imposition of particular conditions promoted by donors or lenders has an impact on the respective legal systems. More than ever, reform projects based on conditional access to resources affect the respective domestic institutions.

This tendency is the result of a conscious effort to develop a new approach to economic policy-making. During most of the twentieth century, economic policy in pursuit of economic growth was designed without paying much attention to institutional settings. With respect to the countries outside the socialist block, the assumption was that once the choice of a market economy was made, the market itself would create the conditions necessary for its own success. According to this logic, it was quite enough to remove the obstacles hindering the working of the market and ensure an appropriate level of investment. The approach changed after some notable failures, for example in the countries belonging to the Commonwealth of Independent States. More sophisticated theories of economic development began to acknowledge how important the quality of the institutions available on the ground was for promoting economic growth. Eventually, a richer view of the meaning of development emerged as well.

Somewhat paradoxically, economic approaches to development have thus highlighted the importance of some factors that mainstream economics has traditionally (p. 461) ignored, such as the quality of the legal system. Thus, international actors who have a stake in these projects now turn to the study of themes concerning legal transfers that have long been discussed in legal scholarship. It is true that interventions aimed at improving economic performance still run the risk of ignoring local knowledge. Still, the prescription of models and practices adopted in the most industrialized countries for less developed regions is now widely regarded as unsuitable and discredited.[68]

Of course, institutional change aimed at improving economic performance has a political dimension. The actors with global ambitions and powerful means are best placed to shape the politics of development. Their use of vague notions, such as ‘good governance’, is instrumental to these ends.[69] But orthodoxies designed for export may well be controversial at home.[70] Within this uncertain landscape, it is not easy to find a reliable standard by which to measure the legitimacy of legal transfers. Of major importance, it seems, are the accessibility of the information concerning the proposed change, the disclosure of its potential impact on the interested parties, and the degree and kind of the actors' involvement in the project.[71]

V. What Change?

Transplants and receptions have been mentioned above as a source of ‘legal change’ but this term itself is so vague that it invites critical scrutiny. Upon closer inspection, it turns

out that transplants and receptions coexist with patterns of change and continuity in various ways.

First, new meanings can be attached to old institutions and rules. The well-known expression: *plus ça change, plus c'est la même chose*, captures the irony of the situation. Sovietologists have often investigated the degree to which soviet law relied on pre-revolutionary law. Students of French law have done the same with (p. 462) respect to the law before the French Revolution. Obviously, innovations introduced through legal transplants may show similar patterns of continuity and change.

Second, the appropriation of foreign elements may be disguised by dressing them in familiar clothes. The invocation of ancient precedents or apparently similar local practices is a strategic move that renders familiar and customary what is truly alien and novel. Such strategies help to forestall adverse reactions to change and to facilitate its acceptance. Yet, they also betray the difficulty of understanding change in its own terms. *Plus c'est la même chose, plus ça change* could be the paradoxical motto showing how innovation proceeds in this case.

Overcoming the vagueness of the notion of 'legal change' is a major goal of comparative law as a study of transplants and receptions. Any such study should begin with an enquiry about what exactly is changing. Does the change in question involve only the operative rules of the legal system? Does it affect the level of operative rules and other levels of the legal system as well? By focusing on these questions, comparative law facilitates our understanding of how continuity and change are often interwoven.[72]

An additional approach that helps us understand the variety of elements involved in legal change is the notion of legal pluralism. It was first developed to describe the coexistence of customary law, religious law, and state-sponsored law in societies where the state was confronted with instances of alternative normativity.[73] Today we need to recognize that theories of legal pluralism are also relevant to contemporary legal systems, including those in which traditional customary laws or religious laws occupy a marginal place.[74] Such theories provide a broad framework within which to discuss legal transplants that may entail a certain degree of diversity among different elements of the same legal system. Contact among different legal orders can result not only in pluralism but also in hybridization when different elements are combined into new phenomena that cannot be entirely ascribed to any single point of origin. Legal systems commonly described as 'mixed' testify to this possibility.

In all these instances, the language of the law is transformed. The appropriation of foreign elements and their introduction into the local context often requires the invention of new terminology. Sometimes the reception or transplant of foreign law generates a new legal style. Ultimately, it may bring about a new legal consciousness. The difficulty of translating legal terminology into the vernacular as well as the existence of multiple vocabularies to express new and old concepts (p. 463) may well produce bewilderment

and perplexity.[75] These are symptoms of the challenges encountered when accommodating different frames of reference within a single language. Linguists who study code-switching could find an ideal field of study here.

VI. Legal Transplants and Receptions as Unsettling Topics

No matter how often transplants and receptions have occurred over time, the recognition of their contribution to the evolution of the world's legal systems still runs counter to some deeply held convictions about law. One of these convictions concerns the relationship between law and state authority. For a positivist, law is the expression of the will of the state. It can be unsettling to realize that law often comes from outside the state and that its adoption may have little to do with any express decision by state authority. Another conviction concerns the relationship between law and society. According to a long-standing and influential tradition of legal thought, law must reflect the mores and culture of a particular society. For adherents of that tradition, it can be unsettling to recognize that much of the law in one society is imported from another. Each of these convictions will be examined in turn.

1. Law and Authority

The recognition of legal transplants and receptions as proper objects of study has been hindered by adherence to legal positivism. Legal transplants and receptions challenge the notion that sovereign power determines legal change in all respects.[76] One response to that challenge might be that the transplants themselves occur because the sovereign power has made a decision about what the law should be. From this standpoint, the legislative adoption of a foreign code, for example, is merely legal positivism writ large. As mentioned above, some transplants do indeed occur because those in authority wish to adopt a solution that has proven itself elsewhere.

(p. 464) Nevertheless, this view attributes more control over the law to those in authority than they commonly possess. It also fails to recognize that legal transplants concern not only rules enacted by the sovereign but also ideals and modes of thought that are highly influential without being formally sanctioned.

It is true that even borrowing elements beyond positive rules can be the result of a rational decision by those in authority. Careful evaluations are sometimes made of the content of what is borrowed along with forecasts of the outcome of the experiment triggered by the transplant. There is something reassuring in knowing that others have already experimented with the element under consideration for adoption. Most transplants, however, are not the result of such conscious decisions nor are they supported by superior knowledge of what is imported. Historically, even proponents of transplants have rarely claimed perfect knowledge of what is eventually transplanted, nor have they necessarily evaluated it thoroughly. In fact, recourse to a legal transfer can be an open admission of weakness or lack of expertise. This raises the question to what extent even a transplant sanctioned by authority is a clear-sighted decision about what the law should be. How much understanding do lawmakers around the world have regarding the implications of their actions? How often do they act in clear recognition of the alternatives? In short, to what extent do those vested with authority really determine the content of the law?

Moreover, many legal transplants are neither mandated by those in authority nor concerned with any practical changes which might be of interest to them. Jurists have developed models of how people might live in society by choosing to work with a great variety of sources, many of which are remote or obscure. Often, they have not done so because their aims are realistic or practical or focused on the need to replace one legal rule with another. Thus, borrowings may reflect the desire to realize a certain ideal more than a realistic assessment of what can or should be done. When Roman law was revived by university teaching in the Middle Ages, it was at first simply a grand ideal. In a similar vein, natural law was developed as an ideal model to which actual legal orders did not necessarily conform. Even today, the best law students are required to learn not only positive laws but also to reflect upon what the law should be. Academics regularly develop purely theoretical perspectives in their publications that are completely

unrelated to the practice of law in their jurisdiction (or, indeed, in any jurisdiction). These are not anomalies—there are countless legal norms across the world that set ideals or goals to be attained rather than rules to be followed. The law is deeply involved with matters of principle,[77] as well as with more mundane considerations. The study of legal transplants and receptions highlights this reality, and it is important to understand it if we are to grasp the way in which legal transfers change the law. They (p. 465) need not do so because sovereign authority mandates some specific change, and they also highlight the gap between transplanting formal legal sources and transmitting tacit assumptions about law.

Even when those vested with authority have decided what law to import, the process of adaptation to the local environment will often add new and unexpected elements to the import. This is inevitable. It makes little sense to view these additions as distortions of the original model that would inexplicably fail to be reproduced locally. Although we commonly speak of ‘adaptation’ to denote this process of transformation, the expression must not mislead us. Sometimes these ‘adaptations’ actually increase the functionality of the import, but there are also ‘adaptations’ that are not ‘functional’ at all. Some reflect resistance to the import while others simply result from quirks of history. Be that as it may, imports are rarely received passively and any innovation faces challenges by forces that may resist change. In the world of law, just as in the physical world, there is no action without reaction.

Thus, those in authority are limited in their control of what the law is. That they are limited in these ways is perfectly consistent with the role a positivist ascribes to them: they possess authority and, indeed, sovereign authority. If that is all a positivist claims, legal transplants should not be unsettling. But they are unsettling if the positivist claims that the content of the law is merely what the sovereign has decided it should be. Transplants and receptions prove otherwise.

2. Law and Society

Legal transplants can also be unsettling to those who believe that law must reflect the mores and culture of a particular society. When law is transplanted, it passes from one society to another. To be sure, if all one believes is that the culture of a society is one force among many that influence the law's contents, there is nothing unsettling about that. But if law is considered inextricably bound and determined by social and cultural factors, transplants and receptions become a problem.

The common stock of ideas that most lawyers share about the relationship between law and society has been shaped by some grand narratives. Montesquieu's classical work on *The Spirit of the Laws* (1748) is a work that has foundational value for comparative law studies as well as for sociology. It is often cited to support the view that legal transplants and receptions have no influence on the evolution of legal systems. The conventional account of the work is that, for Montesquieu, it was ‘a great coincidence’ if the laws of

one nation actually suited another. This has lead to the conclusion that the factors shaping the evolution of the law are inextricably linked with forces at work on the local level, which Montesquieu duly listed.[78] But (p. 466) when reading Montesquieu, it is important not to miss a point often overlooked by his commentators. His argument against transplants was just that: an argument. Montesquieu was *arguing* against the advisability of legal transplants rather than coldly observing their failure or denying their possibility. His point was normative, not descriptive. When Montesquieu wrote, Roman law was still applicable in much of France, and his approach tended to undermine the universal claims of Roman law as *ratio scripta*.[79]

In the first half of the nineteenth century, Savigny conceptualized the relationship between law and society along similar lines but he added a romantic twist and effectively presented Roman law as an inextricable part of the German legal tradition.[80] After Montesquieu and Savigny, the idea of an organic connection between the law and the particular character of the people gained immense popularity. It became standard fare in European legal thought.[81] Incredibly, this idea won recognition just when the world was experiencing waves of legal transplants on an immense scale—without the paradox being noticed.

In due time, sociology, emerging from the tradition inaugurated by Montesquieu, embraced the notion that law reflects the constitution of society. Thus, in his classic work on the division of labour in society, Emile Durkheim argued that the law is an index or mirror of society.[82] Again, the claim of congruence and consistency between the law and society featured in Durkheim's work, just as in the grand narratives of Montesquieu and Savigny, required his readers to remain blind towards the reality around them. Eventually, the inconsistencies, contradictions, tensions, and vagaries in the law-and-society story were too obvious to go unchallenged. For a while, facts that did not fit the model could be explained away as due to time-lag or transition, or as peculiar to a particular historical period of development. In the end, however, the disparity between model and fact could no longer simply be ignored or side-stepped.

Thus today, the explanatory power of that model is doubtful.[83] This is partially due to the fragmentation of our notions of ‘society’ and ‘community’, which is now a common theme among anthropologists and sociologists investigating law.[84] By now, it is also clear that the law makes communities and societies just as it, in turn, is made by them. Legal institutions matter, and traditions can be ‘invented’.

It is also notoriously difficult to make precise empirical claims about the (p. 467) relationship between law and society.[85] Even quantitative studies on specific issues are facing the proverbial chicken and egg question.[86] It would be naïve to assume that whatever keeps society together is always disturbed by the changes triggered by transplants and receptions, at least when they are not imposed. If those changes are a regular occurrence in the history of mankind, they cannot be thought of as more ‘artificial’ than the supposedly ‘organic’ ones. It is also naïve to think that a legal innovation is bound to take firmer roots where it was first produced, rather than

elsewhere. Countless legislative projects abort in their country of origin but succeed abroad. Conversely, in some places, local innovations improve their chance of acceptance when they come dressed up in foreign clothes. Indeed, comparative studies often show that ‘function’ is the most elusive concept in the law and society discourse.

In recent years, Pierre Legrand has challenged the idea that legal transplants and receptions play a major role in producing legal change.[87] Legrand rests his claim not on a theory of how societies are constituted but on a denial that law can move from one society to another without a change in content. For Legrand, law does not have a determinate content apart from a given culture. Therefore, it cannot have the same content outside the community that first establishes it; thus it makes no sense to speak of legal transplants. Legrand argues that every language and every culture produces indigenous systems of meaning and world-views. These are bound to interfere with the very attempt to transfer law and will ultimately render such a transfer impossible. If comparative law ignores the significance of cultural diversity and difference, it can only approach the matter in a bookish or technical fashion, which is what Legrand sees in Watson's work on transplants.[88] Moreover, Legrand claims, Watson's approach is inherently conservative because it ‘lacks any critical vocation’.[89]

(p. 468) The argument that Watson's approach is conservative and may, therefore, promote undesirable political agendas can be dismissed rather quickly. The argument can simply be turned on its head: one can use Watson's approach just as well to develop a democratic critique of ruling elites.[90] Indeed, the study of transplants and receptions adds leverage to comparative law as a tool to debunk ideological perceptions of legal orders on a world scale.[91]

Closer consideration is owed to Legrand's larger claim that law does not have a determinate content apart from a given culture. It is true that when cultural differences are ignored, the focus on receptions and legal transplants can lead to facile conclusions about differences and similarities among legal systems. Here, comparatists should be mindful of a simple truth: ‘Once everything is the same, comparison will be impossible, or at any rate impossibly boring’.[92] All comparatists whose motto is *vive la difference!* will welcome Legrand's resistance to such an approach.

Nevertheless, it is far from clear that the transfer of law from one community to another is impossible (incidentally making the topic of this very chapter illusory). Ultimately, such a view rests on a claim about language and a claim about culture, both of which need to be examined more closely.

The claim about language is that it is so bound to culture that the terms of one language cannot have the same meaning in another. It is true that natural languages to some extent divide the world in different ways, as many have noticed. Still, languages have an open and evolving character that allows for linguistic change and cross-cultural communication.[93] Several legal systems have adopted multilingual laws. This shows that the same norms can, in principle, be expressed in several languages. The question whether cross-border communication can ever be ‘complete’ assumes that there can be

‘complete’ communication within any single linguistic system. But this assumption is questionable to begin with because it sets an impossible ideal standard. Our everyday life is a monument to misunderstanding, no matter what language we speak. On the other hand, the linguistic systems of individuals are often far more complex than the linking language, culture, and the law are willing to admit. Whole communities of individuals use different languages, spoken and written, for different purposes and in different contexts. This is not a recent phenomenon, that is, a by-product of modernity or of post-modernity. These facts are irreconcilable with a romantic view in which (p. 469) there is an indissoluble bond among law, language, and culture. Communication that takes place across linguistic or cultural boundaries is neither flawed nor doomed by definition. In short, there are problems with Legrand's claim about language.

His claim about culture is that each culture represents a unified and indigenous system of meaning. But this claim is problematic as well. If law is culture, we should be open to the idea that law, like culture, is the outcome of mishmash, borrowings, mixtures that have occurred, though at different rates, ever since the beginning of time.[94] If we view culture in this way, we can make sense of the opposing claims made by Watson and Legrand about legal transplants. According to Watson, ‘the transplant of legal rules is socially easy’.[95] The difficult task is the intellectual work that transplantation or reception requires. Students may have to learn Justinian's Institutes, read cases in law reports, or familiarize themselves with the civil code (and perhaps even all these things at once). Legislators, judges, lawyers, and commentators may draw inspiration from an extraordinary variety of sources while doing their jobs. It is not self-evident that when they do so, they will accord primacy to local sources rather than the ones they seek to borrow. At the same time, however, the meaning of the import will be determined by the sense that the local user gives it. The transfer of law (just like that of other cultural elements) involves the reproduction of certain elements across time or space. This is not a mechanical process. It involves human learning, and learning cannot take place without improvization and experimentation. Learning is both imitative, as it requires following a model, and improvisational and experimental because the model must be tested. Needless to say, this process is rather creative, as any teacher knows. But creative interpretation does not take place in a vacuum—it takes place in a cultural context. Consequently, it is idle to ask if there can be perfect imitation because such perfection is simply not the point. To be sure, this cultural dynamic may involve the sacrifice of autochthonous elements of culture. But it does not imply a passive attitude by the culture that is exposed to change.[96]

Hence, there is some truth in Legrand's claim that ‘the transplant’ cannot survive the change of context. The essential point is that the law is a product embedded in the specific culture of the local actors, a culture that is usually (p. 470) different—and sometimes radically different—from the culture that produced the imported law. This is not an endorsement of the extreme view that law has no determinate content apart from a given culture. It is simply based on the familiar view that the meaning of law is not fully determined, and that each interpreter will influence how it is understood. Consequently, although the meaning of law, like any other cultural element, may be manipulated,

rearranged, transformed, and distorted as it is passed on, the transmission of law from one culture to another can still take place. Thus, it is wrong to claim that '[a]t best, what can be displaced from one jurisdiction to another is, literally, a meaningless form of words'.[97] That would be true only if cultures were so totally distinct that the law of one culture meant nothing in another. But cultures are not that distinct. Although they are unique configurations produced by the individuals who share them, cultures interact and change through the transmission of cultural elements—every day and throughout the world. The identity of a cultural group is not compromised by change through contact with another culture, except in tragic cases.[98] On the contrary, the selective appropriation of foreign cultural characteristics is often crucial to the maintenance of a living culture.

Legrand does not deny this.[99] He is simply strongly objecting to the urge to make comparative law the white knight in the quest for the unification of different legal systems in Europe as elsewhere and, thus, to the strait-jacket that such an approach imposes on comparative legal research. When Legrand's claims are understood in this, qualified, manner, the existence of legal transplants need not be unsettling to those who believe that law indeed reflects the culture of a particular society.

VII. Lessons

We can now ask what the study of legal transplants can teach us about law. We have seen that in order to understand transplants, we must not regard them simply as expressions of sovereign authority. Instead, we must consider the variety of roles played by those who initiate them, be they state authorities, interest groups, or academic or professional elites. We can also see that we must consider how law is transformed when it is transplanted.

(p. 471) Neither of these considerations is directly related to the law's overall intellectual coherence, rationality, and responsiveness to society's needs. Some scholars regard these factors as essential to any intellectually satisfactory account of law and they criticize studies of legal transplants for neglecting them. Yet, such criticism is ultimately misconceived. Legal transplants are winning increasing attention in comparative law circles precisely because they challenge the philosophical emphasis on the law's overall intellectual coherence, rationality, and responsiveness to society's needs.

The distorting effect of this philosophical emphasis on theories which propose unified generic concepts of 'the law', 'legal culture', and 'society' becomes obvious here. One can also see this effect in studies that try to explain successful transplants in terms of their 'fit' with the society that adopts them. And can see it in the efforts of comparative law scholars to classify legal systems into legal families. As we will see, each of these approaches misunderstands how and why transplants occur because they have all been

led astray by the emphasis on coherence, rationality, and responsiveness to society's needs.

In short, legal theories proposing generic concepts of ‘law’, ‘legal culture’, and ‘society’ and stressing the law's coherence and consistency lead to stereotypes when the true issue is what, exactly, travels across time and space. Thus, such theories are part of the problem, rather than a key to the solution.[100]

To understand legal change in a comparative perspective, one must recognize that law in society is not the coherent and consistent object described by these generic concepts. ‘The law’ is really a generalization denoting a collage of legal artefacts.[101] Thus, within the same legal system, a multiplicity of factors can be at work. It may well happen that the application of the provisions of the French civil code falls into the hand of lawyers steeped in German legal thinking, who will read these provisions through the lenses of German legal categories. It may also happen that the structure of Justinian's Institutes is adopted to expound the common law, though the relationship between the two is, at best, elusive. Such odd combinations are rather common. Soviet lawyers could employ the notion of a legal act (*Rechtsgeschäft*)—the very symbol of private autonomy throughout the nineteenth century—while developing socialist law under a system of central planning. Islamic law may well accommodate customary elements of law which do not fully accord with, or indeed contradict, its sacred principles.

When we recognize this multiplicity, we can see that what crosses boundaries is highly diverse in both substance and form, even though it may simply be ‘the law’ to the untrained eye. Unified visions of legal cultures and legal orders should (p. 472) thus be replaced by a more analytic, dynamic, and realistic picture of the local law, which also comprises that law's interaction with other legal orders. Comparative law, as the study of legal transplants and receptions, shows that mismatch and contradiction are as much features of law as are consistency and coherence.

The process of transplantation and reception is often explained in terms of the supposed ‘fit’ between the transferred law and the local context. Scholars who take this approach often distinguish between autonomous and semi-autonomous institutions, or between self-contained and non-self-contained transplants, and so on.[102] Such distinctions are drawn in order to show which elements of the law can be transplanted (because they are rather loosely connected with their place of origin) and which cannot. It is commonly assumed, for example, that law governing economic matters (such as contracts) is rather easily transplanted while law pertaining to more culture-bound matters, such as family or succession law, is more resistant to reception. This approach, again, seeks consistency and rationality but by doing so, it distorts reality. One problem is that it pays insufficient attention to the reasons why transplants succeed or fail. They may fail on rather specific grounds, rather than simply on lack of ‘fit’, for example, because they are opposed by vested interests that would be adversely affected by legal change.[103] Another problem is that this approach does not explain how transplants actually occur. That law reflects or constitutes many of society's arrangements is beyond doubt. But the law may exhibit no

obvious connection with those arrangements. The claim that legal transplants occur because they ‘fit’ rests on broad generalizations about what is, and what is not, resistant to transplants and receptions. These generalizations are not supported by the study of the actual transplants themselves. The evidence advanced to support them is usually anecdotal and thus hardly compelling.[104] Indeed, there are glaring examples which run completely counter to the explanation of transplants by virtue of ‘fit’ with the recipient culture. Up to this day, for example, the English and the Scottish laws of contracts exhibit a number of significant differences that would be difficult to explain from the standpoint criticized here.

(p. 473) Yet another problem is that the approach of explaining transplants by their degree of ‘fit’ disregards the actors who effect transplants. Who these actors are affects what is transplanted. The study of legal transplants and receptions shows that networks of individuals and sub-communities have a conspicuous part in the diffusion of legal models across the world. Detailed investigations conducted at this level demonstrate who does what and for what purposes. Such investigations reveal more about the relationship between law and society than any broad generalization about the mutual ‘fit’ between them.

As we have seen, the sheer application of force has been a formidable engine of legal transfer. History also shows that change through transplants and receptions has often been produced by subtler means. The role of university teaching in the production and diffusion of legal innovation has been historically prominent. Today, transplants are regularly undertaken in the belief that imitation reduces the costs of legal innovation, at least in the short term.[105] Imitation based on this motivation need not ascribe prestige to its sources and may depend on circumstances that are entirely fortuitous. Private actors, such as global law firms, or organizations that receive governmental support, are also promoting the diffusion of legal models on a scale that was unknown before.[106] These global actors are actively pursuing strategies of legal change based on the mobility of law. The contemporary dynamics of legal change across the world can simply not be understood without attention to the global and international dimension of the subject. In short, ‘fit’ may matter, but so do the mechanisms of change. To be sure, to explain transplants in terms of ‘fit’ is attractive because it asserts coherence with pre-existing law. But reality is less coherent and more dynamic. Perhaps the limits of cultural transmission are ultimately only those set by our genes.[107]

Yet another way in which those who study comparative law have sought coherence is by attempting to divide the world into separate legal families and legal traditions. Comparative law assigns local law to such families and traditions by recording legal patterns that cross political boundaries. But these patterns are mostly the effect of transplants and receptions, rather than of independent parallel evolution caused by the uniform agency of extra-legal factors.

We are not concerned here with a general critique of such taxonomic exercises. Suffice it say that they are of little help for the study of legal transplants themselves. This study has shown that the boundaries of the world's legal systems are not (p. 474) watertight. Legal transfers regularly take place across those boundaries, irrespective of what comparative lawyers think about legal families and legal traditions. Indeed, transfers occur even while boundaries between one legal system and another are being drawn and where the significance of law for the identity of a society is emphasized. Therefore, the study of transplants and receptions shows that many qualifications are in order when presenting the world's legal systems as a group of legal families. This study also provides a better account of the resemblances among these families.

VIII. Conclusion

Comparative law studies tell us that legal orders owe their existence to both original innovation and borrowing. This mix produces a variety of unique legal experiences.

The study of legal transfers offers considerable intellectual rewards. It shows that the law is a complex phenomenon and corrects simplistic views regarding what law is and how it develops. The spread of legal institutions, ideals, ideologies, doctrines, rules, and so on, is often in the hands of professional elites. The study of transplants and receptions demonstrates that the knowledge and standing of those elites comes from interactions between the local and non-local dimensions of the law, that is, between the national and international spheres. This picture is true in Berlin and in New York, in London and in Lima, but it is also true in less cosmopolitan environments. The conditions under which this interaction takes place deserve careful study.

Students of legal transplants have often emphasized that the correlation between law and society is not self-evident as the law migrates. Here, we also need to take into account the communities and individuals involved in the transfer. As we have seen, to understand transfer, one must first consider the role of those who bring it about, whether they are state authorities, individuals, groups, global actors, or members of the academic or professional elite. One must also examine the ways in which what is borrowed is not lost in the process, but nevertheless transformed.

The study of legal transplants has sometimes been accused of embracing a conservative orientation. Yet, ultimately this study simply subjects the law's pretensions concerning its origins and ends to critical analysis. Doing so is not inconsistent with advancing progressive goals at all; in fact, it may actually be vital to a progressive agenda.

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Notes:

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(1) See eg the literature cited in Max Rheinstein, Hans-Eckart Niethammer, and Reimer von Borries, *Einführung in die Rechtsvergleichung* (2nd edn, 1987), 124 ff (quoting contributions by Max Rheinstein, Andreas B. Schwarz, and Imre Zajtay).

(2) The important precedent was the conference on the 'Reception of Foreign Law in Turkey', held by the International Association of Legal Sciences in Istanbul in 1955. See the *Annales de la Faculté de droit de Istanbul*, n 6, (1956) and Unesco, *International Social Science Bulletin* (1957), IX n 1.

(3) Alan Watson published widely on the topic since the first edition of this title. For a discussion of the first twenty years of his work on transplants see William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants', (1995) 43 *AJCL* 489. Watson's latest book on the subject is *Law Out Context* (2000)

(4) Rodolfo Sacco, 'Les buts et les méthodes de la comparaison du droit', in *Rapports nationaux italiens au IX Congrès international de droit comparé, Téhéran 1974* (1974), 113 ff, at 127–31.

(5) See below, Section VI.2.

(6) For an overview and a full bibliography, see David M. Trubek, 'Law and Development', in *International Encyclopaedia of the Social and Behavioural Sciences* (2004), at 8443.

(7) Dan Fenno Henderson, 'Chinese Legal Studies in Early Eighteenth Century Japan—Scholars and Sources', (1970) 30 *Asian Studies* 21. For a study concerning Vietnam, see Nguyên Ngọc Huy and Tạ Văn Tài (eds), *The Lê Code: Law in Traditional Vietnam: A Comparative Sino-Vietnamese Legal Study with Historical-Juridical Analysis and Annotations* (1987).

(8) One could cite an entire library on this topic. Abdullahi A. An-Na'im (ed), *Islamic Family Law in a Changing World: A Global Resource Book* (2002) surveys the state of affairs in the field of family law. The *Studies in Islamic Law and Society* edited by Ruud Peters and Bernard Weiss and the volume by Michael Kemper and Maurus Reinkowski (eds), *Rechtspluralismus in der islamischen Welt. Gewohnheitsrecht zwischen Staat und Gesellschaft* (2005), explore the interaction between Islamic law and local laws. On the relationship between religious and secular laws today in general, see Andrew Huxley (ed), *Religion, Law and Tradition: Comparative Studies in Religious Law* (2002).

(9) Franz Wieacker, *A History of Private Law in Europe* (trans Tony Weir, 1995); Manlio Bellomo, *The Common Legal Past of Europe, 1000–1800* (trans Lydia Cochrane, 1995) are the principal reference works in English. Peter Stein, *Roman Law in European History* (1999) provides a brilliant introduction to the topic, starting from the Roman foundations. Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (2000) covers the reception in Scotland.

(10) Indeed, since the codification of the civil law eventually rescued the study of the Roman law sources from their troubling association with contemporary legal practice, nineteenth-century German legal historians noticed that, as a result of codification, the Roman legal sources could be subject to a properly historical scrutiny. On this episode, see Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law* (2001), 44 ff.

(11) See eg Gerald Strauss, *Law, Resistance, and The State: The Opposition to Roman Law in Reformation Germany* (1986).

(12) Paul Koschaker, *Europa und das Römisches Recht* (2nd edn, 1953), 79–81, 137–8, where he expresses the opinion that ‘the question of the reception of a legal system is not a question of quality’ with reference to the reception of laws in general.

(13) John H. Baker, *The Oxford History of the Laws of England (1483–1558)*, vol VI (2003), 3 ff. On the French scenario, see John P. Dawson, *The Oracles of the Law* (1968), 262 ff.

(14) For an overall view of the links between English law and the civilian tradition see Reinhard Zimmermann, ‘Der europäische Charakter des englischen Rechts’, (1993)1 *Zeitschrift für europäisches Privatrecht* 4 ff; *idem*, ‘Roman Law and the Harmonisation of Private Law in Europe’, in Arthur Hartkamp, Martijin Hesselink, Carla Joustra, Edgard du Perron, and Muriel Veldman (eds), *Towards a European Civil Code* (3rd edn, 2004), 21 ff, at 34 ff. See also the series Comparative Studies, Continental and Anglo-American Legal History.

(15) David J. Ibbetson, *A Historical Introduction to the Law of Obligations* (1999); *idem*, ‘“The Law of Business Rome”: Foundations of the Anglo-American Tort of Negligence’, (1999) 52 *Current Legal Problems* 74 (with important final remarks).

(16) Richard Helmholz and Reinhard Zimmermann (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (1998); Michele Graziadei, Ugo Mattei, and Lionel Smith (eds), *Commercial Trusts in European Private Law* (2005), with further references.

(17) For an illustration of this point, see Michele Graziadei, ‘Changing Images of the Law in XIX Century English Legal Thought (The Continental Impulse)’, in Mathias Reimann (ed), *The Reception of Continental Ideas in the Common Law World 1820–1920* (1993), 115 ff.

(18) This issue is best analysed by distinguishing its different aspects. See Mathias Reimann, ‘Continental Imports: The Influence of European Law and Jurisprudence in the United States’, (1996) *The Legal History Review*, 391 ff; idem, *Historische Schule und Common Law: Die Deutsche Rechtswissenschaft des 19. Jahrhunderts im amerikanischen Rechtsdenken* (1993). Michel H. Hoeflich, ‘Translation and the Reception of Foreign Law in the Antebellum United States’, (2002) 50 *AJCL* 753. A different story concerns the heritage of Spanish and French law derived from early settlers and conquerors: Rudolf B. Schlesinger, Hans W. Baade, Peter E. Herzog and Edward M. Wise, *Comparative Law: Cases—Text—Materials* (6th edn, 1998), 16 ff.

(19) Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (trans Tony Weir, 1998), 100–22, provide an excellent overview in English. The following volumes collect important contributions: Barbara Dölemeyer, Heinz Mohnhaupt, and Alessandro Somma (eds), *Richterliche Anwendung des Code civil in seinen europäischen Geltungsbereichen ausserhalb Frankreichs* (2006). Jean-Philippe Dunand and Bénédict Winiger (eds), *Le code civil français dans le droit européen* (2005); various authors, *Le code civil 1804–2004: Livre du bicentenaire* (2004); various authors, *1804–2004: Le code civil* (2004); various authors, *La circulation du modèle juridique français, Travaux de l’Association Henri Capitant* (1993). Paolo Cappellini and Bernardo Sordi (eds), *Codici: Una riflessione di fine millenio* (2002). For a brilliant short piece, see Michel Grimaldi, ‘L’exportation du code civil’, *Pouvoirs* (2003), 80 ff.

(20) On the legacy of the French code in Louisiana: Vernon V. Palmer, ‘Concernant le 200 anniversaire du Code Napoléon: son importance historique et contemporaine sur la codification du droit en Louisiane’, in various authors, *Le code civil* (n 19), 575 ff.

(21) Jaen-Louis Baudouin and Pierre-Gabriel Jobin, ‘Le Code Civil Français et les codes civils québécois’, in various authors, *Le code civil 1804–2004* (n 19), 630 ff.

(22) Ewoud Hondius, ‘Le code civil et les néerlandais’, in various authors, *Le code civil 1804–2004* (n 19), 612 ff discusses the relationship between the new code and the French tradition.

(23) Indonesia and Suriname did not repeal the Dutch code after independence. Hence, the Dutch civil code of 1838 is still in force in both countries. Cp Jan M. Smits, ‘Import and Export of Legal Models: The Dutch Experience’, (2003) 13 *Transnational Law & Contemporary Problems* 551.

(24) Stefano Solimano, ‘*Il letto di procuste’: Diritto e política nella formazione del codice civile unitario. I progetti Cassinis* (*1860–1861*) (2003). The Italian civil code of 1865 is still in force in the Vatican State.

(25) Valentin A. Georgescu, ‘Rumänien—Sources et literature du droit privé (1800–1914/1918)’, in Helmut Coing (ed), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* III.2 (1988) 214 ff, 220–1.

(26) Alejandro Guzmán Brito, *La codificación civil en iberoamerica. Siglos XIX y XX* (2000); Gustavo Bossert, 'Bicentenaire du code civil: L'Argentine', in various authors, *Le code civil 1804–2004* (n 19), 539 ff. Bartolomé Clavero, Ama Llunku, Abya Yala, *Constituyencia indígena y codigo latino por América* (2000), discuss the fate of indigenous customs under the code both before and after independence. The Spanish civil code (1889) influenced the codes of Nicaragna (1904) and Panama and it entered into force in Cuba and Puerto Rico.

(27) Eiichi Hoshino, 'L'influence du code civil au Japon', in various authors, *1804–2004 Le code civil* (n 19), 871 ff. For a detailed analysis accessible in English, see Wilhelm Röhl (ed), *History of Law in Japan since 1868* (2005), 166 ff.

(28) See Kéba Mbaye, 'Le destin du code civil en Afrique', in various authors, *Le code civil 1804–2004* (n 19), 515 ff; Etienne Le Roy, 'Le code civil au Sénégal ou le Vertige d'Icare', in Michel Doucet and Jacques Vanderlinden (eds), *La réception des systèmes juridiques: implantation et destin (1994)*, 291 ff. What Le Roy writes about Senegal is true for other francophone countries in the same area.

(29) The key figure behind this code was 'Abd al-Razzāq al-Sanhūrī, who worked with Eduard Lambert on the codification project. Cp *Actes du congrès international du cinquantenaire du Code civil égyptien (1948–1998)* (1998). For a general view, see Pierre Gannagé, 'L'influence du code civil sur les codifications des états du proche orient', in various authors, *Le code civil 1804–2004* (n 19), 597. The Egyptian precedent was influential in Lebanon, Syria, Iraq, Libya, Algeria, Qatar, Kuwait, and Bahrain.

(30) James Gordley, 'Myths of the French Civil Code', (1994) 42 *AJCL* 459.

(31) According to Zhiping Liang, 'Law, Politics and Social Change: Codification in China since 1902', in CappeUini and Sordi (eds), (n 19), 401 ff, 410 ff, that text was a direct response to the extraterritorial jurisdiction of foreign powers in China at the time, and the fruit of the conviction that the Japanese turn towards Western law provided a model for the modernization of China as well. On this, see also Philip C. C. Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (2001).

(32) The influence of German scholarship in its heyday was so great that even where the law in force owed nothing to the German code the works of German jurists guided its commentary. Cp Ugo Mattei, 'Why the Wind Changed: Intellectual Leadership in Western Law', (1994) 42 *AJCL* 195.

(33) The Swiss codification itself was drafted in the light of the German and French experience with the codes: Bénédict Winiger, 'Le Code suisse dans l'embarras entre BGB et Code civil francais', in Dunand and Winiger (eds), (n 19).

(34) Esin Orücü, ‘Comparatists and Extraordinary Places’, in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003), 467, 477 ff. This is especially true in the field of family law: *idem*, ‘Turkish Family Law’, (2003) 18 *Migrantenrecht* 4; Ihsan Yilmaz, ‘Non-recognition of Post-modern Turkish Socio-legal Reality and the Predicament of Women’, (2003) 30 *British Journal of Middle Eastern Studies* 25. On the relationship between the code and the previous sources, see Ruth A. Miller, ‘The Ottoman and Islamic Substratum of Turkey's Swiss Civil Code’, (2000) 11 *Oxford Journal of Islamic Studies* 335.

(35) Cp *Mabo and others v Queensland* (No. 2) (1992) 175 CLR 1.

(36) On the situation in Canada, see Jacques Vanderlinden, ‘La réception des systèmes juridiques européens au Canada’, in *Revue d’histoire du droit* (1996), 359 ff. With respect to British colonies in Africa, see Gordon R. Woodman, ‘The Peculiar Policy of Recognition of Indigenous Laws in British Colonial Africa: A Preliminary Discussion’, in *Verfassung und Recht in Übersee* (1989), 273; Robert B. Seidman, ‘The Reception of English Law in Colonial Africa’, in Yash Ghai, Robin Luckham, and Francis Snyder (eds), *The Political Economy of Law* (1987).

(37) Werner Menski, *Hindu Law beyond Tradition and Modernity* (2003), 131 ff illustrates the impact of English rule on Hindu law. Muslim law was subject to similar pressure.

(38) *Waghela Rajsanji v Shekh Masludin* (1887) 14 Ind. App. 89, 96 (PC). The High Courts in Bombay, Calcutta, and Madras had original jurisdiction to apply the common law directly. See Martin Lau, ‘The Reception of Common Law in India’, in Doucet and Vanderlinden (n 28), 266 ff.

(39) For a general view of mixed jurisdictions (and a complete list of them), see Vernon V. Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001). See also the papers presented to the first worldwide congress on mixed jurisdictions: (2003) 78 *Tulane LR* 1–501. For an in-depth study concerning South Africa see: Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996) and the more recent essay by Francois du Bois and Daniel Visser, ‘The Influence of Foreign Law in South Africa’, (2003) 13 *Transnational Law & Contemporary Problems* 593.

(40) Nicholas Kasirer, ‘Bijuralism in Law's Empire and in Law's Cosmos’ (2002) 52 *Journal of Legal Education* 29.

(41) John Bell, ‘Property and Legal Culture in France’, in Peter Birks and Arianna Pretto (eds), *Themes in Comparative Law in Honour of Bernard Rudden* (2002), 83 ff, 95.

(42) Siniša Petrovic, ‘The Legal Regulation of Company Groups in Croatia’, (2001) 2 *European Business Organization LR* 285.

(43) Elisabetta Grande, 'Italian Criminal Justice: Borrowing and Resistance', (2000) 48 *AJCL* 227.

(44) The history of the enactment of the present constitution of Japan illustrates the point: Kyoko Inoue, *MacArthurs Japanese Constitution* (1991).

(45) Rheinstein (n 1), 126, rightly notes that the law of the English colonies in America was at first the law practised in the English villages and towns that the settlers had left. On this theme see eg David Grayson Allen, *In English Ways: The Movement of Societies and the Transfer of English Local Law and Custom to the Massachusetts Bay in the Seventeenth Century* (1981).

(46) John Braithwaite and David Drahos, *Global Business Regulation* (2000) show how this is occurring across many fields.

(47) Like those that have worked to advance legal reforms in central and eastern Europe, the ABA promoted the Central European and Eurasian Law Initiative (CEELI) to advance the rule of law and the legal reform process in that area. The Center for International Legal Cooperation (based in the Netherlands) supports legal reform in developing countries and in Central and Eastern Europe as well. The German Foundation for International Legal Cooperation is active in the same area. Cp more generally John C. Reitz, 'Export of the Rule of Law', (2003) 13 *Transnational Law and Contemporary Problems* 429.

(48) See M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975) (reviewing the impact of British, French, and Dutch colonial laws in various areas of the world).

(49) Upendra Baxi, 'The Colonialist Heritage', in Legrand and Munday (eds) (n 34), 46 ff, 48 ff; Laureen Benton, *Law and Colonial Cultures* (2002).

(50) There are abundant illustrations of the policy mentioned in the text. See eg Bartolomé Clavero, 'Minority-Making: Indigenous People and Non-Indigenous Law between Mexico and the United States (1785–2003)', in *Quaderni fiorentiniper la storia delpensiero giuridico* (2003), 175.

(51) For a broad reflection on this theme, see Sally Falk Moore, 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999', (2001) 7 *The Journal of the Royal Anthropological Institute* 95, 104–5 (referring the reader to the works of Richard Abel, Laura Nader, and Sally E. Merry); Jean Malaurie, 'Droit et logique coloniale', in Doucet and Vanderlinden (n 28), 449; Bernard Grossfeld, 'Comparatists and Languages', in Legrand and Munday (n 34), 154 ff, 168–9.

(52) Baxi (n 49).

(53) See eg Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (2004). On German emigré lawyers in the USA see Marcus Lutter, Ernst C. Stiefel, and Michael H. Hoeflich (eds), *Der Einfluss deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (1993).

(54) Rodolfo Sacco, *Introduzione al diritto comparato* (5th edn, 1993), 148 ff; Alan Watson, 'Comparative Law and Legal Change', (1978) *Cambridge LJ* 313.

(55) Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 *International Review of Law and Economics* 3. See also *idem*, *Comparative Law and Economics* (1999). Later works by the same author represent a different phase of his thought.

(56) The nature of social facts like prestige has been clarified by John Searle, *The Construction of Social Reality* (1997).

(57) Elisabetta Grande, *Imitazione e diritto: ipotesi sulla circolazione dei modelli* (2000), 43 ff.

(58) Mathias Reimann, 'A Career in Itself: The German Professoriate as a Model for American Legal Academia', in Reimann (ed) (n 17).

(59) William Twining, 'Social Science and Diffusion of Law', (2005) 32 *Journal of Law and Society* 203, 217–23.

(60) Diego Eduardo Lopez de Medina, *Teoría impura del derecho: La transformación de la cultura jurídica latinoamericana* (2004) illustrates this point with respect to Colombia.

(61) Mattei (n 55). Cp Chapter 26 of this *Handbook*.

(62) The features of these institutions in different places show significant variations, however. See eg Curtis Milhaupt (ed), *Global Markets, Domestic Institutions: Corporate Law and Governance in a New Era of Cross-Border Deals* (2003); John C. Coffee Jr, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control', in Klaus J. Hopt and Eddy Wymeersch (eds), *Capital Markets and Company Law* (2003), 663. On the gap that may exist between transplanted law and everyday practice, see the case study by John Gillespie, 'Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam', (2002) 51 *ICLQ* 641.

(63) Douglas C. North, *Economic Performance through Time* (Nobel prize lecture, 1993).

(64) See eg Michael Heller, 'A Property Theory Perspective on Russian Enterprise Reform', in Peter Murrell (ed), *Assessing the Value of Law in Transition Economies* (2001), 288 ff

(65) Cp Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, 'The Transplant Effect', (2003) 51 *AJCL* 163; Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect', (2003) 47 *European Economic Review* 165–95.

(66) Cp The World Bank, *Review of World Bank Conditionally: Issues Notes* (2005). For a view from the trenches, see Sally Falk Moore, 'An International Legal Regime and the Context of Conditionality', in Michael Likowski (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (2002), 333 ff

(67) Frank Schimmelfennig and Ulrich Sedelmeier, 'Governance by Conditionality: EU rule Transfer to the Candidate Countries of Central and Eastern Europe', (2004) 11 *Journal of European Public Policy* 661.

(68) Yves Dezalay and Bryan G. Garth (eds), *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (2002). See also the bibliography on the law and development movement cited by Trubek (n 6).

(69) Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006); Gianmaria Ajani, 'The Transplant of Vague Notions', in I. H. Sziágyi and M. Paksy (eds), *Ius Unum—Lex Multiplex-Festschrift in Honour of Zoltán Péteri* (2005).

(70) Yves Dezalay and Bryan G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (2002).

(71) Cp Gianmaria Ajani, 'By Chance and by Prestige: Legal Transplants in Russia and Eastern Europe', (1995) 43 *AJCL* 93, on the debates concerning transplants in post-soviet regimes.

(72) A good example of this dynamic is the present influence of American law in Europe: Symposium 'L'Américanisation du droit', (2001) 45 *Archives de philosophie du droit* 7–271.

(73) Cp Hooker (n 48).

(74) Cp Moore (n 51); Jacques Vanderlinden, 'Trente ans de longue marche sur la voie du pluralisme juridique', in *Cahiers de l'anthropologie du droit* (2003), 21; Norbert Rouland, *Legal Anthropology* (trans Planel, 1994). The works of scholars like Franz and Keebet Benda-Beckman, Nicholas Kasirer, Ichiro Kitamura, Roderick Macdonald, Laura Nader, and Gunter Teubner come to mind here.

(75) For an excellent study concerning the Japanese situation, see Ichiro Kitamura, *Problems of the Translation of Law in Japan* (1993).

(76) The point is forcefully made by Alan Watson, *Roman Law and Comparative Law* (1991), 97.

(77) This is why prices should not be confused with sanctions, and vice versa. They do not work the same way: Robert Cooter, 'Prices and Sanctions', (1984) 84 *Columbia LR* 1523.

(78) Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (4th edn, T. Nugent trans, 1766) Book I, Chapter 3, p 7.

(79) See Robert Launay, 'Montesquieu: The Specter of Despotism and the origins of Comparative Law', in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (2001), 22, 23 ff.

(80) Peter Stein, *Legal Evolution: The Story of an Idea* (1980), 56 ff.

(81) Jhering was not convinced, however: cp Stein (n 80), 65–6.

(82) Emile Durkheim, *The Division of Labour in Society* (1893, W. D. Halls trans, 1984). In later works Durkheim softened his position.

(83) See Chapter 24 of the present *Handbook*.

(84) Cp Roger Cotterell, 'Is there a Logic of Legal Transplants?', in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (2001), 71 ff.

(85) Lawrence Friedman, 'Some Comments on Cotterell and Legal Transplants', in Nelken and Feest (eds) (n 84), 93, at 94.

(86) Erhard Blankenburg, 'Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany', (1998) 46 *AJCL* 1.

(87) Legrand's many contributions on legal transplants cannot all be cited in the space of a footnote. A representative sample includes at least: Pierre Legrand, 'What Legal Transplants?', in Nelken and Feest (eds) (n 84), 54 ff, first published under the title 'The Impossibility of Legal Transplants', (1997) 4 *Maastricht Journal of European and Comparative Law* 111; *idem*, 'The Same and the Different', in Legrand and Munday (eds) (n 34), 240 ff; idem, 'Issues in the Translatability of Law', in Sandra Berman and Michael Wood (eds), *Nation, Language and the Ethics of Translation* (2005). Mitchel de S.-O. l'E. Lasser, 'The Question of Understanding', ibid 197 ff provides a helpful reading of Legrand's work. What follows in the text is my attempt to offer a concise critical discussion of his work on transplants, rather than a surrogate of it.

(88) See also Charles Donahue, 'Comparative Legal History in North America', (1997) 65 *Tijdschrift voor Rechtsgeschiedenis* 1, 15. For Watson's rejoinder, see Watson, 'Legal Transplants and European Private Law', (2000) 4.4 *Electronic Journal of Comparative Law*, <http://www.ejcl.org>(Jus *Commune Lectures on European Private Law*, 2).

(89) Legrand, ‘What Legal Transplants’ (n 87), 65–6. In the same sense, see Richard L. Abel, ‘Law as Lag: Inertia as a Social Theory of Law’, (1982) 80 *Michigan LR* 785, 803.

(90) Pier Giuseppe Monateri, ‘Everybody's Talking: The Future of Comparative Law’, (1998) 21 *Hastings International and Comparative Law Review* 825, 840, advances this reading of Watson's work.

(91) Cp Duncan Kennedy, ‘Two Globalizations of Law and Legal Thought: 1850–1968’, (2003) 36 *Suffolk University LR* 631; Lopez de Medina (n 60).

(92) Tony Weir, ‘The Timing of Decisions’, (2001) *Zeitschrift für Europäisches Privatrecht* 678, 685.

(93) More generally, research on cognition mechanisms contradicts the idea that cultures are cages: Raffaele Caterina, ‘Comparative Law and the Cognitive Revolution’, (2004) 78 *Tulane LR* 1501. On the possibilities of legal translation see Legrand's ‘Issues’ (n 87), but also Susan Šarčević, *New Approaches to Legal Translation* (1997).

(94) Claude Lévi-Strauss, *Race and History* (1952), 28. Cp Ulf Hannerz, *Cultural Complexity: Studies in the Social Organization of Meaning* (1990). To be sure, as Legrand himself illustrates, the local community can be unwilling to concede that its identity (like all identities) is syncretic: Pierre Legrand, ‘Comparative Contraventions’, (2005) 50 *McGill LJ* 669, 672–3.

(95) Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, with an afterword, 1993), 95.

(96) For this reason Esin Örücü, ‘Law as Transposition’, (2002) 51 *ICLQ* 205, proposed a new metaphor to speak of legal transplants. I do not know if the metaphor will stick, but the point is well taken.

(97) Legrand, ‘What Legal Transplants?’ (n 87), 63.

(98) See on this point the seminal contribution by Fredrik Barth (ed), *Ethnic Groups and Boundaries* (1969).

(99) See eg Pierre Legrand, ‘Issues’ (n 87), 48 n 47: ‘It seems pertinent to repeat that I should not be understood as arguing that communication across legal cultures is absolutely impossible’.

(100) Cp Stig Strömholm, ‘Comparative Legal Science—Risk and Possibilities’, in Marku Suksi (ed), *Law under Exogenous Influences* (1994), 5 ff.

(101) Rodolfo Sacco, ‘Legal Formants. A Dynamic Approach to Comparative Law’, (1991) 39 *AJCL* 1; Alan Watson, ‘From Legal Transplants to Legal Formants’, (1995) 43 *AJCL* 469.

(102) See the classic article by Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law’, (1972) 37 *Modern LR* 1.

(103) Compare the explanation of English resistance to good faith advanced by Hein Kötz, 'Towards a European Civil Code: The Duty of Good Faith', in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998), 243 ff (most English precedents concern commercial cases; the litigation raising issues of good faith in other jurisdictions is of a different nature), with that advanced by Gunter Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies', (1998) 61 *Modern LR* 11 (the type of capitalism prevailing in Britain would be the key to understanding English resistance to that notion. But what about Scotland then?).

(104) Cotterell (n 84), 71 ff, 80 ff, gives many examples of similar anecdotal evidence. David Nelken, 'Comparatists and Transferability', in Legrand and Munday (eds) (n 34), 446 ff, 457, rightly notes that: 'Legal transfers are frequently—perhaps predominantly—geared to fitting an imagined *future*' (emphasis in original).

(105) Alan Watson, 'Aspects of Reception of Law', (1996) 44 *AJCL* 335; Jonathan M. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process', (2003) 51 *AJCL* 839, 845, notes that transplants with this motivation 'may appear to have ludicrously little link to the drafter's society'.

(106) Yves Dezalay, *Marchands de droit: la restructuration de l'ordre juridique international par les multinationales du droit* (1992).

(107) Natural sciences define cultural transmission as the transmission of information between individuals by non-genetic means.

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