# Comparative Law, Transplants, and Receptions



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## Abstract and Keywords

The comparative study of transplants and receptions investigates the patterns of change triggered by contacts among laws and legal cultures. 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. Furthermore, it highlights how the language of the law is transformed as a consequence of such a dynamic through translations and adaptations. 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. This picture is true in Berlin, in New York, in London, and in Lima, but it is also true in less cosmopolitan environments. The study of legal transplants has sometimes been accused of embracing a conservative orientation. Yet, 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 be vital to a progressive agenda.

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# (p. 443) I. Introduction

\*WHILE transplants and receptions have played an important part in shaping the world’s laws since antiquity, even in the cosmopolitan world of comparatists, the subject of this chapter is a relatively new field of inquiry. 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 some early studies that appeared before the 1970s.1

After a pioneering conference on the ‘Reception of Foreign Law in Turkey’, held by the International Association of Legal Science in Istanbul in 1955, the International Academy of Comparative Law dedicated a section of its 1970 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 Subsequently, legal transplants rapidly 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 (see Section VIII.2).

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. Still, in a shrinking world, these reflections were long overdue. Today, twelve years after the original edition of this *Handbook*, the importance of the topic is still growing, and it has found its place in new textbooks.5 Recently, a commentator noted that: ‘Few concepts in legal scholarship have enjoyed such a remarkable “career” as the concept of “legal transplants”.’6 Law reform programmes adopted or supported by supranational and international institutions that promote legal change on a global scale provide contemporary examples of massive legal transplants. The law and economics literature that investigates the relevance of efficient institutions to economic performance covers the subject (see Section VI.3). Legal historians who work on global legal history investigate transformations that are linked to these processes; political scientist who study policy (p. 444) diffusion often deal with legal transplants (although they do not label them as such). 7 In an interdependent world, the law is never the result of purely local factors or formants.

# 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. An alternative term 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 under that title, while more recently, the Academy debated the same theme under the label of ‘Legal Culture and Legal

Transplants’ (‘La culture juridique et l’acculturation du droit’) at the XVIIIth Congress of Comparative Law in 2010, held in Washington, D. C.8 The *Association Henri Capitant* dedicated one of its annual meetings to the circulation of the French legal model abroad and published its proceedings on the topic in 1993.9 More recent contributions speak of the ‘transfer’, instead of the ‘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 the universities during the medieval and early modern ages. Yet, ‘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’. The list of terms used to identify legal change by legal transfer or diffusion goes on.10 Generic expressions such as ‘influence’ or ‘inspiration’ are also in use, while other expressions, for example, ‘cross- fertilization’ or ‘migration’ of legal ideas, institutions, and norms, have gained currency. All these variations subtly qualify the study of the main theme. For example, the notion of ‘transposition’ indicates the fine tuning and adaptation that must take place for a transplant to be successful,11 but a different terminology may still denote phenomena similar to those covered by another vocabulary.

(p. 445) 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. Such an approach does not pre-empt the question of the boundaries of the relevant phenomena, nor does it deny the variety of approaches and problems inherent in the study of legal transplants and receptions. In fact, the current debates about terminology reflect the open character of the discussion about the law’s mobility. The following pages will map them and assess them critically.

# III. Some Classical Cases

An overview of all the transplants and receptions that have changed (or are changing) the legal landscape of the world is a task that exceeds the ambition 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, and the expansion of the common law across the world. The last part of this section concerns the transfer of constitutional norms, to show more clearly that legal transfers are by no means confined to private law matters, but are found in every branch of the law.

Inevitably, the cases considered later constitute a very small sampling of legal transplants and receptions. The general character of these 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 many geographical areas and in disparate fields of the law around the world. An interesting case is the influence of traditional Chinese law outside China, notably in pre-modern Japan. 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) Codes by the imperial court during the eighth century AD with a few adaptations. After that, Japan was exposed to neo- confucian ideas of family and governance that were also adapted to the local situation. Even in the Tokugawa period (AD 1603–1867), which was marked by a relative isolation, the Chinese influence in Japan was still felt in the shogunate and daimyo domains.12 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. Islamic law itself has

(p. 446) been repeatedly confronted with the challenge created by contacts with other legal systems and their influence.13

## 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.14

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, not sanctioned at first, by any political power. The lawyers involved in this enterprise, with the notable later exception of the Humanists, were not philologists.15 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 com*mune* 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. This was hardly an original sin, however, as Justinian’s compilation itself had seen the light thanks to the selective appropriation and the interpolation of the original sources. Indeed, since the codification of the civil law eventually rescued the study of the Roman law sources from their troubling association with legal practice, nineteenth- century German legal historians noticed that, as a result of codification, the Roman legal sources could finally be subject to a proper historical scrutiny.16

As mentioned earlier, 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, for centuries to come, a whole class of learned lawyers who practised law as administrators, judges, notaries, and advocates. The Roman law revived by the universities eventually received political sanction from the Emperor, but sometimes (p. 447) also met with resistance, even within his realm.17 To be sure, the Roman law never prevailed to the exclusion of other legal orders, 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. They too, however, 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.18 Recent empirical research supports the idea that the rational, scientific, and systematic approach to the sources adopted as the basis of the training of jurists in the newly established universities was the cause of Europe’s medieval turn to the Roman law, rather than the intrinsic quality of the substantive rules on which the jurists exercised their intellectual powers.19

To be sure, the occasional presence of strong central institutions antedating the triumph of the Roman law tradition in 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.

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 of civil law. 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.20 In fact, over the centuries, the Romanist legal heritage 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.21 Indeed, some institutions that are often thought to be specifically English, such as trusts, upon closer examination turn out to be part of a wider European picture.22 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 (p. 448) continental Europe.23 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.24

For better or for worse, during most of its history, the system of origin of one of the world’s main legal traditions, the common law, 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 of Europe, the initial spread of the Romanist learning in Central and Latin America and elsewhere, for example, in South Africa, was an effect of the expansion of imperial and colonial powers. The Roman law was the legal tradition of the conquerors and colonizers and thus became one of the sources of the local law, which in Latin America was eventually replaced by codifications. In South Africa, Roman-Dutch law is followed in contract, delict, and some parts of property law, while in other fields, such as civil and criminal procedure, or company law, the English influence prevailed.

## 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 influential codification in Europe was the French civil code enacted in 1804. Its model was widely imitated throughout the world.25

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 or control. Thus, it entered into force in the Netherlands, first in a slightly altered version and then in its original form, when the country 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 that were annexed to the Empire, and in a few others, either with, or without modifications.26 Moving further east, the Napoleonic code entered into force in Poland where, as in some other countries, it 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 (p. 449) by it, though Spanish civil law was initially also very influential. 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 1994.27

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 (repealed with the entry into force of the new Dutch civil code in the late twentieth century) was essentially a translation of the French codification. The Italian civil code of 1865, applicable until superseded by the *Codice civile* of 1942, was also by and large a translation of the French model. 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 and was eventually replaced by a new civil code in 2011.

The diffusion of the model provided by the French *Code civil* outside of 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), which was partly based on the French precedent,28 and show a tendency to draw from more recent codes as well, such as the German (1900), the Swiss (1912), and the Italian (1942).29

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

With the exception of Turkey and Israel, the *Code civil* reached Africa and the Middle East as well. African lawyers in francophone countries still often approach the law through the provisions of the *Code civil*. Another vehicle of (indirect) French influence was the Egyptian civil code of 1949, which sought to knit together Islamic and Western law thanks to the efforts of ’Abd al-Razzāq al-Sanhūrī, who worked with Eduard Lambert and Louis Josserand on the codification project.30 The Egyptian precedent was influential in Lebanon, Syria, Iraq, Libya, Algeria, Qatar, Kuwait, and Bahrain.

While this diffusion of the *Code civil* was often based on force, the initial imposition was not the key to its final success. Its acceptance after Napoleon’s defeat calls for further explanation.31 In many European countries, the content of the civil code was not entirely novel. In fact, it rested to a great extent on the foundation of a common legal heritage.

(p. 450) Though the *Code civil* could claim to be the first codification in the world to herald the ideals of a bourgeois society, it did not incorporate the most radical ideas aired during the French Revolution. 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 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 of 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 in terms of foreign influence, the project of the German BGB 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; the legacy of the BGB is also present in the current debate about the making of China’s civil code.32 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 as well as the Portuguese codification of 1966, which, however, is also indebted to the Italian civil code of 1942. 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. And 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 has a general part is indebted to the German model of private law, in code form or otherwise. Indeed, in its heyday, the influence of German legal science was so great that even where the law in force owed nothing to the German code, the works of German jurists could guided its interpretation.

As another example, the Swiss civil code and the Swiss code of obligations provided the substance for the former Turkish civil code, enacted in 1926 after the creation of the Republic by Kemal Atatürk.33 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 (p. 451) Turkey fit a pattern of developmental idealism which has profoundly affected the country. Today, the coexistence of official law and traditional norms in Turkey offers a typical example of legal pluralism, at least with respect to family law34 (see Section VII). When accession to the European Union appeared feasible, Turkey amended its Constitution and changed the code to promote gender equality in family matters. More recent events require these reforms to be evaluated in a different light, although they are not for the moment disavowed.

## 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 height 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 the British considered them 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 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 previously applicable law 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 gained ground (p. 452) and became the applicable law in 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 under its new Constitution.39

A similar pattern of transition was apparent in the United States, although under very different constitutional and socio-cultural conditions. 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. Once more, reception involved transformation,40 and in any case the formative era of American law was marked by a variety of influences.

The formal recognition of the link between the law of newly independent countries 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 many jurisdictions once under British control still share several distinctive features. The role of the judiciary, the relationship between bench and bar, the methods of legal education, and the style and substance of legislation make the impact of the common law tradition 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; it needs to be qualified because the new environment often required an adaptation to new circumstances as well as imaginative change.

## 4. Constitutional Transplants, Borrowings, and Migrations

In recent years, legal transfers have become a hot topic in constitutional and comparative constitutional law.41 Yet, the topic is also a classic, for obvious reasons. Since antiquity, constitution making has been conducted through the study of previous experiences, either to borrow promising solutions, or to reject unfortunate constitutional

arrangements.42 Furthermore, the exercise of power or influence over a certain territory has also been a fertile source of (p. 453) constitutional transfers. Thus, for example, in the second half of the twentieth century, the process of decolonization carried with it constitutional transplants on a large scale, as it happened when the constitutions of several African States were written under the supervision of the British Colonial Office.43

This general pattern could not be openly acknowledged in the age of nationalism, because the prevailing philosophical view during the nineteenth century was that the constitution of a people depended in general ‘on the character and development of its self consciousness’,44 an idea that is hardly dead today. In the aftermath of the fall of the Soviet block, and under the pressure of a new pace of integration of the world system, the topic was bound to be considered in a different light, however. New perspectives pertain to the relation between the constitutional text, the local political and constitutional culture, the international and transnational dimensions of constitutionalism, and its relative success also with respect to the trajectory of constitutionalism in Asia.45 More recently, the study of the topic has benefited from quantitative approaches that add an empirical dimension, and that help to renew its theoretical edge by opening new avenues for research by showing what trends prevail at the world level through the diffusion of different constitutional models.46

There is at least one key example of a constitution that is clearly not a home-grown product, ie the post World War II constitution of Japan. It is considered a prime example of a constitution conceived and imposed by external forces with sufficient leverage to make it effective in the country. A retrospective analysis of this dynamic highlights the need for a more nuanced approach to this case, however, because whole sectors of Japanese society agreed that change was indeed needed in the aftermath of World War II.47 Other constitutional transplants, however, are much more dubious from a long term perspective, such as the recent constitutions of Iraq and Afghanistan, which were written at gun point.

Constitution-making in the present age has been standardized to a great degree and cast in a rather uniform language that is shared among constitutional elites and their consultants, as well as social movements with a constitutional agenda (think to the spread throughout the world of human rights norms). Günter Frankenberg points to the existence at the transnational level of a reservoir of constitutional ideas that are generated by a de-contextualized, hegemonic liberal constitutionalism, still shaping mainstream comparative constitutional studies. The isolation from the local context, as the initial step in the process leading to the creation of that reservoir, eventually makes these ideas suitable for display in a sort of IKEA showroom of universally applicable constitutional commodities.48 At the end of this process, there is the recontextualization and adaptation to a new or ‘host’ environment. This means that constitutions are not ‘invented’ by societies: ‘To be more precise, they are, by and large, (p. 454) constructed by constitutional elites and experts on the basis of transnational transfers, involving a great deal of *bricolage*’.49 Frankenberg is reflecting on a phenomenon that is well known to comparative constitutional law scholars, who speak of ‘constitutions without constitutionalism’ to refer to documents that do not live up to the promises they make, and that are quite often the results of transplants.50

Beyond this, there is the larger issue of constitutional interpretation conducted in the light of foreign examples, possibly as a vehicle for solutions anchored to them. The use of comparative law in constitutional adjudication has divided especially the US Supreme Court in the late 1990s and early 2000s, though it is far less controversial elsewhere. The role of comparative law in their interpretation is formally admitted by some constitutions, like the South African, which allows the Constitutional Court to consider foreign law in the interpretation of the Bill of Rights. Still, the use of foreign sources in the interpretation of constitutional law has proven to be controversial in South Africa as well. This is hardly surprising: one of the key problems of this exercise is how to select the pertinent material, and to decide what use of them is appropriate, beyond a mere show of erudition.

In a major study, Ran Hirschl notices that ‘comparative constitutional law scholarship often overlooks (or is unaware of) the methodological principles of controlled comparison, research design, and case selection deployed in the human sciences’, and sets out a range of proposals to improve upon the current situation.51 Until a rigorous approach is adopted, looking at other constitutions while interpreting one’s own will meet with some criticism. An answer to this criticism could be to develop a typology of constitutional experiences that shows how to correct unbridled, uprooted cosmopolitanism with a form of rooted cosmopolitanism, as Bruce Ackerman suggests to do in his forthcoming book on world constitutionalism. Still, in most countries, a ‘decent respect for the opinions of human kind’ is a cornerstone of contemporary constitutional law.52

# IV. Global Governance as a Source of Legal Transplants

Much of the literature on legal transplants concentrates on direct state to state transfers of law. States are clearly at centre stage when they contract for the introduction of specific regimes. US law on investment protection, for example, was introduced in several countries via free trade agreements, offering the prospect of greater access to the American market in exchange for adopting US-style investor protection rules.53 Yet, this model has never been (p. 455) adequate to understand other phenomena, such as the reception and the adaptation of foreign ideas, concepts, and rules through the study of foreign experiences by legal scholars, or through the diffusion of new business practices on markets. As a theoretical framework, the statist model of legal transplants has been rendered even more inadequate in recent decades because of the ongoing redefinition of the role of the state as a consequence of globalisation and the rise of the regulatory state. New global governance structures and networks of actors have transformed the dynamics of legal transfers both at the regional and the global level. The literature on legal transplants is paying increasing attention to this new landscape.

A rough estimate of institutions that are active at the global level to promote various goals and missions has identified about 2,000 international regulatory regimes.54 Many of these institutions are formidable norm entrepreneurs. Some of them, like UNIDROIT, have as their mission the unification of law at the world level with respect to particular sectors. For example, to understand why and how international commercial arbitration has spread, it is necessary to know the activities of UNCITRAL and of the International Chamber of Commerce. In a similar vein, to adequately address health or environmental law across the world one needs to have regard to the international regimes that by now constitute the overarching framework of every national regulation. Among these global players, the World Bank and the IMF are responsible for programs involving legal change on a massive scale. Financial markets law is shaped by the work of international organisms such as the International Organisation of Securities Commissions (IOSCO). These are just some of many examples that show how the diffusion of legal models can be coordinated at the world level. Transnational private regulatory regimes, supported by contract or company law, also provide new sets of binding rules that work across national boundaries to bring about more uniformity across markets with respect to technical rules, methods of production and distribution, risk-control regimes, and so on.55 Global networks of activists play a role in this respect too, by advancing campaigns that promote human rights, LGBT’s rights, a greener economy, etc.56 Today, the role played by non- binding tools to induce legal change across jurisdictions is remarkable. One interesting example in this respect is recourse to indicators to assess how states perform in various fields, from human rights to corruption and the establishment of business friendly environments. Benchmarking and measurement thus become a part of the governance techniques that contribute to the alignment of legal regimes across jurisdictions.57

(p. 456) All these inputs do not respond to a single logic. Some of them are top down, vertical mechanisms for securing states compliance with international norms. Others are horizontal, market-led initiatives that target firms as economic actors. Still others are bottom up, grass-root initiatives that rely on networking and mobilisation to advance civic causes. In one way or another, they all contribute to adding new dimensions to the study of the transfer of laws (and related policies) across the globe, often responding to crises or problems that have a true transnational dimension.

# V. Legal Transplants, Language Contact, and Legal Translation

Much law is entrusted to language, whether written or not, but much of it—even today— is not. It may be expressed through non-verbal symbols—images, for example—or remain implicit, and to be inferred from conduct. One of the major problems that legal transfers raise is how communication takes place through (radically) different linguistic means and in different cultural contexts. The transfer of law across linguistic borders is inextricably bound up with massive translation efforts. They often lead to the introduction of a new vocabulary and concepts. Thus, the accession of several Central and Eastern European states to the EU required the translation of the EU acquis into Slavic languages, a formidable challenge in its own right. Eventually a new terminology was coined and these languages were correspondingly enriched.58 The crucial question then, is how to work through languages to ensure that they express a certain normative content? Much depends on what linguistic and conceptual resources are available or can be conjured up for this purpose. The first translations of the US Declaration on Independence into Japanese or Chinese surely posed some difficult problems in this respect.59 Today, the translation of human rights norms into the local vernacular is a good example of the problems associated with the exercise.60 The turn towards a Westernized legal system as a rule involves a great deal of linguistic innovation, not just to cover the more technical aspects of the law, but also to capture its intellectual context, as far as possible.61 A specialized literature dealing with legal translation and language contact, by now consisting of hundreds of titles, is exploring these and (p. 457) other themes concerning the relations between legal transfers, language contacts, translations, and language change. The function of this short section is simply to alert the reader to its crucial importance with respect to the study of legal transplants as well.

It has been argued that legal transplants cannot succeed because ‘at best, what can be transferred from one jurisdiction to another is, literally, a meaningless form of words’.62 The question whether the linguistic match is possible, or more or less satisfactory, is clearly open to debate in all these contexts. But the transfer of ‘a meaningless form of words’ is neither a figment of the imagination nor an odd joke. It is a fact that calls for attention to the need to find out how language contact, word formation, styles of communication, and translation operate in the transformation or the making of a legal culture. That meaningless form of words, namely an example of heteroglossia, is profoundly implicated in the project of an imagined future that is shaped through the imposition or the appropriation of the foreign.63 Unfortunately, as Ralf Michaels notes commenting on these issues, the power of the form is missed by most contemporary legal scholarship as a consequence of its anti-formalistic posture.64 I have argued elsewhere that the concept of mediated action, that is action relying on cultural tools to achieve its ends, may help to understand how texts—even foreign texts—turn out to be formidable instruments in developing and fixing new laws and new normative practices.65

# VI. Factors of Change

Legal change is caused by a variety of factors which often concur to produce a particular outcome. Historically, the migration of a population, or a foreign presence in the country, has often been at the root of legal transfers; so has the need to accommodate a foreign set of rules in a legal system.66 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 may lead to the adoption of (p. 458) similar laws in different countries, or at least to an examination of how to respond to similar conflicts here and there (consider the response of various legal systems to the new services introduced by the transportation platform Uber). 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. Lack of resources, time pressure, or sheer neglect often lead to transplants that are not prepared by careful studies.

As mentioned earlier, in the last decades, the production of uniform or harmonized legal norms at the international level has become a major force for stimulating legal transplants across the world. Many public and private initiatives target specific geographical areas or sectors.67 Projects of regional integration often involve the massive enactment of uniform or harmonized law, as is the case in the European Union. Although this is not usually observed through the lenses of ‘legal transplants’, some of the problems that are discussed with respect to the enactment and implementation of EU law, or more generally of uniform or harmonized norms, reflect the same concerns that often emerge with respect to legal transplants.68

Confronted with the problem of understanding legal change, comparative law pays attention to these factors and initiatives. For example, comparative legal study is sometimes employed to gauge how much uniformity or harmonization is actually achieved by enacting uniform or harmonized norms, or to construe the draft instruments to begin with. So far, however, comparative legal scholarship has generally refrained from systematically asking whether and how other academic disciplines actively pursue studies that intersect with the field of legal transfers and can thus cast light on them. It should be clear, e.g., that the study of economics, political science, and anthropology stand out as promising allies in the enterprise. Psychology, neurobiology, etology, and linguistics in turn can deliver fundamental clarifications about cognition, imitation, improvization. emulation, adaptative learning, and language contacts and translation—matters that are vital to an understanding of the bases and the dynamics of cultural diffusion.

The following pages discuss four 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; reform initiatives that aim to improve economic performance, and the role of politics in the making of transplants.

## 1. Imposition

Transplants and receptions have often been the result of military conquest or expansion. The growth of colonial empires in Africa, the Americas, Asia, and Oceania brought with it the selective importation of Western models, which were the only ones familiar to the

(p. 459) colonizers.69 In the Middle Ages, military expansion by Islamic rulers extended the reach of Islamic law. 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. 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 for substantial periods of time by the political or military control exercised by the dominating power. The regime thus established often generates dual and contradictory notions of legality.70 This happens, for example, when the law in force denies equal treatment to all.71 Such a strategy of differentiation was characteristic of colonial rule—often showing that the law in force in the colonies did not work as in the metropolitan territory—but by no means limited to it. Oppressive legal regimes enforce exclusion and produce alienation.72 When independence is gained, the laws of the colonizer may be maintained to avoid an alledged legal vacuum or for other reasons.73 Their reach may be even extended (at least on paper) to assert that the new regime grants the equal protection of the laws to all. For example, the French colonizers did not systematically apply the French civil code to the indigenous populations of Western Africa, but in the wake of independence the newly established States of this region decided that the Code civil would not just govern transactions among the Europeans, but also, as far as possible, among the locals.

Domination or coercion through the application of force often requires the use of local skills and abilities. It is no wonder, therefore, that colonial rulers invested so much energy in the creation of the stereotype of the loyal colonial subject.74 This strategy shows how force or coercion may be blended with other factors such as prestige to uphold a specific legal regime (see Section V.2). 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 testimony to this phenomenon: jurists escaping Nazism and fascism had to abandon their homeland and start a new life abroad.75

## (p. 460) 2. Prestige

Although legal change can be brought about by outright imposition, receptions and legal transplants have often occurred without violence. The desire to have what others have, especially if it is deemed superior, may be enough to trigger transplants or receptions. Thus, ‘prestige’ motivates imitation.76 While some have objected to this notion, describing prestige as a ‘largely empty idea’,77 that objection fails to recognize that the influence of prestige is a well-known fact, not only in the field of law, but also beyond it.78

Generally speaking, prestige, like dominance based on outright imposition, is normally associated with social stratification, and so it must be understood as a variety of power. An ideology determining what is deemed ‘superior’ is an ideational component that supports the working of prestige as a ruling factor.79 As a factor of change, prestige differs from dominance in several respects. In contrast to prestige, dominance does not produce willing adherence to cultural models. 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 imitation driven by prestige alone. For instance, the circumstance that in the nineteenth century the German professoriate became a role model for top legal academics in the United States can only be explained in terms of prestige.80

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. 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.81

Who governs the diffusion of an innovation supported by prestige? To be sure, the source proffered for imitation may provide incentives, and thus act as a policy-maker. 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. As a result, 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 (p. 461) 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.82

## 3. Economic Performance and the Transplant of Legal Institutions

Some of the most ambitious programmes of neo-liberal 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. Many of these changes broadly qualify as legal transplants, such as the massive enactment of new IP laws as a consequence of the TRIPS Agreement, one of the most contentious international agreements signed by a large number of countries.83 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 (although some clear ‘no’s’ are on record84).

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. A distinct issue is whether the search for economic efficiency plays out as a major factor in producing legal transplants. In the last few decades, law reform initiatives with an impact on the economy have seldom refrained from claiming that they aim to introduce more efficient regimes. Hence, at least as a rhetorical device, ‘efficiency’ works wonders.

When the merits are considered, one thesis is that transplants often do facilitate the development of efficient legal institutions.85 At first glance, this claim is plausible. The rise of similar legal institutions in different societies may be related, e.g., 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.86

(p. 462) Yet, the notion that the efficiency of an institution or rule explains its diffusion remains problematic. It is also questionable to argue that the efficiency of institutions on the ground depends on their legal origins, as La Porta Silanes and others have claimed.87 The debate over the legal origins hypothesis ended up in a refutation of the initial thesis, namely that more efficient outcomes were connected to the common law origins of the transplanted rules.88 There is, however, evidence of path dependency in the patterns of reception, as Holger Spamann has shown with respect to corporate and securities law by documenting the frequent and often exclusive use of legal materials and models from the respective legal family’s core countries in treatises and law reform projects in thirty-two jurisdictions.89

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’,90 suggests prudence. Nor can one ignore that vested interests play a major role in any battle for or against change, and worthy causes for resistance may be grounded in a variety of considerations. 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.91 Still, there are at least some clear cases of law reform initiatives targeted at enhancing efficiency, such as the development of new mortgage laws in Eastern Europe under the aegis of the European Bank for Reconstruction and Development.92

It is clear that the study of economics can provide empirical evidence about the effects of legal transplants in terms of economic performance (or lack thereof).93 Thus, it is a welcome addition to the stock of tools employed by fact-based comparative legal studies. Still, the quality of the economic indicators used to prove a correlation between economic performance and the law remains a persistent problem because measuring legal effects is a notoriously difficult task, especially in a cross-cultural context.

Somewhat paradoxically, purely economic approaches to development have highlighted the importance of some factors that mainstream economics has ignored for decades, such as the quality of the legal system. Thus, international actors who have a stake in these

(p. 463) 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. The prescription of models and practices adopted in the most industrialized countries for less developed regions is now widely regarded as unsuitable and discredited as a starting point.94

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.95 But orthodoxies designed for export may well be controversial at home.96 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.97

VII. What Change?

Transplants and receptions have been mentioned earlier 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 respect to the law before the French Revolution. Other parts of the world too, in Africa, Asia, and Central and South America show that innovations introduced through legal transplants produce similar patterns of continuity and change.

Second, the appropriation of foreign elements may be disguised by dressing them up 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. What exactly is changing? Does the change

(p. 464) involve only the operative rules of the legal system? Does it affect the other formants as well? How about the social norms that condition the working of the legal system? By focusing on these questions, comparative law facilitates our understanding of how continuity and change are often interwoven.98

An 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, religious, and state-sponsored law in societies where the state was confronted with instances of alternative normativity. Today theories of legal pluralism are also relevant to the study of contemporary legal systems, including those in which traditional customary laws or religious laws occupy a marginal place.99 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, but the relevant phenomena also involve a number of legal systems that are not usually labelled as such.

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 may well produce bewilderment and perplexity.100 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.

# VIII. 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 (p. 465) 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 and political rule determine legal change in all respects.101 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 earlier, some transplants do indeed occur because those in authority wish to adopt a solution that has proven itself elsewhere.

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 neither 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 adopted, 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 (p. 466) 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, law students are required to learn 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,102 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 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 vested with state 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 great work on *The Spirit of the Laws* (1748) has foundational value for comparative legal studies as well as for (p. 467) sociology. It is often cited to support the view that legal transplants and receptions have no influence on the evolution of legal systems, since for Montesquieu, it was ‘a great coincidence’ if the laws of one nation actually suited another. Accordingly, the factors shaping the evolution of the law would be inextricably linked with forces at work on the local level, which Montesquieu duly listed.103 But when reading Montesquieu, let us not 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 their impossibility. His point was normative, not descriptive. The Roman law was still applicable in much of France, and his approach tended to undermine the universal claims of Roman law as *ratio scripta*.104

In the first half of the nineteenth century, Savigny conceptualized the relationship between law and culture along similar lines, but he added a romantic twist and presented Roman law as an inextricable part of the German legal tradition. 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.105 Incredibly, this idea won recognition just when waves of legal transplants on a world scale occurred—without the paradox being noticed.

In due time, sociology, emerging from the tradition inaugurated by Montesquieu, embraced the notion that law reflects conditions of society. Thus, in his classic work on the division of labour, Emile Durkheim argued that the law is an index or mirror of society.106 Eventually, the inconsistencies, contradictions, tensions, and vagaries in the law-and-society story became 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. Ultimately, however, the disparity between model and fact could no longer be ignored or side-stepped.

Today, the explanatory power of that model is doubtful. 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.107

It is also notoriously difficult to make precise empirical claims about the relationship between law and society. Even quantitative studies on specific issues are facing the proverbial chicken and egg question. 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 have aborted in their country of (p. 468) origin but succeeded abroad.108 Conversely, in some places, local innovations improve their chance of acceptance when they come dressed up in foreign clothes.

The idea that legal transplants and receptions play a major role in producing legal change has some opponents. Foremost among them is Pierre Legrand, who 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.109 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.110 Moreover, Legrand claims, Watson’s approach is inherently conservative because it ‘lacks any critical vocation’.111

The argument that Watson’s approach is conservative and may, therefore, promote undesirable political agendas can be dismissed rather quickly. Indeed, it can be turned on its head: one can use Watson’s approach just as well to develop a democratic critique of ruling elites.112 The study of transplants and receptions can be a tool to debunk ideological perceptions of legal orders on a world scale.

Closer consideration is owed to Legrand’s larger claim that law does not have a determinate content apart from a given culture. Surely when cultural differences are ignored, the focus on receptions and legal transplants can lead to facile overrating of similarities among legal systems, which, is of course, the real problem. Here, comparatists should be mindful of a simple truth: ‘Once everything is the same, comparison will be impossible, or at any rate impossibly boring’.113 All comparatists whose motto is *vive la difference!* will welcome Legrand’s resistance to such an approach.

(p. 469) Nevertheless, it is far from clear that the transfer of law from one community to another is impossible. 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. 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. Research on cognition mechanisms contradicts the idea that cultures are cages.114 Several legal systems have multilingual laws, hence the same norms can be expressed in several languages, as it happens when the EU enacts new legislation. 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 those linking language, culture, and the law are willing to admit. Whole communities 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 there is an indissoluble bond among law, language, and culture. Legrand’s claim about culture is that each represents a unified and indigenous system of meaning. This claim, however, is problematic. If law is culture, we should be open to the idea that law, like culture, is the outcome of mishmash, borrowings, and mixtures that have occurred, though at different rates, ever since the beginning of time. If we view culture in this way, the opposing claims made by Watson and Legrand about legal transplants are not totally at odds. According to Watson, ‘the transplant of legal rules is socially easy’.115 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) 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. Yet, creative interpretation 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.

Hence, there is some truth in Legrand’s claim that ‘the transplant’ cannot survive the change of context unscathed. The essential point is that the law is a product embedded in

(p. 470) the specific culture of the local actors, a culture that is usually 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. Although cultures are unique configurations produced by the individuals who share them, cultures interact and change through the transmission of cultural elements. The identity of a cultural group is not compromised by change through contact with another culture, except in tragic cases. 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.116 He objects, however, 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.

# IX. Lessons

We can now ask what the study of legal transplants can teach us about law. 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 supranational or international organizations, 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.

Neither of these considerations is directly related to the law’s overall intellectual coherence, rationality, and responsiveness to society’s needs. Many regard these factors as essential to any intellectually satisfactory account of law and criticize studies of legal transplants for neglecting them. Yet, such criticism is misconceived. Legal transplants are winning increasing attention in comparative law 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 philosophical 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, or in the efforts of comparative law scholars to classify legal systems into legal families. Each of these approaches misunderstands how and why transplants occur; they have all been led astray by the emphasis on coherence, rationality, and responsiveness to society’s needs.

(p. 471) 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.

Law in society is not the coherent and consistent object described by these generic concepts. ‘The law’ is a generalization denoting a collage of legal artefacts.117 Within the same legal system, there is a multiplicity of factors at work to produce change. 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 them 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 these two elements is far from straightforward. Such odd combinations are rather common. Soviet law employed the notion of a legal act (*Rechtsgeschäft*)—the very symbol of private autonomy throughout the nineteenth century—while developing a system of central planning. Islamic law may accommodate customary elements of law which do not fully accord with, or may indeed contradict, its sacred principles.

To recognize this multiplicity, we must acknowledge that what crosses boundaries is highly diverse in both substance and form. Unified visions of legal cultures and legal orders should thus be replaced by a more analytic, dynamic, and realistic picture of both, which also comprises their interaction with other legal orders and cultures. The study of legal transplants and receptions shows that mismatch and contradiction are as much features of law as are consistency and coherence.

The search for the supposed ‘fit’ between the transferred law and the local context leads scholars who take this approach to distinguish between autonomous and semi-autonomous institutions, or between self-contained and non-self-contained transplants, etc., to show which elements can be transplanted (because they would be rather loosely connected with their place of origin) and which cannot.118 It is commonly assumed, for example, that law governing economic matters (such as contracts) is more easily transplanted than law pertaining to more culture-bound matters, such as succession or family law. This approach, again, seeks consistency and rationality but by doing so often misses what is actually happening—note that recently, family law has become one of the most fertile grounds for reforms inspired by the same values in many parts of the world. One problem is that the search for overall coherence may lead us to ignore the actual reasons why transplants succeed or fail. They may fail on rather specific grounds, rather than because of a lack of ‘fit’, for example, because they are opposed by vested interests.119 That law reflects many of society’s arrangements is beyond doubt, but the law may also not exhibit any obvious connection (p. 472) with those arrangements. The claim that legal transplants occur because they ‘fit’ rests on broad generalizations that are seldom supported by the study of the actual transplants themselves. The evidence advanced to support them is usually anecdotal and thus hardly compelling.120 Indeed, there are glaring examples which run counter to the explanation of transplants by virtue of ‘fit’ with the recipient culture. The English and the Scottish laws of contract, for example, exhibit differences that would be difficult to explain from the standpoint criticized here.

The approach of explaining transplants by their degree of ‘fit’ disregards the actors who effect transplants. Who these actors are affects what is transplanted. Networks of individuals, organizations, and sub-communities have a conspicuous part in the diffusion of legal models across the world. Investigations conducted at this level demonstrate who does what and for what purposes; this kind of analysis reveals more about the relationship between law and society than any broad generalization about the mutual ‘fit’ between them.

Comparative legal studies have sought coherence also by dividing 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. Yet, 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. As a matter of fact, transfers among systems that belong to the same family are more frequent than it is commonly assumed, thus providing empirical proof of the relevance of the classificatory effort. Suffice it say that in the study of legal transplants the most interesting cases are those that reveal how transplants occur even when there is no such common ground. This study has shown that the boundaries of the world’s legal systems are not watertight. The study of transplants and receptions suggests 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 because transplants and receptions played a substantial part into their making.

# X. Conclusion

Comparative law shows 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 corrects simplistic views regarding what law is and how it develops. The spread of legal institutions, ideals, ideologies, doctrines, rules, and so on, is in the hands of a variety of actors. States, supranational and international organizations, firms, NGOs, professional elites, scholars, and others are all taking part in the process. The study of transplants and receptions demonstrates that the knowledge and standing of the local elites that are involved in the making of a transplant (p. 473) 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 because law frequently migrates across borders. Here, we need to take into account the communities and individuals involved in the transfer. To understand transfer, one must first consider the role of those who bring it about. One must also examine the ways in which borrowed law is not lost in the process, but nevertheless transformed.

The study of legal transplants has sometimes been accused of embracing a conservative orientation. Yet, 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 be vital to a progressive agenda.

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Notes:

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(2011) 21 ff; Daniel M Klerman, et al, ‘Legal origin or colonial history?’, (2011) 3 *Journal of Legal Analysis* 379; M. Siems (n 7), 377 ff.

1. Holger Spamann, ‘Contemporary legal transplants: legal families and the diffusion of (Corporate) law’, (2009) *Brigham Young University LR* 1813.
2. Douglas C. North, *Economic Performance through Time* (Nobel prize lecture, 1993).
3. cf Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, ‘The Transplant Ef­fect’, (2003) 51 *AJCL* 163; Valentin Seidler, ‘Colonial Bureaucrats, Institutional Transplants, and Development in the 20th Century’, (2016) 1 Zeitschrift für Verwaltungs*geschichte* 155.
4. Michel Nussbaumer and Frederique Dahan, ‘Promoting Legal Reform in Eastern Eu­rope: the EBRD Approach’, in Christa Jessel-Holst et al (eds), Private Law in Eastern Eu*rope: Autonomous Developments or Legal Transplants?* (2010), 15 ff.
5. See, eg, Dan W. Puchniak, Harald Baum, and Luke Nottage (eds), Independent Direc*tors in Asia: A Historical, Contextual and Comparative Approach* (2017) (the empirical support for staffing boards with independent directors remains shaky). For an insightful general discussion: Holger Spamann, ‘Empirical Comparative Law’ (2015) 11 Ann. Rev. Law & Social Science 131.
6. Randall Peerenboom, ‘Toward a methodology for successful legal transplants’, (2013) 1 *The Chinese Journal of Comparative Law* 4.
7. 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 Devel*opment: A Critical Appraisal* (2006) 253 ff.
8. Yves Dezalay and Bryan G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (2002).
9. 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: Jessel-Holst, et al (n 92).
10. Elisabetta Grande, ‘Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe’, (2016) 64 *AJCL* 583. On the influence of American law in Europe: Symposium ‘L’Américanisation du droit’, (2001) 45

*Archives de philosophie du droit* 7–271, and Daniel R. Kelemen, *Eurolegalism* (2011).

1. See, e.g., Paul Schiff Berman, Global Legal Pluralism (2012) Gunter Teubner, ‘Global

Bukowina: Legal Pluralism in the World Society’ in *idem,* (ed), *Global Law Without a State* (1997), 3 ff; for the traditional context: Jacques Vanderlinden, ‘Trente ans de longue marche sur la voie du pluralisme juridique’, in Cahiers de l’anthropologie du droit (2003), 21 ff; Norbert Rouland, *Legal Anthropology* (transl Planel, 1994). The works of scholars like Franz and Keebet Benda-Beckman, Nicholas Kasirer, Ichiro Kitamura, Roderick Macdonald, Laura Nader, come to mind here.

1. For an excellent study concerning the Japanese situation, see Ichiro Kitamura, Prob*lems of the Translation of Law in Japan* (1993).
2. The point is forcefully made by Alan Watson, *Roman Law and Comparative Law* (1991), 97.
3. 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.
4. Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (4th edn, T. Nugent trans, 1766) Book I, Ch 3, 7.
5. 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.
6. Peter Stein, *Legal Evolution: The Story of an Idea* (1980), 56 ff., but Jhering was not convinced (ibid. 65–6).
7. Emile Durkheim, *The Division of Labour in Society* (1893, W. D. Halls transl, 1984). In later works Durkheim softened his position.
8. cf Roger Cotterell, ‘Is there a Logic of Legal Transplants?’, in David Nelken and Jo­hannes Feest (eds), *Adapting Legal Cultures* (2001), 71 ff., and his chapter in this book.
9. Mathias Siems, ‘The Curious Case of Overfitting Legal Transplants’, in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (2014), 133–46.
10. Legrand’s many contributions cannot all be cited in a footnote. A representative sample of his early works on the topic includes at least: ‘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) 30 ff. More recently: idem, Negative Comparative Law (2015) JCL 405, 438–439.
11. For Watson’s rejoinder: Alan Watson, ‘Legal Transplants and European Private Law’, (2000) 4.4 *Electronic Journal of Comparative Law* <[http://www.ejcl.org](http://www.ejcl.org/)>.
12. Legrand, ‘The impossibility’ (n 109), 122. In the same sense: Richard L. Abel, ‘Law as Lag: Inertia as a Social Theory of Law’, (1982) 80 *Michigan LR* 785, 803. Note that there can be malicious legal transplants, namely, cases in which a dictatorial or authoritarian regime borrows ideas institutions or rules from abroad: Mathias Siems, ‘Malicious Legal Transplants’, (2018) 38 Legal Studies 103; James Q. Whitman, Hitler’s American *Model: The United States and the Making of Nazi Race Law* (2017). But these are unmasked by the study of the topic, and Watson would surely not object to this!
13. Pier Giuseppe Monateri, ‘Everybody’s Talking: The Future of Comparative Law’, (1998) 21 *Hastings International and Comparative LR* 825, 840, advances this reading of Watson’s work.
14. Tony Weir, ‘The Timing of Decisions’, (2001) *Zeitschrift für Europäisches Privatrecht* 678, 685.
15. Raffaele Caterina, ‘Comparative Law and the Cognitive Revolution’, (2004) 78 Tu*lane LR* 1501.
16. Alan Watson, *Legal Transplants*: *An Approach to Comparative Law* (2nd edn, with an afterword, 1993), 95.
17. See, e.g., Pierre Legrand, ‘Issues’ (n 114), 48 n 47: ‘It seems pertinent to repeat that I should not be understood as arguing that communication across legal cultures is absolutely impossible’.
18. 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.
19. See the classic article by Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law’, (1972) 37 *Modern LR* 1. For a critical, helpful rivisitation of ‘legal culture’ as an explanatory device, see Franz Von Benda-Beckmann and Keebet Von Benda-Beckmann, ‘Why Not Legal Culture’, (2010) *5 Journal of Comparative Law* 104.
20. 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 on good faith in other jurisdictions is of a different nature), with that advanced by Gunther 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 is incompatible with that notion. … But what about Scotland then?).
21. Cotterell (n 107), 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 transplants are usually ‘geared to fitting an imagined *future*’ (emphasis in original).

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