LAW AS TRANSPOSITION

ESIN ÖRÜCÜ*

I. INTRODUCTION

Legal scholars approach law in many ways. They are dedicated to various trends such as 'law as rules', 'law as system', 'law as culture', 'law as tradition', 'law as social fact', 'law in context', 'law and history', 'law and economics', and 'law and legal theory'. Most comparative lawyers also are aligned to these trends. Some of the trends share belief in the reality of mobility of law, seeing law reform to be partly related to choice from pools of models supplied from a number of legal systems. There is, however, disquiet as to the appropriateness of the phenomenon of 'legal transplants' as the predominant explanation of law reform. The disquiet is related both to this mode of law reform and to the conceptual frame suggested by the terminology. It is said that law reform should be from within, and that since a transplanted institution continues to live on in its old habitat as well as having been moved to a new one, the choice of the word 'transplant' is inappropriate.[1]

Variations of terminology have appeared in a number of works and many new concepts have been developed to supplement, if not to replace, 'legal transplants'. However, scathing approaches to this mode of law reform suffer from an avoidance syndrome, since law does indeed move, connect, disconnect, change, and contribute to change. This author suggests that all is a process of transposition, tuning and fitting.[2] The movement of legal institutions and ideas is trans-border and such transmigration is a natural phase in legal development. This is both a historical and present fact and the future will see more of it.[3] Today, competing visions of modernity are on offer for

* Professor of Comparative Law, University of Glasgow and Erasmus Universiteit Rotterdam. This article is an extended version of a paper given on 19 May 2001 at the 'Watson Festakt', at the School of Law, University of Glasgow. It also draws on earlier work referred to in the article.

[1] The term 'legal transplant' fits better its original meaning which is, when a people, moving into a new territory with no comparable civilisation, takes its laws with it. Now it is used as a generic term for all transnational or cross-border spread of law.

[2] This author has used and analysed the terms 'transposition' and 'tuning' through examples. See E. Örücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition*, Nederlandse Vereniging voor Rechtsvergelijking No: 59 (Deventer: Kluwer, 1999); id, 'Shifting Horizons for Comparative Law in the New Century', (2000) 8 *Asia Pacific Law Review*, 115–38. Also see id, 'Comparison in Extraordinary Places' paper presented to *Comparative Legal Studies: Traditions and Traditions* Conference, Cambridge 26–30 July 2000 (to be published).

[3] For example, Berkowitz, Pistor, and Richard say, 'The existing formal legal order in most countries around the world was shaped by transplanting formal legal systems that have evolved in

[*ICLQ* vol 51, April 2002 pp 205–223]

systems, ranging from emulation of the West in the construction of a modern, market-oriented society to altogether different visions, including parochial legal nationalism.[4] The future development of law however, is closely tied to the transmigration of ideas and institutions.

It is a truism that the amount of innovation in law is small and borrowing and imitation is of central importance in understanding the course of legal change.[5] However, it is also true that the 'transplant theory' needs reconsideration. At the one extreme is Watson for whom even the misunderstood can be transplanted with advantage.[6] At the other is Legrand who states that 'legal transplants are impossible'.[7] Teubner, though not supporting Watson, claims that a conceptual refinement is needed to analyse institutional transfers.[8] Allison is more suspicious of legal transplants and Watson's suppositions, and points to the need 'to consider both the present and proposed contexts of a transplant'.[9] He concludes that transplantation is hazardous.[10] Obviously ill-considered and not properly tuned or adapted transplants can be dangerous.

This study approaches law as a series of tranpositions and tuning, and aims at replacing the concept of legal transplant with legal transposition, the legal transplant theory being in need of refinement. Today there is renewed interest in transplants especially in view of the new *ius commune* studies and the heated debate on convergence versus diversity. In the belief that analysis of the paths, methods, and consequences of transfrontier mobility of law will be the most significant contribution of comparative law to our century, this author here investigates the old and new metaphors of comparative law.

several European countries in the late eighteenth and early ninteenth centuries', with these formal legal orders being derived during the nineteenth and early twentieth centuries. D Berkowitz, K Pistor and J-F Richard, 'Economic Development, Legality, and the Transplant Effect', Law and Development Paper No 1, CID Working Paper No 39, Mar 2000, Center for International Development at Harvard University at <http://www.cid.harvard.edu.cidwp/039.pdf>.

[4] Obviously not all advocates of modernisation see it as appropriate to rely on foreign models. Kulcsar for example, doubts the value of comparisons between societies as diverse as Ethiopia and Hungary, and says, 'I see the most important characteristic of modernity in whether a society is capable of continuous social change by utilising its own, internal conditions, K Kulcsar, *Modernisation and Law*, tran V Gathy (Budapest: Akademiai Kiado, 1992), 18. Also reviewed by I Pogany in (1994) 43 *ICLQ*, 483. This would nevertheless involve internal transpositions and tuning, so can be regarded as falling within the 'law as transposition' diagnosis.

[5] R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 *Am J Comp Law*, 395.

[6] A Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974).

[7] P Legrand, 'The Impossibility of Legal Transplants' (1998) 4 *MJ*, 111.

[8] G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 *MLR*, 11, at 17.

[9] JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford: Clarendon Press, 1996) at 16.

[10] Ibid, at 236.

II. OLD AND NEW METAPHORS OF COMPARATIVE LAW

Terminology used in classical statements of legal movements such as transplant, imposition and reception have been supplemented by a colourful vocabulary highlighting nuances in individual instances of this mobility such as grafting, implantation, re-potting and cross-fertilisation.[11] New notions and bases for analysis are being developed such as collective colonisation, contaminants, legal irritants, layered-law, hyphenated-law and competition of legal systems. Images such as 'contamination', 'inoculation', 'irritation', and 'infiltration' are all appropriate in describing present day encounters, and the terms 'reception', 'imposed reception' and 'concerted parallel development', the activities.

Although the term 'legal transplant'[12] has been the usual one applied to all these import and export activities, this author believes that the term 'transposition', as used in music, is more appropriate. The term 'transposition' is more apt in instances of massive change based on competing models, in that here the pitch is changed. In musical transposition, each note takes the same relative place in the scale of the new key as in the old, the 'transposition' being made to suit the particular instrument or the voice-range of the singer. So in law. Each legal institution or rule introduced is used in the system of the recipient, as it was in the system of the model, the transposition occurring to suit the particular socio-legal culture and needs of the recipient. In fact, there may be a number of 'transpositions', since no single model is necessarily used by any one recipient. Even what is called 'reciprocal influence', a more acceptable term today among the comparatists, is actually a number of transpositions.

Developments of our day can be seen as instances of transposition, and the 'tuning' that takes place after transposition by the appropriate actors of the recipient is the key to success. If the old models are abandoned with 'optimistic normativism' while new legal models are looked for,[13] a transplanted legal system not compatible with the culture in the receiving country, without

[11] For the former see, Watson, op cit, above n 6, his n 53 at 30 where he also mentions imposed reception, solicited imposition, crypto-reception and inoculation. For a more complete list, see also Örücü, 'A theoretical framework for transfrontier mobility of law', in R Jagtenberg, E Örücü, and A De Roo (eds), *Transfrontier Mobility of Law* (The Hague: Kluwer Law International, 1995), at 5. Here we see cross-pollination, engulfment, emulation, infiltration, infusion, digestion, salad bowl, melting pot, and transposition.

[12] Monateri claims that the term 'legal transplant' utilised by Watson for 'scholarly purposes' is today taken over by 'purposive practical lawyers' involved in projects of 'exporting their own legal systems'. See, PG Monateri, 'The "Weak" Law: Contaminations and Legal Cultures', in *Italian National Reports to the XVT International Congress of Comparative Law*, Bristol 1998 (Milano: Giuffre editore, 1998), 83. Transplants have also been classified into four groups: direct-receptive, direct-unreceptive, indirect-receptive, indirect-unreceptive, the indication being that even 'transplant' from 'transplant', that is indirect transplant, rather than from 'origin', that is direct transplant, can be successful. See Berkowitz *et al*, op cit, above n 3, 15.

[13] See G Ajani, 'La Circulation de Modèles Juridiques Dans le Droit Post-Socialiste', *RIDC*-4 (1994), 1087–105.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

the appropriate transposition and tuning, will create only a virtual reality.[14] In answer to the question, how do legal ideas, institutions and structures find their way from one location to another, it has been aptly put that 'laws do not have wings'.[15] This alone highlights the importance of those who move the law and help in its internalisation, and hence, what I call 'tuning'. Their importance in turn is reiterated by the fact that countries which adapt transplanted law have more effective legality, that is, they further develop their formal sources and build effective legal systems, and have effective economic development.[16] Especially a 'voluntary transplant increases its own receptivity by making a significant adaptation of the foreign formal legal order to initial conditions, in particular to the pre-existing formal and informal legal order'.[17] Therefore 'the way in which the law is transplanted is a more important determinant . . . than the supply of a particular family'.[18]

In historical terms, most tuning was made externally by imposers or exporters of law. Such was the case in the British codifying of the common law for its introduction into the Indian Continent. This is not a very sensitive kind of tuning, since, it cannot consider the new pitch in its entirety, as the tuner is not an active player of the new instrument. It is internal tuning that is required and the tuners should ordinarily be the domestic judges. However, for successful transposition, tuning is necessary at all levels, including legal education. In all cases, even old instruments have to be tuned to new problems, such as in the case of electronic commerce or Internet fraud. One could go further and say that every time a court distinguishes from a prior case, it is undertaking tuning and sometimes transposing a rule or principle from some other area of law to solve the problem at hand.

When Grief says that Community Law is exerting a pervasive influence on common law and is re-shaping the English legal order for example, he suggests that one should assess this influence critically to determine whether it is a corrective or a 'contaminant'.[19] Grief sees it rather as a 'habit forming factor' whereby a practice enters into judicial consciousness, judges appreciate its value as they employ it and then find other uses for it.[20] This could be a 'healthy infusion'. The term 'infusion' indicates a more subtle, positive and penetrating infiltration than the term 'contaminant'. One could of course, regard common law itself as the 'contaminant' of Continental civil law, since

[14] JM Smits, 'Systems Mixing and in Transition: Import and Export of Legal Models: The Dutch Experience', in EH Hondius (ed), *Nederlands Reports to the Fifteenth International Congress of Comparative Law* (Antwerp: Intersentia Rechtswetenschappen, 1998), 55.

[15] F Schauer, 'The Politics and Incentives of Legal Transplantations', Law and Development Paper No 2, CID Working Paper No 44, April 2000, Center for International Development at Harvard University, <http://www.cid.harvard.edu/cidwp/044.htm>.

[16] Berkowitz *et al*, op cit, above n 3 at 5.

[17] Ibid, 11.

[18] Ibid, 19.

[19] N Grief, 'The Pervasive Influence of European Community Law in the United Kingdom', in TG Watkin (ed), *The Europeanisation of Law* (UKNCCL, 1998), at 110.

[20] Ibid.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

some English common law concepts and institutions have already infiltrated the laws of the member states of the EU and EU law itself.[21] It is submitted here that how one assesses the process is entirely related to one's stance in these matters, sending us back to the everyday image of calling half a glass of water either 'half-full' or 'half-empty'.[22] In addition, in the plethora of activities and examples one can always choose illustrations to support one's own stance.

Teubner uses the concept of 'legal irritants' in relation to the transplanting of the continental principle of bona fide (good faith) directly into the body of British contract law by the European Consumer Protection Directive 1994. A 'legal irritant' is defined by the author as an alternative to legal transplants, in that 'when a foreign rule is imposed on a domestic culture . . . something else is happening. It is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events . . . it irritates law's "binding arrangements".'[23] Documents such as the Principles of European Contract Law, and the UNIDROIT Principles of International Commercial Contracts extend good faith into other fields. 'The infecting virus had already found inroads into the common law of contracts, especially in the United States . . .'[24] Teubner claims that this phenomenon should not be assessed in terms of legal transplantation, not as a matter of repulsion and rejection or interaction and integration—that is, the question of whether 'good faith' once transplanted will 'be rejected by an immune reaction of the *corpus iuris britannium*' or will take and interact productively 'with other elements in the legal organism'.[25] Other scholars besides Teubner are also concerned about this development, while some regard it as a 'healthy infusion'.[26]

If one considers the term 'legal irritant' through the example of the concept of 'good faith' one can glean some useful indications for the phenomenon of 'transposition'. Tuebner says, 'Legal irritants cannot be domesticated. . . . Rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.'[27] 'Good faith' will be reconstructed anew under British law, and its meaning will be transformed. Even if the transfer is formal and direct rather than through infiltration or seepage, the rule, according to Teubner, 'may look the same but actually it has changed with its assimilation into the

[21] In historical terms English common law also contaminated ex-colonies such as St Lucia with already existing civilian-based codes.

[22] In a similar vein, Zimmermann recounts the parable of the Good Samaritan and uses the image of 'half alive rather than half dead' describing the wounded man on the way to Jericho. See R Zimmermann, *Roman Law, Contemporary Law, European Law* (Oxford: Oxford University Press, 2001), 188–9.

[23] Teubner, op cit, above n 8, at 12.

[24] Ibid, at 11. 'Good faith' also appears in Art 1.106 of the Principles of European Contract Law and International Commercial Law.

[25] Ibid, at 12. [26] Ibid, at 11. [27] Ibid.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

new network of legal distinctions'.[28] Teubner also puts forward the argument that new divergences will appear as unintended consequences of the Europeanisation of national legal orders. Going back to 'good faith', it follows that it will not be transplanted as such, but irritate British law and create markedly different understandings, 'new dissonances from harmonisation!'[29] The development of a concept in a specific historical and cultural 'constellation' determines its final shape, so even if the starting point is the same, divergences occur. We know that there are no identicals in law. Teubner's guess is that in Britain, 'good faith', together with 'legitimate expectations', 'proportionality' and other 'continental noise', 'will trigger deep, long-term changes from highly formal rule focused decision making in contract law toward a more discretionary principle-based judicial reasoning.'[30]

It is not a question of whether the British contract doctrine will reject or integrate good faith, but rather, once reconstructed anew under British law, 'What kind of transformation of meaning will the term undergo, how will its role differ?'[31] In addition, a transfer will always be 'confronted with the idiosyncrasies of the new legal culture' and face resistance external to the law, that is, a variety of social expectations of highly diverse social environments.[32] This would be, I believe, a desirable outcome and therefore Teubner's view supports the claim that law is a process of transposition.

The terms 'contaminant', 'seepage', and 'irritant' are very welcome additions to the vocabulary for the analysis of reciprocal influences and transposition. However, in its everyday usage, the word 'contaminant' is not a neutral word. One would be forgiven for thinking that anyone using the word for the first time in this context does not regard it as good that transpositions occur and foreign concepts and structures seep into a domestic legal soil. They seep and contaminate. They seep and irritate. They do not purify or correct. Neither is the word 'seepage' neutral. One would surely be advised to stand clear of the source of contamination. 'Contaminant' has the connotation of spoiling the thing it touches, even though it might only leave a mark. However, it is a fact that English law for example, has already been contaminated, therefore purity is not of the essence here. Nevertheless, as an expression abstracted from its literal meaning, the term 'contaminant' could be used neutrally as 'leaving a mark', like the dying process that takes place when two clothes of different colours are washed together. Even then, one of them may be regarded as the culprit, unless of course, the dying is reciprocal, in which case we have a new colour for both! This may be regarded as a true convergence. One could also think of fugitive colours, which gradually grow fainter and may finally disappear! This can happen even before there is time for it to become an 'irritant'.

Neither is the word 'irritant' neutral. The way 'legal irritant' has been

[28] Ibid, at 19. A comparison can be drawn with 'transposition'.
[29] Ibid, at 20. [30] Ibid, at 21. [31] Ibid, at 12.
[32] Among these external forces, Tuebner cites markets, organisations, the professions, the health sector, social security, family, culture, and religion.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

presented and defined implies the 'production of new and unexpected reactions' which may be a side effect of the first 'contamination'. In this sense it accords with Watson's beliefs in the power of reception on the imagination and the fact that, 'borrowing is often creative'.[33] A 'healthy infusion' however, is a more positive and penetrating infiltration.

Is it correct then to say that the implantation into British soil of a 'living law', fed and fertilised by the specific nutrients and conditions of a foreign soil, cannot take root or grow new roots? Imports into Britain have survived even with their roots cut, thanks to the 'rooting powder' provided by British 'gardeners'. Neither is it true to say that the British soil is infertile and continental concepts and institutions cannot grow and blossom in it. Why expect 'repulsion' and not 'interaction'? The metaphor 'irritant', taken in its positive sense, could actually bring about the desired result. This is what is needed for successful transposition. This is harmony rather than harmonisation. To converge does not mean to attempt to create sameness, but to accept diversity. Only when diversity is accepted can there be 'healthy infusion'. Only then can the transferred norms become 'internalised' and thereby work. Interlocking diversities lead to convergence. If legal relationships are seen within a framework of 'reciprocal influences', that is as a series of cross currents rather than as one way movements of 'contaminants' or 'irritants', then on the 'reverse seepage' the legal world at large may benefit and be enhanced by the divergences created in different soils. Such movements, especially when they take place under some type of 'imposed reception', such as is the case under European Directives, cannot be rejected outright. The existing plants can blossom under this 'irritation' and so produce workable new sub-categories which can then, in the course of the intermingling that takes place, as for example between the member states of the EU, interlock to enrich the market of legal systems. The fact that the identity is fundamentally altered is of no matter if the new species is expertly and creatively handled. Good fruit does indeed grow on grafted plants! It is the 'rooting powder' the gardeners provide that makes the difference!

Harmony is, after all, a possibility of communication and conversation. In value-neutral terms both 'contaminant' and 'irritant can be used to explain what is taking place between the legal systems and the social systems of the member states of the EU, be they common law, civil law or 'mixed' jurisdictions. Contamination can give rise to an irritation. An 'irritant' can also serve as a 'corrective' by inspiring a new development to correct for example, a 'historical accident'. Seen in this light, all 'reciprocal influences' can be 'healthy infusions'. This infusion may be extracted from the most efficient solution presented by the competing legal systems. If all legal systems engaged in this enterprise were to serve as contaminants and produce irritants for each other, law would only be enriched and social cultures benefit. This needs proactive systems and 'good faith'!

[33] A Watson, 'Aspects of reception of law' (1996), 44 *Am J Comp L*, 345.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

III. RESULTS OF TRANSMIGRATION OF LAWS

When transmigrations occur and elements from different internal logics come together,[34] differences are as to structure, substance or culture. Where there is a mismatch between model and recipient, history tells us that the result is usually a 'mixed jurisdiction'.[35] In the resultant legal system the diverse elements co-exist. Any intermingling that takes place depends on a number of factors. It may be that there is no socio-cultural but only legal-cultural diversity, so that in time the diverse elements are blended, or one of the elements becomes the dominant element owing to political factors, or again, from the very beginning one of the elements may be systematically erased by the effect of authoritarian power.

Many problems arise for recipient legal and social systems as a consequence of transmigration of law. Systems in this situation are evolving, in transition, interrelated or in the process of becoming mixed systems. Particular attention must be paid to legal–cultural convergence and non-convergence which may come about as a result of import, and to any ensuing socio-cultural non-convergence. In this context, cultural pluralism, clash of diverse cultures, and the consequences for the importing legal system are of particular contemporary interest, with legal pluralism another significant concern.

The consequences can be visualised along a spectrum,[36] and the product depends on conditions such as the size of the transmigration, the characteristics of legal movement, the success or otherwise of transpositions and 'tuning', the element of force or choice inherent in the move and the social culture of the new environment. On this spectrum, a blend or compound can form between systems of both socio-cultural and legal–cultural affinity. At one extreme is a transplant that has not worked, possibly because a genuine transposition has not occurred.[37] Here the official legal system 'curdles' and becomes dysfunctional as is the one in Burkina Faso. At the other extreme is a transmigration working very smoothly, either because of extensive similarities in structure, substance and culture and fine 'tuning', or a strong push from a ruling élite or the legal profession, that is, other tuners, the actors of the law.[38] Between these extremes lie systems where elements from socio-cultural similarity but legal–cultural difference come together, the outcome being a

[34] Örücü, 'Internal Logic of Legal Cultures' (1987) 7 *Legal Studies*,.310.

[35] A 'mixed jurisdiction' in the classical sense is the outcome of an encounter between legal systems of diverse socio- and/or legal-cultures. See Örücü, 'Mixed and Mixing Systems: A Conceptual Search', in E Örücü, E Attwooll and S Coyle (eds), *Studies in Legal Systems: Mixed and Mixing* (London: Kluwer Law International, 1996), 344–5. See for another approach, VV Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press, 2001).

[36] See Örücü, above n 11, at 10–12.

[37] See the work of Sally Moore here, *Law as Process: An Anthropological Approach*, (London, Routledge & Kegan Paul, 1978), and ead, *Social Facts and Fabrications: 'Customary' Law on Klimanjaro, 1880–1980* (Cambridge: Cambridge University Press, 1986).

[38] This type can be called a 'pureé' where the elements are totally blended.

mixed jurisdiction of the 'simple' kind such as Scotland with the ingredients in the process of blending.[39] Then there are 'complex' mixed systems, where the elements are both socio-culturally and legal-culturally different.[40] Algeria is an example of this. Next in complexity are systems such as those of the Sudan and Zimbabwe where ingredients are sitting separately and far apart with internal conflict rules at work.[41] At the end of the spectrum, 'curdling' is seen, as mentioned earlier.

This author has approached the results of the transmigration of law elsewhere under four headings: 'the paths that migration follows', 'the method and specific techniques of migration', 'the outcome of such migrations', and 'the conceptual and future implications of migration'.[42]

Today, the phenomena must be examined in ways other than the historical since the emphasis, the consequences of transmigration of law and the means used are different to those of the past. For example, one of the major differences is that the exporter is now in the market packaging his model as the most efficient, the one to be preferred over others. It is both a buyers' and a sellers' market. It is a buyers' market since there is a large number of models to choose from. It is a sellers' market since, for the importers, there is no real freedom of choice as market forces tie them to certain of the models only.[43] The other difference is that although the present time is not a period of imposition, as we do not any more encounter colonial relationships, neither is it one of voluntary reception. The time is one of imposed reception, that is, voluntary activity of import under circumstances in which exporters hold all the cards.[44] There is still a tendency to assess the whole process from the point of view of the exporter rather than that of the importer, though the interest of the importer is more effectively fought for now.

Most 'reciprocal influence' in Europe today is within the EU, but transpositions from the Western legal traditions to the Eastern and Central European legal systems are of equal, if not greater, importance. The primary task for comparative legal studies in Europe itself is in 'new *ius commune*' studies to facilitate integration and make a case for the success of legal transpositions as the basis for convergence. Europe also seeks the support of comparative legal studies in exporting legal ideas and institutions and aiding law reform by providing a convincing display of competing models from a pool representing Western European legal systems. Elsewhere, other cross-fertilisations are

[39] This type can be called the 'mixing bowl'.

[40] This type can be called the 'Italian salad bowl' where although the salad dressing covers the salad, it is easy to detect clearly the ingredients through the side of the glass bowl.

[41] This type can be called the 'English salad plate'.

[42] Örücü, op cit, above n 11, at 10–12.

[43] Those that want to join the EU for example, cannot but follow Community models, replicate the directives and so on.

[44] There is always a danger of over-transplantation and over-supply. However, other inherent dangers are few since donors like to preserve their own reputation, influence, power, wealth and pleasure. See Schauer, op cit, above n 15, at 21.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

occurring, such as that between China and Hong Kong. The consequences are the birth of a 'new *genre* of *mixité*',[45] the blurring of the demarcation lines between the generally accepted classifications of legal families, and the emergence of new clashes between legal cultures themselves, or legal cultures and socio-cultures. The means appears to be voluntary reception rather than colonisation and imposition as in the past, though, as stated above, imposed receptions are more prominent in some instances. It must be remembered that often, transnational spread of law does not happen because of the power and the intrinsic or instrumental value of the ideas or institutions themselves, but depends on extrinsic factors such as the political and the symbolic. The political reputation of the donor, the desire to belong to or harmonise with a particular group, or ease of access are causal factors that seem to determine the pattern of transmigration of legal ideas, institutions and structures.[46]

IV. TESTING OF HYPOTHESES AND METAPHORS

A. In Eastern and Central Europe

Through the legal systems of Eastern and Central Europe the concepts of 'competing legal systems', 'chance', 'choice', 'prestige', 'efficiency' and 'élite' can be tested. The terms 'reception', 'imposed reception', 'imitation', 'concerted parallel development', 'transposition' and 'layered law' can also be assessed in this surrounding. Ajani highlights the question of whether the current needs of the post-socialist economies are met by 'new legal models'. He also stresses the fact that for importation to be successful there must be adaptation, or what this author calls 'transposition', to the conditions of the recipient countries.[47] Looking at borrowings in the three Baltic States, he observes that Latvia has re-enactment a pre-socialist Code; Lithuania has followed Hungarian and Polish examples and gradually renewed earlier texts, though preserving the general outline of the existing code; while Estonia has opted for the adoption of a new text, largely borrowed from German models.[48] Ajani's work shows the extensive role of transpositions in the Baltic States.[49] In addition, he deals with the 1995 Russian Code where 'the Civil Code . . . has absorbed, like a sponge, many new statutes of foreign legislation and progressive civil law thought'.[50]

[45] Örücü, above n 35, at 351.

[46] See Schauer, op cit, above n 15, at 2–18.

[47] G Ajani, 'The Role of Comparative Law in the Adoption of New Codifications', in *Italian National Reports to the XVT International Congress of Comparative Law*, Bristol 1998 (Milano: Giuffre editore, 1998), 70.

[48] See for the influence of the Louisiana Code there P Varul and H Pisuke, 'Louisiana's Contribution to the Estonian Civil Code' (1999) 73 *Tulane Law Review*, 1027. Estonia also drafted the American Bankruptcy Law with the help of members of the Georgetown Law School.

[49] With the possible exception of Latvia.

[50] Ajani, op cit, above n 47, at 72 n 12.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

The new legal systems of Central and Eastern Europe can be dubbed as 'layered systems' or 'hyphenated systems', if not simply 'mixed systems', depending on the pervasiveness of the seepage and the degree of resolution of internal contradictions between layers of law and culture. The use made of law in effecting legal and social transition, and the success of transposition and tuning will be tested anew in the coming decades.[51]

Evans for example, says that 'force exerted by a foreign model on domestic policy can be of two types: push and pull' and that 'in the context of relations between the Community and third states in Europe, the force seems to be of both kinds'. 'The third state is pulled by its desire for closer relations with the Community and is pushed by its own traders who see voluntary harmonisation as essential for easing their access to the Community market.'[52] The assumption is that these countries will shape the legal foundations for their economic systems on the Community model as an 'irreversible legal framework for integration'.

An important question for comparative lawyers is what will be the implications of these developments for the 'new *ius commune'*? 'Unity or harmony in diversity' may be easier to achieve than 'convergence and integration by eliminating diversity'. The 'new *ius comune'* can be achieved through appreciating differences, making use of 'transpositions' and by accommodating 'differents' in harmony, rather than looking for 'similars'.

B. Turkey

The example of Turkey can be used to test the role of transposition in a system where 'transfrontier mobility of law' has been one between socio-culturally and legal-culturally diverse societies. The term 'hyphenated' legal system can be tested here as well as the concepts of 'chance' and 'historical accident'. The problems facing this recipient of a major borrowing and its aftermath, and the present influence and the continuing relationship between the model(s) and the recipient can be assessed. At the same time, the tuning required to deal with the residual problems of religion and culture can be studied, and terms such as 'reception', 'incremental reception', 'irritant', 'imposed reception', 'modernisation through borrowing foreign models', and 'competing systems' can be tested. It is claimed that an emphasis on 'legal cultures' and their role in framing national laws eventually 'prevents or 'distorts' borrowing.[53] Actually this

[51] It is suggested that in order to understand the CEE systems we should consider them with a bottom-up and source-oriented approach rather than a top-down, target-oriented approach. Any comparisons between common law, civil law and socialist law also demonstrate the 'translation dilemma'. See N Jamieson, 'Source and Target-Oriented Comparative Law' (1996) 44 *Am J Comp L* 121.

[52] A Evans, 'Voluntary Harmonisation in Integration between the European Community and Eastern Europe' (1997) 22 *EL Rev* 201, at 202.

[53] Monateri, op cit, above n 12 at 84.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

may be the most fruitful of developments since it reflects sensitive tuning in transposition.[54]

The borrowing in Turkey took place while a new legal system was evolving and still incomplete. The 'non socio- and non-legal culture bound' approach was indifferent to legal history. The system was certainly 'weak' and widely open to foreign cultural intrusion.[55] In fact, some of the existing traditional institutions were themselves the object of transplant. Also, since what was imported was not only content but also structure, the legal system acquired strong similarity to the Western legal systems. This experience proves the point that, 'between two totally different systems, an overall reception is easier than wide-ranging imitation of particular rules and institutions'.[56]

In colonial relationships, such as those in Indonesia, India or Hong Kong, direct exposure to the model contributed to the social system. In Turkey, at the level of law, the success of the import is not questionable; the mixed layers of modern law from various sources have been successfully adapted to the conditions of the recipient.[57] Whether the import made the desired impact on the whole of the population is however, questionable. It is a truism that for such a reception to be successful it must be backed up by education, pro-active judges and creative academics. Times of reception are also times for domestic creativity. The 'viruses' which then become 'irritants' and create their 'antibodies' must be carefully and creatively nurtured. The concepts of 'habit forming', 'contaminant', 'legal irritant', and 'healthy infusion' have been discussed above. The evolutionary dynamic that ensues from these phenomena can be observed through the example of Turkish law and how it is adjusted, tuned and homogenised. The divergences and the unintended consequences of these phenomena can also be looked at. These developments have been analysed by this author elsewhere.[58]

In such a case as that of Turkey there are always fears that the social and cultural system and the legal system will not easily accord. However, the results of a number of surveys show that the transplanted legal system has indeed influenced even the rural areas of Turkey.[59]

[54] See for a discussion of cases reflecting this tuning Örücü, op cit, above n 2 (1999) at 81–118.

[55] Monateri, op cit, above n 12, at 85.

[56] Sacco, op cit, above n 5, at 400.

[57] Yet in their economic analysis, Berkowitz *et al*, place the Turkish legal system in their Table 3 as an 'unreceptive' transplant with nil adaptation and familiarity. Berkowitz *et al*, op cit, above n 3, at 37.

[58] See Örücü, above n 2, and id, 'Turkey Facing the European Union—Old and New Harmonies' (2000) 25 *EL Rev* 523–37.

[59] J Starr and J Pool, 'The impact of a legal revolution in rural Turkey' (1974) 8 *Law and Society Review* 533. They submit, 'our data . . . suggest that the Turkish revolution is a revolution in more than form.' See also EK Banakas, 'Some thoughts on the method of comparative law: the concept of law revisited' (1981) 67 *Archiv fur Recht und Soziale Philosophie*, 294. He states that 'the determination of Turkish leaders to succeed in their objective, finally caused the desired alteration of the existing socio-economic structure, by the imported legal system'.

It is fair to say that the 'purée' of Turkish law and its 'hyphenated' nature together with the 'hyphenated' nature of her socio-culture are here to stay. The formal legal system in Turkey performs a balancing act. At times it tries to maintain a firm stance, at other times it allows traditionalist views to be heard. Yet, it survives against all odds, thanks to the tuners of the transpositions.

C. In England and Scotland

English common law can also be studied with the view of seeing reciprocal influence between the civil law and the common law at work and assessing to what extent the two legal traditions are able to intermingle and intertwine with the aid of sensitive tuning. This would be of vital importance if pan-European Codes were to come and have any chance of success, both in their inception and in their working. It is true that codification is not part of the British legal culture. It could however, become a 'contaminant'. It could also become an 'irritant'. Though it is highly unlikely that there will be pan-European Codes in the near future, even if there were, the British approach to implementation and interpretation would not be identical to the German one, but then, neither are the Dutch or the French approaches identical.[60] Law is after all a continuous process of transposition.

Some of the theoretical terminology such as 'seepage', 'contaminant, 'irritant', 'underlay', 'overlay', 'cross-fertilisation' and 'diffusion' can be tested in the experience of England and Scotland.

Ibbetson calls the receptions from Civil law and Roman law into English law 'sporadic receptions', and instances of 'civil law based reasoning filtering into common law'.[61] He states that 'the amalgam of these factors ensured that English law was repeatedly, if not constantly, enriched by ideas drawn from the civilian tradition'. That it developed in total isolation from the Civil law is an over-crude generalisation. 'Nonetheless', he says, 'we must beware of going too far in the opposite direction in characterising English law as just another emanation of the Western European legal tradition based on the *ius commune*.'[62] English law received 'injections' of Roman law. However, any rules based on Roman law or the later *ius commune* 'were immediately cut off from their roots'; and 'immediately assimilated into the specifically English framework and given life outside their original context'. The resultant new law 'did not remain in dialogue with the old law from which it derived'; and 'once the borrowings are cut off their roots they cease to be part of the same culture'.[63] Is this not 'law as transposition' *par excellence*?

Moreover, there was, and is, the constant encounter with the Scottish law and legal system, which is itself a 'mixed jurisdiction' with an underlay of

[60] See, eg, Zimmermann, op cit, above n 22, at 107–85.
[61] DJ Ibbetson, 'A Reply to Professor Zimmermann', in Watkin, op cit, above n 19, at 228.
[62] Ibid, at 229.
[63] Ibid, at 229–30.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

Roman, Dutch and French law, and a partial overlay of common law. The word 'partial' is used advisedly here, since the Scottish legal system is protected by the Act of Union of 1707. Nevertheless a strong and continuous seepage occurs from English law into Scots law, thus, English common law and the laws of other common law jurisdictions, such as those of Australia, New Zealand, and Canada, provide the partial overlay. This state of co-existence within the UK has also led, as would be expected, to some reverse seepage. The influence is lop-sided but reciprocal. One well-known example of this reverse seepage is *forum non convenience*, another is 'unjust enrichment'.[64] Although references to Scots law are not extensive in England as far as the English courts are concerned, we find Lord Justice Bingham saying:

> Eventually, as we know—in no small part due to the work of Lord Goff, both as advocate and judge, and the wisdom of Lord Diplock—the Scottish rule was adopted in England. But it took three appeals to the House of Lords to put the law where, one feels, it should always have been and might have been had English lawyers of the time been willing to look north of the border and acknowledge that acceptance of jurisdiction by the English court is not necessarily an unmixed blessing for all concerned.[65]

Civilian and Scottish solutions, concepts and institutions were developed, modified, and thus tuned, by English lawyers. Similar to Ibbetson quoted above, Lewis states that, 'once the continental ideas were imported into England, the umbilical cord was cut'.[66] The Continental civilian concepts were either 'fugitive colours' then, or became 'irritants' or themselves became 'contaminated' by common law.

Should European Law be regarded as a 'corrective' or a 'contaminant' of the common law?[67] This question is worthy of further comment, especially in view of its theoretical importance. However, one should assess the consequences of the encounters within the European Union as instances of 'reciprocal influence' or 'cross-fertilisation', rather than only considering the contamination of common law by the civilian input into EC law.

V. THE FUTURE

Many issues are tied up with transfrontier mobility of law and the reality of reciprocal influence and cross-fertilisation—issues such as European integration, the reconciliation of common law and civil law and of socialist and civil

[64] See also for frustation of leases *National Carriers* v *Panalpina* [1981] AC, 675. For the influence of Scots law on English law in the field of conflict of laws see Watson, op cit, above n 33, at 341.

[65] Lord Bingham, 'There is a World Elsewhere: The Changing Perspectives of English Law' (1992) 41 *ICLQ*, 517.

[66] X Lewis, 'Europeanisation of the common law', in R Jagtenberg *et al*, op cit, above n 11, 47 at 50.

[67] Grief, op cit, above n 19, 90 at 110.

law, the future of developing legal systems in transition and the problems of the recipient or importer of legal export. Influences are not just between legal systems but also between socio-cultures and legal systems, and legal culture and legal systems.

States in transition, poised for law reform and modernisation, are looking for models from other states which are socio-culturally and/or legal culturally diverse from their own. Such models will only really help if properly transposed, and if in that transposition, local tuning takes place. It is true that even systems from the same legal tradition have problems when borrowing from each other.[68] Obviously, there are more serious problems when legal systems from diverse traditions such as the socialist, religious or traditional look towards civilian or common law systems. This must be of greater concern for legal systems that have never been fully part of a single legal tradition.[69] These issues which are general problems of comparative law, are of particular interest for legal and social systems at the receiving end of movements from the civilian and the common law models while trying to re-shape their societies and their law.

Watson's view is that one need not know much about the background of either the donor or the recipient, one just has to find an 'idea' capable of importation,[70] and similarity is not necessary for successful tranplantability or fruitful cross-fertilisation. Differences between national rules do not restrict the importation of them, though, legal cultural difference is the most serious cause of mismatch.[71] Watson claims that even the misunderstood can be transplanted. Is it then the 'tuning' that is the vital spark?

It must be remembered however, that what actually happens in such movements is often not a matter of choice but a matter of chance, if not necessity and urgency. The Eastern European systems for example, some poised to join the EU, must somehow prepare themselves to undergo change in 'the desired direction', this desire being not necessarily one of the bottom but of the top, or of outside forces. These systems actually have little choice in the matter. The relationships are negotiated between parties of unequal power and influence. So

[68] In areas where law is developing fast, or new areas of law are opening up, the British courts, for example, look at other common law jurisdictions where socio- and legal-cultural affinity is deemed to exist. But, even then, occasionally, one can come across cases where New Zealand or Australia are found to be 'too progressive' or to rely on 'other philosophical and social premises'. For such cases see Örücü, 'The United Kingdom as an Importer and Exporter of Legal Models in the Context of Reciprocal Influences and Evolving Legal Systems', in *UK Law for the Millennium* (1998, UKNCCL, London, and 2nd edn 2001), 206.

[69] Consider, eg, the US Uniform Commercial Code in Uzbekhistan, or the German Code of Bankruptcy in the Kyrgyz Republic.

[70] Watson, op cit, above n 6, at 79. However, Berkowitz *et al* demonstrate the importance of not only 'adaptation' but 'familiarity' as a measure of receptivity. See Berkowitz *et al*, op cit, above n 3.

[71] Cf V Gessner, 'Global Legal Interaction and Legal Cultures' (1994) 7 *Ratio Juris* 132, who says that universal harmonisation abstracts completely from the cultural dimension of law and yet this is a major problem for European integration.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

hope lies only in transposition and the later sensitive tuning by the actors and organs of the recipient.

As systems in transition look to the pool of competing models available in Western Europe and America with the purpose of re-designing and modernising their legal, economic, and social systems, a whole new world of research possibilities is opening up. The models will be competing hard to sell their legal products in order to put a foot in the door of the new markets.[72] Comparatists will be system-watching studying the success or otherwise of this new *mixité*. They will also be called to provide an understanding of this major tool for law reform by supplying models and will be pressed to create blue prints for the importer of models.[73] In this way, comparatists can assist systems in transition in structured change. As comparative lawyers examine the way in which legal institutions are connected, disconnected, and transposed, they will be able to extend their subject beyond the traditional areas, both geographic and substantive.

Once reciprocity and mutuality between legal and cultural systems have been achieved, all will be 'contaminants' and 'irritants' of each other. When elements from different interpretive communities combine, they can tap into each other and mesh, bringing 'cultural conversation' into a broader narrative.[74] This is the factor of 'fit'. To realise this 'fit', tuning at the time of 'transposition' and understanding law as transposition are crucial. Depending on the metaphors employed, what are needed are 'good tuners' with 'good instruments', 'good gardeners' with 'good fertilisers and soil', and 'good cooks' with 'good ingredients'.

It must be noted that the adjective 'mixed' is gaining new ground and may come to mean many things: a 'combination of various legal sources', a 'combination of more than one body of law within one nation, restricted to an area or to a culture', and 'the existence of different bodies of law applicable within the whole territory of a nation'.[75] It is claimed that today, 'the law of all the member states of the European Community is mixed, since in a sense these have derived their law from Brussels as well'.[76] Instances of mixing are complicated as they can be overt or covert, structured or unstructured, complex or simple, blended or unblended; and therefore difficult to define.[77] Mixed systems also present themselves to comparative lawyers in very diverse forms; there are ongoing states of 'mix', and a wide scope of knowledge is

[72] eg, there will be ample scope to study the impact of the new Dutch Civil Code, which is already becoming a valuable export product.

[73] In addition, they will have to provide a better understanding of changing concepts of nationhood, sovereignty, legal system, legal families, law, and identity.

[74] DS Berry, 'Interpreting Rights and Culture: Extending Law's Empire' (1998) IV *Res Publica—A Journal of Legal and Social Philosophy* 1, at 10.

[75] M Milo and J Smits, 'Trusts in Mixed Legal Systems: A Challenge to Comparative Trust Law', (2000) 3 *European Review of Private Law*, 421, at 423.

[76] Ibid.

[77] Such mixes can be portrayed along a spectrum. See Örücü, op cit, above n 11, at 12

required to fully analyse this phenomenon, especially since many more systems are shifting and in transition as new types of mixes come into being.[78] Being prone to using culinary metaphors, this author envisages the new 'mixes' as 'cake mixes' where the outcome is not precisely known until the cake is fully cooked, the chances of being spoilt by under- or over-cooking being a possibility. The conclusion is that all law is mixed and there are no exceptions. It is only that the mixture is different, and the levels of combinations and therefore the extent of the mix varies.[79] The diagnosis is that law is transposition.

In the past, mixes were formed through strong movements of transmigration of legal institutions and ideas, mostly in the form of impositions and of divergent linguistic, communal or religious traditions indigenous to the system itself. In contemporary terms law is the fruit of cross-fertilisation and direct transposition. This is strengthened by the fact that many legal systems are interrelated, such as in the EU. Here, law is created through transposition at points of reconciliation.

VI. CONCLUSION

According to Sacco, 'Borrowing and imitation is . . . of central importance to understanding the course of legal change', and 'the birth of a rule or institution is a rarer phenomenon than its imitation'.[80] This view also accords with Watson's when he says, 'the moving of a rule or a system of law from one country to another has now been shown to be the most fertile source of legal development since most changes in most systems are the result of borrowing'.[81] Monateri goes even further and says that almost every system has grown out of 'contaminations' and the actual legal world is to be seen as a world of 'contaminations' rather than a world split into different families.[82] Very little is original in law. What there is, is in the selectivity in the borrowing, in the ensuing mix and the homogenisation process in the courts, that is, successful 'tuning'.

Internalisation of norms and standards by the people in a recipient system is crucial if there are to be fruitful developments. This is aided by the tuners. Harmony as a possibility of conversation can be achieved through appreciating diversity as well as by eliminating diversity.

Shared human problems require similar responses from legal systems, hence legislatures and courts look to other jurisdictions for inspiration at least,

[78] eg, in the new South African mix created by the Constitution of 1996, the scope of the mix is extended by regarding traditional law as part of South African law, as well as adding the Canadian and German models to the elements in the mix. In the Hong Kong mix, the common law is shifting from being the overlay to becoming the underlay.

[79] For the patterns of internal logic and the outcome of movements of elements between systems, see the schematic exposé in Örücü, op cit, above n 35, 339 and 343.

[80] Sacco, op cit, above n 5, at 394, 397.

[81] Watson, op cit, above n 33, at 94.

[82] Monateri, op cit, above n 12, at.107.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

if not for direct borrowing, in an effort to improve these responses. Global problems of our day need global solutions or interrelated local solutions. Legal ideas and institutions are crossing borders rapidly. The new forms in these systems challenge the established conceptual and analytical frameworks of law, the role and value of receptions, theories of convergence and divergence, the dynamism of comparative law, the classification of legal families, and the concept of the legal system itself.

In most transmigrations of law the process is a one way trajectory. Therefore the arguement that 'transplants' should be avoided but 'cross-fertilisation' is desirable is not a convincing one, as even in what is called cross-fertilisation there is one, if not a number of transpositions. Moreover, 'pollenisation' may be a better word to use, since fertilisation services only the soil, but 'pollenisation' the product.[83]

Most 'law as transposition' was once firmly in the area of private law. Now, one area where transposition and fertilisation can be analysed with advantage is in the construction of constitutions, since most developing constitutional systems have adopted institutions, norms and constitutional models from elsewhere both as to content and to structure. Even though constitutions epitomise national aspirations, institutions of democracy, the rule of law and human rights and related issues are at the bases of all modern Western constitutions. However, the word 'Western' has been losing its exclusive meaning since the 1990s. The most striking rapprochement is the acceptance of principles such as the rule of law, equality, legal certainty, fairness, non-discrimination and all the rights and freedoms protected by the ECHR. This rapprochement is mostly as to content but also as to structure.[84] Here too we can regard law as transposition.

The history of law is largely the history of legal transpositions, often from a number of sources, law being a constructive synthesis. Though divergence is fruitful and the differences between the similars are especially interesting, there is now a move towards 'bridging' and harmony. This harmony can only materialise through carefully tuned transpositions.

It is of course true that structure and substance can be transposed with less difficulty than values and legal culture, itself part of socio-culture. Difficulties are not in the transposition of techniques and forms, but the transposition of values and content. As transposition takes place, distortion may occur in order to fit the existing traditions. These in turn may have serious impact on how the structure and substance work. How the transposed become 'irritants', what these irritants produce as 'anti-bodies', and the health of the systems in transition of today, will be assessed in this new century.

[83] It may of course be argued that the soil will be changed and possibly enriched by the fertilisation.

[84] See Örücü, 'Public Law in Mixed Legal Systems and Public Law as a "Mixed System" ', vol 5.2 Electronic Journal of Comparative Law, (May 2001), <http://law.kub.nl/ejcl/52/art52–2.html>, 6.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press

Legal systems are constantly mixing, blending, melting, then solidifying into new shapes as they cool down while transposition and tuning take their effect. This is an ongoing process. There will always be new movements, new transposition and further tuning. Law is the outcome of a series of transpositions.

https://doi.org/10.1093/iclq/51.2.205 Published online by Cambridge University Press