On successful Legal Transplants in a Future Ius Commune Europaeum

Chapter 8

ON SUCCESSFUL LEGAL TRANSPLANTS IN A FUTURE *IUS COMMUNE EUROPAEUM*

*Jan Smits**

The success of a transplant is measured by what it achieves, and this for Smits is uniformity. For Smits, the aim is to establish a new private law for Europe and the main role for comparative law is in the supplying of an answer as to how to establish this, which he sees as the main methodological question of European private law. This piece makes the claim that uniformity can be achieved in an organic bottom-up way by the competition of legal rules, transplanting rules through a 'market of legal culture', for which national courts should be responsible. According to Smits success is in organic growth. He challenges those who claim that legal transplants do not lead to uniformity, and assesses the internal and external factors influencing legal transplants. Like Nelken and Örücü, and also Foster and de Cruz, Smits discusses, compares and contrasts the views of Watson, Legrand and Teubner. The author claims that the use of legal transplants is the most promising way to build a European ius commune *if national courts are allowed to choose the most suitable rules. However, diversity of law will remain in Europe and any centralist imposition will strangle diversity. This piece also paves the way for van Gerven's contribution.*

Smits is not so much interested in the process of, or the reason for, transplants, as in their results. He claims that past transplants have been successful and have led to uniform law and the future European ius commune *will largely use legal transplants, which will again lead to uniform law. The contribution presents a programmatic approach to European private law and empirical evidence, through the areas of contract and property (trust), of successful legal transplants. Unlike Nelken and Örücü above, Smits' criterion for assessing the success of a transplant is the creation of some degree of uniformity between the laws of the importing and exporting countries. Mixed legal systems, for Smits, present the answer, a 'mix of national mentality and European uniformity'.*

He tests his ideas through commercial contract law and property law in Europe because transplants were successful, and no uniformity is seen in property law because there is a lack of successful legal transplants in this field. The acceptance of trust-like arrangements in civil law countries in recent years is, according to Smits, one result of

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Comparative Law in the 21st Century, 137–154.

the increasing globalization of world trade. This is also shown as an unsuccessful transplant, since the institution of the trust changed while it moved into the civil law countries from its common law environment. Here the reader might also like to consider the contribution by Rafenne. According to Smits, what is important, then, is the environment of the transplanted rule, international or national. He looks at South Africa and suggests that the transplanted law should be seen by the legal elite as suitable to the environment of the importing country.

The environment into which the foreign legal rule is imported is the external factor. The internal factors are approached through the concept of 'path dependence'. The socio-economic environment (that is, the external factor) may favour legal transplants, but the type of rules (that is, the internal factor) may prevent the uniform law from materializing and vice versa.

In this contribution legal transplantation is seen as the most promising way of establishing a European ius commune *and the test of success is seen as uniformity, any tension to be resolved by national courts. We must accept that diversity will remain. But is this indeed 'just as good as uniformity'?*

[A. Harding and E. Örücü]

1. Introduction

In the now very alive discipline of European private law, one of the main methodological questions is *how* to establish a common law for Europe. Given the desirability of a uniform private law, various methods have been proposed as to its realisation in a European context.[1] In this paper, it is investigated to what extent the specific method of using legal transplants (or, the borrowing of law) may contribute to the emergence of this *ius commune Europaeum*. In doing so, I will focus not so much on *the way* legal transplants take place[2] or *why* these take place,[3] but on *what they lead to*. This seems to be an appropriate subject for a contribution to a volume devoted to aspects of 'Comparative Law in the 21st Century' for two different reasons. First of all, the success of legal transplants has been huge in the past and if we must believe Alan Watson, it is even so that 'most changes in most systems are the result of borrowing'.[4] If this is true, the development of European *ius commune* in

[1] For an overview of the debate cf. J. Smits, *Europees Privaatrecht in Wording*, (Intersentia, Antwerpen-Apeldoorn-Oxford, 1999), 51 et seq., and C.U. Schmid, 'The Emergence of a Transnational Legal Science in European Private Law' (1999) 10 *Oxford Journal of Legal Studies* 673.

[2] Cf. A. Watson, *Legal Transplants* (2nd. edn., The University of Georgia Press, Athens, Georgia, 1993), 30: 'imposed reception, solicited imposition, penetration, infiltration ... '.

[3] This question is addressed by U. Mattei, 'Efficiency in Legal Transplants' (1994) 14 *International Review of Law and Economics* 3.

[4] Watson, n. 2 above, p. 95.

the near future could, to a large extent, also be directed by the use of legal transplants. Secondly, despite the presence of so much historical evidence for legal transplants in the past, a recent discussion of a more theoretical nature has been launched as to the extent to which legal transplants really *did* lead to uniform law in the past and *will* lead to uniform law in the future. The main argument against transplants is that they tend to lead to a disintegration of national legal systems and not to any uniformity at all. According to me, this argument overlooks some essential features of the whole European enterprise and I will elaborate on this by looking at, *inter alia*, the mixed legal systems. I thus hope to contribute to the development of theory in the field of transfer of legal ideas and institutions, in particular to the assessment of factors involved in the transferability of law.

This paper is a mixture of a programmatic contention about the future of European private law and a presentation of empirical evidence of what legal transplants lead to. In paragraph 2, it is explained what we should consider to be a legal transplant and why transplants are important for the development of European legal uniformity. In paragraph 3, some objections against the use of legal transplants for this purpose are discussed. Paragraph 4 and 5 provide the reader with some evidence of how uniformity through legal transplants may come about and try to assess the factors that favour or hamper this process. Finally, paragraph 6 offers a general outlook on the future of European *ius commune* through legal transplants, mixing the programme and the findings of the other paragraphs.

2. Ius Commune and Legal Transplants: Toward a Mix of National Mentality and European Uniformity

At the outset, we need to have some idea of what is meant with legal borrowing or legal transplanting. In a very broad definition of these concepts, one can indeed[5] maintain that practically all legal change is the result of the transplanting of law from one legal system to another. The inspiration Justinian drew from the classical Roman law sources, the reception of Roman law in later times, the making of the *Code Civil* out of different types of materials (custom, scholarly literature, case law, *etc.*), the enactment of the *Code Civil* in other countries than France, the interaction of English law and Scots law in the United Kingdom,[6] even the very development of a legal institution on the basis of arguments derived from other legal sources than the legal system itself, all these are examples of borrowing legal rules or ideas from a different time period or a different legal system. This borrowing could take place by both the legislature and the courts and could be imposed from the above because of reasons of political power (as in the case of the enactment of a Civil Code) or be

[5] As Alan Watson does. See, e.g., ibid.; A. Watson 'Aspects of Reception of Law' (1996) 44 *American Journal of Comparative Law* 335.

[6] Cf. recently R. Evans-Jones, 'Roman Law in Scotland and England and the Development of one Law for Britain' (1999) 115 *Law Quarterly Review 1999* 605.

much more driven by a need to find better law than one has in one's own legal system. Some examples of legal borrowing from more recent times include the inspiration that Eastern European countries drew from American and Western European sources in transforming their economies,[7] and the use of Anglo-American legal institutions (like trust, lease, franchising, swaps and netting) in the European continent.[8]

To use such a broad definition of legal borrowing is, however, not very insightful. Watson deliberately abstains from elaborating a classification of different types of borrowing, as he abstains from developing any theory of legal borrowing what so ever.[9] To him, as a legal historian, the providing of real evidence of legal transplants that took place in the past, is enough. Any need to critically assess the transplants from the perspective of what they led to or why they took place, can then be absent. However, as this paper is concerned with the extent to which legal transplants may be of use for the emergence of a *ius commune*, there is a need for some criterion to critically evaluate these transplants. In the following, I simply assess legal transplants as successful if they create some degree of uniformity between the laws of the importing and the exporting country, and as unsuccessful if they do not lead to any uniformity at all or, even worse, pose a threat to the consistency of the importing system. In the latter case, the system would even be worse off than it was before the transplant.

As I have defended before,[10] the use of legal transplants in this narrow sense is one of the most promising ways of establishing a uniform private law in Europe. Uniformity of law in most of the cases cannot be created by just imposing rules through public policy considerations. Private law is – at least partly that is – *more* than rules and may, in this respect and in some cases, be considered as (legal) *culture*;[11] in those cases, public policy consequently cannot have a serious influence on private law, and uniformity thus will not follow automatically from the famous

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[7] On which E. Örücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition* (Kluwer, Deventer, 1999) 118 et seq.; G. Ajani, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' (1995) 43 *American Journal of Comparative Law* 93.

[8] On which W. Wiegand, 'The Reception of American Law in Europe' (1991) 39 *American Journal of Comparative Law* 229; U. Mattei, 'Why the Wind Changed: Intellectual Leadership in Western Law' (1994) 42 *American Journal of Comparative Law* 195.

[9] Watson, n. 2 above, pp. 13, 30; cf. A. Watson, *The Evolution of Law* (Blackwell, Oxford, 1985), ix. Cf. however W. Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law* 489, 504.

[10] J.M. Smits, *The Good Samaritan in European Private Law: on the Perils of Principles without a Programme and a Programme for the Future* (Kluwer, Deventer, 2000); Smits, n. 1 above, 19 et seq.; J.M. Smits, 'A European Private Law as a Mixed Legal System' (1998) 5 *Maastricht Journal of European and Comparative Law* 328; J.M. Smits, 'How to Take the Road Untravelled? European Private Law in the Making' (1999) 6 *Maastricht Journal of European and Comparative Law* 25.

[11] For the most outspoken defense of this thesis see P. Legrand, *Le Droit Comparé* (PUF, Paris, 1999).

'berichtigende Worte des Gesetzgebers'.[12] The two different claims that are immanent in this presupposition still need some elaboration.

The first claim is that the mere drafting and enacting of Principles of European Private Law[13] or the mere searching for a common core[14] does not in itself lead to uniformity. Private law is to a certain extent harmonization-resistant, even when confronted with centrally imposed rules. To which extent this is the case (is it true for all areas of private law and for all types of legal rules?), is a question that may be answered by looking at legal transplants and the uniformity already created by these. The contention of Pierre Legrand that 'legal systems (. . .) have not been converging, are not converging and will not be converging'[15] appears to be too radical. His idea of law as *entirely* embedded in the society and culture of a specific country has not been recognised as insightful.[16] Moreover, many comparative lawyers would not identify Legrand's idea of comparative law as falling within the limits of that discipline at all. Lawson, for example, once stated that comparative law in itself 'is bound to be superficial' and linking law to other societal and cultural phenomena of a specific country would be impossible.[17] But Legrand is right, up to a certain point: there are areas of law where the morality of the civil law and the common law are indeed too divergent to reach uniformity. The problem of how to establish where this is precisely the case, leads me to the second claim.

The second claim I want to make is that a greater extent of legal uniformity than exists right now *is* possible, but this should come about, to a large extent, in an *organic* way, by proceeding bottom-up instead of top-down. The best way of attaining this would be through the competition of legal rules.[18] In transplanting legal rules from one country to another on a 'market of legal culture',[19] the best European legal rule may survive. This does not automatically imply that *any* rule glorifies or that uniformity does indeed evolve in the end: in some instances, diversity of law may be just as good as uniformity, as long as there is this free movement of

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[12] J. Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (Manutius Verlag, Berlin, 1848).

[13] Like O. Lando and H. Beale (eds.) *Principles of European Contract Law. Parts I and II Combined and Revised* (Kluwer Law International, The Hague, 2000); D.J. Hayton, S.C.J.J. Kortmann and H.L.E. Verhagen (eds.), *Principles of European Trust Law* (Kluwer, The Hague, 1999).

[14] On common core projects such as the Trento Project see M. Bussani and U. Mattei, 'The Common Core Approach to European Private Law' [1997–1998] *Columbia Journal of European Law* 339.

[15] P. Legrand, 'European Legal Systems are not Converging' (1996) 45 *International and Comparative Law Quarterly* 52, 61–62.

[16] Although Legrand has some illustrious predecessors. I refer to F.C. Von Savigny's idea of the *Volksgeist* and of civil law as characteristic for the people of a country: F.C. Von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (reprint, Olm, Hildesheim, 1814/1967); and to Lord Cooper of Culross, 'The Scottish Legal Tradition' in *Selected Papers*, (Edinburgh, 1957), p. 199 (cited in Watson (1993), n. 2 above, p. 22: 'law is the reflection of the spirit of a people, and so long as the Scots are conscious that they are a people, they must preserve their law'.

[17] F.H. Lawson, 'The Field of Comparative Law' (1949) LXI *Juridical Review* 16.

[18] Smits (1998), n. 10 above, p. 328.

[19] Cf. U. Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 *International Review of Law and Economics* 3.

legal rules, at least creating the *possibility* of legal change toward uniformity. Although several different legal actors may play a role in this borrowing process, pride of place should, in my opinion, be given to the national courts. These can be considered to be best able to judge which areas of the law are so invaded with national morality that it is impossible to reach uniformity in these areas.[20] As long as national courts do not consider it appropriate to deviate from their national rules – having taken into account the different solutions in other countries – there is obviously some national mentality that stands in the way of borrowing another rule. What will result in the end is thus not just uniformity through the imposing of principles or no uniformity at all because of differing national mentalities, but a mix of the two: as much uniformity as is possible, given the differing mentalities, to be judged by the national courts.

This theory also explains the fact why this paper is mainly about the *voluntary* borrowing of law by national courts in Europe. I feel this is appropriate since an imposed transplant (for example, in the case of legislation of an exporting country imposed upon an importing country) is fundamentally different from a voluntary one. The true essence of an imposed transplant is that its success (the extent to which it creates uniformity) is artificially created by the exporting country through the use of mere force. The example of the French Civil Code is paradigmatic: its success can only be understood from the point of view of political power. Uniformity of private law in Europe can, in my view, however, only be successful if it comes about in an *organic* way, in a bottom up approach in which the courts play a primordial role. Examples of what I typically see as legal borrowing in Europe include the transfer of the doctrine of offer and acceptance from the European continent to English law in the nineteenth century,[21] the incorporation of the German *Verwirkung* doctrine in Spanish law in the 1980s[22] and the incorporation of the French distinction between *obligations de moyen* and *obligations de résultat* in Belgian and Dutch case law.[23]

It is this programmatic assertion that is taken as a starting point for the rest of this paper. First, we must deal with the argument of those who contest that legal transplants lead to uniformity of law at all (paragraph 3). Then, it is apt to discover the factors that influence legal transplants taking place in a successful way. If these factors are assessed well, we are able to explain why there is already uniformity in some areas of the law, divergence in others. I believe that two different sorts of factors are at work here. First, there are *external* factors related to the environment in which the transplanted legal rules have to try to survive (paragraph 4). Second,

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[20] Smits (2000), n. 10 above, p. 45.

[21] See A.W.B. Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247; and more generally, M. Reimann (ed.), *The Reception of Continental Ideas in the Common Law World 1820–1920* (Duncker and Humblot, Berlin, 1993).

[22] See A. Vaquer, 'Importing Foreign Doctrines: Yet Another Approach to the Unification of European Private Law? Incorporation of the *Verwirkung* Doctrine into Spanish Case Law' (2000) 8 *Zeitschrift für Europäisches Privatrecht* 301.

[23] Cf. Smits, n. 10 above, p. 93.

there are also *internal* factors, concerned with the transplanted rules themselves (paragraph 5).

3. Legal Borrowing and the Consistency of a Legal System

Any theory that tries to assess the success of legal transplants should take into account the extent to which law is tied to its social, economic and cultural environment.[24] It is after all this environment that is decisive for the extent to which uniformity will arise. If the legal rule that is transplanted has a wholly different meaning within its new environment, only a terminological and not a true uniformity arises. Two opposite views as to the interaction of a transplanted rule and its environment have actually been held in the scholarly literature.

The one extreme view we have seen already is held by Alan Watson: legal evolution (including the borrowing from other legal systems) takes place more or less insulated from the environment the legal rules are part of. That Watson regards legal transplants as having been so successful in the past is of course caused by this view of law, most of the time *not* being the mirror of society: if legal rules can be transported from society to society and do not change under pressure of their environment, law is relatively autonomous and not related to some *Volksgeist* or *mentalité*. Borrowing law could then never infringe upon a national system's consistency or legal culture. This view is however not evidenced by all legal transplants. Sometimes, there is indeed uniformity coming about, but more often, the legal rule that is borrowed from another country obtains a whole new meaning within the importing legal system.[25] This is the reason why some authors have disputed the usefulness of speaking of a transplant, a word that seems to imply that the transferred rule remains identical, playing the same role in its new environment.[26]

The most outspoken dissenter in this respect is Pierre Legrand. He is at the other end of the spectrum, emphasising that all legal rules are embedded in a national environment.[27] While Watson says that 'the recipient system does not require any real knowledge of the social, economic, geographical and political context of the origin and growth of the original rule',[28] Legrand emphasises that legal transplants are actually impossible because of the always differing meaning a rule begets in another legal system. The mere fact that the rule is imported into that other system

[24] Cf. E. Örücü, 'Mixed and Mixing Systems: a Conceptual Search' in E. Örücü, E. Attwool and S. Coyle (eds.), *Studies in Legal Systems: Mixed and Mixing* (Kluwer, The Hague, 1996), p. 335 (and Table II, appearing on p. 343).

[25] Think of the very different interpretation of art. 1384 *Code Civil* in Dutch law (art. 1402 *Burgerlijk Wetboek*).

[26] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

[27] P. Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

[28] A. Watson, 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review* 79, 81.

makes it a different rule: its local meaning is an inevitable part of that rule.[29] For this reason, rules cannot travel from one system to another.

The point Legrand is making is important: from a standpoint of what legal transplants lead to, regard should be had to both the exporting and the importing environment. Without looking at the way the transplant is received in the importing country, one cannot judge to what extent the transplant has been successful. Here, I will not argue that a lot of the criticism of Legrand against Watson's argument stems from a different understanding of what a legal transplant actually is (Watson not being concerned with its effect, Legrand on the other hand emphasising it).[30] Legrand's argument, should however be supplemented in two other ways. In the first place, Legrand – who does not deny that legal borrowing in Watson's sense has taken place extensively – does not show what the fact of borrowing leads to, other than that it does *not* lead to uniform law. Does it, for example, lead to inconsistencies within the importing system, or is there a smooth adaptation of the imported rule? Secondly, Legrand seems to go too far in asserting that *the whole* of the law is tied to *the whole* of society ('a social totality').[31] Why could it not be that the environment in which a national rule is operating is identical to the environment in another country? This refers to a point recently made by Gunther Teubner.

Teubner, standing midway between Watson's insulation thesis and Legrand's contextual thesis, maintains with Legrand that to speak of a legal transplant is in itself misleading.[32] To speak of a transplant suggests that the transferred rule or institution 'will remain identical with itself playing its old role in the new organism' (i.e. the legal system into which it is imported). Teubner would then rather not speak of a legal transplant, but of a legal 'irritant': if some rule is imported into another legal system, what happens is that a series of new and unexpected events takes place within that system. The 'binding arrangements' of the law are irritated, having the result that not only the rules of the importing legal system have to be reconstructed, but also the alien element itself is altered.[33] The introduction of good faith in English contract law as a result of the implementation of the European Directive on Unfair Terms in Consumer Contracts[34] does, for example, not mean that after a careful implantation and cultivation in its new environment, good faith – or the English legal system – will still be the same as they were *before* the implantation. Both English contract law *and* good faith are irritated until evolution leads to a new 'binding arrangement'. In maintaining this thesis, Teubner stresses that law does not operate in a vacuum, but is closely connected with its socio-economic environment. The delicate equilibrium within the legal system as reflecting that environment is

[29] Legrand, n. 27 above, p. 117.

[30] Cf. A. Watson, *Legal Transplants Again*, Ius Commune Lectures on European Private Law (Research School Ius Commune, Maastricht, 2000).

[31] Legrand, n. 27 above, p. 122.

[32] Teubner, n. 26 above, p. 11.

[33] Teubner, n. 26 above, p. 12.

[34] Directive 93/13.

perturbed by the transplant, leading to new divergences. Teubner thus offers what is missing in Legrand's thesis: a notion of what legal transplants do cause in their new environment.

But the extent to which there is irritation of the national legal system may differ – and here it is that Teubner takes side with Watson. Building upon the work of Kahn-Freund,[35] Teubner states that not all legal institutions are culturally embedded; some are insulated from culture and society. In the latter case, legal institutions are more or less 'mechanical' and transfer is easier than in the former case, where law is much more 'organic' and transfer more difficult.[36] Teubner thus sees law as tied to 'social fragments': the degree to which a legal institution is tied to a social system (be it a political, economic, cultural, scientific or technological one) is decisive for the success of transplanting that institution. As the English production regime, characterised by an 'unmediated interplay of market forces[37] and external governmental regulation, is for example, quite different from the German one, in which good faith came up as a way of enforcing legal cooperation duties in an economy, allowing a high degree of autonomy to the different economic agents, the transplanting of good faith to English law cannot be expected to be successful.

To what extent is Teubner right in answering the two questions I just raised? The great benefit of his analysis is that it is a *differentiated* one: not the entire legal system is tied to the economic, social and cultural environment of a country, but parts of it are less 'national'. Although Teubner does not pay much attention to the case where law in different legal systems is tied to a similar 'social fragment' (being mainly concerned with cases where this is *not* so), it follows from his analysis that this could very well be the case. Any 'irritation' of the importing system could not occur. The very important question of where these identical social fragments are now present, may show us where uniformity through legal transplants may be reached. Moreover, it should be noted that Teubner's argument against legal transplants is based upon the example of a European Directive, which is essentially a form of law that is imposed upon the European member states.[38] As far as voluntary borrowing by national courts is concerned, it is – at least in the theory I just proposed – impossible that a court decides to borrow a foreign legal rule that it considers inconsistent with its own legal system or socio-economic environment.

It is thus, very well possible that legal transplants have led to uniformity in the past and will lead to uniformity in the future, as long as there is a similar environment in both the exporting and the importing country. In that case, the emergence of uniformity among several legal systems does not create inconsistencies in the present national systems. In the next paragraph, I hope to show how

[35] O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' in O. Kahn-Freund, *Selected Writings* (Stevens, London, 1978).

[36] Teubner, n. 26 above, p. 17.

[37] Teubner, n. 26 above, p. 26.

[38] On the character of European Directives as non-voluntary borrowing see N. Burrows, 'European Community: the Mega Mix' in Örücü et al., n. 24 above, p. 309.

environmental factors are decisive for the success of legal transplants by using some examples from legal practice.

4. The Success of Legal Transplants as Explained by their Environment

Prestige or quality of the exported legal rules,[39] efficiency,[40] the role of the national elite,[41] chance,[42] practical utility,[43] cultural forces[44] and imposition[45] have been mentioned as factors involved in the taking place of legal transplants.[46] These very diverse factors may be regarded as explaining *why* legal transplants take place and not so much *whether* the transplants have been successful. To judge what factors are really involved in the successful transferring of law, other criteria should be used. It follows from the above that these criteria should first of all be related to the environment into which the foreign legal rule is imported. If the imported rule would have the same effect it has in the 'mother country', that rule would be neutral to considerations of national morality. And – most important – this may be so because *other factors* than national morality had a formative influence on the coming into being of these rules. Here, I will elaborate this idea by looking at both legal transplants in Europe itself and at transplants that have taken place within the mixed jurisdiction of South Africa. In doing so, it is taken as a starting point that where there is uniformity right now, this is caused by successful legal transplants,[47] be it already at the time of the reception of Roman law, and/or, be it at later times.

As to Europe itself, it is striking to see that in some areas of private law, there is already a great deal of uniformity. This is in particular the case in the law of contract. The mere fact that the so-called Lando Commission was able to draft *Principles of European Contract Law*[48] without too much disagreement about what these principles should consist of, is in this respect informative. This can only be explained by the fact that – despite strong national influence on this area of law as well – some other factor has been at work here. It is highly likely that the socio-

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[39] The traditional explanation; cf. Ajani, n. 7 above, and Watson, n. 5 above, p. 345, stressing 'the need for authority'.

[40] In particular Mattei, n. 19 above.

[41] P.G. Monateri, 'The "Weak" Law: Contaminations and Legal Cultures' in *Italian National Reports to the XVth International Congress of Comparative Law 1998* (Giuffre Editore, Milano, 1998) p. 94.

[42] Watson, n. 5 above, p. 339.

[43] Watson, n. 5 above, p. 335.

[44] R. Evans-Jones, 'Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law' (1998) 114 *Law Quarterly Review* 228.

[45] As is rightly stressed by E. Örücü, 'Mixed and Mixing Systems: a Conceptual Search' in Örücü et al., n. 24 above, p. 349.

[46] Cf. Örücü, n. 7 above, p. 121 et seq.

[47] Regardless of whether these can be qualified as transplants in the narrower sense of being initiated by the national courts.

[48] See n. 13 above.

economic 'fragment'[49] here was, and still is, a transnational one. Contracts many times are not just made in a national setting, but in an international one: the law of contract is particularly there to facilitate (legal) persons to practice international trade. In doing so, not only goods are transplanted from one country to another, but also national legal rules, for the simple reason that knowledge of the foreign rules is made available to the contracting parties through the contracting process. In the end, this may lead to uniform practices from which uniform legal rules evolve. Evidence shows that this has at least been the case with regard to the *formation* of contract.[50]

In property law on the other hand, uniformity in Europe is to a great extent lacking. If my thesis is correct, this is mainly caused by the absence of successful legal transplants in this area of law.[51] This may indeed have to do with the existence of some national morality in property law, only providing a national environment for the (then unsuccessful) transplants. Gambaro, for example, states the following about the law of real property:[52]

> When one considers the nature of various property rights (obligations between neighbours, riparian rights, condominium law, rights of superficies, servitudes, and the like), it becomes rather clear that much property law is deeply rooted in locally developed legal traditions. And, for this reason it is better left to those local legal traditions which for hundreds of years have addressed these issues in the manner most adapted to the locality

An interesting example with regard to property law is the recent success that the institution of the *trust* seems to have had outside of the Anglo-American legal world. Over the last decade, some civil law countries have accepted trust-like arrangements in their national laws;[53] the Hague Trust Treaty of 1985[54] forces parties to the Treaty to implement foreign trusts in their national legal systems. I believe the success of the trust is caused by the ever-increasing globalization of world trade, leading to the need for a relatively easy way to establish a separate patrimony with effect *erga*

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[49] To use Teubner's terminology; see above, para. 3.

[50] Which was the very reason why Schlesinger decided to devote his Cornell-project to formation of contract. See R.B. Schlesinger (ed.), *Formation of Contracts: a Study on the Common Core of Legal Systems* (Oceana, Dobbs Ferry, Vol. I, 1968), p. 18: 'it seemed wise to start with a topic to which the system-builders everywhere almost unanimously have assigned an initiatory, separate, and well-defined place'. See for details Smits (2000), n. 10 above, p. 190.

[51] Although here too, transplants in the Watsonian sense, have taken place. Cf. Watson, n. 2 above, p. 82 et seq.

[52] A. Gambaro, 'Perspectives on the Codification of the Law of Property: an Overview' (1997) 5 *European Review of Private Law* 497.

[53] Cf. U. Mattei, *Comparative Law and Economics* (University of Michigan Press, Ann Arbor, 1997), p. 132 and J.H. Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107 *Yale Law Journal* 179.

[54] Convention on the Law Applicable to Trusts and their Recognition, The Hague 1 July 1985.

omnes, but avoiding the continental *numerus clausus* of real rights.[55] It should however be questioned whether this new business environment (again a uniform socio-economic segment) does indeed lead to a uniform trust law for Europe. Here, it is that internal factors, i.e. factors related to the property rules themselves, have to be taken into account. These rules may at first lead to inconsistencies within the property law system, later on to an embedment of the trust *within* that system; the transplant then should be assessed as unsuccessful (cf. paragraph 5).

The great difference between contract law and property law thus seems to be that the former is much more tied to a non-national environment than the latter one, having for a consequence that legal transplants in contract law have been much more successful in the sense that they really led to uniformity. An important point however still needs to be made. If contract law is much more tied to a socio-economic segment than to a national one, it is only as far as *this segment* is concerned that contract law is uniform. In other parts of the law of contract, the transplant that occurred may *not* have led to any uniformity. So, it could very well be that in commercial transactions there is uniformity through legal transplants, as in consumer transactions there is not.[56] Now, let me elaborate this idea of the environment of the transplanted rule as being of great importance by looking at South African law.

South-African law also provides interesting material as to the external factors that determine a successful transplanting of law. In general, the mixed legal systems show which foreign law elements have been regarded to be of use for the development of a national legal system by the national *Rechtshonoratioren*[57] in Scotland, Louisiana, Quebec and South-Africa. In particular, South-African law is of great interest for the venture of creating a European Private Law because of the fact that in this country – unlike the case in for example Scotland, where a civil law system was overlaid by a common law structure[58] – a whole new legal system had to be built up out of elements of both the civil law and the common law. In particular political and cultural forces were at work in doing so. Here too, the socio-economic environment was very much decisive for where the law was transplanted from. In the nineteenth century, it was mainly English law being transplanted because of the strong English orientation of the leading judges and other representatives of the prevailing legal mentality. From 1900 onward, it was however mainly the *Afrikaans* oriented legal elite that successfully managed to drive back the English influence. English doctrines

[55] Cf. Mattei, n. 53 above, p. 132: 'Trust has obtained an easy and well-deserved victory in the competition on the market of legal doctrines'.

[56] This thesis should however be mitigated because of the influence of European Directives in the field of consumer protection. Teubner's whole plea against the introducing of good faith in English contract law however, clearly shows that then consistency problems still may occur.

[57] To quote Max Weber. See M. Rheinstein, 'Die Rechtshonoratioren und ihr Einfluss auf Charakter und Funktion der Rechtsordnungen' (1970) 43 *RabelsZeitschrift* 1.

[58] On Scots law as a mixed legal system *e.g.* E. Attwooll, 'Scotland: a Multi-dimensional Jigsaw' in Örücü et al., n. 24 above, p. 17, and Evans-Jones, n. 44 above.

like the consideration doctrine in contract law and the doctrine of nuisance were rejected as being too little Roman-Dutch law oriented.[59]

Problems with the consistency of South-African law however existed as long as there was no prevailing view of the general cultural embedment of the legal system. This is clearly shown by the battle of *causa* and consideration. As long as there was no agreement in the lower courts (reflecting society in general) whether the system was to be influenced by English law or Roman-Dutch law, a 'nightmare of confusion' (to quote Lord De Villiers) existed. The courts of the Cape and of Transvaal had differing points of view in this regard until the Appellate Division of the Supreme Court finally settled the matter in favour of Roman-Dutch law.

Two things may be learnt from South Africa with regard to the successful transplanting of law. The first is that even in the heyday of English and *Afrikaans* nationalism, some areas of South-African law were not influenced by the battle between the so-called Purists and Pollutionists. Again, large parts of the law of contract appeared, to a large extent, to be resistant to considerations of national morality. Secondly, it is apparently so that the more general political and cultural climate in a country very much decides which rules are regarded as a true part of that country's legal system.[60] In the case of legal transplants, only those rules that are regarded by the prevailing legal elite to form part of the national legal culture will be readily accepted as law that is suited for the environment of the importing country. In South Africa, like in the case of the European Union, a whole new society ('state') had to be built up out of differing economic, social, cultural and legal elements. This leads to irreconcilable conflicts as long as there is no predominant view of what that society should look like, and consequently, a coherent system of law cannot arise. In this respect, a consistent political and institutional system is of great importance for the success of legal transplants. This was so in South Africa – where a legal system with an identity of its own – only emerged after the coming into being of a national State in 1910; it will in my view also be the case in Europe.

The point I want to make for the venture of a future European Private Law is that as long as there is a uniform *European* socio-economic or cultural segment (a 'fragment', in Teubner's terminology) present, transplants *may* lead to uniform law in Europe, but that as far as this segment is lacking, uniform law is impossible. In assessing the possible success of legal transplants in Europe, it thus primarily comes down to identifying new European socio-economic or cultural segments. In the law of commercial contracts, this uniformity has already been more or less attained. Other areas that are concerned with the main goal of the European Union, namely the promoting of economic activity within Europe, may also be unified through the use of transplants. Other uniform segments may come into being as well. In case there would be a shared idea in Europe of to what extent consumers should be

[59] Resp. *Conradie v Rossouw* 1919 *AD* 279 and *Regal v African Superslate (Pty.) Ltd.*, 1963 1 SA 102.

[60] This appears also to be true for Scots law; cf. N.R. Whitty, 'The Civilian Tradition and Debates on Scots Law' [1996] *Tydskrif vir die Suid-Afrikaanse Reg* 227.

protected from unfair trade practices, a segment of consumer protection could come about as well.

To assess what factors are involved in the successful transferring of law, one can however not halt at the external factor of the environment into which the foreign legal rule is imported. The extent to which uniformity is created through transplants is also dependent upon other, *internal*, factors. These factors may also explain why legal transplants have been more vigorous in the field of contract law than in, for example, property law.

5. Internal Factors Involved in the Success of Legal Transplants: Path Dependence and Areas of European Private Law

Apart from the factors related to the environment of which the transplanted rules become parts, there are also *internal* factors that account for the success (or failure) of legal transplants. Some transplanted rules are better able to adjust themselves to their new environment than others. It is this interaction of different types of rules and their environment that is tackled in the concept of *path dependence*. This concept was developed to explain why evolution in general (of species in biology, of economies in evolutionary economics, etc.) might not lead to the best possible result. The central idea is that the path evolution is bound to take in the future, does not only depend on the 'adaptive landscape'. Many times, a true spontaneous order cannot evolve because of internal materials (in organisms these would be genes) that have been shaped by transformations in the past and that are now irreversible. These were responsive once to the environment of previous times, but are now constraints upon adaptive change.[61] The future development is thus affected by the path that was traced out in the past. In biology, especially Gould has pointed out that evolution often depends on 'accidents', leading to an eccentric path.[62] The lesson to be learnt from this for the law is that evolution of legal norms through transplants may not under all circumstances lead to uniform results, *even though a socio-economic or cultural segment may be identified*. So, even though the environmental prerequisite is met, transplants may in these cases not be successful after all.

To decide to what extent uniformity of private law through legal transplants can come about in Europe, it is useful to presume that this is least probable where it is only possible to change the present rules at the expense of high costs. This is so in case of rules that many people rely upon. On the other hand, the amount of uniformity to be attained should theoretically be the greatest in the case of rules that are only of use for the parties that set these rules themselves. If one takes the

[61] J. Hirshleifer, 'Evolutionary Models in Economics and Law' reprinted in Ulrich Witt (ed.), *Evolutionary Economics* (Elgar, Aldershot, 1993), 205. For an application to law see M.J. Roe, 'Chaos and Evolution in Law and Economics' (1996) 109 *Harvard Law Review* 641.

[62] S.J. Gould, *Wonderful Life* (Norton, New York, 1989).

statement of Gambaro on real property law as being based in local legal traditions,[63] he is certainly right that any uniformity in this field of the law is hard to attain. But the reason why this area of law is looked at as most adapted to the locality has in my view, much more to do with the investments that have already been made in the path of property law, and from which it is too costly to deviate, than with 'the nature' of property rights, as Gambaro states. To change the national law in the areas mentioned by Gambaro would mean that third parties' interests would have to be reconsidered on a very large scale. The reliance of the parties involved on the existence of 'absolute' rights that have effect *erga omnes* would be violated if the applicable rules on, for example, the establishment of limited rights and the registration of these, would be eliminated or even changed. The taking into account of so many different interests has led to delicate static systems of property law with – most of the time – a *numerus clausus* of limited real rights.[64] Moreover, to get to know the ins and outs of property law in a specific system is far more difficult than to get to know a country's law of contract: the information costs of the former are much higher.[65] In this sense, property law is stuck in a 'local equilibrium'. In the bigger part of property law, this does not pose a true problem: any need to have uniform law is virtually absent. It is a problem however, where there *is* a need, namely in the field of security interests: here, the external factor (the coming into being of an international commercial environment) and the internal factor of the specific type of legal rules are the most divergent. Accordingly, it is most difficult to come to uniformity in this area of law.

This is entirely different in case of the law of contract. The parties to a contract would not be truly hampered by a change of the law because of their ability to set the rules for their relationship themselves. The law of contract's dynamic character guarantees the elimination and survival of rules that are respectively the least and the most suited for their new environment. Benson quotes Rubin as he says:[66]

> If conditions change (. . .) and two individuals decide that, for their purposes, behaviour that was attractive in the past has ceased to be useful, they can voluntarily devise a new contract stipulating any behaviour that they wish. That is, old custom can be quickly replaced by a new rule of obligation toward certain other individuals without prior consent of or simultaneous recognition by everyone in the group (or of some legal authority)

This evolutionary thesis is backed up by evidence from both economic analysis of law and comparative law.

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[63] See paragraph 4.

[64] Cf. Smits, n. 10 above, p. 246.

[65] Cf. M. Dreher, Wettbewerb oder Vereinheitlichung der Rechtsordnungen in Europa? (1999) 54 *Juristenzeitung* 105, 109: 'Da Wissen und Kosten eng Miteinander Verbunden Sind, Stellt Unwissenheit Zumindest vor Informationskosten und Begrenzt so auch die Faktormobilität Ganz Entscheidend'.

[66] B.L. Benson, 'Evolution of Commercial Law' in *The New Palgrave Dictionary of Economics and the Law, vol. i* (MacMillan, London, 1998), p. 90.

Economic analysis of law shows the need for a distinction between default and mandatory rules. Rules should be mandatory when any other rule that the parties adopt would be violating third party interests. Mattei and Cafaggi rightly point out that the amount of mandatory rules should decrease in a system where alternative means of protection of third parties are available. They mention, for example, the lesser amount of mandatory rules in contract law if the tort system protects third parties.[67] It is obvious that property law is much more related to these mandatory rules than contract law. The economic reason for property law being more mandatory thus runs parallel with the evolutionary idea of property law being less able to change when confronted with a changing environment.

Also comparative law provides evidence of some rules being more suited to be transplanted than others. I already pointed out that there is a far greater uniformity in European contract law than there is in European property law. If one turns again to the mixed legal systems, one sees that contract law in South- Africa, for example, is to a great extent a true mix of civil law and common law elements.[68] It has for example rejected the requirement of consideration, but has developed a system of contractual remedies that is to a large extent comparable to English law. Any true influence of English property law on the Roman-Dutch system is however absent: South-African private law has essentially kept its system of a *numerus clausus* of real rights, even though it would not be called that way.[69] In Scots law, a similar tendency can be identified.[70]

Again, I use the trust to illustrate this. Despite the ever-greater use of the trust in civil law countries in recent years, it should be doubted whether its reception will lead to convergence of the civil law and the common law. In both South African[71] and Scots law,[72] the implant of the trust led to an institution that is still called a trust, but is mainly civilian as to its contents. South African law for example does not recognise the English law dichotomy of legal and equitable ownership: the trustee is the full owner of the trust and the beneficiary only has a right *in personam* against the trustee.[73]

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[67] U. Mattei and F. Cafaggi, 'Comparative Law and Economics' in *New Palgrave* I, n. 66 above, p. 348.

[68] Cf. on the mixed character of the various areas of South African law: R. Zimmermann and D. Visser (eds.), *Southern Cross; Civil Law and Common Law in South Africa* (Clarendon Press, Oxford, 1996).

[69] Cf. Smits, n. 10 above, p. 257.

[70] Cf. Smits, n. 10 above, p. 189 et seq.

[71] Cf. T. Honoré, 'Trust' in Visser and Zimmermann, n. 68 above, p. 849; and M.J. De Waal, 'The Uniformity of Ownership, *Numerus Clausus* and the Reception of Trust into South African Law' (2000) 8 *European Review of Private Law* 439 et seq.

[72] G. Gretton, 'Scotland: The Evolution of the Trust in a Semi-Civilian System' in R. Helmholz and R. Zimmermann (eds.), *Itinera Fiduciae; Trust and Treuhand in Historical Perspective* (Berlin 1998), p. 507.

[73] Yet, insolvency of the trustee does not imply that the trust can be liquidated. Cf. Art. 12, Trust Property Control Act 1988. Art. 1 of the Principles of European Trust Law (n. 13 above) also provides a very broad definition of the trust, accommodating both the English trust and the more civilian versions of the mixed legal systems.

Still open for further discussion is what exactly is the relationship between the two types of factors that are decisive for the success of legal transplants. I have shown that the two do not have to run together. In property law, for example, the socio-economic environment may favour legal transplants if international commerce would be in need of a uniform regime of security interests, yet the type of rules involved may prevent a uniform law from coming about (as we saw with law of trusts). On the other hand, the environment of the exporting system may be different from the importing one, while the type of rules (as in the case of contract law) does allow a successful legal transplant to take place. It is most likely that this happens in the case of exporting Western contract law to legal systems in transition to a market economy (as is the case in Eastern Europe). Uniform law will then not come about either, but now because of the external factor preventing this.

6. A European *Ius Commune* through the Use of Legal Transplants?

In the above, the assessment of factors that favour and hamper the successful transplanting of law have been illustrated by using some historical examples. The framework that has been developed in this paper should however not only be suitable to *explain* present uniformity and diversity in Europe, but should also be able to *predict* it. Both the environmental factor of a socio-economic or cultural segment (preferably accompanied by a European political-institutional system) and the internal factor of legal rules of a certain type are decisive for the success of legal transplants.

As to the present environment in Europe, one can on the one hand identify an increasingly global segment of transfrontier trade. Consequently, there will be a good setting for uniformity of commercial law, coming about through transplants. In Europe itself, this segment is politically backed up by the EC Treaty. On the other hand, there are some segments that in a way are auxiliary to the promoting of economic activity, like consumer protection and the avoidance of unfair competition. These segments may also be 'European' ones. As to the type of rules, it is clear from the above that mainly the law of contract (and possibly the law of tort) offers rules with a high potential for transferring these to other legal systems. In property law, this may be different, in particular leading to problems in the field of harmonizing the law of security interests. Any transplant that takes place in this field would probably not lead to uniformity at all, but rather to inconsistencies within the importing legal system.

It is however my profound belief that using legal transplants is still one of the most promising ways to establish a European *ius commune*. Any tension between legal-cultural unity and socio-cultural diversity will be smoothly resolved if it is left to the national courts to decide which rules remain national in character and which rules become part of a European uniform law. Of course, an important consequence of this theory is that diversity of laws in Europe will, to a large extent, remain. This is however not to be regarded as negative, but much more as a strength – as Örücü has

recently pointed out as well. In my view, diversity is just as good as uniformity,[74] as long as the *Rechtshonoratioren* have at least taken into account that there are other solutions than the national one, and have seriously investigated whether the foreign legal rule may not have been better suited to solve the case. Any other view on harmonization of law through centralist imposition would strangle the present diversity. In this sense – even though disadvantages of the approach defended here may be identified – the future of legal transplants in Europe will be brilliant.

[74] See Örücü, above n. 7, p. 22, stressing 'harmony' instead of harmonization. Cf. R. Hyland, 'Comparative Law' in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, London, 1996), p. 184.