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THE 'TRANSPLANTABILITY' DEBATE IN COMPARATIVE LAW AND COMPARATIVE LABOUR LAW: IMPLICATIONS FOR AUSTRALIAN BORROWING FROM EUROPEAN LABOUR LAW

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The 'Transplantability' Debate in Comparative Law and Comparative Labour Law: Implications for Australian Borrowing from European Labour Law

Anthony Forsyth[*]

I INTRODUCTION

This paper examines the long-standing conceptual debate in comparative law literature about whether, and if so in what circumstances, it is possible to 'transplant' laws from one legal system to another. The paper also focuses specifically on how the transplantability debate has played out in the field of labour law. The major contributions to the debate in the comparative law and comparative labour law literature are discussed in Parts II and III of the paper. In Part IV, these various approaches to legal transplantability are assessed, to determine which of them offers the greatest assistance in identifying the factors that are likely to affect whether laws can be successfully borrowed from overseas jurisdictions. The paper concludes that Teubner's analysis of the interaction between law and various social systems provides the soundest conceptual framework for considering the transplantability of labour laws, and in particular, the potential for successful Australian adoption of European labour law concepts and institutions.[**]

II COMPARATIVE LAW

A *Introduction*

Arising from consideration of the purposes of comparative law generally,[1] and in particular its potential use in the process of law reform,[2] the question whether laws can be successfully transferred or 'transplanted' from one legal system to another has become a central theme of discussion in comparative law.[3] Much of this debate has been triggered by Watson's forceful advocacy of the feasibility of 'legal transplants'

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[**] This examination of the transplantability debate was originally carried out for purposes of the author's PhD thesis, *Transplanting Social Partnership: Can Australia Borrow from European Law to Improve Employee Participation Rights in Business Restructuring?* (Unpublished PhD Thesis, University of Melbourne, 2005). That particular context for considering 'legal transplants', and the author's conclusions in that respect, will be referred to but will not be explored in detail in this paper. Further information may be obtained by contacting the author at: anthony.forsyth@buseco.monash.edu.au.

[1] See, eg, Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law: Volume 1 – The Framework* (2nd ed, 1987) 15–27; Michael Bogdan, *Comparative Law* (1994) 27–30.

[2] See, eg, Bogdan, above n 1, 29; Bernhard Grossfeld, *The Strength and Weakness of Comparative Law* (1990) 15; Zweigert and Kötz, above n 1, 15–16; cf Jonathan Hill, 'Comparative Law, Law Reform and Legal Theory' (1989) 9 *Oxford Journal of Legal Studies* 101, 106–7.

[3] Rudolf Schlesinger et al, *Comparative Law: Cases – Text – Materials* (6th ed, 1998) 13.

over many years.[4] In response, a diverse range of views has emerged, including some quite strong critiques of Watson's position. This pivotal exchange in the comparative law literature will now be considered.

B *Watson: The Ease of Legal Transplants*

According to Watson, 'legal transplants, the desirability and practicality of borrowing from another legal system' are the essence of comparative law in its practical conception, offering the prospect of making improvements to one's own legal system.[5] Two key points emerge from Watson's writings on legal transplantation. First, he argues that legal transplants are common in practice. For example, in his view, 'borrowing (with adaptation) has been the usual way of legal development' in the Western world.[6] This assertion has been challenged by other comparative law writers.[7] However, Watson's second major claim, that 'the transplanting of legal rules is socially easy',[8] has proven even more contentious and lies at the heart of the legal transplants debate.

Watson's assertion that laws move easily and are accepted in other legal systems without great difficulty rests on the notion that law is quite separate from other social systems. For example, he argues that 'to a large extent law possesses a life and vitality of its own' with no close or inevitable relationship between legal structures, institutions and rules on the one hand, and the needs and political economy of a society on the other.[9] Watson concludes that 'successful borrowing could be made from a very different legal system', such as one at a different stage of development or with a different political structure, and that:

> What … the law reformer should be after in looking at foreign systems [is] an *idea* which could be transformed into part of the law of his country. For this a systematic knowledge of the law or political structure of the donor system [is] not necessary, though a law reformer with such knowledge would be more efficient. Successful borrowing could be achieved even when nothing [is] known of the political, social or economic context of the foreign law.[10]

For Watson, the success of a legal transplant depends largely on the recipient country's desire for the foreign legal rule, rather than an awareness of, or similarities with, its context.[11] However, he acknowledges that other factors may come into play,

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[4] See Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review* 79; Alan Watson, 'Comparative Law and Legal Change' (1978) 37 *Cambridge Law Journal* 313; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd ed, 1993).
[5] Watson, 'Comparative Law and Legal Change', above n 4, 317–18.
[6] Watson, *Legal Transplants: An Approach to Comparative Law*, above n 4, 7, see also 95, 107, chapter 4; Watson, 'Legal Transplants and Law Reform', above n 4, 80–2; Watson, 'Comparative Law and Legal Change', above n 4, 313–14, 318.
[7] See eg William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law* 489, 503.
[8] Watson, *Legal Transplants: An Approach to Comparative Law*, above n 4, 95; see also Watson, 'Comparative Law and Legal Change', above n 4, 313.
[9] Watson, 'Comparative Law and Legal Change', above n 4, 314–15; note however that Watson expresses some contradictory positions on this subject, eg while he suggests that legal rules are 'part of the social structure' (at 315) and 'some degree of correlation *must* exist between law and society' (at 321), elsewhere he maintains that 'even in theory there is no simple correlation between a society and its law': *Legal Transplants: An Approach to Comparative Law*, above n 4, 108.
[10] Watson, 'Legal Transplants and Law Reform', above n 4, 79.
[11] Ibid 83.

such as the pressure for and against legal change exerted by groups and individuals in society ('pressure force' and 'opposition force'), and the receptivity of a legal system to foreign law due to the sharing of linguistic traditions or legal experience with another system ('transplant bias').[12]

C *Kahn-Freund: Contextual Factors Explaining Transferability*

Like Watson, Kahn-Freund was interested in the possible use of comparative law as a tool of law reform. He also saw that this raised the problem of 'transplantation', and asked:

> What are the uses and what are the misuses of foreign models in the process of law making? What conditions must be fulfilled in order to make it desirable or even to make it possible for those who prepare new legislation to avail themselves of rules or institutions developed in foreign countries?[13]

In response, Kahn-Freund contended that 'there are degrees of transferability', and the chances of survival or risk of rejection of the foreign law in the transplanted environment depend on a range of factors – such as geographical, economic, social and, above all, political factors.[14] Writing in the mid-1970s, Kahn-Freund felt that political considerations had greatly increased in significance compared with these other factors over the preceding two hundred years, so that (for example) differences between communist and non-communist countries, and between dictatorships and democracies, presented major impediments to the transfer of laws. Even more important, however, was 'the enormously increased role which is played by organised interests in the making and in the maintenance of legal institutions', such as big business, trade unions and cultural and religious groups.[15]

Accordingly, Kahn-Freund submitted that a putative law reformer should consider how closely a foreign institution or law is connected with a distribution of power in the foreign country that is not shared in the recipient country; and how it is likely to be received by organised interest groups in its new setting.[16] This was demonstrated, for example, by the resistance of the politically powerful Catholic Church to divorce law reform in Italy and Ireland, despite the growing tendency towards legal borrowing between other countries in the area of family law.[17] And in the field of labour law, Kahn-Freund asserted that '[t]he obstacles to transplantation are formidable' because of the strong influence of politically-grounded interests representing management and labour. This was especially the case in attempts to transplant laws or institutions dealing with *collective* labour relations, as demonstrated in the case of the British *Industrial Relations Act 1971*.[18]

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[12] See further Watson, 'Comparative Law and Legal Change', above n 4, 321–32.
[13] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 1–2, 5; see also Otto Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 *Law Quarterly Review* 40.
[14] Kahn-Freund, 'On Uses and Misuses of Comparative Law', above n 13, 6, 8, 27.
[15] Ibid 8, 11–12.
[16] Ibid 12–13.
[17] Ibid 13–17.
[18] Ibid 20–1, 24–7; see further Part III(B) below.

In summary, Kahn-Freund argued that the transplantability of legal rules or institutions should not be taken for granted, and that while the use of laws outside their environment of origin entails a risk of rejection, '[t]he use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores [the] context of the law'.[19] In contrast to Watson, Kahn-Freund considered that knowledge not only of the relevant foreign *law* is important in the use of the comparative method – knowledge of the foreign law's social, and more importantly, its political *context*, is also critical.[20]

D *Legrand: Legal Transplants are Impossible*

While Kahn-Freund highlighted the dangers of ignoring contextual background in considering the transplantability of laws, a much stronger position is advocated by Legrand. He argues that legal transplants are impossible at a fundamental theoretical level, because of the inability of legal rules to 'travel across jurisdictions … unencumbered by historical, epistemological, or cultural baggage'.[21] Legrand takes Watson's assertion that the transplanting of legal rules is 'socially easy' and subjects it to close scrutiny. But first, he takes a step back from the question whether legal transplants are feasible, by examining precisely what is to be 'transplanted' or 'displaced': 'laws', or 'legal rules'? By 'legal rules', he understands Watson to mean statutory instruments and, possibly, judicial decisions. In other words, according to Legrand, Watson makes no distinction between law and legal rules.[22] However, Legrand argues, '[r]ules are just not what they are represented as being by Watson'. Rather, a 'rule is necessarily an incorporative cultural form … supported by impressive historical and ideological formations', with a meaning or interpretation that is also socially and culturally embedded.[23] From here, Legrand's argument develops as follows:

> … [T]here could only occur a meaningful 'legal transplant' when both the propositional statement as such *and* its invested meaning – which jointly constitute *the rule* – are transported from one culture to another. Given that the meaning invested into the rule is itself culture-specific, it is difficult to conceive, however, how this could ever happen. … [A] crucial element of the ruleness of the rule – its meaning – does not survive the journey from one legal system to another. … Thus the imported form of the words is inevitably ascribed a different, local meaning which makes it *ipso facto a different rule*. As the understanding of a rule changes, the meaning of the rule changes. And, as the meaning of the rule changes, the rule itself changes.[24]

Accordingly, Legrand contends, 'the transplant does not, in effect, happen: a key feature of the rule – its meaning – stays behind so that the rule that was "there", in

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[19] Ibid 27; see also Bogdan, above n 1, 29–30; Zweigert and Kötz, above n 1, 16.
[20] Kahn-Freund, 'On Uses and Misuses of Comparative Law', above n 13, 27; see also Eric Stein, 'Uses, Misuses – and Nonuses of Comparative Law' (1977) 72 *Northwestern University Law Review* 198, 208–9; Bogdan, above n 1, 41, 45, 49–55, 78–81; Basil Markesinis, *Foreign Law and Comparative Methodology: a Subject and a Thesis* (1997) 203–7; John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (1996) 15–16, 236.
[21] Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111, 113–14.
[22] Ibid 111–13.
[23] Ibid 114–16; see also Grossfeld, above n 2, 47; Bogdan, above n 1, 51–2; Jerome Hall, 'Comparative Law as Basic Research' (1980) 4 *Hastings International and Comparative Law Review* 189, 197.
[24] Legrand, above n 21, 116–17.

effect, is not displaced over "here"'. The implications of this conclusion for Watson's legal transplants thesis are, to Legrand, plain: legal transplants 'cannot happen' and, at best, all that can be displaced from one jurisdiction to another is 'a *meaningless* form of words'.[25] In summary, Legrand's argument is that while *laws* are capable of transplantation, *legal rules*, because of their deep cultural embeddedness, are not.[26]

Legrand's emphasis on the significance of legal culture can be seen as one dimension of a sociological approach to legal scholarship that focuses on the contextual operation of law or 'law in action', rather than simply the text of legal rules.[27] Nelken, for example, identifies the various elements of legal culture that are relevant in considering the processes of legal change and transfer. These include legal norms and institutions; social behaviour affecting whether law is used or not; the role and influence of courts, judges and the legal profession; understandings in society of what law is, what it is for, and what it is made up of; approaches to legal reasoning, case law and the framing of legislation; and the role played by rules operating outside the law, such as religious and ethical norms. In Nelken's view: 'The idea of legal culture thus points to differences in the way features of law are themselves embedded in larger frameworks of social structure and culture which constitute and reveal the place of law in society.'[28]

Legrand illustrated the difficulties of transplantation by reference to the process of European integration, involving increasing interaction between the two major Western European legal traditions, the common law and civil law systems. He saw this process as highlighting the differences between the two systems, not just in terms of substantive laws, but more importantly in their 'legal cultures', or 'the frameworks of intangibles within which interpretive communities operate and which have normative force for these communities'.[29] That is, the different ways in which the two legal traditions think, learn, write about and understand law are what really matters in determining the prospects for transferring legal rules and institutions between them. Lawyers schooled in the common law tradition will never be able to read, interpret and apply civil law codes in the way that civil lawyers do, while civil lawyers would have similar difficulties in understanding legislation as common lawyers do. So, Legrand argues, it is questionable whether European legal integration can succeed,

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[25] Ibid 120.

[26] See also Grossfeld, above n 2, 38, 41, 45–6, 49, 71; Günther Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411, especially 442–3.

[27] See, eg, David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (2001) 7, 9; Roger Cotterrell, 'Is There a Logic of Legal Transplants?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (2001) 71, 79; Roger Cotterrell, 'Comparatists and Sociology' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) 131; David Nelken, 'Comparatists and Transferability' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) 437, 451–2.

[28] Nelken, 'Towards a Sociology of Legal Adaptation', above n 27, 24–6; see also Cotterrell, 'Is There a Logic of Legal Transplants?', above n 27, 79, 90; and Part III(E) below. Note also that Watson, too, discussed the importance of 'legal culture' as an influence on the attitude of lawmakers to the idea of borrowing from other legal systems, see *Legal Transplants: An Approach to Comparative Law*, above n 4, 108, 112–13, 114–15.

[29] Pierre Legrand, 'Legal Traditions in Western Europe: The Limits of Commonality' in R Jagtenberg, E Örücü and A J de Roo (eds), *Transfrontier Mobility of Law* (1995) 63, 68–82.

just as any use of comparative law for law reform will fail if insufficient attention is paid to differences in legal culture.[30]

Watson's defence of his 'legal transplants' thesis against Legrand's attack should also be noted here.[31] Watson maintains that he agrees with Legrand's argument, and has long argued himself, that a transplanted rule will not be the same thing as it was in its former home. There is indeed some support for this view in Watson's earlier work, for example:

> Transplanting frequently, perhaps always, involves legal transformation. Even when the transplanted rule remains unchanged, its impact in a new social setting may be different. The insertion of an alien rule into another complex system may cause it to operate in a fresh way. Not infrequently, moreover, often because of translation from a foreign language, a rule that is borrowed is misunderstood yet is still accepted. … The whole context of the [transplanted] rule or concept has to be studied to understand the extent of the transformation.[32]

There may also be more to Watson's conception of 'legal rules' than Legrand gives him credit for. For example, Watson stated that 'legal rules, in addition to being part of the social structure, also operate on the level of ideas', and that what is 'borrowed' is very often the idea, rather than simply the rule.[33] However, Watson's major concern with Legrand's approach is that he overlooks the importance of comparative legal history. Watson agrees that the differences between legal systems must be considered, but so must the similarities and their causes, including the extent of borrowing or transplanting that has occurred.[34]

E *Teubner's 'Legal Irritants' Thesis*

Seeking to explain the gap between the positions of Watson and Legrand, and utilising aspects of Kahn-Freund's analysis, Teubner calls for a 'conceptual refinement' of the legal transplants debate.[35] He sees Legrand's argument as too culturally bound, ignoring the separation or 'deep cleavages' between cultural and other discourses, and the many examples of successful legal transfers that have occurred among Western societies. As for Watson, Teubner agrees that transplants have been a major source of legal change, but objects (among other things) to Watson's dismissal of the significance of context in the process of legal borrowing: 'if one wants to understand the dynamics of legal transplants one must analyse [the] external pressures from culture and society carefully.'[36]

Teubner therefore attempts to explain legal transplants in terms other than the 'simple alternative context versus autonomy' presented by Legrand on the one hand, and

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[30] Ibid 82–4; see also Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995) 58 *Modern Law Review* 262.
[31] Alan Watson, 'Legal Transplants and European Private Law' (2000) 4.4 *Electronic Journal of Comparative Law* <http://www.ejcl.org/ejcl/44/44-2.html> at 29 January 2004.
[32] Watson, *Legal Transplants: An Approach to Comparative Law*, above n 4, 116 (citations omitted).
[33] Watson, 'Comparative Law and Legal Change', above n 4, 315; see also Watson, 'Legal Transplants and European Private Law', above n 31, where he maintains that legal borrowing relates not only to statutory rules, but also institutions, legal concepts and structures.
[34] Watson 'Legal Transplants and European Private Law', above n 31.
[35] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11, 17.
[36] Ibid 14–17.

Watson on the other. To take this forward, Teubner develops Kahn-Freund's focus on the interconnection between law and political power structures, and explores 'law's "binding arrangements"' with other social systems.[37] He finds that law's 'contemporary ties to society … vary from loose coupling to tight interwovenness.'[38] Transfers are relatively easy in areas of law that have only loose contact with social processes, but there is greater resistance to change where laws are tightly coupled with other social discourses. However, even where there is loose coupling, and transfers are apparently easier, this is not a mechanical process: 'legal transfer is not smooth and simple but has to be assimilated to the deep structure of the new law, to the social world constructions that are unique to the different legal culture.'[39] And where there is tight coupling, transfers face resistance not only from a foreign legal culture, but also from spheres outside the law, including (as Kahn-Freund observed) politics, along with economic processes, technology, health, science and culture. In that case, transfers may not be possible 'without a simultaneous and complementary change' in these other social fields, but the more likely result is that the transfer will cause 'irritations' to the social fabric in its new setting.[40]

Teubner illustrates his 'legal irritants' thesis by reference to the implementation in Britain of the European Community ('EC')'s 1994 *Consumer Protection Directive*, involving adaptation of the continental 'good faith' principle to British contract law. Observing that the abstract, open-ended concept of good faith is a unique expression of European legal culture, he queries its compatibility with 'the more rule-oriented, technical, concrete but loosely systematised British style of legal reasoning'. In Teubner's view, good faith would not be fully transplanted in Britain, in the sense that British lawyers and judges would start adopting continental methods of interpretation and reasoning: 'But it will 'irritate' British legal culture considerably.'[41] He argues that, given the 'special historical and cultural constellation' of the German style good faith principle, including its grounding in the broader production system of 'Rhineland capitalism', only a very different version of good faith could emerge in the context of Britain's market-oriented economic culture.[42] That is, good faith in German contract law is rooted in a broader framework of cooperative relations operating throughout the economic system, exemplified by (among other elements) harmonious labour relations, and the extensive obligations of capital providers and other stakeholders to promote the company's long-term interests over their own. In contrast, the British production regime is typified by, for example, financial markets imposing 'short term horizons'; deregulated, management-controlled labour markets; and strong inter-firm competition.[43]

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[37] Ibid 17; these ideas build on Teubner's previous expositions of 'systems theory' and the interconnection between legal systems and other social systems of communication; see, eg, Gunther Teubner, 'Autopoietic Law' in Gunther Teubner (ed), *Autopoiesis in Law and Society* (1987); Gunther Teubner, *Law as an Autopoietic System* (1993).
[38] Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', above n 35, 18.
[39] Ibid 19.
[40] Ibid 21–4, 27–8.
[41] Ibid 11, 19–20, and see 20–1 where the likely development of good faith in the British legal context is considered further.
[42] Ibid 20, 22–8.
[43] Ibid 25–7.

Accordingly, Teubner asserts that an 'implantation' of the 'living law' of German good faith (involving notions of cooperation, information, renegotiation and contractual adaptation) 'into the British soil simply would not find its roots in a corresponding economic culture.' German good faith would not irritate the British production regime if it merely sought to facilitate trust and cooperative relations between contractual parties. However, irritation could be expected if British implementation of the German concept involved the imposition of prohibitive rules on certain types of economic action, thus constraining key elements of Britain's market-driven, competitive production system.[44]

In summary, Teubner maintains that when a foreign rule is imposed on a domestic culture, rather than 'interaction' or 'repulsion' in its new environment, something else happens to the law:

> It is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events. … [I]t irritates law's 'binding arrangements'. It is an outside noise which creates wild perturbations in the interplay of discourses within these arrangements and forces them to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself. 'Legal irritants' cannot be domesticated …[45]

In other words, according to Teubner, the ease or difficulty of legal transfer depends on the degree of connection between law and its social context. Legal transplants may become 'legal irritants', depending on whether there is loose or tight coupling between law and other social discourses.

F *Örücü: The 'Transposition' of Laws*

Örücü senses some 'disquiet' about the idea of 'legal transplants' and (like Teubner) argues that it needs to be reconsidered in light of the extreme positions taken by Watson and Legrand. For Örücü, this involves a search for new terminology to explain how law moves and contributes to change, an investigation of 'the old and new metaphors of comparative law'.[46] In her view, the concept of 'legal transposition' is more appropriate:

> 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. …
>
> 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.[47]

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[44] Ibid 26–8.
[45] Ibid 12.
[46] Esin Örücü, 'Law as Transposition' (2002) 51 *International and Comparative Law Quarterly* 205, 205–6; see also 208–11, and Nelken, 'Towards a Sociology of Legal Adaptation', above n 27, 15–20, 30, for further discussion of Watson's 'legal transplants' metaphor, Teubner's concept of 'legal irritants' and other relevant terminology; note also Lawrence Friedman, 'Some Comments on Cotterrell and Legal Transplants' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (2001) 93, where the author asserts that the language of 'transplants' or 'borrowing' of law is really being used to describe the processes of modernisation and industrialisation.
[47] See Örücü, 'Law as Transposition', above n 46, 207–8.

Örücü identifies several elements affecting successful 'intermingling' following the transposition of laws, including political factors and the potential for a 'clash of diverse cultures' (both legal and social), with a range of results possible:

> At one extreme is a transplant that has not worked, possibly because a genuine transposition has not occurred. … 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.[48]

Referring to Teubner's 'legal irritants' thesis, Örücü considers that some level of 'irritation' caused by the transplanted law in its new environment may be necessary for successful transposition.[49] The real benefit of adopting foreign legal models is only obtained through proper transposition of the foreign law, which requires 'tuning' by participants (like judges) within the recipient legal system. However, the process of transposition is not an easy one (even between systems within the same legal tradition), particularly when values and culture are being exported along with the substance of the law.[50]

Örücü's discussion also draws attention to an issue underlying much of the debate about the transplantability of law – that is, whether transfers are 'successful' or not. Nelken explores this question in considerable depth, pointing out that there are many different measures of the success of transplants, such as whether the new law 'fits', is observed or utilised, or influences social change in its new environment. Nelken also highlights the importance of considering who, in a given society, is in a position to judge whether a transplant has succeeded. [51] While these matters are often taken for granted, they have important implications for determining the feasibility of legal transplantation.

III COMPARATIVE LABOUR LAW

A *Introduction*

Just as the 'legal transplants' question is a central theme in comparative law, so too does transplantability loom large as an important issue in comparative labour law. Discussion of the extent to which labour laws and institutions can be transplanted, and studies of transplants that have occurred or are being contemplated, both feature heavily in the comparative labour law literature. Several commentators have observed that 'borrowing' by countries from other systems has become an increasingly accepted method of labour law reform.[52] However, some have urged the need for caution in utilising comparativism for this purpose. As Kohler notes:

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[48] Ibid 212 (citations omitted); see also Esin Örücü, 'A Theoretical Framework for Transfrontier Mobility of Law' in R Jagtenberg, E Örücü and A J de Roo (eds), *Transfrontier Mobility of Law* (1995) 5, 17.

[49] Örücü, 'Law as Transposition', above n 46, 211.

[50] Ibid 208, 219, 222.

[51] Nelken, 'Towards a Sociology of Legal Adaptation', above n 27, 35–51; see also Cotterrell, 'Is There a Logic of Legal Transplants?', above n 27, 79.

[52] See eg Roger Blanpain, 'Comparativism in Labour Law and Industrial Relations' in Roger Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies, Volume 1* (1990) 5; Christopher Whelan, 'Labor Law and Comparative Law' (1985) 63 *Texas Law Review* 1425, 1426–7; S A Ivanov, 'Methodological Problems of Comparative Legal Research in Labour Law' in W

> … strong reservations continue to persist in some quarters about the legitimacy of any critical comparative analysis of labor and employment law issues, and of attempts to suggest the adaptation of the lessons learned from foreign experiences to the resolution of a domestic problem. These misgivings typically rest on the view that labor and employment law represents a field so bound-up with the unique character of national habits, ideology, and experiences as to exclude any sort of reflection employing external … reference points.[53]

These issues will now be considered, in the course of exploring the response of comparative labour law scholars to the debate in comparative law about the importance of various contextual factors in determining the success of transplants. The discussion will focus, in particular, on Kahn-Freund's argument that political factors are the major determinant of the transferability of law, and his interlinked proposition that individual labour laws are more readily transplantable than aspects of collective labour law. These views have provided the basis for much of the ensuing discussion about transplantability within comparative labour law, with many other observers supporting Kahn-Freund's two main claims. More recently, however, these issues have been revisited as part of a concerted effort to explain the importance of law's interaction with various other social spheres in comparative labour law inquiry.[54]

B *Kahn-Freund's Position Revisited and Expanded: The Industrial Relations Act 1971 (UK)*

It will be recalled that, according to Kahn-Freund, the prospects of successful legal transfer are linked to a range of contextual factors, such as geographical, economic, social and, most importantly, political factors. That is, the transferability of law depends primarily on its connection to political power structures, and for this reason labour law is particularly difficult to transplant. However, Kahn-Freund drew an important distinction here between two separable elements of labour law, the first concerned with *individual* employment relations (such as wages, working hours, health and safety), and the second dealing with *collective* relations between unions and management (for example, collective agreements, conflict resolution processes). He then concluded that:

> In my opinion the first element – individual labour law – lends itself to transplantation very much more easily than the second element – that is collective labour law. Standards of protection and rules on substantive terms of employment can be imitated – rules on collective bargaining, on the closed shop, on trade unions, on strikes, can not.[55]

E Butler, B A Hepple and Alan Neal (eds), *Comparative Labour Law: Anglo Soviet Perspectives* (1987) 10, 11; Johannes Schregle, 'Explaining Labour Law and Labour Relations to Foreigners: Some Reflections about International Comparison' in J R Bellace and M G Rood (eds), *Labour Law at the Crossroads: Changing Employment Relationships (Studies in honour of Benjamin Aaron)* (1997) 155–6.

[53] Thomas Kohler, 'The Disintegration of Labor Law: Some Notes for a Comparative Study of Legal Transformation' (1998) 73 *Notre Dame Law Review* 1311, 1314 (citation omitted).

[54] See Sean Cooney, Tim Lindsey, Richard Mitchell and Ying Zhu, 'Labour Law and Labour Market Regulation in East Asian States: Problems and Issues for Comparative Inquiry' in Sean Cooney, Tim Lindsey, Richard Mitchell and Ying Zhu (eds), *Law and Labour Market Regulation in East Asia* (2002) 1; and Part III(E) below.

[55] Kahn-Freund, 'On Uses and Misuses of Comparative Law', above n 13, 21.

This was demonstrated, Kahn-Freund suggested, by the fact that most of the International Labour Organisation ('ILO') instruments were directed towards establishing international standards of individual protection. In contrast, in relation to principles of freedom of association and the right to collectively bargain, the ILO provided its member nations with some latitude to adopt laws suited to their domestic conditions. In his view, '[n]othing could more clearly demonstrate the knowledge of the draftsman [sic] that collective bargaining institutions and rules are untransplantable'.[56]

Kahn-Freund also examined the British *Industrial Relations Act* of 1971 (the '*IR Act*'), which was strongly influenced by various foreign laws, to see how this attempt at transplantation had fared. First, the *IR Act* imported some aspects of individual labour law, such as provisions protecting workers from unfair dismissal (from Germany) and protections against discriminatory treatment by reason of trade union membership or activity (from the United States ('US')). Kahn-Freund observed that, in both cases, the imported rules had been 'diluted' in the *IR Act*, in that a worker could not claim reinstatement as a remedy for a dismissal or an act of discrimination (contrary to the German and American 'prototypes'), but only compensation. This was due to the entrenched British common law doctrine preventing specific enforcement of employment contracts. This example illustrated 'not only that in the sphere of individual labour law rules and institutions can be transplanted, but also that even here deeply engrained legal ideologies may set a limit to transplantation.'[57] Secondly, the bulk of the *IR Act* dealing with collective labour relations raised 'the different problem of how far one can transplant institutions closely linked with the structure and organisation of political and social power in their own environment.' For example, the union registration provisions had some origins in the Australian system but, according to Kahn-Freund, did not work well in a country like Britain that otherwise rejected the Australian compulsory arbitration model.[58]

However, most of the *IR Act*'s provisions were based on the American model, such as those dealing with the contractual effect of collective agreements, bargaining units and agents, and the closed shop. Kahn-Freund observed that 'these specimens of attempted transatlantic transplantation are taken out of a habitat of industrial relations quite different from that to which they are to be adjusted', which set the scene for their rejection in the British environment. For example, collective agreements in America were formal written documents, readily capable of legal construction, whereas in Britain they were more esoteric in nature and formed part of a continuing bargaining process. Similarly, rules restricting the closed shop were bound to fail in the British setting, where industrial relations relied heavily on informal custom and practice.[59] Differences in the political systems of the two countries also played an important role. Some provisions of the *IR Act*, like the industrial dispute emergency procedures, adopted the American practice of allowing the executive to refer essentially political decisions to a regulatory commission or court, which in Britain 'means what it does not mean in America, that is, an encroachment on the principle of parliamentary responsibility.' In summary, in Kahn-Freund's view, the British

[56] Ibid 21–2.
[57] Ibid 23–4.
[58] Ibid 24–5.
[59] Ibid 25–6.

experience of adopting elements of American collective labour relations law in the *IR Act* showed that:

> It would indeed be an almost unbelievable '*hazard*,' an unexpected coincidence if substantive rules wrenched out of their American constitutional, political and industrial context could successfully be made to fit the needs of a country with institutions and traditions so different from those of the [US].[60]

C *Other Studies of the IR Act*

The British *IR Act* of 1971 has spawned several other academic studies. Indeed, this legislation has become a major 'case study' of labour law transplantability, and a vehicle for examining the views of Kahn-Freund and Watson on this subject.[61] For example, Whelan (like Kahn-Freund) points to the operation of the industrial dispute emergency procedures under the *IR Act* as an illustration of 'the paramount need for the comprehension of a foreign political system, if a procedure from that system is to be utilised in a new environment.' Allocating responsibility for invoking those procedures to the courts, as in the US, was at odds with 'the British doctrine of ministerial responsibility for political decisions'.[62] Whelan also identifies socio-political factors as the main reason for the failure of the provision in the *IR Act* adopting the American presumption that collective agreements were intended by the parties to be legally enforceable: 'the transplant made no discernible difference to collective bargaining parties; they simply contracted out of the Act.'[63]

Overall, Whelan considers that the *IR Act* was 'revolutionary' in creating a legal framework of rights and limitations in the field of collective labour relations, where previously the law had tended not to intervene.[64] However, this tradition of voluntarism in British industrial relations, compared to the history of extensive legal regulation in the US, was a fundamental difference affecting the transferability of labour law between the two systems.[65] Based on the experience of the *IR Act*, Whelan prefers Kahn-Freund's view that labour laws cannot be understood in isolation from their domestic environment. For Whelan, Watson's claim that the political context of

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[60] Ibid 26–7.

[61] In addition to the studies discussed here, see William Gould, 'Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971' (1972) 81 *Yale Law Journal* 1421; Hamish Sandison, 'A Rejected Transplant: The British Industrial Relations Act (1971-1974)' (1979) 3 *Industrial Relations Law Journal* 247.

[62] Christopher Whelan, 'On Uses and Misuses of Comparative Labour Law: A Case Study' (1982) 45 *Modern Law Review* 285, 293–4; see also Whelan, 'Labor Law and Comparative Law', above n 52, 1436, noting that this led to 'a political clash between Parliament and the courts regarding control of political and economic decisions.'

[63] Whelan , 'Labor Law and Comparative Law', above n 52, 1434; see further Anthony Bartlett and David Lowry, 'Collective Agreements in the United States and Britain: Status and Consequences' (1979) 3 *Utah Law Review* 469.

[64] Whelan, 'Labor Law and Comparative Law', above n 52, 1428.

[65] Whelan, 'On Uses and Misuses of Comparative Labour Law: A Case Study', above n 62, 298–9; see also David Lowry, Anthony Bartlett and Timothy Heinsz, 'Legal Intervention in Industrial Relations in the United States and Britain – A Comparative Analysis' (1979) 63 *Marquette Law Review* 1, 18–19; emphasising political differences between the US and Britain as the reason for the *IR Act*'s failure (see 20–3), these authors conclude (at 28) that the fate of this legislation 'makes it clear that there cannot be a wholesale importation of American labor law into the British system.'

the foreign law is unimportant has little practical value for reform purposes: '[l]egal ideas do not have an independent existence outside their own local setting.'[66]

McDonough finds more common ground between Watson and Kahn-Freund on the transplantability question than other observers.[67] She observes that the American laws borrowed by Britain in the *IR Act* had developed under vastly different circumstances in the US, where the labour movement was not as well established as in Britain and so required some statutory assistance to compel employers to bargain. British unions, however, needed no such legislative aid, and were strong enough to resist unwanted legislation. Therefore, on Kahn-Freund's analysis, the different degrees of power of British and American unions within their own systems created an obstacle to transferral.[68] However, according to McDonough, the conclusion that the *IR Act* would fail was also available by adopting Watson's theory, which allowed for consideration of (inter alia) 'opposition force' to the legal transplant (in this case, the resistance not only of unions but also by business interests) and 'inertia' in the new environment (that is, the industrial parties' 'contentedness with the British voluntary system, despite its deficiencies').[69]

McDonough concludes that while elements of both Watson's and Kahn-Freund's theories are useful in analysing the likelihood of successful transplantation, 'neither theory alone can be seen as the ultimate determinant … A hybrid of the two theories would prove the most useful to a legal reformer.' In any case, there is significant overlap between them. For example, Watson's discussion of 'pressure force' and 'opposition force' parallels Kahn-Freund's emphasis on the role played by organised interest groups: 'while the two apply different terminology, they are identifying the same forces.' McDonough ultimately appears to favour Watson's approach over Kahn-Freund's, claiming that the latter 'underestimated the value of a borrowed idea'. In contrast, 'Watson is able to impose some order on the otherwise quite mysterious process of legal borrowing.'[70]

D *Responses to Kahn-Freund: Other Studies of the Transplantability of Labour Law*

Kahn-Freund's two main arguments about the transferability of law, and labour law in particular, have been considered in many other contributions to the comparative labour law literature. Some of these will now be considered.

1 *The Relative Importance of Various Contextual Factors in Labour Law Transplantation*

First, Kahn-Freund's assertion that political factors have the greatest bearing on the transferability of legal rules and institutions has found favour with a number of other observers. For example, both Stein and Blanpain have strongly endorsed Kahn-Freund's emphasis on the role of organised interest groups in determining both

[66] Whelan, 'Labor Law and Comparative Law', above n 52, 1436–7.
[67] Lorraine McDonough, 'The Transferability of Labor Law: Can an American Transplant Take Root in British Soil?' (1992) 13 *Comparative Labor Law Journal* 504.
[68] Ibid 519–20; see also Lowry, Bartlett and Heinsz, above n 65, 19, 20–1.
[69] McDonough, above n 67, 515–17.
[70] Ibid 528–9.

whether transplants occur in the first place, and (if they do) how successfully they operate.[71] However, others such as Ivanov and Schregle have downplayed the importance of politics, suggesting that differences in social and economic conditions, cultural backgrounds and industrial relations systems are equally or more important in considering the prospects for transplanting labour law.[72]

Many other observers have highlighted the significance of industrial relations and its close relationship with labour law.[73] The attempted transplantation of elements of American collective labour law to Britain is once again illustrative here. Townshend-Smith's study focuses on the implementation of American-style union recognition laws in Britain in the *Employment Protection Act 1975* (the '*EP Act*').[74] He identifies several important similarities between the two countries, such as their liberal-democratic political systems, the shared common law tradition, a commitment to freedom of organisation and free collective bargaining, and the traditional judicial hostility to unions. However, major differences created 'unexpected difficulties' when Britain tried to borrow from US labour law. These differences related primarily to the evolution and nature of the industrial relations systems of the two countries. Union recognition laws were introduced in the US in the 1930s 'to restrict employer anti-union excesses' – that is, to address employers' reluctance to recognise unions for collective bargaining.[75] In contrast, British unions traditionally enjoyed much higher levels of membership and collective bargaining coverage. Recognition was already widely established before the introduction of legislative provisions compelling it. However, by the mid-1960s the rate of union membership growth had slowed and membership among white-collar workers was relatively low. The statutory union recognition procedure aimed to address these problems, by providing 'a spur to voluntary recognition, backed up with compulsion' where unions needed that assistance. It was not intended that the legal processes would become the norm across industry.[76]

Ultimately, however, the 1975 provisions had 'very little impact in numerical terms', with most recognition awards applying to small firms. The extent of employer opposition to the new laws was not anticipated. This resulted in extensive legal challenges to the recognition procedure, with the courts placing significant limits on the powers of the Advisory, Conciliation and Arbitration Service, the statutory body responsible for its operation.[77] Townshend-Smith concludes that a major reason for the legislation's demise lay in the 'failure to examine how far the principle of

[71] Stein, above n 20, 204–8; Blanpain, above n 52, 18–19.
[72] See Ivanov, above n 52, 15, 17; Schregle, 'Explaining Labour Law and Labour Relations to Foreigners: Some Reflections about International Comparison', above n 52, 155; Johannes Schregle, 'Comparative Industrial Relations: Pitfalls and Potential' (1981) 120 *International Labour Review* 15; see also Martin Vranken, 'Comparativism and Australian Labour Law' in Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995) 134; Kohler, above n 53, 1321.
[73] See, eg, Whelan, 'Labor Law and Comparative Law', above n 52, 1447; Alan Neal, 'Comparative Labour Law and Industrial Relations: "Major Discipline?" – Who Cares?' in Chris Engels and Manfred Weiss (eds), *Labour Law and Industrial Relations at the Turn of the Century (Liber Amicorum in Honour of Roger Blanpain)* (1998) 55, 56–60.
[74] *Employment Protection Act 1975* (UK) c 71; Richard Townshend-Smith, 'Trade Union Recognition Legislation – Britain and America Compared' (1981) 1 *Legal Studies* 190.
[75] Townshend-Smith, above n 74, 190–3.
[76] Ibid 195–6.
[77] Ibid 198, 206–10.

compulsion would or could marry with the tradition of voluntarism'.[78] That is, British unions had obtained high levels of recognition from employers on a voluntary basis. The notion of compulsion was an alien one, drawn from the American system which was always much more legally-oriented. Overall, the compulsory procedure did not assist but arguably harmed the British trade union movement,[79] partly because of the clash of traditional industrial relations systems.

In contrast, McDonough finds that the exporting of American laws restricting industrial action and trade union power to Britain in the 1980s worked more successfully. In her view, lessons had been learned from the earlier failed attempts at transplantation. This time, ideas were adapted from US law through existing British legal doctrines and institutions. The progressive introduction of the legislation allowed participants in the system to adjust to operating in a more legalistic framework. The laws were introduced in a more receptive political and economic environment, with widespread public support for the Thatcher government's ideological attack on the role of trade unions. Further, the influence of unions and their capacity to resist the new laws had considerably weakened. On this basis, McDonough suggests that both Kahn-Freund and Watson would have predicted successful transplantation in this case.[80]

In addition to industrial relations systems, Schregle pays particular attention to the importance of culture in labour law comparison. He stresses that one must 'penetrate deeply the traditions of foreign nations' to understand their labour laws and labour relations, especially when considering countries with a completely different system of legal values. For example, Schregle suggests that '[n]o Westerner can expect to understand the vital substance of Japanese labour law unless he [sic] is introduced to the historical evolution of legal concepts in Japan and generally the role of law in Japanese society.'[81]

This emphasis on the importance of cultural differences is developed further in Gould's study of the Japanese 'reshaping' of American labour law in the post-war period. He seeks to explain how almost identical labour laws in the two countries have led to very different results.[82] Gould finds that a large part of the answer lies in the different cultural underpinnings of the two societies. In Japan, paternalism, the desire for harmony, and informal consensus are significant cultural traits. These are borne out in aspects of Japan's industrial relations system. So, for example, in contrast to the adversarial nature of labour-management relations in the US, there is a strong emphasis on cooperation in Japan.[83] This is rooted in traditional master-apprentice relationships, which led to the emergence of a familial or parental-like bond between company and worker. Japanese employees are therefore much more reliant on

[78] Ibid 198, 210.
[79] Ibid 211.
[80] McDonough, above n 67, 522–8. However, this again requires consideration of what is meant by 'successful' transplantation; the Conservative governments' laws no doubt 'succeeded' in constraining union activity and strike action to a considerable extent, but they may also have contributed to increased levels of industrial and social divisiveness in Britain; see eg Simon Auerbach, *Legislating for Conflict* (1990).
[81] Schregle, 'Explaining Labour Law and Labour Relations to Foreigners: Some Reflections about International Comparisons', above n 52, 162–3.
[82] William Gould, *Japan's Reshaping of American Labor Law* (1984) xv, xvii, 16.
[83] Ibid xiv, 5, 11, 94–5, 163.

employers than their Western counterparts for the provision of housing, transport, leisure facilities and the like. They also exhibit much higher levels of loyalty to the firm, and are more accepting of company discipline.[84]

Gould finds that all of these cultural distinctions have contributed to the divergent operation in the Japanese setting of American-style laws dealing with unions, unfair labour practices, dispute resolution and job security. For example, the cooperative approach in Japan has allowed German-style plant committees and other worker participation systems to develop within the framework of the formal (US-oriented) legal structures. In contrast, the conflict-based approach has limited the emergence of these types of schemes in the US, where they frequently infringe legal prohibitions on employer-sponsored unions.[85] Similarly, according to Gould: 'The Japanese have moved unabashedly toward the provision of job security and of the information on which managerial decisions are based. American labor law, on the other hand, has tended to genuflect to the concept of management prerogatives.' Differences in their legal systems and legal cultures have also played a part. For example, the quasi-legal administrative processes for resolving labour disputes are more confrontational in the US than in Japan. While the US system has incentives built into it for expeditious resolution, these are absent in Japan, where the crowded legal calendar, small numbers of lawyers, and lower power of unions under these arrangements means they are resorted to less frequently than in the US.[86] Gould concludes that: 'If ever there was living proof that the law cannot function in a vacuum, it is to be found in this tale of two nations with contrasting philosophies, cultures and conduct.'[87]

Porges reaches similar conclusions in her account of the importation of American labour law in the South Korean context. She focuses on the differential impact of labour laws transplanted from a developed Western country to the cultural and political situation of a developing country.[88] As in Japan, US labour law has strongly influenced the development of labour law in Korea since the Second World War. However, many aspects of these laws have never been implemented in practice, so that in Porges' view the transplants have proved ineffective. Her explanation for this points to the differing stages of economic development of America, on the one hand, and Korea on the other. For example, immediately after the war, the American Military Government introduced laws in Korea (still predominantly an agrarian country) providing for minimum working conditions, union organisation, compulsory arbitration, limitations on strikes, and administrative processes to oversee the new laws.[89] However, according to Porges, similar laws to these had developed in the US over a much longer period of time and in response to the demands of participants in the labour relations system:

> In the [US], industrialization preceded unionization and developed in response to the needs of the people. In South Korea … the government prescribed a labor system to the people before they even experienced industrialization and the resulting problems unique to its situation.

[84] Ibid 4–5, 162.
[85] Ibid 95–9, 164–5.
[86] Ibid 61; see also xv, observing that the Japanese generally have less propensity for resort to the law to solve human problems.
[87] Ibid xvii.
[88] Jennifer Porges, 'The Development of Korean Labour Law and the Impact of the American System' (1991) 12 *Comparative Labor Law Journal* 335.
[89] Ibid 338–40, 342.

> Given the different situations of each country, it is not surprising that many of the isolated laws transplanted from the American system were, from the beginning, not implemented.[90]

Later duplications of the American model in Korea produced similar results. For example, labour standards legislation passed in 1953 set down minimum wages, health and safety and dismissal protections, limits on working hours, paid maternity leave and so on. According to Porges, though: 'These far-reaching goals … were unrealistic at the time. They were set too high for management to follow while building a successful business, and for the government to follow while trying to rebuild Korea.'[91]

Another factor accounting for the failure of the American labour law transplants in Korea highlighted by Porges is culture. She finds that the adoption of the US framework for collective bargaining and unfair labour practices, based on an adversarial approach to labour-management relations, 'ignores a fundamental premise of Korean tradition … the Confucian tradition of a cooperative relationship between these groups, and a familial relationship in the workplace.'[92] However, the period since the 1960s has seen a series of amendments to the US-inspired Korean labour statutes and the introduction of new legislation, as part of a process of 'tailoring laws specific to the Korean environment, thereby enhancing their chances for success.'[93] In this process, elements of the American approach have been retained, suitably adapted to reflect the more cooperative philosophical basis of Korean labour relations. And now that industrialisation is at a much more advanced stage in Korea, with an independent labour movement seeking to establish itself, US labour law concepts no longer seem as ill-fitted as they once did.[94] Similar culturally-oriented explanations for the failure of Western labour law transplants in Korea and other East Asian countries have been developed by Cooney et al and Cooney and Mitchell.[95]

2 *The (Non-)Transferability of Collective Labour Law*

Kahn-Freund's second main argument, that aspects of individual employment law stand more chance of being successfully transplanted than collective labour relations law (which flows from his emphasis on political factors), also finds support among some other comparative labour law scholars.[96] However, Hepple mounts a strong argument in support of 'collective labour law transplants' by pointing to South Africa's labour reform legislation of the mid-1990s.[97] In its provisions governing

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[90] Ibid 340–2.
[91] Ibid 343–4, 348.
[92] Ibid 345–6; see further 337, discussing the importance of Confucian ideals (such as unquestioning service to the head of the workplace or family, and the supremacy of the ruler) in the development of Korean law.
[93] Ibid 348–9; see further 350–8.
[94] Ibid 349–50, 356, 357–9.
[95] See Part III(E) below.
[96] See eg Blanpain, above n 52, 19–20; Whelan, 'Labor Law and Comparative Law', above n 52, 1449; Benjamin Aaron, 'The Comparative Labor Law Group: A Personal Appraisal' (1977) 2 *Comparative Labor Law* 228, 234.
[97] Bob Hepple, 'Can Collective Labour Law Transplants Work? The South African Example' (1999) 20 *Industrial Law Journal (South Africa)* 1, discussing the *Labour Relations Act 66 of 1995* (South Africa); see further Darcy Du Toit et al, *Labour Relations Law: A Comprehensive Guide* (2000) chapter I, including discussion of the 1995 Act's departure from the apartheid-era legacy of highly conflictual labour relations in South Africa.

freedom of association, collective bargaining, industrial action, workplace consultation and dispute resolution, this statute draws on a combination of ILO standards and the labour laws of Italy, America, Quebec, Germany, the Netherlands, Australia, Britain and Israel. Hepple asks: 'Will these new transplants survive and flourish in South African soil?' He refers to Kahn-Freund's argument that collective labour laws are too intertwined with political power structures to be transported to another jurisdiction, and in response argues that:

> … this thesis needs to be modified. *Concepts and ideas – but not specific institutions – can be borrowed from another system of collective labour law, provided four essential conditions are met.* These conditions are: (1) a social consensus between business and labour; (2) an organic relationship between a specific social need and the form of regulation adopted; (3) an internationalist and open-minded legal culture; and (4) the form of labour law adopted must contribute to improved national economic performance.[98]

Discussing these conditions further, Hepple (echoing Kahn-Freund) maintains, first, that 'the attitude of organized business and labour is decisive to the survival of transplants of collective labour law.' This is shown by the successful transfer of New Zealand's compulsory arbitration system to Australia; the failed experiment with aspects of American labour law in Britain in the 1970s; and the employment regulation directives emerging from the 'social dialogue' process in the EC. South Africa's 1995 legislation is also 'based on a hard-won consensus between business and labour', and in Hepple's view the transplants it implements 'will endure for as long as that social accord survives.'[99] Secondly, the legislation responds to the 'social need' in South Africa for sectoral level collective bargaining (through bargaining councils based on earlier experience with the British model) and a German-style workplace consultation system, while eschewing the interventionist American approach of compelling plant level bargaining.[100]

Thirdly, Hepple argues that the 'hybrid character' of South African law, combining European and English influences, and its open-minded judiciary, positions South Africa well to accommodate foreign transplants. However, the overseas concepts and ideas borrowed in the 1995 statute 'will succeed … only if they are interpreted in the light of the specific context and needs of South African labour relations.'[101] Finally, he observes that there is some doubt as to whether the new collectivist law will aid the nation's economic performance. It swims against the tide of individualisation and deregulation, prompted by globalisation, that has swept Britain, New Zealand and Australia since the 1980s. In contrast, Hepple suggests that 'legal solutions [are needed] which reconcile productive efficiency with employment and income security', noting that the South African legislation does this by providing for worker participation in firm decision making through workplace forums.[102] While evidence suggests that that aspect of the legislation has failed,[103] overall, the attempted transplantation of foreign labour laws appears to have succeeded in bolstering support for collective bargaining and trade union membership in South Africa.[104]

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[98] Hepple, above n 97, 2–3 (emphasis added).
[99] Ibid 3.
[100] Ibid 4–6.
[101] Ibid 6–7, 9–10.
[102] Ibid 10–12.
[103] See, eg, Geoffrey Wood and Pralene Mahabir, 'South Africa's Workplace Forum System: A Stillborn Experiment in the Democratization of Work' (2001) 32 *Industrial Relations Journal* 230.
[104] See eg Du Toit et al, above n 97, 39–42.

Like Hepple, de Roo adopts a different position from Kahn-Freund on the transplantability of collective labour law, based on the results of a four-nation study of processes for labour dispute settlement in Europe.[105] The study showed that on many occasions since the nineteenth century, legislators and both sides of industry in Britain, France, Belgium and the Netherlands have looked across their borders for models on which to base statutory machinery for settling both individual and collective labour disputes.[106] One of its conclusions was that 'national politics and/or different legal traditions did not appear to be barriers to cross-border inspiration'. Accordingly, in de Roo's view, Kahn-Freund's argument that collective labour law cannot be transferred because it is too tied up with national politics:

> … is perhaps too rigid. Indeed, unlike cross-border inspiration, pure imitation does not often occur. Changes in the functioning of the institutions studied … were either made by the recipient countries from the very start of the borrowing or in the course of time.

She suggests that there is much to be learned from these examples, in which foreign laws were modified to fit the national industrial relations systems of the recipient countries.[107] Indeed, some of the dispute settlement processes operating in the countries studied may in turn provide useful models for EC-level regulation on the subject.[108]

Works councils and other mechanisms for worker participation are institutions of collective labour law, and discussion of their capacity for transplantation between jurisdictions generally tends to reflect Kahn-Freund's scepticism about the transferability of aspects of collective labour relations. For example, in Stein's view the close ties between worker participation instruments and power relations in the union and business communities explains the failed attempts to transplant the German two-tier company board system to France in the mid-1960s, to Britain in the mid-1970s, and at the European level.[109] Blanpain also points to the long-standing inability of EC member countries to agree on arrangements for worker participation under the proposed EC companies directive, 'because of [their] potential effect on the power relationships in enterprises'.[110]

E *The Importance of Culture and other Non-Political Contextual Factors: More Recent Consideration of Kahn-Freund and Transplantability*

As indicated earlier, Kahn-Freund's emphasis on the importance of political power structures in determining the transferability of labour law has been the subject of considerable examination in recent years, in the context of studies of the reception of Western labour law models in the countries of East Asia.[111] In particular, Cooney et al

[105] Annie de Roo, 'Cross-Border Inspiration in the Settlement of Labour Disputes: A European Perspective' in R Jagtenberg, E Örücü and A J de Roo (eds), *Transfrontier Mobility of Law* (1995) 31; see further Annie de Roo and Rob Jagtenberg, *Settling Labour Disputes in Europe* (1994), especially 7, 15–16, 286.
[106] de Roo, above n 105, 31, 35–9, 45–6.
[107] Ibid 35–6.
[108] See ibid 44–6; de Roo and Jagtenberg, above n 105, chapter 9.
[109] Stein, above n 20, 204–6, 208.
[110] Blanpain, above n 52, 18–19; the *European Company Statute* was finally adopted in 2001, see, eg, Paul Davies, 'Workers on the Board of the European Company?' (2003) 32 *Industrial Law Journal* 75.
[111] See primarily Cooney, Lindsey, Mitchell and Zhu, above n 54.

build on Kahn-Freund's notion of the 'rejected transplant' to explain the significant gap between the content of labour law and its practice in East Asian nations, such as Indonesia, Malaysia and South Korea. Resulting from the combined influence of former colonial administrations and ILO standards, most East Asian countries have adopted Western-style labour laws providing for basic rights to minimum employment conditions, collective bargaining and freedom of association. However, the practical experience has been far different from the text of the legal provisions in these labour law regimes. For example, most East Asian countries have low levels of union organisation and collective bargaining coverage.[112]

In seeking to account for this 'law-practice gap', Cooney et al subject Kahn-Freund's analysis to close scrutiny. They note that in highlighting the importance of political factors, Kahn-Freund deliberately downplayed the importance of others, such as economic, cultural (including religious) and social considerations, although his language in defining these different categories was somewhat imprecise. Further, in their view, Kahn-Freund's distinction between individual and collective labour law 'rests on an overly narrow and simplified conception of labour law.'[113] A more fundamental shortcoming in his analysis, though, was his claim as to the overriding significance of political influences on law. According to Cooney et al:

> Apart from three casual examples … Kahn-Freund offered no supporting evidence for his contention about the relative importance of particular influences. It is true, of course, that the close interrelationship of a political power structure in a society and its laws makes such a position as that taken by Kahn-Freund intuitively plausible. Nevertheless there is no reason for supposing *a priori* that political power structure is always the dominating variable in accounting for difference. The relative influence of factors can only be addressed and resolved – if indeed it is possible to resolve such a problem – by empirical observation.[114]

Cooney et al observe that differences in political power structures can partly explain the failure of Western labour law transplants to take hold in the East Asian countries, where (in contrast to Western liberal democracies) authoritarian governments have been common. However, they consider that some of the contextual factors downplayed by Kahn-Freund must also be 'highly relevant to an understanding of the labour law regimes in the region'.[115] Drawing upon Teubner's theory of the interaction between law and other social spheres, and the work of Legrand and others, Cooney et al highlight in particular the importance of legal culture:

> On this approach, the different effects of law in different societies may not be solely or even fundamentally caused by contrasting political structures, although that may … be an important influence. 'Interpretative' perspectives maintain that there are fundamental conceptual differences between legal systems. Further, law, rather than simply reflecting other aspects of society, is one of the elements that constitutes it – law contributes to a society's difference from other societies. Accordingly, a legal text taken from one society and transplanted into another may be understood differently by government officials, lawyers, employers and workers in that country, even if the political and economic systems are similar. It will not necessarily operate in the same way as in the 'parent' system; thus, the relationship between law and practice may be different from that in the parent system.[116]

[112] Ibid 1, 3–5, 9.
[113] Ibid 9–11.
[114] Ibid 11 (citation omitted).
[115] Ibid 11–12.
[116] Ibid 13, see also 14–20.

This approach is further developed by Cooney and Mitchell, who utilise Teubner's systems theory analysis 'to reconceptualise and illuminate the interaction between state-based law in East Asia and its political, economic and cultural contexts'.[117] In their view, it was to be expected that Western labour laws would operate very differently in the radically contrasting East Asian environments to which they were transferred. To begin with, the internal structure of law in the East Asian countries is underdeveloped compared to that in the West. The established systems for processing disputes that exist in Western countries, based on substantial bodies of statutory and judicial material, have not advanced to the same extent in many East Asian societies. There are 'major conceptual lacunae' in these labour law systems, and 'dysfunctional' legal institutions (such as courts) lack the capacity to effectively create new legal norms. These 'weaknesses internal to the structure of labour law in East Asian states … diminish labour law's capacity to operate as a self-sustaining system. It becomes relatively dependent on norms produced by other social systems.'[118]

Cooney and Mitchell then discuss the interaction between labour law and three other social systems in the East Asian context: political power, labour markets, and culture (or legal culture). They find, first, that the political and economic policies of authoritarian governments have strongly influenced labour law in each of the East Asian countries: '… labour law is firmly bound to politics. Law simply translates political objectives into legal terminology: that which is contrary to the interests of the state is illegal.' This can be seen, for example, in the tight legislative regulation of trade unions in Taiwan, South Korea and Malaysia, closely tracking state control over, and sometimes repression of, unions. Other variations of the interplay between law and politics are also identified, such as administrative measures in Vietnam and Indonesia through which rights granted under legislation (for example, the right to strike, the right to form trade unions) can be withdrawn.[119]

Secondly, Cooney and Mitchell observe that labour markets in some of the East Asian countries operate almost completely outside the formal legal system. This is most pronounced in Vietnam, Indonesia and the Philippines, where most workers are employed in the informal sector, beyond the reach of labour regulation. Many firms in East Asian countries are unable to comply with labour standards drawn from the model of industrialised economies, and enforcement mechanisms are often ineffective.[120]

Thirdly, cultural differences help explain the divergent operation of Western labour laws in the East Asian countries.[121] In summary, Cooney and Mitchell conclude that:

> … the capacity of labour law to impact on East Asian societies is diminished by a variety of phenomena. These include structural weaknesses in the formal legal system; a high degree of political incursion into law, sometimes with little reciprocation; very significant economic

[117] Sean Cooney and Richard Mitchell, 'What is Labour Law Doing in East Asia?' in Sean Cooney, Tim Lindsey, Richard Mitchell and Ying Zhu (eds), *Law and Labour Market Regulation in East Asia* (2002) 246, 249–251.
[118] Ibid 251–4.
[119] Ibid 255–8.
[120] Ibid 258–61.
[121] For detail, see ibid 261–6.

> disincentives against compliance with legal provisions; and the prevalence of competing legal ideologies, regulatory systems and social norms.[122]

Brooks makes some similar observations about the impact of former colonial powers on traditional customs and practices, in the context of his examination of the importation of Western labour law systems into a number of South Pacific countries.[123] For example, he finds that the notions of 'employer' and the performance of paid work are quite alien to the traditional, subsistence economy of South Pacific villages. Similarly, the voluntarist British approach of unregulated collective bargaining, and Australasian compulsory conciliation and arbitration mechanisms, have proved inappropriate in the South Pacific. These foreign models have had to accommodate local cultural values concerning the settlement of disputes and the importance of custom as a source of legal obligations.[124]

Brooks also finds a gulf between the formal text of labour laws in the South Pacific, and the tendency of governments in these countries to adopt less democratic industrial relations structures, to restrict the activities of trade unions, and to subject both management and labour to high degrees of control. He attributes this to, first, the continuing role of culture, tradition and custom in shaping local industrial relations systems; and secondly, the fact that Western labour law models promoting collective bargaining and the right to strike have often conflicted with the economic policies of the state and the need for South Pacific nations to win over foreign investors.[125] Brooks' findings support the conclusions of Porges, and Cooney and Mitchell, that Western labour law transplants in developing countries often fail because Western standards are adopted before the developing economies are ready for them, and the adoption of such standards becomes a hindrance to the development process. They also illustrate that cultural factors are strongly influential.

IV AN ASSESSMENT OF THE TRANSPLANTABILITY DEBATE AND ITS IMPLICATIONS

A *Introduction*

The major contributions to the transplantability debate in comparative law and comparative labour law will now be assessed. On one level, it could be said that many of the participants in this debate ultimately arrive at the same conclusion – that laws cannot be transplanted without considering the broader context in which they originally operated, and into which they are to be implemented. However, they part company when it comes to the different aspects of 'context' that they emphasise, and these divergences in their views are quite important for the debate, and in particular for any consideration of the potential for Australian borrowing from European labour law.

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[122] Ibid 266–7.
[123] Brian Brooks, 'The Significance of the South Pacific for Comparative Studies in Labour Law' (1996) 26 *Victoria University of Wellington Law Review* 345.
[124] Ibid 345–6, 348, 353.
[125] Ibid 349, 351–3.

B *From Watson to Hepple: The Limitations of Many Approaches to Transplantability*

Watson's view that laws can be transferred without regard to political, social or other contexts seems too simplistic. What he is really suggesting is that the text of a law can be transferred without any difficulty, and in a sense this is true – anything is transplantable at a literal level. But this ignores any consideration of the effect of the law once transplanted, how it operates in the new setting, whether the transplant is successful, and the various situational and structural factors that impact on those questions. Watson's position also leaves important questions unanswered, such as whose 'desire' to embrace a foreign transplant within a particular country most matters – that of the government, or some politically powerful group, or other interests? In any case, by considering the possible impact of phenomena like 'opposition force', 'pressure force', 'transplant bias', and 'inertia' on legal transfers, Watson *does* in fact acknowledge the importance of contextual factors. As McDonough has pointed out, this means Watson's position is closer to that of Kahn-Freund than might first appear. It also indicates a degree of confusion in Watson's overall approach to the transplantability question.

At the same time, Legrand's response to Watson's apparent dismissal of the importance of context is too extreme. Legrand is right to point out that cultural differences, especially those relating to *legal* culture, are significant determinants of transplantability. Both Gould and Porges provide examples of labour law transplants that encountered difficulties because of profound cultural differences between the donor and recipient countries. But Legrand overstates the importance of culture by portraying it as an insuperable obstacle to transplanting legal rules. This ignores the possibility that transplants can be modified over time in their new setting, to take account of cultural and other domestic factors, as Gould and Porges have shown occurred in Japan and South Korea. This is essentially the position advocated by Örücü – that the 'transposition' of laws from one country to another can occur through processes of 'tuning' by local actors in the receiving country. In summary, Legrand's thesis that legal transplants are impossible is at odds with the fact that transplants can and do occur frequently, although Legrand would probably explain this by arguing that in these instances, the 'legal rules' are not transplanted at all – rather, new rules are constructed in the foreign setting.

Unlike Watson, Kahn-Freund was interested in the *reception* of the transplanted law in its new environment. However, as Cooney et al argue, Kahn-Freund's contention that political factors are of overriding importance disregards the significance of other contextual factors. This is best explored through an examination of Kahn-Freund's related claim that individual labour laws are easier to transplant than aspects of collective labour law. Kahn-Freund's position is not borne out by all of the examples of collective labour law transplants that have 'failed'. That is, the explanations for those failures go beyond what Kahn-Freund considered to be the major issue affecting transplantability – the attitudes of organised interest groups.

As Kahn-Freund rightly observed, powerful interest groups 'on the ground' can substantially influence whether a transplant succeeds or fails, or even whether it occurs in the first place. However, in his own analysis of the failure of the British *IR Act* of 1971, Kahn-Freund ignored this issue, giving no indication of how trade unions

and business groups responded to this legislation. We know from Whelan and McDonough that the resistance of unions and the ambivalence of employers towards the statute contributed to its demise. However, they identify other factors that played a more significant role in producing that outcome, such as incompatible industrial relations systems (Kahn-Freund acknowledged this too). Similarly, as Townshend-Smith shows, employer opposition to the union recognition provisions in the British *EP Act* of 1975 was a major reason for their downfall. But the clash of US-style legalism with the British tradition of voluntarism in industrial relations was even more important.

So it can be seen that a range of factors, in addition to the positions adopted by organised interest groups, explain why some attempts to transplant collective labour law have failed. In addition to differing industrial relations systems (which reflect, in turn, cultural differences), the stage of development and state of readiness of the recipient country for the new laws can be critical factors (as indicated by Porges, Cooney and Mitchell, and Brooks). So too can differences in labour markets, legal systems and legal culture (Cooney and Mitchell).

Several other observations need to be made about Kahn-Freund's arguments on transplantability. First, his suggestion that collective labour law transplants cannot occur is simply wrong. His assessment of the ILO's position in this area downplays the extent of its achievements in promoting international standards on collective bargaining, freedom of association, and other aspects of collective labour relations. Many ILO member states have adopted these standards in their national labour laws.[126] Further, Kahn-Freund's argument has to some extent been disproved by the examples of successful collective labour law transplants that *have* occurred, such as those examined by de Roo and Hepple.

Of course, Australia has a long history of successful borrowing from overseas legal systems and international labour standards in fashioning its domestic labour laws.[127] Conciliation and arbitration, the cornerstone of Australia's legal framework for labour regulation for the last one hundred years, was borrowed from New Zealand labour law, among other sources.[128] Australia's approach to occupational health and safety regulation has closely followed the British model since the late nineteenth century.[129] Major changes to the traditional Australian industrial relations system over the last twenty years have drawn heavily on overseas inspiration, including: the transition to industry-based union structures from the mid-1980s (borrowing from West Germany,

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[126] Breen Creighton, 'The ILO and Protection of Freedom of Association in the United Kingdom' in K D Ewing, C A Gearty and B A Hepple (eds), *Human Rights and Labour Law: Essays for Paul O'Higgins* (1994) 1, 2.

[127] Breen Creighton, 'The ILO and the Internationalisation of Australian Labour Law' (1995) 11 *International Journal of Comparative Labour Law and Industrial Relations* 199, 199–200, noting that overseas systems have also borrowed from Australian labour law from time to time: 'This is part of a continuous process of cross-fertilisation which to a greater or lesser degree characterises labour law systems everywhere.'

[128] See Richard Mitchell, 'State Systems of Conciliation and Arbitration: the Legal Origins of the Australasian Model' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890-1914* (1989) 74.

[129] See Richard Johnstone, *Occupational Health and Safety Law and Policy: Text and Materials* (1997) 38–49, 70–7.

Austria, Sweden and Norway);[130] and the 1993 legislative provisions for unfair dismissal protection (based on ILO standards),[131] good faith bargaining (US and Canadian labour law)[132] and 'protected' industrial action (ILO and north American influences).[133] Australia's considerable past success in transplanting overseas labour laws counters Kahn-Freund's assertion as to the non-transferability of collective labour law, illustrating that such transplants can occur in certain circumstances.

Secondly, to the extent that Kahn-Freund's argument as to the easier transplantability of individual labour law implies that this aspect of labour law is distant from the interests of powerful groups like unions and business, this is clearly not the case. Standards of individual employment protection, such as wages and working conditions, are often products of collective bargaining and the other institutions of collective labour law that Kahn-Freund referred to.[134] Trade unions agitated for many of the improvements to individual working conditions that workers now enjoy. Organised interests on both sides in the labour relations field are frequently just as concerned about the standards applicable in the individual employment relationship as they are about the framework for conducting their collective relationships.

Hepple's argument that collective labour law transplants can succeed, provided that four conditions are met, has some important limitations. First, the distinction that he draws between 'concepts and ideas' of collective labour law (which are transferable) and 'specific institutions' (which are not) is not explained. It is also contradicted by the example that he discusses – that is, South Africa's extensive borrowing from several overseas labour law systems in its 1995 labour law statute. For example, as Hepple points out, this legislation established a new dispute resolution body (the Commission for Conciliation, Mediation and Arbitration) based on a combination of Australian, British and American models.[135] Surely, then, this is a case of transplanting 'institutions' of collective labour law (or aspects of them), rather than just 'concepts and ideas'. The point is that institutions, such as unions, collective bargaining processes, and dispute resolution bodies, are what *makes* collective labour law. The concepts and ideas of collective labour law are bound up in the institutional arrangements that it supports.

However, Hepple's distinction between concepts and institutions has some merit, as a basis for concluding not (as he did) that institutions of collective labour law are not transferable, but rather that this can occur over time. This is demonstrated by the

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[130] See Department of Trade, *Australia Reconstructed – ACTU/TDC Mission to Western Europe: A Report by the Mission Members to the ACTU and the TDC* (1987) chapter 6.

[131] See Ronald McCallum, 'The Internationalisaton of Australian Industrial Law: The *Industrial Relations Reform Act* 1993' (1994) 15 *Sydney Law Review* 122, 131–3; see now *Workplace Relations Act 1996* (Cth), Part 12, Division 4 (as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)).

[132] See Richard Naughton, 'The New Bargaining Regime under the Industrial Relations Reform Act' (1994) 7 *Australian Journal of Labour Law* 147, 164–9. It should be noted that this transplant was relatively unsuccessful, partly due to the federal industrial tribunal's ruling in *Asahi Diamond Industrial Australia Pty Limited v AFMEU* (1995) 59 IR 385, that a union could not obtain orders compelling an employer to bargain with it, but only orders going to the process of bargaining.

[133] See Greg McCarry, 'Sanctions and Industrial Action: the Impact of the Industrial Relations Reform Act' (1994) 7 *Australian Journal of Labour Law* 198; see now *Workplace Relations Act 1996* (Cth), Part 9 (as amended by the 2005 legislation).

[134] See eg Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (3rd ed, 2000) 24–5.

[135] Hepple, above n 97, 2.

United Kingdom ('UK')'s implementation of EC directives providing for worker participation in business restructuring decisions, such as collective redundancies and transfers of undertakings, and the *European Works Councils Directive* and *Information and Consultation Directive*.[136] In the process of implementing these European directives, European social partnership *concepts* have been more readily accepted in the UK industrial relations system than social partnership *institutions*, which are taking longer to gain widespread acceptance.[137]

Secondly, and more importantly, Hepple's position is somewhat simplistic. In some respects, the four conditions that he specifies as necessary for successful transplanting of collective labour law parallel the explanations of transferability provided by several other commentators. Hepple's first condition, the need for 'a social consensus between business and labour', is similar to Kahn-Freund's emphasis on the attitude of organised interest groups. Hepple's focus on both the 'social need' for the transplant, and its purported economic benefits, reflect the attention given to social and economic contexts by Teubner, and Cooney and Mitchell. And the importance he attaches to legal culture echoes the views of Nelken, Legrand, and Cooney and Mitchell, among others. However, what is missing from Hepple's analysis is any consideration of the *relative* importance of these factors, the differing *connections* that they each have with law, and how these differences may affect the prospects for transplanting collective labour law.

Instead, Hepple focuses simply on whether the four conditions are met or not. In this sense, his main concern (like Watson) is with the circumstances required for the transplant to occur, rather than how it will operate once implemented. There are also some important omissions from his list of conditions. For example, it ignores a factor that several studies have highlighted as critical to the success or failure of labour law transplants – that is, differences in industrial relations systems. Further, the difficulties that can usually be expected in meeting the first condition are overlooked by Hepple. Obtaining a consensus between business and trade unions over labour regulation is extraordinarily hard, even when institutional mechanisms exist to promote the achievement of such outcomes, such as the EC social dialogue process that Hepple refers to. In relation to Hepple's second condition, it is unclear whose perception of 'social need' within a given society matters – for example, that of the government, or of a dominant interest group? Again, the complexities of a concept like social need are swept aside in Hepple's discussion. It is clearly possible, then, that even if all four of his conditions applied, a transplant could fail; or that, where not all of the conditions were met, a transplant could succeed. Overall, Hepple's argument lacks a sophisticated analysis of the relationship between the transplanted law and the context that it emanates from, and into which it will be placed.

In summary, it can be seen that the literature is fairly divided on the capacity for legal transplantation. Much of the transplantability debate centres on the difficulties

[136] See eg Mark Hall, 'Assessing the Information and Consultation of Employees Regulations' (2005) 34 *Industrial Law Journal* 103.

[137] See, eg, Keith Sisson, 'The Information and Consultation Directive: Unnecessary "Regulation" or an Opportunity to Promote "Partnership"?' (Warwick Papers in Industrial Relations No 67, Industrial Relations Research Unit, University of Warwick, 2002); Pascale Lorber, 'National Works Councils: "Opening the Door on a New Whole Era in United Kingdom Employment Relations"?' (2003) 15 *International Journal of Comparative Labour Law and Industrial Relations* 297.

associated with borrowing between legal systems. However, there are also examples of successful transplants that one can point to. In considering the prospects for transplanting a particular law or legal institution from one system to another, some analytical tools are required, and these are provided by Tuebner's approach.

C *Teubner's Theory: A Sound Conceptual Framework for Analysing Legal Transplants, and the Transplantability of European-Style Labour Laws to Australia*

Bearing in mind the limitations of the other approaches discussed above, Teubner's theory of the interaction between law and other social systems appears to offer the most satisfactory explanation of legal transplantation. As we have seen, rather than singling out a particular factor as the *most* important influence on transferability, Teubner highlights law's connection with *a range* of other social discourses. What matters is how closely the law is 'coupled' with these other social spheres. Loose coupling means that transplantation will be easier, while tight coupling creates greater prospects for the law to become an 'irritant' in its new setting. Cooney and Mitchell's application of Teubner's theory to the experience of Western labour law transplants in East Asia demonstrates its usefulness as a basis for understanding why legal transfers can fail. The approach adopted by Teubner, and Cooney and Mitchell, does not preclude the possibility of transplanting laws. Rather, it focuses attention on the need for sensitivity to the different contexts – cultural, social, economic, political and so on – of the transporting and receiving countries.

Accordingly, this approach provides a valuable conceptual framework for assessing the prospects for transplanting laws and legal institutions from one jurisdiction to another. Take, for example, the possible importation of German, EC and UK laws providing for employee participation rights in business restructuring into the Australian legal setting.[138] Teubner's analysis would involve identifying the other 'social discourses' that these laws are connected to in their home jurisdictions; the degree of those connections – is there 'loose' or 'tight coupling' between them?; and how they might influence the impact of the transplanted laws on relevant social systems once introduced in Australia.

Teubner's approach would require a particular focus on the close connections (or 'tight coupling') between the German, EC and UK laws, and certain key features of their *industrial relations systems*. Teubner's theory would suggest that where such laws are to be transplanted to an environment with a vastly different industrial relations system, resistance to the transfer may be expected unless the receiving industrial relations system changes or adapts to the new law.[139] This approach is supported by the findings of many comparative labour law scholars, including Kahn-

[138] These were the specific potential transplants considered by the author in his PhD research, referred to earlier in this paper. The relevant EC directives and their implementation in the UK have also been referred to. Relevant laws in Germany provide employees with extensive information, consultation and (in some circumstances) joint decision-making rights over a wide range of business restructuring decisions through 'works councils'; see eg Rudolf Buschmann, 'Workers Participation and Collective Bargaining in Germany' (1993) 15 *Comparative Labor Law Journal* 26.

[139] See again Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', above n 35, 22.

Freund, Whelan, McDonough and Townshend-Smith, who have highlighted the crucial importance of differing labour relations systems in transplanting labour law.[140]

Accordingly, comparing significant features of the relevant industrial relations systems would need to form the major focus of any analysis of the transplantability of German, EC and UK worker participation laws to Australia. In particular, a close comparison would need to be undertaken of the similarities and differences between Australia's traditionally highly adversarial industrial relations system,[141] and the collaborative 'social partnership' concepts that underpin the European approach to workplace regulation.[142] Further, Australia's tradition of 'single channel' worker representation through trade unions, compared to the continental 'dual channel' approach involving worker representation through unions and works councils, would also have to be factored into this analysis.[143]

Teubner's approach would also require a consideration of the broader *economic frameworks* in which the relevant laws and industrial relations systems operate in the various jurisdictions. This would involve comparison of the Anglo-Australian free-market economy and shareholder-centred model of corporate governance, with the 'social market' economy and stakeholder-oriented system of corporate regulation prevalent in continental Europe.[144]

On the other hand, differences in *legal culture* – a factor commonly identified as holding important implications for transplantability – would be unlikely to figure prominently in considering the potential for importing German, EC or UK worker participation laws into the Australian setting. Cooney et al and Cooney and Mitchell identified profound differences in legal culture and the stages of development of legal systems as among the most significant reasons for the failure of Western labour law regimes to take hold in East Asian states. However, these problems would be far less likely to surface in transplanting relevant European laws to Australia. That is because, unlike the East Asian countries, Australia has a fully developed, well-functioning

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[140] See also, more recently, Martin Vranken, 'Transfer of Undertakings in Australia and New Zealand: How Suitable is the European Regulatory Approach for Exportation?' (2005) 21 *International Journal of Comparative Labour Law and Industrial Relations* 227, especially at 244–7.

[141] See eg G W Ford and J M Hearn, 'Conflict and Industrial Relations' in G W Ford, J M Hearn and R D Lansbury (eds), *Australian Labour Relations Readings* (4th ed, 1987) 2, 14.

[142] See eg Doug Miller, 'Social Partnership and the Determinants of Workplace Partnership in West Germany' (1982) 20 *British Journal of Industrial Relations* 44.

[143] In his PhD research, the present author concluded that these major differences in industrial relations systems created significant impediments to Australian adoption of the German, EC and UK laws under consideration. However, several factors indicated that considerable potential exists for importing aspects of the European social partnership approach into the Australian industrial relations system. These included: significant similarities in the respective industrial relations systems; the breakdown of the Australian union movement's traditional resistance to European-style workplace consultation structures, reflected in the ACTU-led debate about the merits of works councils since the mid-1990s; past successful Australian 'borrowing' from overseas labour law; and recent Australian experimentation with workplace partnership mechanisms, such as the Victorian Government's 'Partners at Work' Program.

[144] See eg Jeswald Salacuse, 'Corporate Governance, Culture and Convergence: Corporations American Style or with a European Touch?' (2003) 14 *European Business Law Review* 471. Again, the present author concluded in his PhD research that differences in business culture and corporate governance frameworks presented considerable, although not insuperable, obstacles to Australian adoption of European-style laws providing workers with greater rights of participation in decisions about workplace restructuring.

legal system.[145] It also has a long tradition of statutory regulation and judicial expertise in the labour law field.[146]

Even so, it might be thought that legal culture could create some problems in the process of transplanting the German and EC laws, given that they are products of civil law systems, while Australia's legal system is based on the common law. The analyses by Legrand and Teubner of the impact of EC law on British legal culture showed that when a common law system borrows from the civil law, the fundamental concepts underpinning the civil law are borrowed with them and can create tensions with the common law traditions into which they are transplanted.[147] However, the potential for 'clash' between the common law and civil law systems does not appear to have arisen as a major factor in the UK's implementation of the EC worker participation directives. Rather, industrial relations issues have been central to that process of transplantation, and could be expected to be just as significant in transferring the EC (and German) laws to Australia. In any case, the traditionally strong legal orientation of labour regulation in Germany, the EC and Australia should ensure that legal culture is unlikely to present an obstacle to transplantation in this instance.

Several other social systems that have been found to impact significantly on the transferability of law could also be disregarded in any analysis of the transplantability of European worker participation laws to Australia. These include *geographical, religious, technological and scientific* similarities or differences between Australia and the 'donor' countries. However, *cultural* factors *would* have to be considered, to the extent that common or contrasting industrial relations and business 'cultures' may impact on the transferability of the overseas laws to Australia. *Political* factors (in the sense that these were discussed by Kahn-Freund) would also have to be given some consideration. That is, Kahn-Freund's emphasis on the influence of political interests over the reception of proposed transplants would have to be taken into account, in the course of considering how key actors in Australia's industrial relations system (trade unions, the business community, and industrial tribunals) might respond to the importation of the German, EC or UK laws.[148]

V CONCLUSION

In summary, a range of commentators – including Watson, Kahn-Freund, Legrand, and Hepple – have made significant contributions to the transplantability debate in comparative law and comparative labour law literature. However, Teubner's analysis of the connections between law and various social systems, as it has been utilised by Cooney et al and Cooney and Mitchell, provides the most convincing conceptual framework for considering whether aspects of European labour law can be

[145] See eg Patrick Parkinson, *Tradition and Change in Australian Law* (2nd ed, 2001).
[146] See eg Creighton and Stewart, above n 134.
[147] See Part II(D)-(E) above. On the significance of the differences in approach of the common law and civil law systems (including the reactive, decision-based approach of the former, and the comprehensive regulatory approach of the latter), see further Volkmar Gessner, Armin Hoeland and Csaba Varga, *European Legal Cultures* (1996) 91–9; Peter de Cruz, *A Modern Approach to Comparative Law* (1993) 30–1; Xavier Lewis, 'The Europeanisation of the Common Law' in R Jagtenberg, E Örücü and A J de Roo (eds), *Transfrontier Mobility of Law* (1995) 47, 47–50, 53–7.
[148] This would of course form part of the analysis of similarities and differences in traditional industrial relations systems and cultures, discussed above.

transplanted to the Australian setting, and for understanding legal transplantation generally.

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