THE NATURE OF LEGAL TRANSPLANTS – INSPIRATIONS FROM POSTCOLONIAL SCHOLARSHIP

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This article reviews the current state of the comparative debate on the evolution of law and seeks to establish new perspectives to explain the mechanism of legal reception. It finds the comparative discussions centred on the appropriateness of describing the movement of law from one country to another in terms of "legal transplants" perplexing and lacking a convincing inquiry on the reception process. In an attempt to fill that gap, this article contends that certain recent contributions on culture contact and culture change provide an interesting explanation for the circulation of juridical models across national boundaries. More precisely, this article argues that the notion of hybridity, as it originated in postcolonial theory, offers a formidable conceptual means to examine the intricacies of legal evolution, to refine and to give content to the observation of the reception of law. The complexities of the arguments on legal transplants and hybridization are explored in this article by looking at two well-known episodes of transfer of an entire legal system under hegemonic and non-hegemonic contact situations: the voluntary diffusion of ius commune in the Middle Ages in Germany and the introduction of the Code Napoléon in Europe.

I INTRODUCTION

This article critically explores the comparative debate on the pattern, meaning and significance of the circulation of legal paradigms across national frontiers. In particular, the inquiry questions whether it is appropriate to describe the movement of law from one country to another by using the metaphor of "legal transplant".

Broadly, two approaches are available. The first one, relying on historical evidence, suggests that the evolution of law is largely autonomous from society, as it primarily consists of a function of rules being imported from another legal system under the impulse of legal elites. The second approach is sceptical about the

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role of history and of comparative law as a tool to detect the pattern and the drivers of legal change. It points out that the development of law does not take place through borrowing because law mirrors, and is responsive to situated linguistic, cultural and moral national frameworks. Part II finds that the two views are irreconcilable and misleading, as they overlook the relationship between legal comparison and sociology of law and over-simplify the concepts of language and culture, respectively.

To address these shortcomings, an original interpretation of the pattern of legal change is offered. The underlying theme put forward in this article is that the practice of borrowing is not exclusively a legal phenomenon, but it reflects a common trend of social life, a mechanism of culture diffusion. It applies to law because law is itself a form of culture. Building on this understanding, Part III proposes a new perspective for considering the significance of legal borrowing and for explaining legal evolution. The main argument is that the movement of legal paradigms from one country to another does not consist of a mere transplantation of rules. Instead, it involves a complex and gradual process of interaction between legal and social consciousness, between imported models and indigenous traditions. In the light of that perspective, specific attention is given in this article to recent studies on acculturation, colonialism and contact situations in general. In particular, the focus of the analysis is on the notion of "hybridity". This theme, fundamental in cultural and postcolonial debates, suggests that the claim for a hierarchical purity of cultures is untenable in colonial situations and that the copying of the colonisers' culture and values is not a simple reproduction of the same traits. Cultural norms in colonial contexts are peculiar to each contact situation and they do not qualify as colonial nor indigenous "in disguise". Hybrid culture is more than the result of the fusion of features of colonial and indigenous background. It is a new creation in its own right. The possible conceptual pitfall inherent to the notion of cultural hybridity, based on the presumption of the existence of once pure cultures, is overcome by redefining it with the term "hybridization". This gives a more appropriate representation of the process of interaction and negotiation between the social actors in the colonial situation and ensures there is no need for references to a reified concept of culture and culturally predetermined identities.

Building on this conceptual scenario taken from postcolonial scholarship, this article finds an interesting analogy between the dynamics at the basis of colonialism and the movement of law from one country to another. In particular, in Part IV, it is suggested that similar arguments to the ones posed in the postcolonial debate can be employed to explain the reception mechanism, the process of interaction between imported legal models and indigenous legal traditions. As with
colonial norms and standards, borrowed legal paradigms outside their original meanings become unsettled. They interact at different levels with local traditions, with certain indigenous perceptions, and do not survive in their original identities. No matter whether this occurs by way of imposition or as a result of a voluntary process, a new legal tradition, a third space that is peculiar to the specific contact situation is created each time. Borrowed legal paradigms in the new environment become almost the same as the original ones, but not quite. Part V offers a few concluding thoughts.

II THE DEBATE ON THE DIFFUSION OF LAW

Understanding the pattern, meaning and significance of the circulation of legal paradigms and ideas across national frontiers is a central theme in comparative law. It has recently attracted a great deal of academic interest, especially under the impulse of studies on globalization, convergence among legal systems, and on the unification of private law. Many themes and views have emerged, but, for the


4 This is not entirely new. It has been one of the original tasks of comparative legal studies. Reference, inevitably, goes to the initiatives carried out by the International Institute for the Unification of Private Law (UNIDROIT) since the end of WWI and, more recently, starting from the 1960s, by the United Nations Commission on International Trade Law (UNCITRAL). However, the projects for unification of private law have recently acquired a growing interest in shaping the agenda for the creation of the European Union (EU). One of the most significant
most part, the debate has been centred on the appropriateness of describing and explaining the phenomenon in terms of legal transplants. There is disquiet both as to this mode of innovation in law and as to the conceptual framework suggested by the terminology. In particular, it has been claimed that that borrowing and


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imitation are not relevant in understanding the pattern of legal evolution and that "since a transplanted institution continues to live on its old habitat as well as having been moved to a new one, the choice of the word transplant is inappropriate".

A The Theory of Legal Transplants

The notion of "legal transplant" as a metaphor for the movement of law from one country to another belongs to Alan Watson's pioneering works on legal change. It has been later adopted by many and it represents today the predominant terminology. Observing the historical and comparative pattern of the reception of Roman law in most countries of medieval, renaissance and 19th century continental Europe, Watson suggested that borrowing had been the most fertile source of legal growth in "Catholic, Calvinist and Lutheran territories, in agricultural nations, in trading cities ruled by a merchant oligarchy, in monarchies..."


7 E Orucu "Law as Transposition" (2002) 51 ICLQ 205 at 206.


and republics alike." Legal evolution, he maintained with a variety of accents, rarely stems from isolated national innovation (creatio ex nihilo), but is rather the result of borrowing from other jurisdictions, or the "moving of a rule [...] from one country to another, or from one people to another. By contrast to one of the most established preconceptions of modern legal thought according to which legal development is a rational response to existing social, economic and political circumstances, Watson argued that the scale of the empirical evidence of legal transplants shows that law has a vitality of its own and does not necessarily progress in a rational way. He rejected the postulate that law is a mirror of society, that there must be a close relationship between law and the society in which it operates, and claimed that the frequency of borrowing proves the fallacy of seeking to correlate developments in law with the internal growth of the society. Two main arguments are put forward in support of this proposition.

The first one relates to the highly developed autonomy and specific role of the legal profession. Law is the province of lawyers and legal rules are treated as ends in themselves, as existing in their own right. Because of their training and experience, lawyers, who have been historically entrusted to shape, preserve and

11 A Watson "Comparative Law and Legal Change" (1978) 37 CLJ 313 at 313.
12 As Ewald puts it in his attempt to systematise Watson's detailed historical arguments in theoretical terms, Watson has sometimes "presented his theory in a somewhat loose and intuitive fashion" under different formulations. What is considered in his study discards Watson's extreme views and focuses on his conventional claims in comparative jurisprudence ("weak Watson" according to Ewald's terminology). See W Ewald "Comparative Jurisprudence (II): The Logic of Legal Transplants" (1995) 43 Am J Comp L 489 at 492. This interpretation has been criticised by R Cotterrell "Is There a Logic of Legal Transplants?" in D Nelken and J Feest Adapting Legal Cultures (Hart, Oxford, 2001) at 71.
13 Apart from limited exceptions. Roman law of the late Republic is for example seen as self-reliant. See A Watson The Nature of Law (Edinburgh University Press, Edinburgh, 1977) at 100.
15 Montesquieu, for example, in asserting that the law is intimately connected with the society on which it operates, argued that law reflects the "spirit of the people": CS Montesquieu De l'Esprit des Lois (Gallimard, Paris, 1970), reprint JP Mayer and AP Kerr (eds), book 1, chapter 3. Friedrich Carl von Savigny also conceptualised the law as reflecting the spirit of the people (Volksgeset). This conventional interpretation is questioned by W Ewald "Comparative Jurisprudence (I): What it was Like to Try a Rat?" (1995) 143 Penn L Rev 1189 at 2031 footnote 288). On the same issue, see P Stein Legal Evolution: The Story of an Idea (CUP, Cambridge, 1980) at 56; and R Pound Contemporary Juristic Theory (Claremont College, Claremont (CA), 1940) at 79.
interpret the law, have a very restricted perception of (and interest for) the social implications of law. This is particularly evident in certain branches of law that develop with no input from society. Over most of the fields of law, "and especially of private law, in most political and economic circumstances, political rulers have no interest in determining what the rules of law are or should be (provided always of course that revenues roll in and that the public peace is kept)".

The second one concerns the very nature of the legal rules. In addition to being part of the social structure, legal rules operate at the level of ideas. Law develops by transplanting, not because a given rule was the inevitable consequence of the social structure and would have emerged even without a model to copy, "but because the foreign rule was known to those with control over law making and they observed the (apparent) benefits which could be derived from it".

The extent to which law is independent from changes in society appears to be particularly evident when noting that unsuitable legal rules have sometimes persisted for centuries in a country even if they were commonly perceived to be out of step with society. The case of the English system of land tenure and registration provides a good example of the divergence between law and society. In England, by contrast to Scotland or South Africa, for example, a system of compulsory registration of title to land was introduced only in 1925. Although the law of real property "contained so many antiquated rules and useless technicalities that additional and unnecessary impediments had arisen to hinder the facile transfer of land", it survived almost unchanged as a cumbersome, expensive and complex system of conveyances for more than 600 years. The major cause for the slow introduction of registration in England is not attributable to the circumstance that the work involved in the simplification was enormous and expensive, but rather to

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18 At 41-42.
19 For instance, the conflict of laws.
20 A Watson Roman Law and Comparative Law (University of Georgia Press, Athens (GA), 1991) at 97.
23 Land Registration Act 1925 (Eng).
the role of lawyers. Lawyers could not be expected to press for the reform. Conveyancing represented such a large proportion of their work:25

… that they could not greet with enthusiasm any plan which would make it more difficult to justify their fees. Moreover, lawyers enjoy their own technicalities. In addition, such expensive reform as was needed could only come from legislation, and English lawyers traditionally have been suspicious of statute.

Thus, according to Watson,26 comparative legal history suggests that the evolution of law is primarily a function of rules being imported from another legal system following the impulse of the legal elites, as mentioned earlier. This brings into question the plausibility of the assumption that there is an inevitable correlation between legal development and social change. Law is largely autonomous from society. It operates in its own dimension, separate from those of other social institutions. Social and economic circumstances are simply not an insurmountable obstacle for legal transplants.

A less radical explanation for the significance of legal borrowing27 and for the relation between changes in law and changes in society was offered by Otto Kahn-Freund28 some 30 ago. Kahn-Freund pointed out that that there are "degrees of transferability" and that the viability of borrowing requires congruent donor and host country socio-political structures. In contrast to Watson’s thesis,29 Kahn-Freund’s position originated in sharp contrast to the series of lectures delivered by Watson at Virginia University and published in A Watson Legal Transplants: An Approach to Comparative Law (Scottish Academic Press, Edinburgh, 1974). Following Kahn-Freund’s article, Watson reiterated his original thesis in A Watson "Legal Transplants and Law Reform" (1976) 92 LQR 79. An independent view of this debate is offered by E Stein "Uses, Misuses – and Nonuses of Comparative Law" (1977) 72 NW U L Rev 198.


26 And his followers. See the contributions from the section titled "Transplants, Receptions and Comparisons" in JW Cairns and OF Robinson (eds) Critical Studies in Ancient Law, Comparative Law and Legal History (Hart, Oxford, 2001) 211.

27 This has been specifically formulated with reference to labour law.


Freund reasoned that since most laws are deeply embedded in their social and institutional matrices, it cannot be assumed that all rules or institutions are transplantable. Legal institutions are ordered along a spectrum which ranges from the "mechanical", where transfer is relatively easy, to the "organic", where transfer is very difficult, if not impossible. Hence, as laws have been decoupled to some extent unevenly from their socio-political roots, some are more prone to being transplanted than others. Kahn-Freund effectively supports a piecemeal practical approach for borrowing and reception. Contrary to the thesis of recent scholarship on the very specific issue of the role of legal doctrine, he argued that it does not represent per se an insurmountable obstacle to the further development of legal transplants. Taught law, Kahn-Freund states, is tough law:

… and what is taught are primarily the general doctrinal foundations to which in after life the lawyer will cling as he may cling to the religious beliefs he learned at his mother's knees. Practical details are negotiable. Fortunately, for the future of Europe what matters are the practical details, and the diverse doctrinal foundations can look after themselves.

B A Postmodernist Approach to Legal Borrowing

By contrast to the "legal change as legal transplants" thesis, postmodern scholarship is sceptical about the role of history and comparative law as a tool to detect the pattern and the drivers of legal change. The postmodernist approach reflects a radical trend of recent critical international scholarship to comparative


34 O Kahn-Freund "Common Law and Civil Law—Imaginary and Real Obstacles to Assimilation" in M Cappelletti (ed) New Perspectives For a Common Law of Europe (Sijthoff, Leiden, 1978) 137 at 147.
law. It is based on the assumption that comparative law is a mere scholarly imaginative construction: since there is no neutral (external) ground on which the comparatist can stand, comparative law is a futile attempt to compare the incomparable. The postmodernist objection to traditional comparative law stems from the premise that "reasoning, language and judgement are determined by inescapable and incommensurable epistemic, linguistic cultural and moral frameworks". It reflects on the need for legal comparison and claims that legal frameworks are incommensurable since they are not comparable across history and cultures. The conclusion is that legal comparison fails when it does not follow "a rigorous experience of distance and difference".

The idiosyncrasies of diverse legal cultures, according to the anthropologically informed culturalist perspective of Pierre Legrand, simply prevent the possibility of legal borrowing. He argues that law is a culturally situated


37 A Peters and H Schwenke "Comparative Law Beyond Postmodernity" (2000) 49 ICLQ 800 at 802.


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phenomenon. Since it is not an autonomous entity unencumbered by historical, epistemological, linguistic or cultural baggage, legal rules cannot travel (unchanged) across jurisdictions. More precisely, every language and culture produces an indigenous system of meanings. What can be imported is a rule with similar wording, a comparable prepositional statement but, inevitably, with a different meaning. This is because the ultimate meaning of the rule is "a function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned". A rule is necessarily an incorporative cultural form. It does not have "any empirical existence that can be significantly detached from the world of meanings that defines a legal culture". The borrowed rule is ipso facto a different rule. What can be displaced from one jurisdiction to another is a meaningless form of words. The development of law reflects and is responsive to a specific legal culture. It does not take place through the transplantation of legal rules because rules are not simply bare prepositional statements.

To sum up, legal comparison is a pointless venture if the analysis does not depart from the assumption that law is a culturally-situated phenomenon and that 'law lives a profound way within a culture specific – and therefore contingent – discourse". Against this background, legal transplants are simply impossible.

C Critique of the Terms of the Debate on the Diffusion of Law

The outline of the terms of the debate on the diffusion of law above has highlighted the nature and the complexities of the arguments put forward by the supporters of the "legal change as legal transplants" thesis and the ones advanced by critical legal scholars. However, these views do not provide a satisfactory and conclusive explanation for the movement of law across national borders and for the pattern of legal change. They contain elements of truth, but they also present significant theoretical flaws. Two fundamental aspects will be considered in turn: the marginalized sociological aspects of law in Watson's argument and the flawed assumptions of the postmodernist perspective.

According to Watson's thesis, law is insulated from society. It is an empire of its own which develops in accordance with internal dynamics and is autonomous from external forces. Under Watson's thesis, law amounts largely to legal doctrine and

43 At 114.
intellectual history. This perception is misleading, as law must be understood in relation both to the society in which it originates, and in which it operates. In particular, it has been argued convincingly that without legal sociology, the theory of legal transplants explains very little. A sociological inquiry is essential to predict how and under what conditions legal elites shape the law in a given period. Moreover, the dysfunctional character of some legal rules together with empirical evidence of borrowing do not prove that legal developments always occur independently from other reasons to be found in society. Mirror theories are not wrong per se. As they do not explain every legal development, they merely need supplementing. To overlook that is a fundamental fallacy in Watson's reasoning, the result of a formalistic approach to law. He does not succeed in proving an absolute negative, "that no interests of any kind are served by the law? Or that there could be no social reason for it?" Finally, the idea that legal systems are formed of rules and principles that serve nobody's interests, but, nevertheless, persist over centuries because legal professional elite controls the patterns of development of legal doctrine, greatly simplifies the significance of law as a social phenomenon. Legal systems are not static entities, persistent and insulated from their contexts. Briefly, Watson's radical approach to borrowing offers an impoverished explanation for the pattern of legal change. In his attempt to argue that the frequency of legal transplants demonstrates the limits of the sociology of

48 See R Cotterrell "Is There a Logic of Legal Transplants?" in D Nelken and J Fest (eds) Adapting Legal Cultures (Hart, Oxford, 2001) 70. Watson's sociological conclusions are ludicrous according to Friedman. Attacking Watson on his interpretation of law as a social phenomenon is "like shooting fish in a barrel": L Friedman "Some Comments on Cotterrell and Legal Transplants" in D Nelken and J Fest (eds) Adapting Legal Cultures (Hart, Oxford, 2001) 93.
52 A different critique on this same issue that considers legal rules as entities with "a life of their own" in the hands of legal elites is put forward by G Teubner in Law as an Autopoietic System (Blackwell, Oxford, 1993) at 40 where he states that "professionalism is of minor importance compared with the structural phenomenon of self-reference in law. The fact that legal standards appear to have a life of their own can be explained by the relation between self-reference and formality".
law, it overlooks cases where legal transfers occurred by imposition\textsuperscript{54} or as a part of socio-legal changes.\textsuperscript{55} Above all, placing "law in context" is crucial for explaining the pattern of legal change. It greatly contributes to "[appreciating] the social and (even more) the political context in which law was shaped in order to avoid rejection of a legal transplant".\textsuperscript{56} What survives from the theory of legal transplants is little: it is the emphasis on comparative legal history for explaining the significance of borrowing in the evolution of law.\textsuperscript{57} This element alone, however, amounts to a mere description of the itineraries of legal culture. It does not help to explain the reasons for the pattern of legal change and the peculiar traits of the assimilation process.\textsuperscript{58}

On the other hand, the claim of postmodernists that law cannot move from one society to another without a change in content is also not entirely convincing. It rests on certain flawed assumptions of law as a product exclusively embedded in a set cultural and linguistic context. These assumptions are questionable. Language is certainly bound to culture, but it has an open and evolving character "that allows for linguistic change and cross cultural communication".\textsuperscript{59} The idea of a complete and autarchic linguistic system is misleading.\textsuperscript{60} Moreover, empirical evidence of legal systems that have adopted multilingual laws suggests that the same rules can be expressed in different languages and that, therefore, they can be transferred from one community to another.\textsuperscript{61} In addition to that, culture "is too weak a concept to

\textsuperscript{54} For instance the case of the diffusion of the Napoleonic code in Europe. See Part IV below.


\textsuperscript{57} With slightly different accents, the same view is shared by R Sacco "Legal Formants: a Dynamic Approach to Comparative Law" (Instalment II) (1991) 39 Am J Comp L 343 at 395 when he discusses about the circulation of "legal formants" and J Gordley "Why Look Backward" (2002) 50 Am J Comp L 657.

\textsuperscript{58} This issue is highlighted also by M Chen-Wishart "Legal Transplants and Undue Influence: Lost in Translation or a Working Misunderstanding?" (2013) 62 ICLQ 1.

\textsuperscript{59} M Graziadei "Transplants and Receptions" in M Reinmann and R Zimmermann (eds) \textit{The Oxford Handbook of Comparative Law} (OUP, Oxford, 2006) 441 at 468.


\textsuperscript{61} With specific reference to European legal integration, see W Twining "Surface Law" in H Petersen, AL Kjaer, H Krunke and M R Madsen (eds) \textit{Paradoxes of European Legal Integration} (Ashgate, Aldeshot, 2008) at 157. For a challenging view, see the critical comment of P Legrand "Word/World (of Primordial Issues for Comparative Legal Studies)" in H Petersen, AL Kjaer, H
act as an epistemological model in itself”. It is not an entity that can be confined within rigid boundaries as empirical evidence gathered from the studies of comparative legal history suggests. The assumption that there are closed cultural frameworks is simply flawed. Culture is not a monolith, but rather an "adaptive and porous multilayered compound where actors having different stakes in the game are at work". If, as Legrand argues, an Italian lawyer cannot think like an English one, "why should it be assumed that a lawyer from Welsh-speaking North Wales can think like an English lawyer born and bred in London?" […] Above all, "what are the important boundaries and essential elements of cultures for purposes of comparison?" Further, the postmodernists' argument is per se unhelpful. It is obvious that the practice of legal transplants is impossible in its narrow sense, if it is treated as the attempt to use laws and legal institutions to reproduce identical meanings in different cultures. This refutation of the theory of legal transplants, however, greatly trivialises Watson's more general position and reduces the investigation to a meaningless rigid terminological dispute. Above all, it is not clear why some "(even minor) change in meaning has to have the radical consequence that only a meaningless form of words remains, and that the process of influencing consequently is not worthwhile examining at all". The empirical evidence gathered especially from mixed jurisdictions points against the claim that cultures are mutually incompatible and transplants are inherently impossible. What is still valuable in Legrand's approach is that it allows a more careful reflection on the complexities of the process of displacement and assimilation of

Krunke and M R Madsen (eds) Paradoxes of European Legal Integration (Ashgate, Aldeshot, 2008) 185.

62 G Samuel Epistemology and Method in Law (Ashgate, Aldershot 2003) at 50.


legal paradigms. These are not just mechanical transfers, but rather involve a process of cultural change that needs to be considered appropriately.

**D The Way Forward**

This paper attempts to remedy the shortcomings identified in the academic debate analysed above. The following analysis rests on an overlooked argument on the circulation of legal models across national frontiers, rarely raised in the debate on legal transplants. It stems from the acknowledgement that the practice of borrowing has been one of the most fruitful and vital sources of legal change in the western world. This is simply a truism\(^70\) that cannot be defeated by any culturally oriented approach. It is not, however, a phenomenon peculiar to law. Instead, borrowing reflects a general trend of social life, a mechanism of culture diffusion. It has been probably one of the most successful mechanisms and "so common that in any socio-cultural system the overwhelming majority of traits has originated in other societies".\(^71\) It applies well to law because law is itself a form of culture.

It has already been said that law is not an autonomous entity detached from society and that it is not merely the province of lawyers. It is a system of meanings by which human experience is shaped and represented. Law cuts across all social life and is so closely intertwined "into the texture of society that no neat dichotomy is possible between legal and extra-legal or social reality".\(^72\) A special explanation for borrowing in law should therefore be called only when it is distinguished from other forms of cultural diffusion. It is generally suggested that it is not clear that it does so significantly. It follows that any investigation on the movement of legal paradigms across national frontiers is necessarily part of a broader discourse on cultural diffusion.\(^73\)

Building upon this awareness, this study proposes an original perspective for considering the significance of legal borrowing and for explaining the pattern of legal change. What is found to be missing in the theory of legal transplants is a convincing explanation for the reception mechanism, for the mechanism of appropriation of foreign elements. Watson's rigid description of the pattern of

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70 This is also the view taken by R Sacco "Legal Formants: a Dynamic Approach to Comparative Law" (1991) 39 Am J Comp L 343 at 395; and E Orucu "Law as Transposition" (2002) 51 ICLQ 206.

71 M Harris *Culture, Man, and Nature. An Introduction to General Anthropology* (Crowell, New York, 1971) 152.

72 See EM Wise "The Transplant of Legal Patterns" (1990) 38 Am J Comp L 1 at 21.

73 This view is shared by BS Jackson "Evolution and Foreign Influence in Ancient Law" (1968) 16 Am J Comp L 372 at 374.
borrowing based on the postulate of the autonomy of law from society, on the assumption that law largely exists and operates independently from other social institutions, is not convincing.

It has been shown above that the claim of law as an autonomous institution is based provocatively on certain exceptional cases of legal rules being 'out of step' with the needs and aspirations of society. This idea oversimplifies the significance of law as a system of meaning by which human experience is modelled and expressed. In particular, it does not give sufficient attention to (or at least greatly overlooks) the interactions of the borrowed model with the social/economic setting of the country where the borrowing occurs. It is unsatisfactory to treat episodes of legal borrowing merely "as the internal history of legal doctrine enlarged to take account of foreign sources of inspiration".\textsuperscript{74} The mere acknowledgement of the occurrence of borrowing demonstrates nothing about culture interaction and the assimilation process. It is not an independent explanatory principle per se, as it does not reflect on the contents of the process. Borrowing cannot be considered "a causal principle for explaining sociocultural differences and similarities since to say that a trait diffused from A to B", among other things, "leaves unanswered the question of how and why the trait was accepted in B".\textsuperscript{75} Briefly, it is simply impossible "to explain variables by constants".\textsuperscript{76}

The main argument of this paper is that the movement of legal paradigms from one country to another does not consist of a mere transplantation of rules, but involves a complex and gradual process of interaction between legal and social consciousness, between imported models and indigenous traditions. In this respect, specific attention is given to recent studies on culture contact and culture change. It will be shown that these studies can provide an explanation for the process of borrowing and the pattern of the legal change. The underlying claim is that recent insights from the theoretical debates on acculturation, colonialism and contact situations in general can be used to explain the pattern of development in certain areas of law. The focus is on the notion of "hybridity" as a fundamental theme in cultural and postcolonial studies.

\textsuperscript{74} EM Wise "The Transplant of Legal Patterns" (1990) 38 Am J Comp L 1 at 18.

\textsuperscript{75} M Harris Culture, Man, and Nature. An Introduction to General Anthropology (Crowell, New York, 1971) at 154.

\textsuperscript{76} At 154.
III POSTCOLONIALISM AND THE PROCESS OF HYBRIDIZATION

A Overview

Part II showed the boundaries of the current debate on the diffusion of law and explained the limits of the predominant works in the area. It also introduced the contribution of this study to the comparative discussion which is developed in this part. This part addresses the theoretical grounds for explaining the process of legal change through the appropriation of foreign legal paradigms and ideas. In doing so, it focuses on the notion of "hybridity" as developed in postcolonial studies, and tests it against a number of possible applications, including situations outside the modern imperialist pattern. A clarification of the impact and relevance of this investigation within the specific debate on legal borrowing will be provided in Part IV.

B The Concept of Hybridity

The term hybridity originated in the mid-19th century in the context of biological and evolutionary debates to describe a cross between animal or plant species. Although it has also been occasionally used as a metaphor to indicate the lack of racial purity, the term today defines a research theme in cultural and postcolonial studies involving "processes of interaction that create new social spaces to which new meanings are given".

The concept of cultural hybridity is usually associated with the pioneering works of Homi Bhabha who attempted to overcome the rigid dualist perception of culture in the colonial contexts that neatly distinguished between colonisers and colonised. Bhabha, developing the "orientalist" discourse initiated by Said, in his celebrated book (EW Said Orientalism (Penguin London 1985) at 98, Said maintained that the notion of Orient is a western invention. Orientalism is a "kind of western projection onto and
essentially criticised the conventional way of binary thinking whereby the inhabitants of a colonised region are regarded as either colonial or indigenous.\(^8^3\) The claim for a hierarchical purity of cultures is untenable in colonial situations. So is the picture of a rigid process of acculturation where one group becomes more like another by borrowing discrete cultural traits.\(^8^4\) Rather, there are areas of "in-betweenness" of people and their actions, and it is the "in-between" space that carries the burden and meaning of culture.\(^8^5\)

Building on the above-mentioned findings, Bhabha suggested that the notion of cultural hybridity expresses the result of cross-cultural exchange or "the effect of an ambivalence produced within the rules of recognition of dominating discourses as they articulate the signs of cultural difference".\(^8^6\) The ambivalent relationship between coloniser and colonised, in particular, qualifies as "mimicry"\(^8^7\) because the copying of the colonisers' culture and values is not a mere reproduction of the same traits. Rather, it creates a blurred copy of the original model, sometimes not far from mockery. The reproduced colonised subject "is almost the same, but not quite".\(^8^8\) It is the effect of "a flawed colonial mimesis in which to be Anglicised is emphatically not to be English".\(^8^9\)

The essence of the effect of mimicry is the creation of a "third space" between colonial and indigenous cultures. In the words of White, who coined the term to will to govern over the Orient". See also R Young *Colonial Desire. Hybridity in Theory, Culture and Race* (Routledge, London, 1995) 161.

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86 H Bhabha "Signs Taken for Wonders: Questions of Ambivalence and Authority Under a Tree Outside Dehli, May 1817" in H Bhabha (eds) *The Location of Culture* (Routledge, London, 1994) 144 at 162.

87 From to "mimic" the colonizer.


describe the interactions between the Native Americans and Europeans in the Great Lakes Region of North America between 1650 and 1815, it is in the "Middle Ground", an area of mediation where the worlds of the natives and colonists melt at the edges. This is where hybridity establishes its meaning and where a potentially alternative authority to the colonial one is set up. Hybridity is therefore the moment where the discourse of colonial authority loses its univocal grip on meaning and finds itself open to the trace of the language of the other. It is "the name for the strategic reversal of the process of domination through disavowal (that is, the production of discriminatory identities that secure the 'pure' and original identity of authority)".

It follows that cultural norms in colonial contexts are neither colonial nor indigenous "in disguise", but peculiar to each specific contact situation. Hybrid culture is more than the result of the fusion of features of colonial and indigenous background. It is a new creation in its own right that, inevitably, locates "a crack in the certainty of colonial dominance, … in its control of the behaviour of the colonized".

C The Limits of the Concept of Cultural Hybridity

One of the fundamental critiques to Bhabha's work has been that the notion of cultural hybridity is based on the presumption of the existence of once pure cultures and on the understanding that pre-colonial culture is an authentic, well-defined and autonomous entity. As already seen when discussing Legrand's


93 H Bhabha "Signs Taken for Wonders: Questions of Ambivalence and Authority Under a Tree Outside Dehli, May 1817" in H Bhabha (eds) *The Location of Culture* (Routledge, London, 1994) 144 at 159.


arguments, this critique is devastating. Pure cultures do not exist. Hybrid cultures are no less authentic than pre-colonial ones. The various cultural traits are combined into a new and internally equally coherent culture. This is because the relation between meaning and origin is not an intrinsic one and cultural "forms become separated from existing practices and recombine with new forms in new practices".

The conceptual pitfall inherent to the notion of cultural hybridity referred to above can be overcome by redefining it with the term "hybridisation". This gives a fair representation of the process of interaction and negotiation between the social actors in the colonial situation. It also avoids any reference to a reified concept of culture and culturally predetermined identities. The inhabitants of a colonised region (both colonial and indigenous) are not simply the objects of culture change, of the interaction between two different cultures. They are rather the protagonists of cultural encounters.

The term hybridisation therefore essentially captures the process underlying the "culture mixture [which] is the effect of the practice of mixed origins". It is a sort of conceptual reorientation to observe the process of construction of local identities in the specific contact situation.

D The Terms and Boundaries of the Postcolonial Debate

The idea of hybridisation as the process of cultural mixture for colonial situations, originally developed in postcolonial studies, is not specifically modern or western. It goes beyond particular temporal and spatial contexts. The phenomenon of ambivalence can be observed in all colonial situations, not only in the modern ones.

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A clarification of the above statement is proposed below. The analysis first considers the meaning of "colonialism" and then argues that the process of hybridisation is applicable also to all colonial situations.

The term colonialism does not reflect an abstract concept, restricted to the dominance assumptions of European historical experience,\textsuperscript{103} to a consequence of imperialism.\textsuperscript{104} It does not coincide with the meaning and connotations of modern times colonialism that has often been associated with the idea of political, military and economic domination by intrusive foreign groups over indigenous people.\textsuperscript{105} Nor does it imply violent occupation or exploitation of the region involved as the case of European cultural hegemony in science in the early political independence of United States and Australia demonstrates\textsuperscript{106} or the influence of Anglo-Saxon corporate governance in shaping the evolution of corporate law in Europe in the 20th century.\textsuperscript{107}

Colonialism embeds a much broader idea that applies to non-hegemonic contexts as the contributions of Osborne\textsuperscript{108} and De Angelis\textsuperscript{109} on the history of Greek overseas settlements have pointed out. In this light, colonialism refers primarily to the "absence from home and being in a foreign country",\textsuperscript{110} a notion

\begin{footnotesize}
\begin{enumerate}
\item Even if, de facto already implicitly included in some (arguably, over-stretched) definitions of colonialism. See R Horvath "A definition of colonialism" (1972) 13 Current Anthropology 45. See also G Stein "Colonies without Colonialism: A Trade Diaspora Model of Fourth Millennium B.C. Mesopotamian Enclaves in Anatolia" in CL Lyons and JK Papadopulos (eds) The Archaeology of Colonialism (Getty Research Institute, Los Angeles, 2002) 27.
\item EW Said Culture and Imperialism (Knopf, New York, 1994) at 9.
\item See N Dirks "Introduction: Colonialism and Culture" in N Dirks (eds) Colonialism and Culture (University of Michigan Press, Ann Arbor, 1992) at 1-25.
\item A Thomas "Cultural Hegemony: the Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany" (1998) 73 Tul L Rev 69.
\item P van Dommelen "Ambiguous Matters: Colonialism and Local Identities in Punic Sardinia" in CL Lyons and JK Papadopulos (eds) The Archaeology of Colonialism (Getty Research Institute, Los Angeles, 2002) 121.
\end{enumerate}
\end{footnotesize}
more akin to the Greek *apoikia*\(^{111}\) than to the Latin equivalent *colonia*.\(^{112}\) It follows that not only the Greek cities in southern Italy and Sicily from the 8th century BC qualify as colonies,\(^{113}\) so too do other situations of "non-hegemonic contact" such as for example the Mesopotamian trade settlements in Syria and southeast Anatolia of the Uruk period\(^{114}\) and the Greek establishments in south-east Spain.\(^{115}\) The latter, in particular, were essentially no more than trading contacts without foreign occupation and without submission of the host community. In this respect, they were not dissimilar from the various Phoenician trade posts in central and western Mediterranean,\(^{116}\) the Greek *emporia*\(^{117}\) or, the 13th century Genoese economic networks in southern England.\(^{118}\) The object of "colonisation" can therefore well be "the web of connectivity itself rather than the productive terrain".\(^{119}\) There is a clear thread that links the cases of Miletos in the 6th century BC, the medieval "aristocratic diasporas"\(^{120}\) and the commercial expansion of Genoa outside the Mediterranean borders.

Against this understanding of the concept of colonialism, it is argued below that the process of hybridisation is a recurring feature in all colonial situations, even where the modern imperialistic connotations are not in place. By distinguishing

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111 See the definition provided by G Stein "Colonies without Colonialism: A Trade Diaspora Model of Fourth Millennium B.C. Mesopotamian Enclaves in Anatolia" in CL Lyons and JK Papadopulos (eds) *The Archaeology of Colonialism* (Getty Research Institute, Los Angeles, 2002) 26 at 30.

112 See J Webster "Roman Imperialism and the Post-Imperial Age" in J Webster & N Cooper (eds) *Roman Imperialism: Post-Colonial Perspectives* (University of Leicester, Leicester, 1996) 5.


between "non-hegemonic" and "hegemonic" contacts, the following inquiry will show how the pattern is not the same under both scenarios. The underlying theory\textsuperscript{121} is based on the idea of hegemony as a manifestation of coloniser's supremacy, both in terms of "intellectual and moral leadership"\textsuperscript{122} and the "domination".\textsuperscript{123}

\textbf{E Inspirations from Archaeology}

This search for the process of hybridisation in colonial situation following for the process of hybridisation focuses on pre-modern examples and relies primarily on archaeological studies. The recourse to archaeology follows the simple rationale that this discipline (arguably more than any other social science) provides for accurate, verifiable and reliable results. In considering material culture deriving from physical evidence, archaeology studies cultures and people who "did not inscribe their own narratives in writing" and it "gives voice to people marginally represented or excluded even in literate cultures".\textsuperscript{124} As in the often quoted Chippindale's example "to be a slave girl at the wrong end of town in Classical Athens was not to experience Plato's world".\textsuperscript{125}

The outcomes of a great number of archaeological studies on the settlements established by Phoenicians, Greeks, Carthaginians and Romans in the western Mediterranean have evidenced that commercial contacts were intense since the Mycenaean period and that people from across the Mediterranean Sea met and interacted, and no doubt shared many ideas and views alongside their trading of goods.\textsuperscript{126} Contacts rarely amounted to a claim to possession of new territories overseas or to the creation of settlements limited to citizens of the foreign community. At the base of \textit{apoikia} there was a search for economic benefits, not

\begin{itemize}
\item \textsuperscript{121}See D Kurtz "Hegemony and Anthropology. Gramsci, Exegeses, Reinterpretations" (1996) 16 Critique of Anthropology 103.
\item \textsuperscript{122}That is predominance based through consent of the subordinate people. See J Femia "Hegemony and Consciousness in the Thought of Antonio Gramsci" (1975) 23 Political Studies 30. This is the classical definition provided by Gramsci where hegemony is the predominance obtained by consent rather than by force of one class or group over other classes. See A Gramsci \textit{Opere di Antonio Gramsci. Il Risorgimento} vol IV (Einaudi, Torino, 1949) at 70.
\item \textsuperscript{123}See L Gruppi "Il Concetto di Egemonia" (1967) 3 Prassi Rivoluzionaria e Storicismo in Gramsci, Critica Marxista at 78 where he maintains that "for Gramsci the concept of hegemony normally includes those of ‘leadership’ and ‘domination’ together".
\item \textsuperscript{124}CL Lyons and JK Papadopulos "Archaeology of Colonialism" in CL Lyons and JK Papadopulos (eds) \textit{The Archaeology of Colonialism} (Getty Research Institute, Los Angeles, 2002) 1 at 11.
\item \textsuperscript{125}C Chippindale "Theory in Archaeology: A World Perspective" (20 October 1995) \textit{Times Literary Supplement} 1 at 9.
\item \textsuperscript{126}See S Antoniadou and A Pace \textit{Mediterranean Crossroads} (Pierides Foundation, Athens, 2007).
\end{itemize}
only for the mother city, but for other homeland cities and for non-Greek peoples too. From "the point of view of state policy, its initial motivation seems to have been as much a negative as a positive one, to ease pressure on the land of the founding city and to rid it of restless elements".127 This is clearly in contrast with a traditional view of ancient overseas settlements based on assumptions taken from the modern age imperialism, 128 with the practice of "thrusting the desired modern standards on to the antiquity". 129 There is archaeological evidence that in most of the cases commercial and cultural relationships between local inhabitants and foreigners were not antagonistic nor a clash between isolated entities.130 They rarely amounted to mechanistic relationships of acculturation, of cultural "colonisation" of the indigenous population.131 Even in the limited cases of political domination, as in the case of the Roman colonies, the distinction between coloniser and colonised was not straightforward or stable.132 Rather, a local "Middle Ground" of cultural mediation and accommodation and areas of "in betweenness" of people and their actions emerged. New traditions peculiar to each contact situation were invented. This is, of course, in line with the findings of postcolonial theories and consistent with the notion of hybridisation as a process of culture change.

As suggested earlier, this inquiry distinguishes between "non-hegemonic" and "hegemonic" contacts. Two examples are presented below.

The perception of the cultural intricacies of colonial encounters and the process of development of new local cultural norms in their own right is straightforward in


128Eg the case of the indigenous Sicilians converted into "artificial Greeks" claimed by EA Freeman A History of Sicily from the Earliest Times (OUP, Oxford, 1891) vol I, at 8, the argument of Greek superiority (the "trade before the flag" argument) advanced by A Blakeway "Prolegomena to the Study of Greek Commerce with Italy, Sicily and France in the Eight and Seventh Centuries BC" (1932) 33 ABSA 170 or the imperialistic character of English colonization suggested by J Hasebroek Trade and Politics in Ancient Greece (Biblio and Tannen, New York, 1965) at 110.


130See the references to the works cited above and the useful summary of the recent bibliography on the extent to which Etruscans adopted Greek institutions provided by M Torelli "The Encounter with the Etruscans" in G Pugliese Caratelli (eds) The Greek World: Art and Civilization in Magna Grecia and Sicily (Rizzoli, New York, 1996) 567.

131Consider the case of "Hellenization" in the overviews presented by D Adamensteanu "Greeks and Natives in Basilicata" and F D'Andria "Greek Influence in the Adriatic: Fifty Years after Beaumont" in JP Descoeudres (eds) Greek Colonist and Native Populations (OUP, Oxford, 1990) at 143 and 281.

the absence of any direct hegemonic relationship. The colonial situation is less constrained by antagonistic interests. It is, therefore, usually open to novelty and change and conducive to the formation of a cultural middle ground where the process of hybridisation occurs. In this respect, the study of archaeological remains in Greek (Pithekoussai133 and Morgantina134) and Phoenician (west Sardinia135)

133 The remains of the Greek commercial *emporium* in the bay of Naples on the island of Pithekoussai evidence mutual contacts between colonisers and Etruscan and local Italic communities. Pithekoussai essentially represents a model of early Greek colonisation "one of touching and tapping rather than grabbing and possessing" (I Malkin "A Colonial Middle Ground: Greek, Etruscan, and Local Elites in the Bay of Naples" in CL Lyons and JK Papadopolos (eds) *The Archaeology of Colonialism* (Getty Research Institute, Los Angeles, 2002) 151 at 154). A very early form of the flexible model for the founding Greek institutions, constituting a new entity, independent from its mother city. Pithekoussai was a colonial Middle Ground of regular exchanges where nobody was an absolute other in terms of binary-oppositional model. Although it is generally agreed that the Greek presence provided the Etruscans with unprecedented social, cultural and political stimuli, it is also clear that this was not a unilateral affair. There is no sign that a direct domination of the Greek culture over the others took place. On the contrary, Etruscans formed a significant part of the Greek experience in the course of the 8th century. The contents of Greek tombs in Pithekoussai, for example, illustrate that personal ornaments used by Greek in the second half of the 8th century were identical to those used in Etruria and in Latium (see G Buchner "Early Orientalizing: Aspects of the Euboean Connection" in D Ridgway and F Ridgway (eds) *Italy before the Romans: The Iron Age, Orientalizing and Etruscan Periods* (Academic Press, London, 1979) 133. See also D Ridgway "La Presenza Etrusca nella Campania Meridionale" in P Gastaldi and G Maetzke (eds) *La Presenza Etrusca nella Campania Meridionale: Atti delle Giornate di Studio, Salerno-Pontecagnano 16-28 novembre 1990* (Olschki, Firenze, 1994) 513). It is, of course, also true, that during the second half of the 8th century the Etruscans adopted the Euboian alphabet, learning it from the Euboian settlers in Pithekoussai. This was, however, shaped in accordance to the special needs of Etruscan phonetics. Moreover, the same Greek colonials contributed to the spread of the motifs from Greek epics in Italy. They were, however, adapted in Etruscan pottery to suit the local taste (see FH Massa-Pairault *Iconologia e Politica nell'Italia Antica: Roma, Lazio ed Etruria dal VII al I secolo AC* (Longanesi, Milano, 1992) at 19). Briefly, Pithekoussai expresses a frontier zone for both Greeks and Etruscans where a new colonial culture emerged, a normative process that fuse "mother-cities", settlers and natives alike. It was not exclusively Greek, nor Etruscan. It was a “Middle Ground” where Greeks and Etruscans mixed with local elites and where Greek elements and frameworks were being introduced, amended and appropriated.

134 The analysis of the burial customs in the Greek cemetery of the colony of Morgantina in Enna Province (Sicily) is also a good example illustrating hybridisation and the pattern of diffusion of material culture in a non-hegemonic context. The archaeological excavations carried out by five different American universities have evidenced in particular that despite the fact that the site has been culturally and politically Greek from at least the 6th century, a large percentage of the material recovered was not Greek, but indigenous (Sikel). The fact that Greek objects have often been mixed with non-Greek ones, in particular, was contrary to orthodox Greek burial conventions. The combination clearly points out that Greek customs have been integrated in the local traditions (see CL Lyons "Sikel Burials at Morgantina: Defining Social and Ethnic Identities" in R Leighton (eds) *Early Societies in Sicily: New Developments in Archaeological Research* (Accordia Research Centre, University of London, London, 1996) 77) and that, therefore, in the specific colonial situation, the Greek objects per se do not denote as such any more an "original" Greek culture. The meaning and significance of Greek objects must consequently be sought in the local web of meanings that developed around local and imported material culture in the specific indigenous setting. In short, Morgantina's material culture, especially in the Archaic and early Classical periods, is neither wholly Greek, nor indigenous. It
settlements has clarified that in the presence of colonial, "non-hegemonic" situations the pattern of cultural change does not amount to a unidirectional process of civilisation of the indigenous population. Rather it consists of a complex original phenomenon of social and cultural interaction (hybridisation) between new settlers and local indigenous population.

The notion of hybridity as elaborated in postcolonial studies applies equally well to the ancient colonial situations where a dominance relationship between colonisers and colonised was present. The modern hegemonic colonial scheme, however, does not overlap exactly with the ancient one. There are structural differences that make a parallel between ancient and modern empires misleading, a result of a priori definitions. The analogy is in fact based on a flawed interpretation drawn from western national historiography. The best example is probably the case of Roman expansion and colonialism. Since the beginning of the 19th century the Roman Empire has often been presented as the archetype for modern nationalism and imperialism. The idealisation of the Roman conquest inspired the adoption of Roman symbols to legitimise the colonial cultural mission of European modern nations. In Italy, this process was brought to extremes during fascism with the

is the outcome of a specific colonial identity, the original consequence of the process of hybridisation (see C Antonaccio "Hybridity and the cultures within Greek culture" in C Dougherty and L Kurke (eds) The Cultures Within Greek Culture: Contact, Conflict, Collaboration (CUP, Cambridge, 2003) 57).

135 This is the case of the unevenly distributed Punic colonies starting from the end of the 5th century BC in west central Sardinia (in general, see F Barreca La Civilità Fenicio-punica in Sardegna (Delfino, Sassari, 1986) at 31–40). A coherent colonial settlement pattern is missing. While some colonial settlements are located in the Campidano and Marmilla and are closely associated with the abandoned nuraghi, the emporia in the costal areas do not present traces of previous occupation. Although they both qualify as "colonial" settlements, they are very different. The identification of "nuraghic" features in the rituals of Marmilla, for example, "suggests that colonial settlements somehow seems to have been ‘less colonial’ in the interior of the west central Sardinia than in the costal area" (P van Dommelen "Ambiguous Matters: Colonialism and Local Identities in Punic Sardinia" in CL Lyons and JK Papadopulos (eds) The Archaeology of Colonialism (Getty Research Institute, Los Angeles, 2002) 121 at 133). The most reliable explanation for the distinction is that, contrary to the "romanization" of the island that took place in the Imperial period, the Punic presence was only in part hegemonic. Certain settlements were less uniformly colonial simply because indigenous inhabitants were not fully assimilated to the colonial Punic culture. They were "able to retain and express a distinct sense of identity, even if they had to do so by taking recourse to new – Punic – material culture" (P van Dommelen "Ambiguous Matters: Colonialism and Local Identities in Punic Sardinia" in CL Lyons and JK Papadopulos (eds) The Archaeology of Colonialism (Getty Research Institute, Los Angeles, 2002) 121 at 137). The transformation of local culture in those colonial situations as evidenced in the study of the remains of pottery and amphorae locally produced was therefore not an imposition of colonial norms, but merely the result of a non-hegemonic process of cultural interaction.

use of the fasces. In archaeological terms, it led to attention being given to certain data such as urban layout, public monuments and elite manifestations in general, which complied well with the pictured pattern of nationalistic cultural diffusion. This historical reconstruction is however flawed. The Roman military expansion and colonial organization was hegemonic, but the notion was very different from the modern western examples. The modern political agenda has obscured the importance of non-Roman components in the formation of the Roman Empire. The role of the communities incorporated has generally been ignored. Particularly in the largely urbanised Mediterranean basin, "non-Roman aristocracies played an important role in negotiating the terms of the incorporation of their communities within the Roman Empire and in participating in the benefits of the Empire". Ethnic boundaries were easily crossed and new and strong political networks emerged from the interaction of Roman and non-Roman aristocratic families. Evidence for this can be found when examining the career of leaders from colonies, as the case of Emperor Adrian illustrates so well. This is of course very different from modern imperialism; it was difficult, for example, for an Indian Rajah to become a member of the House of Lords under the British Empire. With the development of postcolonial approaches, archaeological research on Roman colonialism showed that settlements in "native" lands were rarely areas of conflicting interests, but rather involved a close interaction and cultural exchange. What went on in most cases "was mainly a political and territorial reorganization, largely involving non-roman people already residing in the area, and carried out by the central power with the cooperation of native elites".

138 N Terrenato "The Deceptive Archetype: Roman Colonialism in Italy and Postcolonial Thought" in H Hurst and S Owen (eds) Ancient Colonizations (analogy, similarity and difference) (Duckworth, London, 2005) 60 at 64.
142 J Webster and NJ Cooper (eds) Roman Imperialism: Postcolonial Perspectives (University of Leicester, Leicester, 1996).
F Summary

The analysis above has suggested that the process of hybridisation is a recurring feature of all colonial situations. Colonialism does not necessarily form part of the 21st century imperialistic agenda, but it embeds a much broader idea, which deals with relationships not based on dominance and hegemony, on the overwhelming superiority of the colonisers' culture. The study of archaeological remains, in particular, has shown that colonisation often involves non-antagonistic cultural and commercial relationships where the role of the local population in the process of settlement is not ignored. Even when hegemonic contact situations are in place (e.g., romanisation), cultural evolution never amounts to a one-way process. It never consists of a process of mere acculturation where the use of the colonisers' styles indicate the adoption of their cultural identity by local populations. Rather, it involves a more complex phenomenon of interaction and negotiation between colonisers and indigenous traditions which eventually lead to the formation of a middle ground, of an original hybrid culture. In other words, it involves a process of hybridisation in line with the one observed in postcolonialist studies.

IV HYBRIDIZATION AND LEGAL TRANSPLANTS

A Overview

Part III has shown that the idea of hybridity originating in postcolonial theory is applicable outside the boundaries of modern colonialism. It is a powerful tool to understanding the pattern of cultural change both under hegemonic and non-hegemonic contact situations. It may be of great relevance for social sciences in general. This Part, by way of analogy with postcolonial discourse, argues for its employment in law. The process of hybridisation, it claims, is a formidable conceptual means to explain some of the complexities of the pattern of legal change, to refine and provide contents to the observation of the reception of law.

B A Possible Analogy

As discussed above, the significance of legal borrowing as one of the most fertile sources of the evolution of law in the western world is undeniable. Historical evidence leads to the conclusion that legal change often follows from the stimulus of foreign models. Borrowing, however, is not peculiar to law. It reflects a general phenomenon of any socio-cultural system. Merely observing the episodes of

144 Sometimes it has been quite the opposite as the case of the Greek colonies who had to pay tribute to local powers well suggests. See the case of the Odrysian Kingdom in Thrace described in ZH Archibald The Odrysian Kingdom of Thrace: Orpheus Unmasked (OUP, Oxford, 1998).

145 The barbarian versus civilised paradigm.
borrowing in itself explains little about the characteristics of the process of development of law. It is a superficial achievement. While it is "an important corrective to provincialism in the writing of legal history which, like most other forms of history, has been primarily national history", it does not provide, among other things, a satisfactory explanation for the phenomenon of assimilation and the interaction between legal cultures.

In this light, the rigid perception of legal change suggested by the theorisation of "legal transplants" is not helpful. It tends to oversimplify the pattern of reception and the relationship between legal paradigms. Hybridisation, instead, recognises the complexities of cross-cultural exchange and gives meaning to the consequences of borrowing. The interaction between cultures proceeds with the illusion of transferable forms and transparent knowledge, "but leads increasingly into resistant, opaque and dissonant exchanges. It is in this tension that a 'third space' emerges which can affect forms of political change that go beyond antagonistic binarisms between rulers and ruled".

Building on this general understanding of the process of culture contact, this paper finds an interesting analogy between the dynamics at the basis of colonialism and the movement of law from one country to another. It suggests that similar arguments to the ones posed in the postcolonial debate, refined by the employment of a broader notion of colonialism, can explain the reception mechanism, the process of interaction between imported legal models and indigenous legal traditions. As with colonial norms and standards, borrowed legal paradigms outside their original meanings, become unsettled. They interact at different levels with local traditions, with certain indigenous perceptions and do not survive in their original identities. In the colonial context, neither colonial norms nor indigenous traditions survive; both give way to an entirely new way of doing things and perceiving meanings which is peculiar to each colonial situation. A new legal tradition, a third space that is peculiar to the specific contact situation is therefore created. Borrowed legal paradigms become "almost the same, but not quite" in similar ways as, "to be anglicised is emphatically not to be English". It follows that legal hybrid identities are not the mere sum of features of colonial and indigenous background, but new creations in their own right.

146 EM Wise "The Transplant of Legal Patterns" (1990) 38 Am J Comp L 1 at 22.
C Legal Transplants, Contact Situations and Hybridisation

The significance of the process of hybridisation in unveiling the mechanism of legal reception is immediate when reflecting upon the conventional understanding of certain classical cases of borrowing involving entire legal systems. These are generally labelled as legal transplants and very little attention is dedicated to explaining the reception process.

A preliminary discussion that examines two of these "broad" episodes of reception is set out below. It is intended to show the limits of the model of legal transplants as a guide for interpreting the process of legal evolutions and the importance of considering the role of culture contact in that respect. It will be argued that the idea of pure transferable forms and transparent knowledge is largely an illusion. It is only by focusing on the nature of the process of hybridisation that a meaning can be given to legal borrowing and to the mechanism of reception. In line with the scheme outlined in Part III, this inquiry distinguishes between non-hegemonic and hegemonic contact situations. The reception of Roman law in Germany and the diffusion of the Code Napoleon in continental Europe will be adopted as examples of non-hegemonic and hegemonic contact situations, respectively.

1 Non-Hegemonic Contacts

The non-hegemonic diffusion of Roman law in Germany following the work of the Glossators in Bologna (1070 AD circa) who examined and adapted the Digest against the perspective of the contemporary reality offers a well known example of diffusion of a legal model and reception of an entire legal system.

The consolidated Justinian scheme of the Corpus Iuris as reinterpreted by Irnerius and Accursius (1185-1263) in Bologna made its way across most of continental Europe on the back of its clarity and conceptualisations that were apt to be implemented in late medieval culture. The Glossators programme of study created a trend in legal scholarship, and a convergence of interest on Italy took place. Roman law, in particular, embodied legal ideas about property useful to an

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149 That is, one of the founding parts of the Corpus Iuris Justiniani (that the codification of Roman law carried out by the Emperor Justinian in the early 6th century AD) that gathered in 50 books the opinion and commentaries of Roman juriconsults.

150 As the pandectist scholarship later evidenced. See R Zimmermann Roman Law, Contemporary Law, European Law (OUP, Oxford, 2000) at 44.

emerging commercial and manufacturing elite and "at the same time its uniform methods for the protection and management of possessions appealed to a growing corps of technicians engaged in these tasks". Above all, in contrast with existing native laws, the Corpus Iuris represented a closed body of thought that suggested a strong sense of comprehensiveness and integration. Roman law was intended to act as a common system of justice for all the countries that formed part of the Empire (ius commune). As established in the form of the mos italicus doctrine promoted by the Commentators Bartolus (1314-1357) and Baldus (1327-1400), Roman law generally applied on a subsidiary basis when local laws were uncertain or gave no basis for judgment.

Although it has been suggested that the process of reception of Roman law in Germany has been the result of direct legal transplantation, recent contributions in legal history have demonstrated that it was not a unilateral imposition from above, nor did it take place in unison. The process has been more complex. It began from the cultural movement driven by contingents of students (most of whom were clerics) who crossed the Alps to learn the mos italicus and who then exported it to the universities of Cologne, Erfurt, Rostock, Leipzig and Heidelberg from the early 15th century. These legal experts, who later operated in the government and in the judiciary, introduced Roman methods to German law. They succeeded "over the course of a century or so in transforming native law and legal procedure by making it learned, scholarly, professional, scientific" in a process known in German scholarship as Verwissenschaftlichung. The reception was not en bloc or automatic. It was a gradual advent that accelerated after the collapse of royal power and the rise of local forces. It involved a dramatic conflict between


153 ius commune is generally defined as anything that has to do with university teaching of law: "Roman law or canon law, be it public law or private law, be it in England or on the Continent": C Donahue jr "Ius Commune, Canon Law and Common Law in England" (1991) 66 Tul L Rev 1748.

154 That is, the "Italian" way of understanding Roman law.


Roman law and native law as the tensions around the interpretation of the old territorial code in Saxony (the Sachsenspiegel) suggests.\textsuperscript{159} The reform of the judiciary where the appointment to the high courts was restricted to "learned" judges,\textsuperscript{160} the circumstance that after the constitution of the Imperial Chamber Court in 1495 judges had to make and explain their decisions in compliance with the principles of Roman law and the development of the habit of referring to academic lawyers for opinions on difficult points of law caused the end of the conflict in favour of the reception of Roman law as subsidiary body of law.\textsuperscript{161} The final picture does not show a uniform model, but consists of a patchy "romanised German law", very different from one place to another. This emerges clearly at the time of the municipal and territorial "reformations" when old rules were replaced by single codes in a search to end uncertainty for clarity and uniformity. The comparison of Wutteenburg and Frankfurt (reformation) laws in 1557 and 1578, where a few traces of old native customs remained, with the Saxon code published in 1572 that left intact all indigenous territorial laws that had been found to agree with each other is emblematic of the situation.\textsuperscript{162}

The above outline of the diffusion of \textit{ius commune} in the Middle Ages in Germany shows the limits of the paradigm of legal transplants. This leaves unanswered the question on the origin of the transfer, whether it is driven by mere admiration (prestige), historical necessity or political opportunity driven by the idea of an uninterrupted Roman reign carried forward by German emperors.\textsuperscript{163} Above all, the theory of legal transplants provides an unsatisfactory account for the phenomenon of borrowing and legal reception. Describing the advent of Roman law in Germany in terms of transplant, does not take into account the peculiarities of the interaction with local customs, the force of local resistance, the way the original Roman scheme has been amended into new original cultural meanings. More than the simple observation of the circulation of the Roman model as such, it is the study of the process of hybridisation and the creation of the new hybrid romanised local paradigm that gives significance to the process of cultural change, of the evolution of law. The essence of legal change was not the adoption of

\textsuperscript{159} Ibid at 110 and 178.
\textsuperscript{160} See the comments on the inadequacy of the previous regime in JP Dawson \textit{A History of Lay Judges} (Harvard University Press, Cambridge, 1960) 94.
\textsuperscript{161} F Wieacker \textit{A History of Private Law in Europe} (OUP, Oxford, 1995) 132.
\textsuperscript{162} G Strauss \textit{Law, Resistance and the State: The Opposition to Roman Law in Reformation Germany} (Princeton University Press, Princeton, 1986) at 87.
\textsuperscript{163} The so-called "imperial connection". Quite significantly, Roman law was later designated by German emperors as "Imperial law" (\textit{Kaiserrecht}).
Roman law per se, but the result of a pattern of cultural contacts, "the outcome of a combined political, social, and cultural process, namely the ongoing penetration from the thirteenth to the sixteenth centuries of the writings of the Italian (and French) jurists of the Middle Ages, of the lawyers they trained, and of the methods and precepts they inculcated".\textsuperscript{164} It follows that hybridisation is more than just a way of describing the phenomenon of legal reception that is an alternative to transplantation. Hybridisation offers a more sophisticated way to understand the complexities involved in the process of legal evolution as it gives meaning to the pattern of cultural interaction and it allows the identifying of the peculiarity of the resulting model as a new paradigm in its own right.

2 Hegemonic contacts

The case of the introduction of the French Civil Code in Europe under the force of the Napoleonic army provides a good example of imposition of foreign legal models.\textsuperscript{165} This is not far from the typical pattern of legal domination generally imposed by colonial rulers.\textsuperscript{166}

The Code Napoleon enacted in 1804 entered into force in the countries that were annexed to France or brought under its rule as the result of military expansion. Although it is often reported as a classical example of legal transplant,\textsuperscript{167} a closer look shows that the pattern of enactment and reception was not uniform. Sometimes the original scheme was imposed in the original form (Belgium), sometimes in a slightly altered way to accommodate national legal practises (Netherlands, Baden) and, occasionally, it was not even translated, but enacted in French (Poland). Although the Code was imposed by force, the ideas contained in it were not generally abolished following Napoleon's fall. In Germany, the Code was repealed in toto in 1814 only where it had been introduced shortly before.\textsuperscript{168} This was not the case of some regions of the left bank of the Rhine (Rhineland and Palatinate), nor the case of Baden where the German version of the

\textsuperscript{164} F Wickecker \textit{A History of Private Law in Europe} (OUP, Oxford, 1995) at 95.
\textsuperscript{165} In general, see K Zweigert and H Kotz \textit{Introduction to Comparative Law} (OUP, Oxford, 1998) 100.
\textsuperscript{167} M Graziadei "Transplants and Receptions" in M Reinmann and R Zimmermann (eds) \textit{The Oxford Handbook of Comparative Law} (OUP, Oxford, 2006) 441 at 444 and 447.
\textsuperscript{168} For example the Hanse cities and Lippe (1812).
Code (the Badisches Landrecht of 1809)\textsuperscript{169} remained in force until 1890. Not to mention, of course, the case of Alsace and Lorraine where the Code not only remained in force until 1900, but was reinstated after the re-annexation in 1919.\textsuperscript{170} In Italy, the Codice civile of 1865 was in its essential elements a translation from the French code.\textsuperscript{171}

The reasons for the various patterns of reception at the time of enactment and during the age of restoration cannot be understood by referring to the paradigm of legal transplants. An explanation can be found only in the history of the mechanism of culture contact.\textsuperscript{172} The different patterns of reception testify to the existence of a process of hybridisation for the formation of new legal identities and meanings. For example, where reception was most successful and the interaction of the local legal traditions with the scheme of the Code proved not conflicting, it was because the scheme of the Code was not entirely novel. It rested in fact to a great extent on the foundation of a common background given by the \textit{iuris commune} tradition and answered to the shared needs and interests of the 19\textsuperscript{th} century bourgeoisie. Even in those circumstances, the acceptance of the model did not necessarily mean abandoning local legal culture for entirely new elements. The text proved in fact flexible and it was often accompanied by a great work of mediation, by "reforms that excluded parts of it, such as the articles on marriage or divorce. Other parts that were considered defective from a technical point of view were also often rejected by importing countries (eg the regulation of mortgages)."\textsuperscript{173}

In essence, the history of the different patterns of reception in various countries and the reaction to the repeal of the Civil Code exemplify the significance of

\textsuperscript{169} Done by Bräun taking properly into account German conditions. See F Wieacker \textit{A History of Private Law in Europe} (OUP, Oxford, 1995) at 274.


\textsuperscript{171} S Solimano \textit{Il Letto di Procuste': Diritto e Politica nella Formazione del Codice Civile Unitario. I Progetti Cassinis (1860-1861)} (Giuffrè, Milano, 2003). See also the comments in K Zweigert and H Kotz \textit{Introduction to Comparative Law} (OUP, Oxford, 1998) at 104. It has, however, authoritatively been held that the Italian Codice civile enacted in 1865 (and the following code in 1942) was interpreted in accordance to the historical method of German Pandectism. Thus, the "private law of Italy is linked to the French legal family by shared Latin attitudes and awareness of the French Revolution (which was also the first Italian one) and it is connected with the German legal family through the Pandectism of the nineteenth century, whose influence there is still quite strong"; F Wieacker \textit{A History of Private Law in Europe} (OUP, Oxford, 1995) at 275.

\textsuperscript{172} See J Gordley "Myths of the French Civil Code" (1994) 42 Am J Comp L 459.

\textsuperscript{173} M Graziadei "Transplants and Receptions" in M Reinmann and R Zimmermann (eds) \textit{The Oxford Handbook of Comparative Law} (OUP, Oxford, 2006) 450.
culture contact in understanding the pattern of legal change and show the relevance of explaining the formation of new legal identities and meanings in terms of a process of hybridisation. As it has been for colonialism, discussed in Part III, the history of the diffusion of the Civil Code shows that binary classifications based on rigid schemes end up presenting a stereotypical and simplified reality.

It follows from the above that legal borrowing, even when imposed under hegemonic circumstances, involves complex processes of reception that need to be disentangled into a proper socio-cultural contextualisation. This is the same idea at the foundation of the ambivalent relationship between colonisers and colonised culture described in postcolonial theory. History demonstrates that the model of legal transplants is not a flexible paradigm and that it may be possibly misleading. It does not provide an accurate representation for the process of legal evolution, as it does not explain the tension and interaction with the existing legal traditions. The idea of pure transferable forms and transparent knowledge is largely an illusion. It is only by considering the process of hybridisation where an area of mediation peculiar to each specific contact situation is created (a hybrid paradigm) that an appropriate meaning can be given to legal borrowing and to the mechanism of reception.

V CONCLUSION

The idea of comparative law as a way of building bridges between legal systems and even cultures is fascinating and has stimulated interesting initiatives on the use of such methodology. One particular debate looks at the relevance of foreign law and foreign legal ideas as a means of shaping national law. The fundamental idea is that legal comparison is a powerful tool to unveil the interaction between different jurisdictions, and to uncover the circumstances and the mechanisms by which law develops. In the wake of the lively discussions on globalisation, convergence among legal systems and on the unification of private law, the exact significance of how legal paradigms are connected and circulate across national frontiers is, however, still largely uncertain. The comparative conundrum, in particular, rests on the appropriateness of describing the movement of law from one country to another by employing the metaphor of "legal transplant".

Broadly put, two approaches have emerged. They are, it would seem, irreconcilable. One school of thought, greatly relying on legal history, maintains that the evolution of law is primarily a function of rules being imported from other legal systems in accordance to the unpredictable directions imposed by domestic lawyers. It follows from this perspective that legal growth is largely independent from society. It operates in its own dimension, often detached from those of other social institutions. Postmodernist theorists, on the contrary, claim that legal
transplants are a scholarly imaginative construction. Reasoning, language and judgement are mostly determined by inescapable and incommensurable epistemic, linguistic, cultural and moral frameworks. The development of law mirrors, and is necessarily responsive to, a specific legal culture. It cannot take place through borrowing because rules are culturally situated phenomena and not simply bare prepositional statements.

In Part II, this paper contended that both perspectives offer elements of truth, but that they also contain flaws in explaining the process of the diffusion of law and the pattern of legal change. The weakness of the first theory, in particular, concerns the explanation of the interaction between legal comparison and sociology of law. This is because law is not an empire of its own that develops autonomously in accordance to internal dynamics. Law cannot be reduced to a static entity composed of legal doctrine and intellectual history. Rather, it must be understood in relation the society in which it originates and operates. The postmodernist approach is also flawed in its orthodox version because it is equivocally over-conceptualised and neglects the significance of the historical evidence of borrowing. Moreover, it relies on certain simplistic assumptions on language and culture suggesting that they can be easily defined and insulated from external relationships and *stimuli*. This is possibly misleading. Although language is bound to culture, it has an open and evolving character that allows for linguistic change and cross-cultural communication. Culture is also not a static entity that can be easily confined within national boundaries.

In an attempt to overcome the criticisms just outlined, this paper offered a corrective interpretation, de facto a gloss to the transplant theory. This is based on an overlooked circumstance relating to the circulation of legal models across national frontiers. The argument stems from acknowledging that, historically the practice of borrowing has been one of the most fruitful and vital sources of legal change in the western world. It is not, however, a phenomenon peculiar to law. Borrowing reflects a general trend of social life, a mechanism of culture diffusion. It applies to law because law is itself a form of culture. What is missing in the literature on legal transplants is, above all, a convincing discussion on the rationale for transplantation and an explanation for the reception mechanisms. As already suggested, the rigid description of the pattern of transplants based on the postulate of the autonomy of law from society, on the assumption that law largely exists and operates independently from other social institutions, is not convincing. That scheme focuses on exceptional cases and it oversimplifies the significance of the law as a system of meanings by which human experience is shaped and represented. It does not pay due attention to the interactions of the borrowed model with the social/economic settings of the country where the borrowing occurs. In
other words, the mere acknowledgement of the occurrence of borrowing demonstrates nothing about culture interaction and the assimilation process. It is not an independent explanatory principle per se, as it does not consider the contents of the process. In this setting, this paper argued that the movement of legal paradigms from one country to another rarely consists of a mere transplantation of rules, but generally involves a complex and gradual process of interaction between legal and social characters, between imported models and indigenous traditions. Running along these lines, Part III considered recent contributions on culture contact and culture change to determine whether they could provide an explanation for the process of borrowing and legal evolution. The goal was to explore whether recent insights from the theoretical debates on acculturation, colonialism and contact situations in general could be used to explain the pattern of development of certain areas of law. The focus of the analysis was on the notion of "hybridity", a fundamental theme in cultural and post colonialist studies. Hybridity is based on the understanding that cultural norms that arise in colonial contexts are necessarily original. They are neither colonial nor indigenous, but peculiar to each specific contact situation. They are the "third space" between colonial and indigenous cultures, a (hybrid) culture in its own right.

This paper suggested that the notion of hybridity is a powerful tool for understanding the pattern of cultural change in social sciences in general and in law in particular. It can provide a conceptual means to explain some of the complexities of the pattern of legal change, to refine and give content to the observation of the reception of law. As with colonial norms and standards, borrowed legal paradigms outside their original meanings, become unsettled. They interact at different levels with local traditions, with certain indigenous perceptions and do not survive in their original identities. When transplantation occurs, a third space that is peculiar to the specific contact situation is therefore created. Borrowed legal paradigms become almost the same as the original ones, but not quite.

Part IV concluded the inquiry in comparative jurisprudence by examining the idea beyond the boundaries of postcolonialist studies. In doing so, it presented a definition of contact situation outside the modern imperialistic perspective of colonialism and examined two well-known episodes of transplantation of the entire legal system under hegemonic and non-hegemonic contact situations: the diffusion of *ius commune* in the Middle Ages in Germany and the introduction of the French Civil Code in Europe under the force of the Napoleonic army provides, respectively. In both cases it was found that legal borrowing involves complex processes of reception and hybridisation similar to those described in postcolonial theory for the ambivalent relationship between colonisers and colonised culture.