

BOOK REVIEWS

LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA
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This book provides a rich source of material and a significant resource on the topic of legal transplants. The 14 specialist authors present informative and usefully interlocking chapters of both a theoretical and specific case nature.

The book is in three main parts. They deal, respectively, with matters of theory, diverse case studies, and case studies specific to the protection of rights and the environment. There are 12 chapters, plus an Introduction and Conclusion, and an extensive table of cases and a table of legislation.¹

The first substantive chapter is that by Harding.² It provides a critique of the Watson/Le Grand debate on transplants. It is this chapter that sets the theme for the book and is the general point of linkage for the various chapters.

Corrin³ in ch 2 deals with the vexed matter of 'statutes of general application' and their relationship to the notion of transplants.⁴ Whatever the merit of the formula in colonial times, it has now well passed its 'best before' date. The fact that the formula is retained by some countries perhaps indicates their attitude to law of the introduced kind, to the concept of the rule of law, and to their colonial past.

Kaino⁵ provides a historical and conceptual survey of the major law reforms of 19th-century Japan and the links to the theories of Bentham. This chapter, like ch 5, indicates the persistence of local phenomena in legal development.

¹ Mostly relating to common-law jurisdictions. The usefulness of this material is substantially curtailed by the absence of any indication of the page or chapter in which the listed material may be found. This and a number of typographical errors and incorrect citations are irritating, but overall they do not detract from the merit of the book.

² Andrew Harding 'The Legal Transplants Debate: Getting Beyond the Impasse?' in Vito Breda (ed), *Legal Transplants in East Asia and Oceania* (Cambridge University Press, 2019) 13–33.

³ Jennifer Corrin, 'Transplant Shock: The Hazards of Introducing Statutes of General Application' in Breda (n 2) 34–62.

⁴ A statute of general application could be seen as an ex post facto piece of legislating and therefore contrary to the rule of law.

⁵ Michihiro Kaino, 'Bentham's Theory of Legal Transplants and His Influence in Japan' in Breda (n 2) 63–83.

Gussen⁶ pursues the Harding theme and relates institutional innovation and constitutional design to evolutionary biology.⁷ The study uses three federal constitutions — those of the United States, Canada and Australia — to explain the theory.

Gray⁸ considers the transplantation of ‘good faith’ in contract into contemporary common-law situations.

Viven-Wilksch⁹ considers the introduction of the *United Nations Convention on Contracts for the International Sale of Goods* (‘CISG’) into Australian law. The focus is on how long it might take or what the conditions are for the introduction of CISG principles to be declared a success. This chapter links well with the contract and good faith discussion of the preceding chapter.

An example of a possible transplant in the field of public law relates to the notion of proportionality — stated to be from France through the common-law system. This is discussed by Campbell and Lee¹⁰ in their chapter, which deals with the apparent Australian reluctance to follow some common-law precedent. That reluctance is in turn consistent with the material on good faith, and also on the cultural origins of an idea.

The terminological and conceptual debate on ‘transplants’, as Stamboulakis¹¹ indicates in the case study of ‘Lessons from the Singapore International Commercial Court’, does not fully capture the ‘multi-fold, simultaneous, and iterative’ borrowing processes inherent to any transactional dealings, which implicate ‘disparate actors, applications, and flows in multiple directions’.¹² Stamboulakis’s focus is on the connection between ‘legal transplants’ and the “procedural hybridity” exemplified by the Singapore International Commercial Court. A practitioner may recognise and be more

⁶ Benjamin Gussen, ‘On the Hardingian Renovation of Legal Transplants’ in Breda (n 2) 84–108.

⁷ This is reminiscent of Bernhard F Freund’s ‘On Mathematical Patterns in the Web of the Law Indicating a Quasi-Biological Evolution’ (2007) 13 *Revue Juridique Polynésienne* 53.

⁸ Anthony Gray, ‘The Incomplete Legal Transplant — Good Faith and the Common Law’ in Breda (n 2) 111–31.

⁹ Jessica Viven-Wilksch, ‘How Long Is Too Long to Determine the Success of a Legal Transplant? International Doctrines and Contract Law in Oceania’ in Breda (n 2) 132–57.

¹⁰ Colin Campbell and HP Lee, ‘Proportionality in Australian Public Law’ in Breda (n 2) 158–82.

¹¹ Drossos Stamboulakis, ‘Legal Transfer and “Hybrid” International Commercial Dispute Resolution Procedures: Lessons from the Singapore International Commercial Court’ in Breda (n 2) 183–210.

¹² Stamboulakis (n 11) 188 n 23. The author is here quoting from G Shaffer, ‘Transnational Legal Ordering and State Change’ in G Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press, 2019) 9. Also, at 200 n 67, referring to J Gillespie, ‘Towards a Discursive Analysis of Legal Transfers into Developing East Asia’ (2007–8) 40 *New York University Journal of International Law and Politics* 657, 713, Stamboulakis states that ‘it must be recalled that it is difficult — if not “impossible” — to attempt to deterministically model legal transfers’.

attracted to the Miller analysis¹³ than to the theoretical analysis of Watson/Legrand/Teubner.¹⁴

The Liljeblad¹⁵ piece considers the International Bar Association ('IBA') endeavours to 'introduce notions of an independent national bar association for Myanmar'. This piece clearly demonstrates the difference between transplanting with purely domestic origins and a missionary endeavour such as that of the IBA in Myanmar. This is to be compared with other similar endeavours in the field of human rights and the environment.

In ch 10, Techera¹⁶ considers shark sanctuaries as vehicles for transplanting conservation tools. Techera uses shark sanctuaries to demonstrate both vertical and horizontal transplanting — ie from domestic systems to international law, and from one domestic system to another — eg from the Cook Islands to the Marshall Islands. Techera makes the important point¹⁷ that borrowing as such is perhaps not the major challenge; rather, the challenge is the implementation in systems that have limited financial, technical and legal resources.

O'Brien¹⁸ addresses the rise of the anti-impunity norm in international discourse, and particularly the case of the Japanese 'comfort stations' of the World War II era.

The chapter by Torresi¹⁹ considers the development of rules for migrants who are 'engaged in temporary migration projects and who do not seek involvement and often indeed avoid investment in their receiving society'; the focus is on the need for a special support system for such migrants particularly in the host and home countries.

¹³ Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History, and Argentine Examples to Explain the Transplant Process' (2003) 51(4) *American Journal of Comparative Law* 839. Miller's analysis is described by Jonathan Liljeblad, 'The Independent Lawyers' Association of Myanmar as a Legal Transplant: Local Challenges to the Idea of an Independent National Bar Association' 211–29, 241: 'Miller categorizes legal transplants into those that are cost-saving, where law-makers save time and costs by using solutions from other jurisdictions; externally dictated, where foreign actors impose foreign legal models into a country; entrepreneurial where domestic actors promote foreign legal ideas; or legitimacy-generating, where domestic actors associate themselves with prestigious foreign legal ideas to build legitimacy.'

¹⁴ Liljeblad (n 13) 214.

¹⁵ Liljeblad (n 13).

¹⁶ Erika Techera, 'Shark Sanctuaries as Vehicles for Transplanting Conservation Tools in Disparate Legal Jurisdictions' in Breda (n 2) 233–55.

¹⁷ Ibid 241.

¹⁸ Sophia O'Brien, 'Global Norms; Local Resistance: Addressing Impunity in Japan and Beyond' in Breda (n 2) 256–96.

¹⁹ Tiziana Torresi, 'Legal Transplants, Temporary Migration Projects and Special Rights' in Breda (n 2) 297–320.

The topic of ‘transplanting’ is, as the theoretical chapters of this book demonstrate, a much vexed one. It is a generally held view that, in the field of transplantation, public law is a less suitable area for such transfer of ideas. There is, however, great similarity among many constitutions, and often there is little but the country’s name in a constitution to indicate its country of application. Equally, criminal law and family law ideas may be thought to be more difficult to transplant because of their close relationship to the social context, but even in those cases there are major examples of the taking of ideas from one legal system, often with a totally different legal and social culture, to another with significant success.

The book is interesting in itself, but also in the range of thoughts that it can stimulate in the mind of a reader. For instance:

- A change in a legal system may be nothing new in substance but simply naming something in accordance with the dominant taxonomy of the legal system — what may be seen as an innovation or a transplant may be simply a renaming for recognition purposes.²⁰
- If ‘good faith’ is acceptable in the field of insurance, why should it not be generally accepted?
- How do the idea of good faith and the role of equity interact in the common law?
- What of the Australian ‘Contract Code’?²¹
- And what of the provenance and progress of the various criminal codes in the region: the Code Penal 1791 of France, the Codice Penale 1889 of Italy, the Criminal Code proposal of Sir James Fitzjames Stephen?
- And the propensity of the United Kingdom to planting ideas abroad that it did not accept for itself?
- And the shift in the notion of adoption from something of religious/family or property protection to a welfare concept?
- The Ombudsman and its lineage?
- And what of the family protection legislation — which spread widely from a New Zealand initiative?
- And the ill fate of endeavours to transplant the New Zealand accident compensation system?
- And how did Vanuatu ‘become’ a common-law state?
- How to get rid of a transplant?²²
- Where does transplanting merge into creativity within the local system?

²⁰ For example, where the categorisation of a river or a mountain as a legal person attempts to reflect in the dominant system a status in another system.

²¹ Law Reform Commission of Victoria, *An Australian Contract Code* (Discussion Paper No 27, September 1992).

²² Consider, for instance, the history of fundamental rights and freedoms in Tuvalu.

The theoreticians are still working their way through a nomenclature or structuring of the ideas about transplants. From a practitioner's point of view, Watson is probably correct. In practice, 'transplanting' is often easy, it is not always known or planned, and there is a certain inevitability about it in many cases. Even an act of translating within a system can change the course of development of the legal system. The range of possibilities for 'transplanting' is potentially infinite. Further, the process for their introduction can be quick or slow.

Pursuing the botanical metaphor, the movement of legal concepts and structures across country boundaries is, it seems, very like the seeds that are blown by the wind, the seeds that are sown by birds, and those conscious actions of humans that spread plants. The consequence in each case is the same ... and wonderful.

Breda, in the closing chapter, states that

one of the side-effects of [a] pragmatic rather than theoretical understanding of foreign-inspired legal reforms is that much of the debate over the nature of pragmatic plausibility of legal transplants appears hollow. ...

Modern legal transplants in East Asia and Oceania are ... a manifestation of multiple social engineering endeavours managed by receiving legal systems. The book shows the benefits and a few of the short-comings that foreign-inspired legal reforms have had in these geographical areas.²³

The book illustrates the diversity, the lack of agreement about, and the extensive evidence of transplants. Each chapter in the book provides interesting comparative insights into how systems view themselves and how they view others. Each chapter is worthy of a review in itself. This is a book to read.

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²³ Vito Breda, 'Conclusion' in Breda (n 2) 321–4.