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JUDICIAL COMPARATIVISM IN HUMAN RIGHTS CASES

Edited by
ESİN ÖRÜCÜ

UKNCL
2003

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Chapter 8

Rejected Organs? The Efficacy of Legal Transplantation, and the Ends of Human Rights in the Russian Federation

Bill Bowring

I. INTRODUCTION

Russia is a recent addition—to the European Convention system for the protection of human rights. Its membership of the Council of Europe since 1996 represents a supreme irony of history, given the origins of the Council in the Cold War, and the question of its admission was highly controversial, both in Russia and Strasbourg. There are those who continue to warn that the world's most successful human rights protection mechanism could be undermined.¹

This paper seeks to understand one aspect of what has happened through an exploration of issues concerning 'legal transplants'. The chapter first analyses ambiguities of the notions of sovereignty and transplantation, followed by a consideration of the theory of legal comparativism. What was the Western construction of 'socialist' law? The notion of legal transplantation is considered specifically in the context of human rights. Russia and other former Soviet states have now ratified most of the international and regional human rights instruments, and subjected themselves to interference by treaty bodies. Since 1 November 1998, the date of ratification of the Convention, the whole jurisprudence of the European Court of Human Rights has become part of Russian law. Is this the insertion of a healthy heart into a moribund body politic, or the writing of a fully modern human rights-based legislation on an empty canvas? The paper therefore briefly considers the dynamic relationship between Western European and Russian law and legality from the eighteenth century. This is the necessary condition

¹ See B Bowring, 'Human Rights in Russia: A Discourse of Emancipation or Just Another Mirage?', in I Pogany (ed) *Human Rights in Eastern Europe* (Aldershot: Edward Elgar, 1995); Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?' (1997) 6 *European Human Rights Law Review*, 628; id, 'Russia's Accession to the Council of Europe and Human Rights: Four Years On' (2000) 4 *European Human Rights Law Review*, 362.

for evaluating the impact of international, especially European, instruments, standards and mechanisms—and waves of Western ‘experts’ and ‘good governance’ specialists—into post-Soviet states.

But I start with a description of the latest phases of Russia’s plunge into a bracing new legal environment.

II. RUSSIA AND THE EUROPEAN CONVENTION

The Russian Federation joined the Council of Europe in 1996. On 1 November 1998 the Council of Europe’s 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) entered into force for the Russian Federation, giving persons whose rights have been violated by Russia the right to petition the European Court of Human Rights.²

The European Court of Human Rights has, at the time of writing, considered the admissibility of 35 cases filed against Russia. It has delivered final judgments in two of them. In the first, *Burdov v Russia*,³ the applicant was a participant in the emergency operations at the Chernobyl nuclear plant disaster. In its judgment of 7 May 2002, the court found that by failing to take the necessary measures to comply with final judicial decisions for compensation from 1997 to 2001, Russia violated Article 6(1) of the European Convention on Human Rights (right to a fair trial), as well as Article 1 of Protocol 1 (right to peaceful enjoyment of possessions). Despite the fact that the applicant had by May 2002 received his compensation, the court awarded ‘just satisfaction’ in the sum of 3,000 Euros. In the second, the controversial landmark case of *Kalashnikov v Russia*,⁴ the applicant was a banker charged with fraud, who spent 4 years, 1 month and 4 days in remand awaiting trial, in severely overcrowded (in a cell designed for eight prisoners, with eight beds arranged in bunks, and no fewer than eighteen to twenty-four prisoners during that period, sleeping in three shifts) and insanitary conditions. The court decided on 15 July 2002 that Russia had violated Article 3 (inhuman and degrading treatment), Article 5(3) (unreasonable period in detention), Article 6(1) (unreasonably lengthy proceedings), and awarded ‘just satisfaction’ in the sum of 5,000 Euros for his treatment, and 3,000 Euros costs and expenses.

In the near future, the Court will render admissibility decisions in the first six cases brought against Russia by Chechen victims of alleged gross violations, including the deaths of children as a result of Russian bombing of refugee columns in late 1999.

² For more on this, see id ‘Russia’s Accession to the Council of Europe and Human Rights: Four Years On’ (2000) 4 *European Human Rights Law Review*, 362.

³ Application No 59498/00, decision of 7 May 2002.

⁴ Application No 47095/99, decision of 15 July 2002.

But one highly controversial case on admissibility has already been heard by a Grand Chamber (seventeen judges) of the Court on 4 July 2001. This is *Ilie Ilascu, Alexandro Leso, Andrei Iwantoc and Tudor Petrov-Papa v Moldova and the Russian Federation*.⁵ These applicants were arrested and convicted in Moldova. The issue against Russia is whether the Russian Federation shared Moldova’s responsibility, if indeed the territory of Transdnistria was *de facto* under Russia’s control, as Moldova argued. The Romanian government was given leave to intervene in the hearing, and also maintained that ‘the organs of the Russian Federation had a political influence on the secessionist authorities of Tiraspol (the “capital” of Transdnistria)’. The Court referred to the case of *Loizidou v Turkey* (concerning ‘North Cyprus’),⁶ and held that a State’s responsibility could arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. Thus, the complaints against Russia raised serious issues of fact and law, which required an examination of the merits; the complaints were held to be admissible. This case, as much as the Chechen cases, touches not only Russia’s sovereignty, but also the most sensitive and potentially embarrassing issues of state policy.

Russia’s internal legal order has also been disturbed. The very first case to be heard against Russia, *Tumilovich v Russia*,⁷ brought about a substantial change in the law. The Court held that the applicant’s applications for supervisory review (*nadzor*), made to the President of the Civil Chamber of the Supreme Court, and the Deputy *Prokuror* General respectively, were extraordinary remedies, depending on the discretionary powers of these persons, and therefore did not constitute effective remedies within the meaning of Article 35(1) ECHR. The decision was not noticed in the Russian press until October 2000, when the newspaper *Sevodnya* noted that Russia now has two Supreme Courts, the other being in Strasbourg. The ruling was followed in *Galina Pitkevich v Russia*.⁸ This means that the Court is now establishing a significant new jurisprudence with respect to Russia, and, by analogy, with other post-Soviet states. A number of the cases have been declared partly or wholly admissible, and will sooner rather than later result in judgments, some of which are bound to prove highly uncomfortable for Russia.

⁵ Application No 48787/99, decision of 4 July 2001.

⁶ Decision of 23 Mar 1995.

⁷ Application No 47033/99, decision of 22 June 1999.

⁸ Application No 47936/99, decision of 8 Feb 2001.

III. ANTINOMIES OF SOVEREIGNTY AND THE LAW

A transplant is inconceivable without the existence of two sufficiently separated and independent bodies. No analysis of the concept of the legal transplant can begin without a dissection of the complexities of the relations between one polity and another.

In the first antinomy, we find two aspects of sovereignty, which are indissolubly linked, especially when sovereignty is contested or is under threat. The first is external, what is not, other than, whatever it is we define as ourselves. Sovereignty is defined against another, and can only be realised in opposition to the alien. For the most part this is the realm of fantasy, of paranoia, of projection of what is unacceptable in one's own self, or the obscenity which cannot consciously be enjoyed, but is always constructed as a theft of what is precious to us. As Slavoj Žižek puts it: 'The late Yugoslavia offers a case study of such a paradox, in which we witness a detailed network of 'decantations' and 'thefts' of enjoyment. Every nationality has built its own mythology narrating how other nations deprive it of the vital part of enjoyment the possession of which would allow it to live fully.'⁹ This means, in particular, the gross violations of human rights which 'we' would never contemplate, but which 'they' perpetrate, or at least secretly desire to carry out.

The second antinomy is internal, the organic, the substance of nationhood—so often in English jurisprudence the true seed-bed for legal development, the almost primordial soil, developing by accretion through the case-law.¹⁰ It should be no surprise that talk of 'legal culture' is contagious, and has all the ambiguity of any use of the Pandora's box, which is the word 'culture'. We of course have the 'culture of human rights' without which there can be no rights or remedies: and the legal culture of the others is not really legal at all, however they may excel in art, literature or music.

This second antinomy of sovereignty also binds the internal and the external. For England, parliamentary sovereignty was the bastion of national character, for many on the left the guarantee of a future for democratic socialism. It is to be defended at all costs against foreign innovation, especially in the form of positive rights, ever since 1789. At the same time, it has always meant domination, especially the supremacy of Westminster

⁹ S Žižek, *Tarrying with the Negative: Kant, Hegel, and the Critique of Ideology* (Durham: Duke University Press, 1993), ch 6, 'Enjoy Your Nation as Yourself', at 200 and 204.

¹⁰ See T Allan, *Law, Liberty and Justice. The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993): 'In the absence of a higher "constitutional law", proclaimed in a written Constitution and venerated as a source of unique legal authority, the rule of law serves in Britain as a form of constitution. It is in this fundamental sense that Britain has a *common law constitution*: the ideas and values of which the rule of law consists are reflected and embedded in the ordinary common law ...', at 4.

over Edinburgh or Cardiff—for Dicey, the implacable opponent of Home Rule and defender of Union between Britain and Ireland, over Dublin.¹¹

Indeed, the language of sovereignty frequently employs anthropomorphic, often biological, metaphors. We speak of the 'body politic', of the body of law. That is why the concept of 'legal transplant' has proved so resonant, even if other terms such as 'transposition' or 'irritant' may be more accurate in particular contexts.¹²

It is at this point that law itself is ambiguous. It is what forms us, as English or American; it is what, if not primordial, is already there. Its inherent conservatism is augmented by the practice of judges and lawyers. At the same time, it is continually transformed through practice, not least because ours is not the only law. The others also have law as history and as practice, and it has never in recorded history been possible to avoid contamination.

IV. ANTINOMIES OF THE 'TRANSPLANT'

I wish to distinguish two senses of transplant. The first is voluntary reception into 'our' law, often almost imperceptible, perhaps passive, or even, in some cases, a function of resistance to a greater foreign threat to sovereignty. The former is represented by the gradual, almost reluctant, reception into English law of the German administrative law concept of proportionality, or, more painfully, of the principles and standards of interpretation of the European Convention on Human Rights, and the latter, resistance, the role played by Roman Law in Scotland as a (defence) against the incursions of the English common law.

The second is more traumatic, more threatening. An obvious example is that of the reception into UK law of the European Convention on Human Rights, where the anguished debates within government have now been well documented. Lord Chancellor Jowett and others were quite clear that what was at stake was the vision of the seamless and organic development of the common law. It is ironical that the strongest opposition have come from both the ideologists of the specifically English legal culture, and from defenders of democratic socialism like Keith Ewing; hence his qualified support for the Human Rights Act.¹³

¹¹ A Dicey, *England's Case Against Home Rule*. (Richmond Surrey: Richmond Publishing, 1973—English political history series); Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, 2nd edn (London: Macmillan, 1914).

¹² Professor Esin Örcü prefers the language of 'transposition, tuning and fitting'—see E Örcü, 'Law as Transposition' (2002) 51 *ICLQ*, 205–23, at 205.

¹³ K Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) vol 62, no 1 *Modern Law Review*, at 79–99.

This second sense of transplant is even more clearly exemplified by Russia, where the implant of Council of Europe principles and submission to the discipline of Strasbourg and other mechanisms has been met by a statist and nationalist discourse of appropriation. Ironically, Russia's accession to the Council of Europe and ratification of the European Convention on Human Rights were supported by a majority of nationalists and communists, for reasons of naked national interest.¹⁴

V. THE PROBLEMS OF LEGAL COMPARISON

In their profound and sensitive study¹⁵ of problems of mainstream comparative law, Bogumila Puchalska-Tych and Michael Salter observe that, 'only by understanding the "socialist" past of contemporary Eastern European societies can we properly grasp the current processes of systemic transformation that these societies are now undergoing . . .'¹⁶ More importantly for the purpose of this chapter, they argue that: both the socialist doctrine, and the systemic apparatus subservient to it, did not transform the Eastern European societies into homogenous, socialist ones. If anything, the legacy of distinctive cultural traditions had been continuously interacting with the ordering of these societies in a much more complex manner than the crudely undifferentiated terms 'socialist' or 'totalitarian' can ever hope to reflect.¹⁷

The dialectical analysis for which they call would 'be the process of reflexive and sensitive constitution of the "other culture" in its specific context via one's own cultural and cognitive structures, and relating it to the theoretical framework of comparative legal studies.'¹⁸ Thus, they commend John Bell's repeated call for reciprocal mediation and contextualisation,¹⁹ and suggest that '[a]n agenda of mediation promises a valuable insight into the meaning, operation and place of law within diverse social, political and cultural contexts.'²⁰ They strongly criticise the 'static and abstract, ie, decontextualised, depiction (which can) . . . only fail to grasp—let alone account for—the socio-political and legal dynamism which drives the various political and social upheavals involved in the systemic transformation still taking place in Eastern Europe.'²¹

¹⁴ B Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?' (1997) 6 *European Human Rights Law Review*, at 628.

¹⁵ B Puchalska-Tych and M Salter, 'Comparing legal cultures of Eastern Europe: the need for a dialectical analysis' (1996) 16 *Legal Studies* 157–84.

¹⁶ *Ibid.*, at 163. ¹⁷ *Ibid.* at 166–7. ¹⁸ *Ibid.* at 180.

¹⁹ J Bell, 'Comparative Law and Legal Theory', in W Krawietz, N MacCormick, and G Wright (eds), *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (Berlin: Duncker & Humboldt, 1994).

²⁰ Puchalska-Tych and Salter, n 15 above, 181.

²¹ *Ibid.*, at 183.

It is part of the argument of this chapter that the complex relations between Russia and international human rights standards and mechanisms can only be understood through an appreciation of the history—the dialectic—of the intellectual history of Russia, always inseparably linked to Western Europe, for more than two centuries.

VI. ABSENCES IN THE THEORY OF TRANSPLANTATION

The theory of legal transplantation is a crucial domain within the theory of legal comparativism. The debate concerning 'legal transplants' can be said to have begun in earnest in an exchange between Alan Watson and Otto Kahn-Freund in the 1970s, to which I will return.²² There is now an extensive and growing scholarly literature on legal transplants, especially as concerns the former Soviet Union and Eastern Europe. Most of it—with a few exceptions—concerns commercial law. Thus, Frederique Dahan writes:²³

What is indisputable is that for the legal systems of Central and Eastern Europe, *transplantation is a reality*. Because transition economies cannot afford and do not wish to go through the same process of slow and tentative development as the developed economies did in the past in order to achieve their modern legal and regulatory structures, they must, to a large extent, import them.

But importing a legal doctrine, mechanism or even a statute is not the same as importing an automobile; and even the automobile may need adapting for left hand driving. Scott Newton, commenting on Dahan's remark, points out that:

the very term 'transplantation', biased towards the technical, masks the political realities, for 'legal transplantation' is always necessarily a species of the genus legislation. That is, even supposing a jurisdiction decides to import a foreign law lock, stock and barrel, it nonetheless must *enact* it, with all the sovereign political implications any enactment brings . . . in transplantation as in transition, the emphasis on product over process works to privilege legality over legitimacy.²⁴

That is why the antinomies of sovereignty are vital to any consideration of the transplant. And one has the strong sense that legality which is illegitimate

²² A Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn (Athens and London: University of Georgia Press, 1993—1st edn 1973); O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1; see A Watson's reply, 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review*, at 79–84.

²³ F Dahan, 'Law Reform in Central and Eastern Europe: The "Transplantation" of Secured Transactions Laws' (2000) *European Journal of Law Reform*, vol 2, no 3, 369–84, at 372.

²⁴ S Newton, 'Transplantation and Transition: Legality and Legitimacy in the *Kazakhstani Legislative Process* (London: SOAS Working Paper, 2001), 3, 7.

ought to be a contradiction in terms.²⁵ Newton's own work is a profound reflection on two substantial items of commercial legislation, an Insolvency Law and a Pension Law, on which he worked on behalf of the US aid agency in Kazakstan.

Most writers on transplantation, for the most part transplants in the commercial arena, do not share Newton's sensitivity to the issues. Some allow themselves to be carried away by the obvious physicality of the metaphor, in addition to losing sight of the real underlying issues. An example is the—informative at the level of description—work of Christopher Osakwa, who performed a 'biopsy' of the 1994 Civil Codes of Russia and Kazakstan²⁶, and employed a colourful biological metaphor. For him, these two Codes:

are ideological siblings—they share a common genealogy, have the same genetic traits . . . suffer from the same genetic disease . . . are both test tube babies that were conceived by in vitro fertilisation in a textbook-perfect feat of genetic engineering, both function like potted plants in their respective societies . . .²⁷

The reader must pause to recover from the shock of comparing test-tube babies and potted plants.

Nevertheless, Osakwa acknowledges that the 'true heroes' of the Code were the Russian 'civilists', who 'with the benevolent assistance of their Dutch masters and American consultants' drafted a code which, he believes, will go down in history as one of the great codes of the twentieth century. But he fails to recognise that there was more than a little tension between the two sides: the Dutch lawyers from Leiden, who from the outset wanted to work supportively and respectfully with established Russian experts, albeit those from the older, Soviet-educated generation, and Americans who wanted to impose an Anglo-Saxon import. He notes that 'right from the inception . . . the Russian drafters fell under the spell of Dutch consultants'.²⁸ But this is not the real story. This error is compounded by his view that the Soviet Civil Codes of 1992 and 1964 were founded on Marxist-Leninist philosophy. Far from it. These codes, the first the product of the New Economic Policy, were firmly based on Swiss and German models, and reflect Russia's orientation to the 'continental civil law tradition', which is not, as he believes, a post-1991 innovation. This is perhaps as misguided as his view that 'the purpose of USAID funding was entirely altruistic'.²⁹

Osakwa's is not the only methodology. Steven J Hein's article³⁰ on his

²⁵ See J Habermas, *Between Facts and Norms* (London: Polity, 1997).

²⁶ C Osakwa, 'Propter Honoris Respectum: Anatomy of the 1994 Civil Codes of Russia and Kazakstan: A Biopsy of the Economic Constitutions of the Post-Soviet Republics' (1998) 73 *Notre Dame Law Review*, at 413–1514.

²⁷ *Ibid.*, at 1413.

²⁸ *Ibid.*, at 1417.

²⁹ *Ibid.*, at 1440.

³⁰ S Hein, 'Predicting Legal Transplants: the case of servitudes in the Russian Federation' (1996) 6 *Transnational Law and Contemporary Problems*, at 187–223.

proposal for Russia's adoption of an entirely new (for it) law on servitudes (easements), is more thoughtful. His approach is, however, unusual in that no such law is yet proposed. His method is to compare and contrast the efficacy for such a transplant of the competing theories of Alan Watson³¹ and Otto Kahn-Freund.³² Their differences are presented by Hein as beginning with Watson's 'proposition that there is no inherent relationship between a State's laws and its society', whereas Kahn-Freund stands with Montesquieu in what Ewald³³ has described as a 'mirror theory'—Montesquieu's claim that, 'laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another . . .'

Thus, Kahn-Freund argued that, 'we cannot take for granted that rules or institutions are transplantable'.³⁴ He proposed a two-stage process. First, determine the relationship between the legal rule to be transplanted and the sociopolitical structure of the State from which it is taken—its macro-political structure (democracy or dictatorship), the distribution of power, and the role played by organised interests. Secondly, compare the sociopolitical environments. The closer the first relationship, the greater must be the similarity between environments for the transplant to succeed.

Watson, similarly, can be said to recommend two steps. First, the logic of the foreign law must be analysed. If the foreign law is not inimical to the political, social or economic circumstances of the receiving state, it can be successfully transplanted. Secondly, the sociopolitical environment of the receiving state must be examined to see if conditions are ripe for legal change by transplantation.³⁵ He identified nine factors, which determine whether a transplant will succeed.³⁶ The 'Pressure Force' is the persons or groups who believe that benefit would result from a change. The 'Opposition Force' is the converse: those who believe that change will harm them. The 'State's Transplant Bias' is its receptivity to a particular foreign law—the general attitude to legal borrowing. The 'Discretion Factor' asks whether the transplanted rule can be evaded by choice, or whether its application is inescapable. The more choices an individual has to avoid undesired aspects of a law, the more likely it is that the law will be accepted. The

³¹ A Watson, *Legal Transplants: An Approach to Comparative Law*; A Watson, *Society and Legal Change*, 2nd edn (Philadelphia: Temple University Press, 2001)—first published in 1977; see also A Watson, *The Evolution of Law* (Baltimore: Johns Hopkins University Press, 1985); id, 'Aspects of the Reception of Law' (1966) 44 *American Journal of Comparative Law* 335; id, *The Making of the Civil Law* (Cambridge MA: Harvard University Press, 1981).

³² O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1.

³³ W Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 *American Journal on Comparative Law*, at 489–510.

³⁴ Kahn-Freund, n 32 above, at 27.

³⁵ Hein, n 30 above, at 195.

³⁶ Watson (1993), n 22 above, at 322.

'Generality Factor' is the scope of the legal rule, or its effects. The greater it is, the more likely there is to be an 'Opposition Force'. 'Social Inertia' is the desire for stability, since elites especially have a desire for no change. The society's 'Felt-Needs' indicate whether a society feels itself in need of the particular change. The 'Source of Law' indicates whether the new law will enter as a statute, case law, custom, or through scholarly writing. 'Law-Shaping Lawyers' are prime actors in bringing about change.

In the contest proposed by Hein, where the criterion for judgment is adequacy in relation to the (imaginary) proposed transplant, Watson wins on points. But, it is suggested, the argument is sterile. The assumption seems to be that the new law on servitudes will come from the USA. But Hein nowhere indicates why Russia could not develop its own law if it so desired, drawing, as has so often been the case, on a variety of foreign resources. And, unlike Alford (and Trubek before him), there is no sense that there might be a dynamic reciprocal effect. What is most surprising is that the historical context of development is entirely absent. This reflects a one-sided appropriation of Watson, most of whose work is based on rich historical empirical research.

Much the same territory is explored in a fascinating article³⁷ by Gunther Teubner, the authorised representative of Niklas Luhmann's 'autopoiesis theory' in English legal academe.³⁸ His starting point is not a hypothetical law, but the real imposition on English law of the continental European principle of *bona fides* through the mechanism of an EU Directive. He too compares Watson and Kahn-Freund. He ascribes to Watson three main arguments. First, comparative law should no longer simply study foreign laws but study the interrelations between different legal systems. Secondly, transplants are the main source of legal change. Thirdly, legal evolution takes place rather insulated from social changes, tending to use the technique of 'legal borrowing', and can be explained without reference to social, political, or economic factors. These arguments are criticised for their incompleteness, and are compared with two sets of key distinctions introduced by Kahn-Freund. First, 'mechanic' (relatively easy transfer) as against 'organic' (transfer dependent on interlocking with the specific power structure of the society concerned). Secondly, 'comprehensive' (the social embeddedness of law) as against 'selective' (where the primary interdependency is concentrated on politics). On this basis, Teubner proposes four theses.³⁹ Law's contemporary ties to society are no longer comprehensive, but are highly selective and vary from loose coupling to tight interwovenness; they are no longer connected to the totality of the social, but to

³⁷ G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) v. 61 *Modern Law Review*, 11, at 17.

³⁸ See id, *Law as an Autopoietic System* (London: Blackwell, 1993).

³⁹ Teubner, n 37 above, 18.

diverse fragments of society; where, formerly, law was tied to society by its identity with it, ties are now established via difference; and they no longer evolve in a joint historical development but in the conflictual interrelation of two or more independent evolutionary trajectories.

A compelling examination of the utterly different German and English legal mind-sets, the former based on a high degree of conceptual systematisation and abstract dogmatisation, the latter on a distinction and elaboration of different factual situations, as well as the contrasting 'production regimes' of the two countries, leads Teubner to his conclusion: This shows how improbable it is that a legal rule will be successfully transplanted in a binding arrangement of a different legal context. If it is not rejected outright, either it destroys the binding arrangement or it will result in a dynamics of mutual irritations that alter its identity fundamentally.⁴⁰

But because for Teubner legal systems are only 'operationally closed social discourses', the historical factor, so important for Russia, cannot perform its exceptionally important mediating role. Nor can Teubner account for the dialectical reflexivity of legal comparativism in theory and practice.

Jonathan Wiener has perhaps come closer to a historicised account of legal transplants, writing in the context of environmental law.⁴¹ He rightly points out that nations frequently borrow doctrines from each other, often across vast distances of time and place, and much of American law was received from England and from France and Spain. Thus, while there is much literature on the question of borrowing from one country to another, there had been none on transplants into international treaty law. He approves⁴² Watson's remark that: 'the time of reception [of a legal idea] is often a time when the provision is looked at more closely, hence a time when law can be reformed or made more sophisticated.'⁴³ He concludes that, 'the metaphor of "legal transplants" is apt: we are selecting a bit of regulatory DNA from national law, inserting it into an international law embryo, and hoping that this new legal hybrid will grow to be a hardy offspring.'⁴⁴

It is noteworthy in the survey above that none of the scholars cited have explored the notion of legal transplants in the context of human rights, although Wiener's metaphor of DNA comes closer to what is needed in order to account for this phenomenon.

⁴⁰ Ibid, 28.

⁴¹ J Wiener, 'Responding to the Global Warming Problem: Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 *Ecology Law Quarterly* at 1295-371.

⁴² Ibid, at 1369.

⁴³ Wiener, n 41 above, 1371.

⁴⁴ Watson, n 31 above, at 99.

VII. TRANSPLANTS AND HUMAN RIGHTS

Only Julie Mertus, well known for her writings on women's rights, and on international interventions in Kosovo, has (to my knowledge) so far made the link.⁴⁵ Her starting point is an exploration of the meaning of globalisation for ideas of democracy and good governance and problems with 'international civil society'. This leads her to a consideration of the role of NGOs at work on 'legal transplant' projects—projects mostly grouped under the rubric 'rule of law'—an area in which she has considerable experience. These she describes as attempts 'to transplant laws and, in some cases, entire legal systems from one place to another, usually from a country perceived as "working properly" to one deemed in great need.'⁴⁶ She sees two waves. The first was after the Second World War, when the victors rewrote the constitutions of the vanquished to conform to their own ideology. The second came in the 1960s, the UN's 'Decade of Development', when 'departing colonial powers hastily impose carbon copies of their own documents and laws which evolved from different cultural and historical backgrounds.'⁴⁷ This coincided with the 'law and development' movement, which sent so many US lawyers to Latin America and Africa to train problem-solving legal engineers, and 'promote a modern vision of law as an instrument of development policy along capitalist and democratic lines'.⁴⁸ Mertus cites Gardner, to say that 'the history of the law and development movement is rather sad'.⁴⁹ 'It is a history of an attempt to transfer the American legal models that were themselves flawed.'⁵⁰ As Mertus notes, one of the movement's shortcomings was its failure to understand that local people are actors, and not mere subjects, and generally turn to American legal assistance for their own ends.⁵¹

These lessons were not heeded when the collapse of the USSR and the end of 'communism' ushered in 'a new wave of legal transplants that duplicates wholesale the techniques of earlier times: sending in American lawyers in an attempt to reconstruct the local legal system in a manner more compatible with United States interests'.⁵² The American Bar Association's

⁴⁵ J Mertus, 'From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society' (1999) 14 *American University International Law Review*, at 1335–89.

⁴⁶ *Ibid.*, at 1378.

⁴⁷ See L Wiehl 'Constitution, Anyone? A New Cottage Industry' *New York Times*, 2 Feb, 1990.

⁴⁸ See AJ Gardner *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison: University of Wisconsin, 1980).

⁴⁹ Gardner, n 48 above, at 22.

⁵⁰ Mertus, n 45 above, at 1380.

⁵¹ For further critiques, see J Faundez (ed), *Good Governance and Law: Legal and Institutional Reform in Developing Countries* (London: Macmillan, 1997).

⁵² G Ajani 'By Chance and By Prestige: Legal Transplants in Russia and Eastern Europe' (1995) 43 *American Journal of Comparative Law* 93; Mertus, n 45 above, at 1380.

CEELI (Central and Eastern European Law Initiative), funded by USAID, has often sought not only to transplant American methods of legal education (the 'Socratic' method), but to encourage the wholesale replacement or re-writing of local law.⁵³

Unfortunately, although her criticisms of US policies are acute, Mertus accepts without question the project of 'transformative democratic goals', namely the 'right to democratic governance' for which Thomas Franck has argued so persuasively.⁵⁴ It is hard to escape the conclusion that such a project is an unproblematised and unreflective product of a specific, American, form of political liberalism. This has two consequences. On the one hand, Mertus rightly identifies a need to make transnational civil society democratic⁵⁵—it does not live up to its own ideals. She points out that many non-governmental organisations, especially those with the most influence in the human rights discursive community, are not democratic at all—Amnesty International, Human Rights Watch, Lawyers Committee for Human Rights. Moreover, they are much more powerful than NGOs outside the US and Western Europe. As Mertus puts it: 'Quite simply, well-financed western NGOs are likely to have more power than their poorer and non-Western counterparts, and the lack of transparency and accountability in transnational civil society is likely to keep this power unchecked.'⁵⁶

On the other hand, she fundamentally mistakes—in the view of this chapter—the reasons why 'many legal transplants do not take root in Eastern Europe'. She puts this down to low salaries of judges, inadequate classrooms, courtrooms and record keeping, 'dead wood'—legal officers who simply refuse to change, and so on.

The answer is, I suggest, elsewhere. Writing about US experience at a different time on the other side of the world—the US transplant of an *Antimonopoly Law* to Japan in 1947, and its rejection by the host legal system—Robert Stack gets much closer to the roots of the problem.⁵⁷ Not only did the Americans give Japan a law without explaining why,⁵⁸ they never understood that during the Meiji era, 1868–1912 (also the period of

⁵³ It should be noted that ABA/CEELI's current programmes, especially in Russia, are primarily focused on issues such as violence against women and juvenile justice.

⁵⁴ T Franck 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; see also his two influential books, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990); *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).

⁵⁵ Mertus, n 45 above, at 1384. See also A An-Na'im 'What do we mean by universal?' (1994) 23 *Index on Censorship*, at 120, 122; D Otto 'Rethinking the Universality of Human Rights Law' (1997) 29 *Columbia Human Rights Law Review*, at 1, 3.

⁵⁶ Mertus, n 45 above, at 1385.

⁵⁷ R Stack 'Western Law in Japan: the *Antimonopoly Law* and other Legal Transplants' (2000) vol 27 no 3 *Manitoba Law Journal*, 39–413.

⁵⁸ *Ibid.*, at 408.

Russian reforms), the Japanese governments had carefully, thoroughly, and with great sophistication, carried out reforms drawing primarily from European civil law models. The reception of human rights standards into Japanese law has, as in Russia, been for this reason, quite different, despite 'Japan's reluctance to engage in human rights discourse generally'.⁵⁹ There is perhaps a paradox, since, as Alston notes, the 1946 Japanese Constitution, albeit a 'classic case of a foreign transplant',⁶⁰ has been a success story, and never amended. But as Alston points out, following Inoue,⁶¹ sexual equality and individual dignity were subsumed within the traditional Japanese notion of aristocratic honour in society, within a hierarchical ordering of social relations, while religious freedom and separation of Church and State were consistent with the particular nature of Shintoism.⁶²

Thus, no one can question the transformation of the Russian legal system since the mid-1980s—and especially since 1991, with accession to the Council of Europe in 1996, and ratification of the European Convention on Human Rights in 1998. But it should be obvious that, especially in the spheres of constitutional and human rights, Russia has not been importing US models. Instead, it has, through its own choice, drawn closer once more to the Western European mainstream. This is not a process which is unique to Russia. As David Feldman has pointed out in connection with belated UK's slow, reluctant and partial incorporation of European human rights principles,⁶³ 'the Convention's approach is far more closely in tune with the essentially collectivist cultural heritage which forms part of the bedrock on which the constitution of the United Kingdom developed and must build . . .'.⁶⁴ This collectivist tradition contrasts strikingly with US 'fundamentalist' liberalism, and must contribute to reassuring sceptical Russians.

⁵⁹ P Alston 'Review Essay: Transplanting Foreign Norms: Human Rights and Other International Legal Norms in Japan' (1999) *European Journal of International Law* v. 10 n 3, at 625–32, at 627, and see Y Iwasawa, *International Law, Human Rights Law and Japanese Law: The Impact of International Law on Japanese Law* (Oxford: Clarendon Press, 1998).

⁶⁰ Alston notes that, 'Popular sovereignty was asserted, equality rights for women were recognised, US-style separation of church and state was mandated, respect for a full range of individual civil and political rights was mandated, and a comprehensive American-style system of judicial review was mandated' (ibid at 629).

⁶¹ K Inoue, *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of its Making* (Chicago: University of Chicago Press, 1991).

⁶² Alston, n 59 above, at 630.

⁶³ See A Lester 'Fundamental Rights: The United Kingdom Isolated?' (1984) *Public Law*, 46–72, at 46; G Marston 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950' (1993), vol 42, part 4 *ICLQ*, 796–826; Lord A Lester 'UK acceptance of the Strasbourg Jurisdiction: What Really went on in Whitehall in 1965' (Summer 1998) *Public Law*, 237–53.

⁶⁴ D Feldman 'The Human Rights Act 1998 and Constitutional Principles' (1999) vol 19, no 2 *Legal Studies*, 165–206, at 178.

The question is: what was there before? Was there a 'legal culture' simply anathema to human rights, as Osakwa suggests? Was Russia simply the home of backwardness and despotism? Is it really the case that the Russians are condemned to catching up with the enlightened West from a position of legal barbarism? To answer these questions, the historical perspective is essential.

I suggest just two anecdotal examples. Serfdom, *krepostnoye pravo*, was abolished in Russia in 1861. Slavery was finally abolished in the USA in 1866—the American Anti-Slavery Society was founded in 1833.⁶⁵ Jury trial has for some years been available in nine of Russia's eighty-nine regions, and is about to be extended to the rest. This is not an innovation forced on Russia after defeat in the Cold War. It is the restoration of an effective system of jury trial for all serious criminal cases, presided over by independent judges, which existed in Russia from 1864 to 1917. Jury trial was introduced in a number of Western European countries at about the same time as in Russia, though it had been strongly advocated by leading law reformers from the late eighteenth century.

VIII. THE RUSSIAN HISTORY OF REFORM AND INNOVATION

What is frequently neglected is any recognition of Russia's own pre-revolutionary traditions, especially the reforms of Alexander II (1855–81). Starting with the revolutionary Law on Emancipation of the Serfs in 1861, these reforms culminated in the Laws of 20 November 1864.⁶⁶ The new Laws introduced a truly adversarial criminal justice procedure, and made trial by jury obligatory in criminal proceedings. Judges were given the opportunity to establish real independence, in part by freeing them of the duty to gather evidence, and enabling them to act as a free umpire between the parties. The Procuracy lost its powers of 'general review of legality', and became a state prosecutor on the Western model. The institution of Justices of the Peace was introduced. It is ironical that the Bolsheviks reinstated the pre-reform model of the procuracy.

Indeed, as Samuel Kucherov wrote in 1953, 'Between 1864 and 1906, Russia offered the example of a state unique in political history, where the judicial power was based on democratic principles, whereas the legislature and executive powers remained completely autocratic.'⁶⁷ A collection on

⁶⁵ See the African American Mosaic on the struggle of abolition and slavery—<http://cweb.loc.gov/exhibits/african/afam007.html>.

⁶⁶ See OI Chistyakov and TE Novitskaya (eds), *Reformy Aleksandr II (Reforms of Aleksandr II)* (Moscow: Iuridicheskaya Literatura, 1998).

⁶⁷ S Kucherov *Courts, Lawyers and Trials under the Last Three Tsars* (New York, 1953), at 215.

jury trial in Russia contains an extensive memoir by one of the most distinguished judges of the period, AF Koni.⁶⁸ Moreover, it also reproduces the advocates' speeches and judicial summings-up in some of the most famous trials, for example the trial in 1878 of Vera Zasulich, charged with the attempted murder of the governor of St Petersburg, Trepov, whom she had shot in broad daylight and before witnesses. Koni, who was the presiding judge, refused to be pressured by the authorities, and Zasulich was acquitted, a verdict which was respected by the authorities.

It is noteworthy that in the major speeches made to legal audiences at the start of his presidency, Putin referred to just these issues. His speech of 24 January 2000⁶⁹ was delivered in his then capacity of Acting President to a colloquium of leaders of Republic, Kray, and Oblast Courts. His main theme was the independence of the judiciary. He quoted Judge Koni, and referred to the necessity for correspondence with generally recognised norms of international law. Most important, he made explicit reference to the ratification by Russia of the European Convention on Human Rights and Fundamental Freedoms, which had therefore become a constituent part of the Russian legal system. Above all, he said, the jurisdiction of the European Court of Human Rights had been recognised. Therefore special attention must be given to those problems of the Russian judicial system that were likely to call forth a reaction from the European Court. Furthermore, on 27 November 2000,⁷⁰ at the V All-Russian Congress of Judges, while he made no mention of the dictatorship of law, or of international obligations, he stressed that judicial decisions should be 'rapid, correct and just', and noted that these simple but precise principles had already been formulated in Russia in 1864, at the time of the judicial reforms which had so closely followed the abolition of serfdom.

Putin's references to history and to the present obligations voluntarily accepted by Russia were no accident.

IX. RUSSIA'S DEMOCRATIC LEGAL TRADITIONS

In order to understand these processes, we should look deeper still into Russian history and traditions. Gross errors by US and other Western legal experts and commentators would be avoided by the realisation that judicial independence, adversarial court proceedings and trial by jury are not recent imports from the liberal West to the uncultured East, but the reinstatement of a rich and specifically Russian experience.

⁶⁸ S Kazantsev *Sud Prisyazbnikh v Rossii: Gromknye Ugolovniye Protsessy* (Trial by Jury in Russia: Great Criminal Trials) (St Petersburg Lenizdat 1991).

⁶⁹ At <<http://president.kremlin.ru/events/2.html>>.

⁷⁰ At <<http://president.kremlin.ru/events/107.html>>.

This history begins at a climactic time for the UK and for Western Europe, and with a surprise for Western scholars. A recent textbook, based on a course of lectures at Moscow State University,⁷¹ points out that the first Russian professor of law, SE Desnitskii (1740–89), was a product not so much of the French enlightenment, that is of Diderot and Rousseau, but of the Scottish enlightenment.

Desnitskii studied in Scotland, under Adam Smith and others, from 1761 to 1767, when he received a Doctorate of Civil and Church Law from the University of Glasgow. He was much influenced by the ideas of the Scottish Enlightenment, and especially by the philosophy of David Hume, and by the Scottish emphasis on Roman Law traditions and principles—the focus of Alan Watson's pathbreaking work on legal transplants.⁷² On the basis of his lengthy researches in Scotland, in 1768 Desnitskii sent the Empress Catherine II his 'Remarks on the institutions of legislative, judicial and penitentiary powers in the Russian Empire'—however, his suggestions were entirely unacceptable, and the work was sent to the archives. Amongst other radical proposals, Desnitskii urged the abolition of serfdom. He survived Catherine's rejection of these ideas, and became a full professor of law in 1777, shortly after the Pugachev uprising. He published books introducing Russians to the ideas of Adam Smith and John Millar. At Catherine's own instruction, he translated into Russian, volume 1 of Blackstone's *Commentaries*, and this was published in Moscow in 1780–3. His courses included the history of Russian law, Justinian's *Pandects*, and comparisons of Roman and Russian law.⁷³ He died in the year of the French Revolution, and the Declaration of the Rights of Man and of the Citizen.

It should be noted that Desnitskii did not undertake a simple transmission of some already existing Western liberalism to Russia. The period of his work was as much the period of the revolt of reason against autocracy in Britain as in Russia. Desnitskii was born only a few years after Thomas Paine.⁷⁴ The much better known Radishchev thus stood on the shoulders both of Desnitskii and Paine when in 1790 he published his scandalous *Puteshestvii iz Peterburga v Moskvu* (*Journey from Petersburg to Moscow*),

⁷¹ NM Azarkin *Istoriya yuridicheskoi mysli Rossii: kurs lektsii* (History of legal thought in Russia: a course of lectures) (Moscow 1999).

⁷² See Watson, 1993, n 22 above.

⁷³ W Butler, *Russian Law* (Oxford: Oxford University Press, 1999), at 24–5, and 52–3. See also A Brown, 'The Father of Russian Jurisprudence: The Legal Thought of S. E. Desnitskii', in W Butler (ed), *Russian Law: Historical and Political Perspectives* (1977), at 117–42.

⁷⁴ Paine left England for the American colonies in 1774, and began writing his extraordinarily influential *Common Sense* in 1775. Its publication in 1776 was a sensation, selling at least 100,000 copies in that year alone. Its content was entirely unacceptable to the English ruling elite. His *Rights of Man* appeared in 1791, and he was forced to leave England, remaining in France for 10 years—he was imprisoned in 1793 after war broke out between England and France.

which was a powerful manifesto for the abolition of serfdom. He was promptly arrested for this by Catherine II. She commuted his death sentence to exile for 10 years. Pavel I allowed him back in 1796, and Aleksandr I even sought to attract him to legislative work. But it was clear his liberal ideas were as unacceptable to his autocratic audience as were those of Thomas Paine to the British monarchy, and in 1802 he committed suicide.

There is no question, however, that political reaction was even deeper in Russia than in Britain, and the defeat of the Decembrist uprising in 1825 drove enlightenment and liberal thinking about rights deep underground. VS Solovyev (1853–1900) was the next Russian to think deeply about issues of rights. He, like Radishchev, was not a lawyer, and his approach, while committed to enlightenment values, had a specifically religious focus to it. This spiritual, idealistic dimension to Russian rights discourse is characteristic and a specific and unique contribution. BN Chicherin (1828–1904) was the first lawyer to work through issues of liberalism in connection with law and rights. He argued for a constitutional monarchy and strong state, and strongly opposed Alexandr Gertsen (Hertzen to us)—a writer who spent much of his life in exile in England. He did, however, draw on both Russian and European experience and traditions. Another lawyer, PI Novgorodtsev (1866–1924), was the chief exponent of a natural law, the Kantian approach to questions of the relationship between the individual and law. He too was strongly influenced by the Russian spiritual heritage. One of the latest proponents of this trend was NA Berdyaev (1874–1948), a member of the *Vekh* group, whose manifesto collection of articles appeared in 1909, attracting the strongest criticism from Marxists and liberals alike. It is a little odd that Berdyaev, a spiritual philosopher, appears in the textbook on human rights; for Berdyaev, inalienable human rights were the form of expression and existence on earth (Caesar's kingdom) of personal freedom, that is of the transcendental (and godlike) phenomena of the kingdom of Spirit. In his book *Gosudarstvo. Vlast i pravo. Iz istorii russkoi pravovoi mysli (The State. Power and law. From the history of Russian legal thought)*, Berdyaev wrote, 'The declaration of the rights of God and the declaration of human rights are one and the same declaration.'

The point I wish to make by way of this brief survey is that there is a distinctively Russian approach to and thought about human rights which repays careful study by Western scholars. These are thinkers of the first rank. Moreover, the account above is sufficient to show that while it is possible to speak of Russian culture, and even of Russian legal culture, it would be a grave mistake to ignore the complex and dynamic interplay of Russian and Western European—especially Scottish!—histories and traditions.

X. RECENT EVIDENCE OF THE INTERPLAY OF RESTORATION AND TRANSPLANT

I wish to point to three respects in which a dynamic of change, bringing into close interrelation the elements of restoration and transplant already noted above.

The first concerns the work of the Constitutional Court. The whole jurisprudence of the European Court is now part of Russian law, and increasingly cited in Russian courts. There are many cases on individual human rights in which the Russian Constitutional Court has relied on international standards. In one of the most striking examples to date, the Court achieved a significant breakthrough in the implementation of international jurisprudence. This was the case of *Maslov*, decided on 27 June 2000.⁷⁵ The case concerned the constitutionality of Articles 47 and 51 of the Criminal Procedural Code, and the issue at stake was the right to defence counsel following detention. According to the Code, a person in detention as a 'suspected person' or an 'accused', was entitled as of right to the presence of a defender. But this was not the case for a person brought to a police station to be interrogated as a 'witness', even though attendance was compulsory, and might well lead to transformation into a suspect or accused.

The Court not only referred to Article 14 of the ICCPR and Articles 5 and 6 of the ECHR, but for the first time cited the jurisprudence of the European Court of Human Rights. The cases—six in all—to which they referred were *Quaranta v Switzerland*,⁷⁶ *Imbrioscia v Switzerland*,⁷⁷ *John Murray v United Kingdom*,⁷⁸ *Deweere v Belgium*,⁷⁹ *Eckle v Federal Republic of Germany*,⁸⁰ and *Foti v Italy*.⁸¹ The legal reasoning in *Maslov* demonstrates that not only the ICCPR and the ECHR, but the jurisprudence of the European Court of Human Rights, are now integral parts of the Russian legal system. This is further demonstrated by the constant reference to the Convention in the latest commentaries and textbooks, and also by the fact that every judge in Russia is now receiving the two-volume collection of the hundred leading cases decided by the European Court of Human Rights, published in the year 2000, together with a comprehensive CD ROM.⁸² The first two volumes of cases of the Russian Constitutional Court (edited by Judge Morshchakova) have now also appeared. The first, containing the jurisprudence of the years 1992 to 1996, was published in

⁷⁵ Case P-10 of 2000, at <http://www.ks.rfnet.ru/pos/p11_00.html>.

⁷⁶ Series A No 205 (1991).

⁷⁸ 8 February 1996, Reports 1996–1, vol 1.

⁸⁰ 15 July 1982 (No 51), 5 EHRR 12.

⁸² *European Court of Human Rights. Collected Decisions in Two Volumes* (NORMA Publishers, the Institute of Europe at the Institute of International relations of the Russian Foreign Ministry, COLPI Institute (Soros), the Council of Europe, and Interights London/Moscow 2000).

⁷⁷ Series A No 275 (1993).

⁷⁹ Series A No 35 (1980).

⁸¹ Series A No 56 (1982).

1997; and the second, containing the jurisprudence of the Court from 1997 to 1998, reached the bookshops in April 2000.

It is to be noted with regret, however, that even though the Russian Constitutional Court is in many ways modelled on the Karlsruhe Constitutional Court of Germany (the Russian justices have all spent time in Germany as well as visiting many other sister courts), the Russian Court has not to date begun to refer to the jurisprudence of the Karlsruhe Court, or indeed the other new constitutional courts of Hungary, Poland and other former Soviet and Eastern European States. Nevertheless, the Russian Court is itself increasingly developing a precedent-based jurisprudence for the purpose of Russian domestic law, and in which European Court cases are an important source as binding precedents.

Another example is the result of Council of Europe pressure, that has been universally applauded. The penitentiary system was transferred from the Ministry of the Interior to the Ministry of Justice in 1998 as required by the Council of Europe, and the three years since have seen a remarkable opening up of the system, and a genuine reform process.

The Council of Europe was also anxious to see the restoration of trial by jury. This was no transplant, as noted above, but was the restoration of a system which worked surprisingly well in late Tsarist Russia. It was restored on 16 July 1993 by the enactment of a new Part X to the Criminal Procedural Code, and enshrined in the December 1993 Constitution. To date it has been introduced in only nine of the eighty-nine regions of Russia. This had a surprising consequence for another bone of contention, the death penalty, in abeyance by virtue of a Presidential moratorium, also a requirement of the Council of Europe until Russia ratifies the Sixth Protocol to the Convention. In February 1999 the Federal Constitutional Court held⁸³ that in order for the death penalty to be applied at all, the accused must be given a trial by jury, as provided in Article 20(2). The Court stated expressly that the death penalty could not be imposed anywhere until trial by jury is available everywhere. This decision means that the death penalty cannot, pending full introduction of jury trial, lawfully be imposed anywhere in the Federation. The Court also noted that it was over 5 years since the Constitution was adopted, which was a sufficient length of time for the necessary amendments to legislation. What was intended as a transitional provision had in fact become a permanent restriction, and therefore conflicted with Articles 19 (equality before the law), 20(2) (right to life) and 46(1) (legal protection of rights) of the Constitution.

President Putin has, in line with his manifesto noted above, pushed through even more dramatic reforms. Most provisions of the new Criminal

⁸³ Decision of 2 Feb 1999, No 3-P, *Rossiskaya Gazeta*, 10 Feb 1999, English summary in Venice Commission, *Bulletin on Constitutional Case-Law*, edition 1999-1, at 96-8.

Procedural Code, enacted on 19 December 2001 came into force on 1 July 2002. Jury trial will be available in every region of Russia from 1 January 2003. The President is adamant however, that this will not permit the restoration of the death penalty.

Strikingly, the new Code finally enables the 1993 Constitution to come fully into force. The reason is that the Constitution provides in Article 22 that arrest and detention are only permitted by judicial decision, and that a person may be held in custody for no more than 48 hours before being brought before a court. But this right could not be made effective until the former Code was replaced. The new Code also enables Russia to withdraw the—highly embarrassing—Reservation it entered on ratifying the European Convention, in view of its inability to comply with Article 5(3) of the Convention. As a result of a startling decision of the Constitutional Court on 14 March 2002,⁸⁴ this part of the new Code came into force with the bulk of the Code, on 1 July 2002, and not in January 2004 as originally intended. The Court laid special emphasis on compliance with the Convention.

Finally, I should mention a transplant, or borrowing, of a more surprising nature—a borrowing from a much earlier period. On 8 March 2000, Russia submitted its first Report⁸⁵ on the Implementation of Provisions of the Council of Europe's Framework Convention (FCNM) for the Protection of National Minorities. Russia signed this Convention on 28 February 1996 on joining the Council of Europe. This 32-page Report will be considered by the FCNM's Committee of Experts, and this examination will be of special importance in view of the multi-national nature of Russia's federal constitution, and the potential for and actual conflict, not least in Chechnya. But a Law on National Minorities, as recommended by the Council of Europe, has not been enacted. Instead, in a process starting in 1988 and culminating in Yeltsin's conversion in 1994, Russia has undertaken the surprising innovation of resurrecting Austro-Marxist theory—that of Otto Bauer,⁸⁶ Rudolf Hilferding,⁸⁷ and Karl Renner,⁸⁸ anathema to the Bolsheviks and their successors, as the basis for the new Russian legislation, in particular the 1996 Federal Law 'On National-Cultural Autonomies'.⁸⁹ By 1999, about 126 NCAs had been created. Among them, the Ukrainian, Polish and German autonomies were the largest and had the most advanced programmes for their development. The process of forming

⁸⁴ Decision p 6-02 of 14 Mar 2002, complaints of SS Malenkin, RN Martynov, and SV Pustovalov, to be found at <<http://ks.rfnct.ru/pos/p6-02.htm>>.

⁸⁵ To be found at <www.riga.lv/minelres/reports/russia/russia.htm>.

⁸⁶ Born 5 Sept 1881, died 4 July 1938.

⁸⁷ Born 10 Aug 1877, died 11 Feb 1941.

⁸⁸ Born 14 Dec 1870, died 31 Dec 1950.

⁸⁹ Federal Law of the Russian Federation 'On National-Cultural Autonomies', of 17 June 1996, No 74-FZ.

an NCA for the more than 1 million Roma of Russia started in November 1999, and it was legally registered in the Ministry of Justice in March 2000. On 20 April the Roma were granted formal representation on the Ministry of Federation and Nationality Affairs. This ongoing experiment exemplifies the fact that borrowing is often a matter of conscious choice—selection, often surprising, from a set of alternatives.⁹⁰

XI. CONCLUSION: CAN ANY GOOD COME OF TRANSPLANTS?

Watson is right to argue that the history of law and legal systems displays so many examples of transplants—or at least of wholesale reception of the law of another country or period—that transplantation is a normal feature of the law of any country. As he puts it: ‘the moving of a rule or a system of law from one country to another has now been shown to be the most fertile source of legal development since most changes in most systems are the result of borrowing . . .’⁹¹ But, I argue, it must equally be true that comparative law can never be simply the comparison of two separate and unconnected entities, frozen in the present. If the laws of the countries in question are studied in their historical development, then in many cases, where there have been diplomatic, trade and cultural contacts, it will be found that there has been a rich and dynamic dialectic. At the very least, another valuable dimension will have been added to the domestic debate, providing authority to the arguments of those seeking change. That is, strengthening the case of those who wish their case to be strengthened—not necessarily those that ‘we’ would regard as radicals or reformers. This may happen even where the transplant appears to have been imposed by pressure or inducements, as with Russia. The process is most rich where there is a constant feedback—where those implementing the transplant, even if there is no reciprocal implantation, are obliged to reflect on their own law and legal traditions.

As indicated above, reception of one set of law may indeed serve resistance to—immunisation against—a set of laws and traditions unwelcome for political reasons; thus, the continued importance of Roman Law in Scotland as resistance to England, or of the Netherlands Civil Code in Russia in preference to the blandishments of the Americans. To take the former, Watson cites TB Smith, Professor of Scots Law and later Scottish Law Commissioner, lamenting, in 1958, the acceptance of rules of English

⁹⁰ See B Bowring, ‘Austro-Marxism’s Last Laugh?: The Struggle for Recognition of National-Cultural Autonomy for Rossians and Russians’ (2002) 54 *Europe-Asia Studies*, at 229–50.

⁹¹ A Watson, ‘Aspects of Recognition of Law’ (1996) 44 *American Journal of Comparative Law*, 345, at 394.

law: ‘But, alas . . . we in Scotland have gone a-whoring after some very strange gods.’⁹²

One consequence of the analysis presented above is a respectful disagreement with Professor Örüciü’s assumption that ‘systems in transition look to the pool of competing models available in Western Europe and America with the purpose of re-designing and modernising their legal, economic and social systems . . .’⁹³ On close examination, the recent lived experience is much more interesting and dynamic. The decision to adopt the National Cultural Autonomy model referred to above did not choose from any model available in the West, but looked back instead to a model which was never implemented in its own time—a historical curiosity, perhaps. And it should never be forgotten that Russia’s apparent importation of Western human rights is in many important respects a restoration of Russia’s own reform traditions.

⁹² Id (2001) n 31 above, at 102; TB Smith, ‘Strange Gods’ (University of Edinburgh, Inaugural Lecture No 4, 1958, at 1), reprinted in *Studies Critical and Comparative* (Edinburgh: Green, 1962), at 72.

⁹³ Örüciü, n 12 above, at 220.